

Fair Trading



# Practice Standard

## For Registered Certifiers

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Volume Two – Class 1a Buildings



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## Legal status

This Practice Standard is prepared by the Commissioner for Fair Trading under section 14 of the Building and Development Certifiers Act 2018 (B&DC Act). Section 14 provides that a registered certifier's conditions of registration may require the certifier to carry out certification work in accordance with specified standards or methodologies prepared by the Commissioner.

If a condition has been imposed on the registration of a registered certifier requiring that they carry out certification work in accordance with this Practice Standard, then non-compliance with this Practice Standard could constitute a contravention of a condition of registration, which is an offence against section 20 of the Act. It is also grounds under section 45 (g) of the Act for taking disciplinary action against a registered certifier if they fail to comply with a condition of registration.

Enforcement of conditions of registration will be carried out by Fair Trading in accordance with compliance policies such as the Fair Trading compliance pyramid, available here: <https://www.fairtrading.nsw.gov.au/about-fair-trading/our-compliance-role>.

If a registered certifier has not yet had such a condition imposed on their registration then they are nevertheless encouraged to read this standard and apply it insofar as it is relevant to their registration.

This document is not and should not be used as a substitute for a certifier referring directly to the legislation that governs their practice. Certifiers are encouraged to obtain independent legal advice where required.

## Application

This standard applies to registered certifiers undertaking certification work for residential buildings, being class 1a buildings under the Building Code of Australia (BCA).

Chapters 1 and 2 of this standard also apply generally to all registered certifiers as they cover the general topics of certifiers as public officials and certifier conflicts of interest.

# Introduction and Purpose

## Introduction

The need for a Practice Standard for certifiers has been highlighted by various independent reviews of building regulation in NSW. The current comprehensive reform of building regulation undertaken by the NSW Building Commissioner has provided the impetus to address the need for a standard for certifiers, setting out the approach that needs to be followed in undertaking certification work as public officials.

When the first volume of the Certifier Practice Standard was published in September 2020, it, with the exception of the first two chapters, focussed on the certification of new high-rise apartment buildings.

This new volume of the Standard focuses on the certification of single residential buildings (BCA class 1a) in order to address another key risk area in certification work. The first two chapters are common to the first volume of the Certifier Practice Standard and this new volume.

The Practice Standard will be regularly reviewed and updated in the light of evolving experience, developments in relevant technology and developments in the overall approach to building regulation and building practice.

The Practice Standard is part of the overall building regulation reform framework which is being developed on behalf of the NSW Government by the NSW Building Commissioner. For information on the program of NSW building reforms refer to <https://www.nsw.gov.au/building-commissioner>

## Purpose

The development and implementation of the Practice Standard is intended to serve a number of important purposes, namely:

### **To provide a clear, accessible and specified standard of what is expected of certifiers in undertaking their role and functions**

Legal obligations of certifiers are contained in a number of pieces of legislation. These include Part 6 (Building and subdivision certification) of the Environmental Planning and Assessment Act 1979 (EP&A Act) the Environmental Planning and Assessment Regulation (Development Certification and Fire Safety) Regulation 2021 (EP&A (Development Certification and Fire Safety) Regulation) and the Environmental Planning and Assessment Regulation 2021 as well as the Building and Development Certifiers Act (B&DC Act) and regulation.

Certifiers must be familiar with the relevant legislative requirements. The legislation provides the minimum set of legal requirements and does not set out everything that is required to carry out certification work, nor does it set out how certification work should be undertaken or capture how practice evolves over time.

The Practice Standard contains requirements for how certifiers carry out their functions, which certifiers may be required to comply with by the conditions of their registration. It sets out the process that a certifier is required to follow, including how each stage in the process links to the next stage and highlights the matters that the certifier has to be fully aware of and actions to be undertaken.

At its core, the principal certifier has the role of independently assessing and verifying that the development has been built in accordance with the terms of the development consent and the completed building will be suitable for occupation and use in accordance with its classification under the BCA.

### **To make clear the professional obligations and conduct of certifiers as public officials**

Certifiers are classified as public officials and as such they are subject to the provisions of the Independent Commission Against Corruption Act, Public Interest Disclosures Act and the Ombudsman Act. As public officials certifiers are required to:

- Act in the public interest, to the benefit of society and the community as a whole.

- Avoid any conflicts of interest between their professional duties and personal and private interests.
- Act honestly and impartially.
- Report any corrupt behaviour to the relevant authorities.
- Adhere to the Code of Conduct for certifiers.

Understanding and application of the requirements of the public interest is vital in the area of building certification, given that the process of certification:

- Involves the assessment of health, safety and amenity impacts of building work on occupants and the general public.
- Assesses a long-life asset which provides services to generations of occupants and whose quality of construction will have ongoing impacts on the quality of services provided to those future occupants.

### **To reinforce that the role of the certifier is different from builders and other building practitioners**

It is essential to differentiate the role of the certifier from that of the builder and other building practitioners. The builder is responsible and accountable for the quality of the building work and ensuring conformity of the building work with the terms of the development consent and the BCA and associated standards.

The certifier, as a public official, undertakes a review role at various stages in the building project, including the issuing of a construction certificate (CC) to authorise commencement of construction, at various inspection stages and assessing the building for the issuing of an occupation certificate (OC). The certifier does not undertake a project management role and is on site only for a relatively short period of time to inspect critical stages of work.

### **To enhance the accountability and responsibility of certifiers**

The Practice Standard sets out what a member of the public is entitled to expect of a reasonably competent registered certifier and failing to comply with the standard could be grounds for disciplinary action.

The certifier has to assess the building design and building work at each stage of inspection and prior to issuing an occupation certificate (OC) to ensure it is in conformity with the terms of the development consent and legislated obligations. The certifier has to also undertake the role according to the principles and process set out in this standard.

The Standard has been structured to provide as much assistance as possible to certifiers in undertaking their public official role in a professional and effective manner. Chapters 1 and 2 provide an overall framework and principles on which certifiers must act as public officials, acting in the public interest. Chapter 2 provides guidance on the issue of why and how certifiers need to avoid a conflict of interest.

Chapters 3 to 5, inclusive, set out the three key stages in building certification and the standards certifiers working on class 1a buildings need to apply in undertaking this work:

- Assessing a development for the issue of a Construction Certificate (Chapter 3)
- Inspection of building work during construction (Chapter 4)
- Assessing a building for the issue of an Occupation Certificate (Chapter 5).

Each of the above chapters has been written to be self-contained.

The last two chapters address two important matters that are applicable to all stages of the certification process. Chapter 6 provides guidance on the form and quality of documentation that the certifier can use as supporting evidence when making decisions during the certification process. Chapter 7 outlines the compliance role of the certifier, specifically how and under what situations certifiers need to act on identified cases of non-compliance and the specific requirements relating to Written Direction Notices.

# 1. Certifiers as public officials

## 1.1 Introduction

Certification work is ‘an important public function with potential impacts on public health, safety and amenity’<sup>1</sup>. Certifiers must carry out their work with the mindset of a public official i.e. impartially, honestly and in the public interest. This chapter will provide guidance on certifiers acting as a public official.

### 1.1.1 Under which legislation are certifiers public officials?

Registered certifiers are considered the equivalent of council officers for certain functions and all certifiers, in any class of registration, are public officials under the:

- Independent Commission Against Corruption Act 1988 (ICAC Act),
- Public Interest Disclosures Act 1994, and
- Are public authorities under the Ombudsman Act 1974.

These Acts all promote integrity in public administration.

### 1.1.2 What is corrupt conduct?

Corrupt conduct is conduct that adversely affects the honest and impartial exercise of official functions or impairs public confidence in public administration<sup>2</sup>.

The ICAC Act defines certain conduct as corrupt, a certifier could act corruptly if they:

- Exercise their certification functions dishonestly or partially.  
For example, when a dispute arises, the certifier automatically supports the builder’s position over that of others, even in the face of contrary evidence. This could be biased or partial conduct.
- Act in a way that constitutes or involves a breach of public trust.  
For example, a certifier issues a construction certificate despite having a professional interest due to helping design the building. This breaches the public’s trust for a certifier to independently carry out certification work.
- Misuse information gained through their certification work. A certifier does not need to benefit from the misuse of information for it to be corrupt conduct.  
For example, information a certifier learns from a client could affect the price of a parcel of land if generally known. The certifier uses that information to help a family member buy the land.

Corrupt conduct may result in investigation by the ICAC, prosecution and/or disciplinary action.

Public officials (but not private registered certifiers<sup>3</sup>) have a duty to report possible corrupt conduct. For councils, the duty to report applies to the general manager. Public officials are protected from reprisal when making disclosures in accordance with the Public Interest Disclosures Act 1994.

### 1.1.3 How is the public official role recognised in the Building and Development Certifiers Act?

The B&DC Act regulates the conduct of registered certifiers and establishes:

- Registration requirements – skills, knowledge, experience and qualifications.

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<sup>1</sup> Section 3(b) of the B&DC Act  
<sup>2</sup> Section 8(1)(a) of the ICAC Act  
<sup>3</sup> Section 11 of the ICAC Act

- Grounds for disciplinary action, which include where a registered certifier has carried out certification work in a partial manner or in a manner that is not in the public interest.
- Powers for the Commissioner for Fair Trading to protect the public, such as to impose conditions on certifiers, investigate complaints, and audit and discipline certifiers.
- A Code of Conduct with required principles, values and standards of behaviour for certifiers.
- Requirements for record keeping, professional indemnity insurance, continuing professional development and avoiding conflicts of interest.

The B&DC Act and regulation also contain offence provisions that require certifier impartiality, including:

- Making it an offence to carry out certification work if the certifier has a conflict of interest (including a non-exhaustive list of circumstances when a certifier has a private interest in a development e.g. being involved in the design, being related to the applicant or builder, having a pecuniary interest or being associated with the council)<sup>4</sup>.
- Making it an offence for a certifier to behave other than impartially and an offence for anyone to provide a benefit to a certifier in order to influence them<sup>5</sup>.
- Making it an offence to fail to comply with the Code of Conduct (which requires certifiers to act in the public interest and avoid conflicts of interest, among other things).

## 1.2 The public interest

### 1.2.1 What is the public interest?

The public interest is undefined in legislation and its scope depends on the circumstances. It has been described as ‘the benefit of society, the public or the community as a whole’<sup>6</sup>.

Public interest is distinct from the

- Private interests of an individual.
- Personal interests of the decision maker (and their relatives, associates, etc).
- Personal opinions of the decision maker, such as considerations of friendship or enmity.

Public interest is also distinct from parochial interests (the interests of a small or narrowly defined group), and partisan political interests.

### 1.2.2 What is the public interest in relation to certification work?

To determine how the public interest applies to certification work certifiers need to first identify ‘the public’, i.e. the section of the population whose best interests must be considered.

Given the lifetime of a building, a certifier’s decisions affect more than just the immediate applicant and could affect everyone with the potential to be affected by non-complying development. Impacts could range from threatening life and property (e.g. where non-compliance results in the collapse of a building or spread of a fire within it) to the reduction of a neighbour’s amenity (e.g. where non-compliance results in a loss of privacy).

The ‘public’ could include current and subsequent building owners, occupiers and users, visitors to the building, neighbours and visitors to the neighbourhood.

Certifiers must identify the specific public interest objectives that apply, by considering fundamental principles and relevant legislative objectives.

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<sup>4</sup> Section 29 of the B&DC Act

<sup>5</sup> Section 42 of the B&DC Act

<sup>6</sup> <http://www5.austlii.edu.au/au/journals/AJAdminLawF/2006/2.pdf>

For example, certifiers issuing construction and occupation certificates should consider the objectives of the legislation the certificates are issued under, which include important considerations, such as to promoting the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants<sup>7</sup>.

The objects of the B&DC Act refer to the need to uphold the public interest and the potentially wide impacts of certification work on health, safety and amenity<sup>8</sup>.

The Code of Conduct in the B&DC Regulation explicitly requires certifiers to act in the public interest and references this in terms of taking all reasonable steps to not adversely affect the health and safety and amenity of people and their property<sup>9</sup>.

Certifiers should consider the public interest in terms of the:

- health, safety and amenity of current and subsequent building owners, occupiers, users, visitors and neighbours, and
- quality of the built and natural environment.

### **1.2.3 Potential conflicts between the public interest and the interests of owners, developers and builders**

The interests of owners, builders and developers may not always be consistent with the public interest.

The builder and developer can have incentives to maximise profits and minimise costs. The owner/ developer may also not be appreciative that the certifier is an independent regulator. There may be an expectation that the owner has paid for an OC, or that the certifier is an agent of the owner/ developer.

Heavy penalties can be imposed on anyone who tries to influence a certifier in a way that is conflict with the certifier's duties to act as a public official.

Certifiers should be clear in communicating with owners, developers and builders about their role as independent public officials. Certifiers are required to attach prescribed information sheets about the role of the certifier with their certification contracts<sup>10</sup>.

A principal certifier can be replaced if the owner, existing certifier and replacement certifier agree and the council and consent authority are notified<sup>11</sup>. If not, then Fair Trading assesses the reasons the owner wishes to replace the principal certifier.

The replacement of a principal certifier may create some inconvenience<sup>12</sup> particularly where the transfer of information between the new principal certifier and the old principal certifier is not executed correctly.

If the existing principal certifier is a council, they must provide the new principal certifier with:

- any information required by Fair Trading under the B&DC Act in relation to the person who performed the certification work on behalf of the council, and
- the records kept by the council under the B&DC Act<sup>13</sup>.

If the existing principal certifier is not a council, they must provide the new principal certifier with:

- the documents and records required to be kept by a registration holder under the B&DC Act<sup>14</sup>.

If the new principal certifier is unable to obtain the prescribed information from the existing principal certifier, they may (by written notice) request that the Registration Secretary give a direction in relation to the matter<sup>15</sup>.

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7 Section 1.3 of the EP&A Act

8 Section 3(b) of the B&DC Act

9 Clause 2 of Schedule 5 of the B&DC Regulation

10 Clause 31 of the B&DC Regulation

11 Section 68 of the EP&A (Development Certification and Fire Safety) Regulation

12 Storer v Commissioner for Fair Trading [2021] NSWCATAD 331

13 Section 69(6)(b) of the EP&A (Development Certification and Fire Safety) Regulation

14 Section 69(6)(a) of the EP&A (Development Certification and Fire Safety) Regulation

15 Section 69(2) of the EP&A (Development Certification and Fire Safety) Regulation

It is an offence for the existing principal certifier (or the person the Registration Secretary reasonably believes has the information) to not comply with a direction given by the Registration Secretary to provide the information about the certification work within the specified period<sup>16</sup>.

Claiming a lien over a document or record, or a right to keep a document or record as security for payment are not valid reasons for the existing principal certifier to withhold the information from the new principal certifier<sup>17</sup>.

### 1.2.4 How can certifiers act in the public interest?

Certifiers can act in the public interest by acting professionally, with due care and diligence, and conscientiously endeavouring to do the right thing.

Certifiers are obliged to be fair and impartial (and be seen to be) regardless of commercial pressures or applicant (owner/developer) expectations. When certifiers make clear their obligation to act in this manner, those affected by a decision are more likely to accept it even though it may not be the outcome they wanted.

Community standards and not 'industry practice' determine the appropriateness of a certifier's actions as required by the B&DC Act<sup>18</sup>.

The Code of Conduct in the B&DC Regulation explicitly requires certifiers to abide by community standards and references this in terms of matters such as:

- acting with honesty, integrity and impartially,
- not knowingly acting in a way that could bring their profession into disrepute, and
- exercising reasonable care and attention<sup>19</sup>.

To act in the public interest, certifiers should:

- Avoid any source of influence, whether actual or as perceived by others, that could bias their decisions, and
- Act in a manner that maintains public trust.

### **What is expected of a certifier?**

Certifiers acting in the public interest should:

- Be aware of the requirements of the relevant laws and regulations.
- Take all reasonable steps to obtain relevant facts.
- Make evidence-based decisions and clearly document the reasons for their decisions.
- Issue certificates only after confirming all applicable requirements are met.
- Not misuse information acquired in the course of their work.
- Take all reasonable steps to not adversely affect the health, safety and amenity of a person or property.
- Take appropriate and prompt action in relation to complaints about a development they are certifying.

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<sup>16</sup> Section 69(3)-(4) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>17</sup> Section 69(5) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>18</sup> Section 45(a) of the B&DC Act

<sup>19</sup> Clause 3 of Schedule 5 of the B&DC Regulation



## 2. Conflicts of interest

This chapter provides advice to certifiers on the conflict of interest provisions that govern their role, and seeks to help certifiers identify and appropriately manage potential conflicts of interest.

### 2.1 What is a conflict of interest?

A conflict of interest is when a certifier's private interests with respect to certification work come into conflict with, and may affect, their duty to act in the public interest when undertaking the certification work.

A certifier's private interests may be pecuniary or professional. They can involve the certifier's own interests or those of friends, family, business associates or competitors.

A conflict of interest does not have to involve money. For example, a conflict may arise out of feelings of affection or animosity.

#### 2.1.1 Why is it important to avoid conflicts of interest?

A conflict of interest can lead to bias. This may result in non-complying building work being improperly certified as compliant, with potential impacts on health, safety and amenity.

Even the perception of bias can be damaging, and the Code of Conduct prohibits any conduct that could bring the profession of certifiers into disrepute<sup>20</sup>. Clearly, a public perception that a certifier is biased brings the profession into disrepute and affects consumer confidence in the certification system and the quality of buildings.

#### 2.1.2 The Code of Conduct requires certifiers to avoid conflicts of interest

The requirement in the Code of Conduct to act in the public interest<sup>21</sup> and avoid conflicts of interest<sup>22</sup> confer a duty on certifiers to pro actively identify and avoid conflicts of interest.

A certifier who doesn't actively identify sources of conflict and later pleads ignorance is not acting in the public interest.

The duty to avoid conflicts of interest also requires certifiers to stop carrying out certification work if a conflict arises (they would need to cancel the appointment and/or transfer the work to another certifier).

A breach of the Code of Conduct carries an \$11,000 maximum penalty for an individual, while a breach of the conflict of interest provisions of the Act has a \$33,000 maximum penalty. Both are also grounds for disciplinary action under the B&DC Act.

### 2.2 When does a certifier have a conflict of interest?

The B&DC Regulation prescribes certain scenarios as conflicts of interest. For scenarios that are not prescribed, the Act has a 'two-step' process to determine if a certifier has a conflict of interest. The legislation also prescribes limited exemptions from the conflict of interest provisions and gives the Commissioner for Fair Trading power to grant exemptions on a case-by-case basis.

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<sup>20</sup> Clause 3 of Schedule 5 of the B&DC Regulation

<sup>21</sup> Clause 2 of Schedule 5 of the B&DC Regulation

<sup>22</sup> Clause 6 of Schedule 5 of the B&DC Regulation

### 2.2.1 Prescribed conflicts of interest

The B&DC Regulation prescribes the following scenarios as conflicts of interest<sup>23</sup> (meaning the ‘two-step’ process does not apply):

- issuing a strata certificate for a strata plan, strata plan of subdivision or notice of conversion if the plan or notice was prepared by the certifier or someone related to them, or
- doing any certification work if the certifier:
  - gave advice on how to amend plans/specifications to comply with the BCA or a legislative requirement, unless the advice only related to the deemed-to-satisfy provisions of the BCA for a class 1 or 10 building, or
  - proposed a design option such as a performance solution.

### 2.2.2 Two-step process for scenarios that are not prescribed

The Act provides a ‘two-step process’<sup>24</sup> to determine if a certifier has a conflict of interest for certification work where the conflict of interest scenario is not prescribed. It is public perception, not the certifier’s own viewpoint, that determines if there is a conflict of interest.

A certifier has a conflict of interest if a reasonable person would conclude that:

- the certifier has a private interest in the certification work, and
- the private interest comes into conflict with, and may affect, the certifier’s duty to act in the public interest.

Both steps in the process need to be satisfied; that is, a certifier does not automatically have a conflict of interest just by having a private interest in the work.

### 2.2.3 The reasonable person

The ‘reasonable person’ in the B&DC Act<sup>25</sup> is a member of the public who doesn’t have a vested interest in the work. For example, a neighbour who is opposed to the work has a vested interest and is not a reasonable person for this purpose. The reasonable person is one who has an objective view as to the matter.

How might a reasonable person view some examples of certification scenarios?

*Example: a certifier who has a favourite sports team is asked to certify a rival team’s clubhouse. It would be reasonable to conclude that the certifier has the required amount of professional detachment to do the certification work without bias.*

*Example: a certifier is asked to certify his cousin’s house. They’ve barely spoken in 10 years and the certifier is fully confident that he is not influenced by the relationship. However, it’s reasonable for a member of the public to conclude that the certifier may be biased in certifying his cousin’s house because of the family relationship.*

*Example: A person acts as a BASIX consultant to prepare a BASIX certificate for a development and then agrees to be the principal certifier for the same development. However, it’s reasonable for a member of the public to conclude that the certifier may be biased when performing the principal certifier role. This is because the certifier is responsible for assessing whether BASIX commitments that they identified have been fulfilled and must consider this when deciding whether or not to issue the occupation certificate.*

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<sup>23</sup> Clause 24 of the B&DC Regulation

<sup>24</sup> Section 29 of the B&DC Act

<sup>25</sup> *ibid*

## 2.3 Private interests

The B&DC Act has a non-exhaustive list of private interests<sup>26</sup> that satisfy the first step in the two-step process. These include when the certifier is any of the following:

- A person obtaining benefit of the certification work (the applicant).
- A person with a pecuniary interest in the development or building to which the work relates.
- A person who provided professional services (other than certification work) for the design or construction.
- A councillor or council employee of the council in the area where the work is to be carried out (where council is not the certifier).
- A person who has a relationship (whether family, personal, employment, or business) with any of the above.

### 2.3.1 A certifier cannot be the applicant for (i.e. obtain benefit from) the work

Being the applicant means the certifier has a private interest in seeing the development proceed, being the first step in the two-step process. Although the second-step also applies, a reasonable person would conclude that a certifier would not be impartial in certifying their own development.

### 2.3.2 Council can be both applicant and certifier – up to a point

A certifier issuing a certificate on behalf of a council may issue a CC or OC to the council or an employee of the council, but only if the development to which the certificate relates has a capital investment value of less than \$2M.<sup>27</sup>

### 2.3.3 A certifier cannot have a pecuniary interest in the work

A certifier has a pecuniary interest in a development or building if there is a reasonable likelihood or expectation of appreciable financial gain or loss, to the certifier or anyone with whom they have a relationship (whether family, personal, employment or business)<sup>28</sup>.

It is not a pecuniary interest if it is so remote or insignificant that it could not be reasonably regarded as likely to influence the certifier's decisions. It is also not a pecuniary interest for a certifier to be paid for certification work.

*Example: a certifier is one of 10 shareholders in a small company that is building an apartment block. There are reasonable profits expected for shareholders.*

*The certifier has a pecuniary interest and cannot certify the work, but may provide any other service or advice as it progresses.*

If it's unclear whether the interest is significant enough to be a pecuniary interest, the safest option is to refuse the work. This is also in keeping with public expectations of certifier impartiality. Legal advice can also be obtained.

### 2.3.4 A certifier cannot provide professional services related to design or construction

A person whose involvement in an application extends beyond the exercise of certification functions may have a vested professional interest in the application that would make impartial assessment challenging, including pre-judging compliance.

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<sup>26</sup> Section 30 of the B&DC Act

<sup>27</sup> Clause 25 of the B&DC Regulation

<sup>28</sup> Section 30 of the B&DC Act

The key consideration is whether the certifier has a stake in the outcome of the decision such that the certifier's objectivity and impartiality could reasonably be called into question.

The issues at stake were set out by the NSW Administrative Decisions Tribunal (ADT) when it stated that the conflict of interest standard 'requires a separation of the consultancy role and the certification role sufficient to satisfy a reasonably informed member of the general public that there is no likelihood that the accredited certifier might be influenced by the performance of the consultancy role and might lack the necessary objectivity'.

The ADT stated that 'there is clearly a risk of pre-judgement of the question of compliance in circumstances where the accredited certifier has also been responsible for framing the application and possibly having to advocate its acceptance to the council'<sup>29</sup>.

### **2.3.5 What are professional services related to design or construction?**

'Professional service' is not defined by the B&DC legislation. It can, therefore, be considered to include any paid service that is not certification work.

Some examples could include:

- recommending changes to class 2 building plans to ensure compliance with a deemed-to-satisfy provision of the BCA,
- preparing DA documents and paying required fees on the applicant's behalf,
- adding notations to proposed construction plans so they are consistent with the development consent, for purposes of issuing a CC,
- acting as an agent, project manager or consultant for the applicant,
- acting as a BASIX consultant,
- preparing a Statement of Environmental Effects for a development.

What advice can certifiers give, and not have a conflict of interest?

Certifiers are specifically permitted to:

- provide advice as to whether something complies with the BCA or a legislative requirement or whether building or subdivision work complies with approved plans or specifications,
- when issuing a CC or OC:
  - identify matters to be satisfied before a certificate can be issued,
  - indicate that a performance solution is required, without giving advice on how it should be designed, constructed or how it should operate,
  - identify relevant BCA requirements,
  - for council certifiers, be involved in the assessment of the DA,
- for a fire engineering brief, determine the scope of work for a fire engineering analysis and the basis for that analysis.

### **Exemption: compliance certificates under the EP&A Act**

A certifier who is not the principal certifier may issue a compliance certificate despite having a conflict of interest in the work<sup>30</sup>.

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<sup>29</sup> Director General, Department of Infrastructure, Planning and Natural Resources v Stapleton (No.2) [2004] NSWADT 70  
<sup>30</sup>

A certifier who is not the principal certifier may issue a compliance certificate if they, or someone related to them, has been involved in the design or carrying out the work<sup>31</sup>.

Although self-certification regarding compliance certificates is allowed because of the specialised nature of the work and the professional liability taken on by the person issuing the compliance certificate, the certifier still has a general obligation under the Code of Conduct to avoid bias and uphold the public interest. A heightened level of diligence, and careful documentation of the decision making process, would be expected of a certifier who issues a compliance certificate for their own design.

### **2.3.6 A private certifier cannot be associated with the local council**

A private certifier has a private interest in certification work carried out in the area of a local council if they are, or are related to, a council employee or councillor of the relevant council. Whether or not this could be reasonably regarded as likely to affect the certifier's impartiality depends on the context. The underlying risk is that an association with a council may give a certifier the opportunity to benefit through obtaining confidential information or influencing council decisions about development.

*Example: a certifier's son works for the council as an enforcement officer who often enforces compliance of building work. Because the son may have to take action on a development where the certifier is providing certification work, the certifier is in a position to influence the son's actions. This could reasonably be regarded as a conflict of interest for both the certifier and the son.*

*Example: a certifier's best friend is a librarian at the council. This role doesn't give the friend any access to confidential information about development, and doesn't put the certifier in a position to influence council decisions. Although the certifier has a private interest, it could not reasonably be regarded as likely to influence their certification work.*

#### **Exemption: Private certifiers can do contract work for councils**

A private certifier can work under contract with a council, while also doing private certification work in that area<sup>32</sup>. This may help alleviate skills shortages. However, the two streams of work cannot involve the same development.

For example, if a private certifier is contracted by a council to assess a CC application, the certifier cannot do any certification work in a private capacity on that development.

### **2.3.7 A certifier cannot have relationships that could compromise their impartiality**

Even if the certifier is not the applicant, the certifier's relationship with the applicant, or someone with a private interest in the development, may result in a certifier feeling obligated or beholden to the applicant or person. This may impact the certifier's impartiality.

The B&DC Act broadly refers to family, personal, employment and business relationships with specified persons as sources of private interest for a certifier.

These relationships are not defined further in the legislation. Since certifiers are required to avoid even the perception of bias, 'relationship' should be interpreted broadly.

Some examples of difficulties that may arise from a certifier's relationships include:

- The certifier's close personal and family relationships, with their emotional, social and financial implications, are likely to make it difficult for the certifier to assess an application from these people impartially.
- The certifier's employer. The employer-employee relationship could prevent the certifier from being objective about the employer's application (e.g. the certifier could fear reprisal for refusing the application). This applies to both private and council certifiers.

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31 Clause 25 of the B&DC Regulation

32 Clause 25(4) of the B&DC Regulation

- The certifier's employee. The employee-employer relationship could prevent the certifier from being objective about the employee's application (e.g. the certifier may overlook a non-compliance in an employee's application).
- The certifier's colleague. The working relationship could prevent the certifier from being objective about a colleague's application (e.g. the certifier might want to do a favour for their colleague; alternatively, if there is enmity between them the certifier may unnecessarily hinder the application).
- The parent organisation of the certifier's employer. As an employee, the certifier could feel beholden to the parent organisation and consequently may not be able to objectively assess the application.
- The person/organisation who has a controlling interest in the certifier's employer. 'Controlling interest' means the capacity to influence/determine the employer's financial and operating policies. This is not dissimilar to the employer-employee relationship.
- An employee of a subsidiary of the organisation that employs the certifier. This is not dissimilar to the relationship between work colleagues. It could occur in situations where the firm that the certifier works for is part of a group of firms in the construction industry.
- An employee of an organisation that is controlled by the certifier. Similar to the situation where the certifier is the employer, the certifier could favour an employee by approving a non-compliant application.
- A person the certifier has a contractual arrangement with might be seen to give rise to a conflict between the certifier's professional duties and their private interests under the arrangement. The nature and scale of the contractual arrangement will affect whether the arrangement could reasonably be considered to influence the certifier's impartiality. A long-standing arrangement of considerable value to the certifier (or a quid pro quo arrangement) is more likely to make the certifier feel obligated to the other party than a low-value or irregular arrangement.

*Example: A private certifier's landlord is the applicant for a certificate. There is a reasonable expectation that the certifier could feel obligated to the landlord – particularly if the landlord has recently given the tenant concessions (e.g. no annual rent increase). The contractual arrangement could affect the certifier's objectivity and impartiality.*

While the contractual arrangement prohibition is more likely to affect private certifiers, council certifiers who are faced with an applicant that they have a personal contractual arrangement with should arrange for an alternative council certifier to process the application to avoid even the possibility of bias.

### 2.3.8 Improper benefits

In addition to the conflict of interest offence provisions of the B&DC Act, the Code of Conduct contains requirements that relate to conflicts of interest. One of these is the prohibition on a certifier from improperly using their status, position, powers or duties for the purpose of obtaining, either directly or indirectly, any personal benefit or benefit for a relative or close associate<sup>33</sup>.

A certifier must take all reasonable steps to ensure that a relative or close associate does not solicit or accept any improper benefit.

An improper benefit is defined as a gift, hospitality or other benefit that could reasonably be expected to give rise to a conflict of interest or perceived as an inducement or reward for:

- Doing or not doing something.
- Showing or not showing favour or disfavour to a person.

Accepting benefits has potential to compromise a certifier's position by creating a sense of obligation and undermining their impartiality. It may also affect the public perception of the certifier's integrity.

It is often not a question of whether a benefit is an attempt to influence a certifier, but what a reasonable person would think of the situation. Factors that could influence the perception of a benefit include:

- The scale, lavishness or expense/value,

<sup>33</sup> Clause 6 of Schedule 5 of the B&DC Regulation

- The frequency of occurrence,
- The degree of openness surrounding the benefit<sup>34</sup>.

Improper benefits generally do not include things that are essentially tokens or constitute moderate acts of hospitality<sup>35</sup>.

## 2.4 Managing conflicts of interest

### 2.4.1 Tips for managing conflicts of interest

#### **Be aware of the statutory conflict of interest and exemption provisions:**

- It's the objective perception (the 'reasonable person') that determines if you have a conflict of interest for the offence provision– consider the two-step process in the B&DC Act (see part 2.2.2).
- Understand what might be a 'professional service' related to the design or construction, as opposed to 'certification work'.
- Don't interpret 'relationship' too narrowly.
- Understand what comprises a pecuniary interest.
- Consider seeking legal advice if unsure

#### **Implement good business practices, for example:**

- Keep a company register of conflicts of interest and review it at appropriate intervals.
- Consider randomly allocating tasks or prevent staff from self-selecting tasks.
- Use standard forms, templates and processes.
- Provide additional staff training in the lead up to a major contract.
- Review financial delegations and access to confidential information and modify if needed.
- Where warranted, do not allow employees to hold secondary employment that could reasonably be perceived as conflicting with their certifier duties.
- Take steps to verify the information in employee disclosures.
- Ensure your company's website and social media don't inadvertently endorse particular services (builders, architects etc) whose work you may inspect.

Note: Refer to ICAC's publication, Managing Conflicts of Interest in the NSW Public Sector (April 2019), at [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au) for more advice.

#### **When appointed as a certifier, only carry out certification work<sup>36</sup>:**

- Do not provide additional services that could comprise 'professional services' related to the design or construction.
- Do not prepare DAs for lodgement or pay fees/levies on the applicant's or builder's behalf.
- Do not prepare design solutions for non-compliances.

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<sup>34</sup> NSW Ombudsman, Good conduct and administrative practice guide, 2017

<sup>35</sup> *ibid*

<sup>36</sup> Certification work includes advising where work does not comply with statutory requirements



- Do not give advice on how to amend a plan or specification to comply with the BCA unless the advice relates only to the BCA's deemed-to-satisfy provisions for a class 1 or 10 building.

Note: Certifiers can advise an applicant for a certificate of where plans, specifications or building work does not comply with statutory requirements.

## **2.4.2 Disclosing a conflict of interest**

Unlike many public officials, certifiers can make decisions on their own without referral to a committee. Many certifiers also work as sole practitioners. Consequently, simply disclosing a conflict of interest is not enough. Certifiers are required to not do any certification work if they have a conflict of interest in the work.

However, a potential (as distinct from an actual) conflict of interest can generally be managed through disclosure in an organisational setting. A certifier may, for example, record it on the company register, and inform their supervisor (if they have one).

Note: A potential conflict of interest is where a certifier has a private interest that could come into conflict with their certification work in the future. For example, a certifier invests in a development company. A conflict of interest will arise if the certifier is appointed to carry out certification work for the company. Until then, the certifier has a potential conflict of interest.

## **2.4.3 Seeking an exemption from the conflict of interest provisions**

An exemption can be granted to a certifier from the conflict of interest provisions. This is for unforeseen circumstances where the legislation unintentionally restricts certification work. Maintaining the public interest is the overarching objective regardless of circumstances.

An exemption may relate to a specific certification work or class of work, and may be granted unconditionally or subject to conditions. Please see <https://www.fairtrading.nsw.gov.au/trades-and-businesses/business-essentials/building-certifiers/certifier-conflicts-of-interest>.

## 3. Construction certificates for building work

### 3.1 Introduction

The issuing of a construction certificate (CC) is the first stage in the certification process and this chapter relates to a certifier's role in determining an application for, and issuing a CC for building work for residential dwellings, being class 1a buildings.

Class 1a buildings are usually single, standalone residential dwellings. Class 1a buildings may be attached via a common vertical wall to another class 1a building/s, to form a duplex, terrace house or townhouse. They cannot be located above or below any other dwelling or class of building, except for a private garage. By contrast, class 2 buildings include attached storey dwellings where there is a common space below. For example, two townhouses above a common basement or carpark.

A certifier determining an application for a CC is carrying out an important public function and the issuing of a CC sets the basis for the entire certification process. Certifiers must act in accordance with the law, in the public interest, and maintain high standards in carrying out certification work.

A certifier has significant obligations and influence on the certification process in:

- Ensuring that the statutory requirements for the issuing of a CC have been met;
- The quality and type of documentation and evidence relied upon in issuing a CC;
- Applying judgement in their decision making.

This chapter will provide guidance on the requirements for a certifier in determining and issuing a CC for residential dwellings, and will provide:

- A general overview of key statutory obligations for certifiers assessing an application for, and issuing a CC.
- Guidance for certifiers in exercising their functions to the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent certifier.
- Guidance where certifiers are required to exercise professional judgement in their decision making when assessing an application for, and issuing a CC.

#### 3.1.1 What is a construction certificate?

A CC is a requirement before the commencement of building work authorised by a development consent. A CC also sets the basis for any future OC for a building.

A construction certificate is defined as 'a certificate to the effect that building work completed in accordance with specified plans and specifications or standards will comply with the requirements of the regulations'<sup>37</sup>.

When a certifier issues a CC they are attesting that the application (including any additional information requested by the certifier) has met the statutory requirements, including but not limited to:

- The design and construction of the building is consistent with the development consent<sup>38</sup>.
- The proposed building will comply with the relevant requirements of the BCA<sup>39</sup>.
- Each precondition to the issuing of a CC in the development consent has been complied with<sup>40</sup>.
- If the building work is completed in accordance with the documentation accompanying the application for a CC, it will comply with the requirements of the EP&A (Development Certification and Fire Safety) Regulation<sup>41</sup>.

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<sup>37</sup> Section 6.4 of the EP&A Act

<sup>38</sup> Section 19(1)(b) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>39</sup> Section 19(1)(c) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>40</sup> Section 20 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>41</sup> Section 23 of the EP&A (Development Certification and Fire Safety) Regulation

- Any required fees, contributions and levies<sup>42</sup> have been paid.

Note: A certifier can be held responsible for their actions through the liability they carry when carrying out certification work. A certifier, certifying that a proposed building (or element) complies with a statutory requirement or standard may be liable if they are negligent in doing so.

### 3.1.2 When is a construction certificate required for building work?

A CC is required to carry out building work and for the erection of a building in accordance with a development consent<sup>43</sup>. Building work includes both buildings and structures and parts of buildings and structures. A CC must only be issued for building work and cannot be issued for other works that do not fit within the definitions of building and building work.

Note:

**building work** means any physical activity involved in the erection of a building<sup>44</sup>. This can include demolition work or activity<sup>45</sup>.

**building** includes a part of a building, and also includes any structure or part of a structure (including any temporary structure or part of a temporary structure), but does not include a manufactured home, moveable dwelling or associated structure within the meaning of the Local Government Act 1993<sup>46</sup>.

A CC is not required where the building work or building is:

- Exempt development<sup>47</sup>.
- Approved by a complying development certificate<sup>48</sup>.
- Crown building work<sup>49</sup>.
- Approved for demolition<sup>50</sup>.

The EP&A legislation does not require a construction certificate for building work where the relevantly approved development is the demolition of a building<sup>51</sup>.

Where the approved development involves the demolition of an existing building and the erection of a new building, the demolition component is considered preparatory work and a preliminary activity necessary to enable the erection of a new building<sup>52</sup>. In these circumstances, the demolition work does not fall within the ambit of a construction certificate<sup>53</sup>.

In contrast, where the approved development involves the demolition of parts of an existing building and the retention of other parts of that building (with alterations or additions), it is not practicable to separate out the demolition work<sup>54</sup>. To do so would introduce uncertainty in respect of the certification of development<sup>55</sup>. In these circumstances, a CC is required before building work can commence.

<sup>42</sup> Section 6.8(1)(b) of the EP&A Act

<sup>43</sup> Sections 6.3(1) and 6.7(1) of the EP&A Act.

<sup>44</sup> Section 6.1 of the EP&A Act.

<sup>45</sup> Over our Dead Body Society Inc v Byron Bay Community Association Inc [2001] NSWLEC 125

<sup>46</sup> Section 1.4(1) of the EP&A Act.

<sup>47</sup> Section 6.3(3) of the EP&A Act.

<sup>48</sup> Section 6.7(2)(a) of the EP&A Act.

<sup>49</sup> Section 6.7(2)(b) of the EP&A Act.

<sup>50</sup> Over our Dead Body Society Inc v Byron Bay Community Association Inc [2001] NSWLEC 125

<sup>51</sup> Over our Dead Body Society Inc v Byron Bay Community Association Inc [2001] NSWLEC 125

<sup>52</sup> Sharp v Hunters Hill Council [2002] NSWLEC 27; Smith v Wyong Shire Council [2008] NSWLEC 115

<sup>53</sup> Sharp v Hunters Hill Council [2002] NSWLEC 27

<sup>54</sup> Over our Dead Body Society Inc v Byron Bay Community Association Inc [2001] NSWLEC 125

<sup>55</sup> Over our Dead Body Society Inc v Byron Bay Community Association Inc [2001] NSWLEC 125

Note: In 2021 the NSW Civil and Administrative Tribunal (in an administrative review of an internal determination) found that a CC issued for demolition works only was an error which contributed to a certifier not meeting the requirements for A1 certification<sup>56</sup>.

### 3.1.3 A certifier's role

A certifier's role is an important public function with potential impacts on public health, safety and amenity. The determining of an application for, and the issuing of a CC is a function of a certifier in carrying out certification work<sup>57</sup>.

The role of the certifier is broad, and certifiers are required to have a suitable level of knowledge and understanding of all relevant aspects of the planning system and building construction.

Because the role of a certifier is generalist in nature, they can rely upon specialists for relevant matters and disciplines, e.g. structural engineering, fire safety, access and energy efficiency. However, a certifier's role is to holistically consider a development, and this requires consideration of matters both individually and in combination i.e. the fact that a specialised component of a building complies with specific requirements does not mean that the component complies with all relevant requirements or the broader development consent.

A certifier must also be aware of their own skills and limitations and they must:

- Not carry out certification work unless authorised by their registration (including any conditions)<sup>58</sup>,
- Not carry out any certification work where a proposal in an application for a CC is beyond their competence or expertise<sup>59</sup>, and
- Where an aspect of a proposal in an application for a CC is beyond their competence or expertise seek and properly consider specialist advice<sup>60</sup>.

If for some reason the requirements of certification work change during the course of a development (eg. if cladding product specified for DTS compliance for a development becomes unavailable and is replaced by a product that requires a performance solution), certifiers need to ensure that their registration covers the certification work needed. If not, the certifier may need to be replaced.

The role of a certifier is predominately regulated by two statutory schemes, and with regard to CCs a certifier must:

- Follow the statutory requirements, as set out in the EP&A Act and regulations, relevant to the determination of an application for, and the issuing of a CC, and
- Carry out certification work and exercise their functions as a certifier in accordance with the requirements of the B&DC Act and regulations.

Failing to comply with either of these statutory schemes can be grounds for taking disciplinary action against a certifier.

It is essential that any CC issued by a certifier is issued in accordance with the statutory requirements, and:

- Based on decision making that is impartial, honest and in the public interest.
- Within the authorities conferred by their class of registration and any conditions of registration.

A CC that is issued in accordance with the statutory requirements:

- Promotes the carrying out of work in accordance with acceptable standards.
- Is in accordance with what a member of the public is entitled to expect from a reasonably competent certifier.

<sup>56</sup> Votano v Building Professionals Board [2021] NSWCATOD 7

<sup>57</sup> Section 6.5(1) of the EP&A Act

<sup>58</sup> Section 5(1) of the B&DC Act

<sup>59</sup> Clause 4 of Schedule of the B&DC Regulation

<sup>60</sup> Clause 4 of Schedule 5 of the B&DC Regulation

- Enhances public confidence in the certification system.
- Limits the exposure to potential legal challenge.
- Sets the basis for an OC to be issued for the completed building.
- Reduces the likelihood of complaints being made against a certifier.

Conversely, a CC that is issued contrary to the statutory requirements:

- Potentially compromises the carrying out of development in accordance with acceptable standards.
- Undermines the public confidence in the certification system.
- Exposes the certificate to challenge or declaration of invalidity.
- May result in an OC not being able to be issued for the building.
- Could be grounds for taking disciplinary action.

Note: In 2019 the NSW Civil and Administrative Tribunal in an administrative review of a disciplinary finding found that in issuing a CC in circumstances where the statutory requirements had not been met, the certifier failed to exercise their functions in the public interest<sup>61</sup>.

### 3.1.4 Documenting decision making

A certifier's role is inherently a decision making one. Whilst the statutory requirements provide the framework for a certifier's role and their decision making, the nature of modern buildings necessitates a certifier making decisions using their professional judgement based on the available facts and evidence. A CC issued by a certifier may be relied upon by various parties including developers, owners, occupiers and other related professionals. Accordingly, any decisions made by the certifier in issuing the CC must be appropriately documented.

The CC documentation (being the CC, the associated application and accompanying documentation and other information given to the certifier<sup>62</sup>) may also be scrutinised by the Government, councils, affected parties or in legal proceedings, where the decision making of the certifier will be relevant.

The Code of Conduct requires a certifier to clearly document reasons for decisions made when carrying out certification work, that include the:

- Decision that was made.
- Reasons for making that decision.
- Findings of fact that the reasons were based upon.
- Evidence for those findings.

#### What is expected of a certifier?

When making decisions a certifier should ensure that:

- Any decision making is in accordance with the statutory requirements, including acting in the public interest<sup>63</sup>.
- All required information and documentation has been provided and is in a suitable form.
- Reasonable steps are taken to obtain all relevant available facts and that these facts are considered before making a decision<sup>64</sup>.

<sup>61</sup> Da Silva v Building Professionals Board [2019] NSWCATOD 177

<sup>62</sup> Section 12 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>63</sup> Section 45 of the B&DC Act

<sup>64</sup> Clause 8 of Schedule 5 of the B&DC Regulation

- Records are kept of any certificate or other document that have been relied upon for the purposes of issuing an CC<sup>65</sup>. This record keeping would encompass the documenting of decision making.
- Where the development consent includes preconditions to the issuing of a CC, the satisfaction of these preconditions must be documented by the certifier.

Note: A certifier must retain sufficient documentary evidence of decision making so as to be able to replicate their conclusions and describe their reasoning in the event of a future audit. File notes, marking of working versions of plans, emails are all examples of written evidence of decision making.

## 3.2 Application for a construction certificate

### 3.2.1 What information is required in an application for a construction certificate?

An application for a CC must contain the information that is specified in the approved form<sup>66</sup>. The applicant must be the person who is eligible to appoint the principal certifier for the development<sup>67</sup>- ie. the person who has the benefit of the development consent<sup>68</sup>. The application must be lodged where required on the NSW planning portal<sup>69</sup>:

The list of documents accompanying the application enables a certifier to have a clear understanding of the documentation to be assessed, as well as providing a nexus to any CC ultimately issued. A CC is relied upon by various parties and therefore must be clear as to what building work is approved by the CC and the documents that form the basis for issuing the CC i.e. the application for the CC.

Note: An application may only be made by a person eligible to appoint a principal certifier for the development i.e. the person having the benefit of the development consent (or with their approval)<sup>70</sup> but not a contractor or any person who will carry out the work unless they are the owner of the land<sup>71</sup>.

### 3.2.2 What documents are required to accompany an application for a construction certificate?

An application for a CC for building work must at minimum be accompanied by<sup>72, 73</sup>:

- All the information and documents specified in the approved form or required by the EP&A Act or the EP&A (Development Certification and Fire Safety) Regulation,
- A detailed description of the development<sup>74</sup>,
- Appropriate building work plans and specifications<sup>75</sup>, and
- A copy of the BASIX certificate, if required.

The prescribed appropriate building work plans and specifications to accompany an application also include:

- A description of any accredited building product or system sought to be relied upon (e.g. a certificate of conformity under the CodeMark scheme).

<sup>65</sup> Clause 50(d) of the B&DC Regulation

<sup>66</sup> Section 7(1)(b) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>67</sup> Section 7(2) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>68</sup> Section 6.6(1) of the EP&A Act

<sup>69</sup> Section 7(1)(c) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>70</sup> Section 6.6(1) of the EP&A Act

<sup>71</sup> Section 6.6(4) of the EP&A Act

<sup>72</sup> Sections 7 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>73</sup> Section 8 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>74</sup> Section 8 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>75</sup> Section 8 of the EP&A (Development Certification and Fire Safety) Regulation

- Copies of any compliance certificate.
- Any matters a BASIX certificate requires to be included

### **3.2.3 What are appropriate plans and specifications?**

Plans must be specific to the subject building and cover the entire scope of the building work which is the subject of the application. Plans should also take into account any applicable local requirements which are included in the development consent such as those set out in a Development Control Plan.

#### **Architectural plans:**

- A site plan, showing the location of the proposed building, setbacks from boundaries, levels of adjacent ground, existing buildings on site and other site features such as easements. Floor plans for each floor of the building, showing all building elements and detailed layouts at a suitable scale, which should include:
  - Reduced levels and proposed finished floor levels.
  - The intended use of each room.
  - Dimensions of rooms.
  - Dimensions of walls and structural elements.
  - Internal and external wall construction, including details of any required sound insulation, fire resistance or the like.
  - Locations of door and window openings.
  - Layouts or rooms within the building and location of fixtures.
  - Details of any performance solutions as relevant.
  - Sufficient detail to demonstrate BASIX compliance where applicable.

#### **Architectural elevations:**

- Elevations of the proposed building, showing the relevant floor levels and heights, design, finishes and materials, which should include:
  - Dimensioned heights, including the overall height.
  - Proposed external materials.
  - Proposed finished floor and ceiling levels.
  - Floor to floor and floor to ceiling heights.
  - Location and sizes of window and door openings, balconies and other external features.
  - Details of any performance solution as relevant.

#### **Architectural sections:**

- Sections of the proposed building showing building elements and construction methods, which should include:
  - Sections of any ramps and other elements with gradients and stairways.
  - Finished floor and ceiling levels.
  - Floor to ceiling heights.
  - Wall, window and door heights.



- Thresholds and set downs.
- Structural supports.
- All relevant vertical and horizontal building elements and their relationship to the building.

**Architectural details:**

- Details showing building elements and construction methods, which should include:
  - Details of key areas of the building.
  - Methods of weatherproofing and attaching building elements.
  - Waterproofing details.
  - Tanking and damp-proofing details.
  - Wall details such as for required fire resistance and sound insulation.
  - Any access ramp, landing, threshold details.
- Provision for fire safety and fire resistance, showing which elements are fire resisting, and the proposed level of fire resistance.. Ideally plans should be colour coded differentiating all the fire-resisting elements and clearly identifying fire separation. .

**Building specification:**

Many design decisions and building details cannot be expressed in graphic form and therefore instead need to rely upon text. Details and design decisions that cannot be shown on plans may be detailed in a building specification which complements the plans. Typically, a specification will:

- Embody design decisions.
- Describe the construction and material of which the building is to be built and the method of drainage, sewerage and water supply.
- State whether the materials to be used are new or second-hand (and in the case of second-hand materials) give particulars of the materials to be used.
- Demonstrate compliance with statutory requirements
- Be specific to the subject building.
- Describe the materials to be used in the proposed building, such as internal and external walls, finishes and linings, floors, ceilings, windows and doors, and roofing.
- Reference the design, product and installation and execution standards as applicable to the construction.

**Other design and construction drawings:**

Other design and construction drawings may be provided by the applicant or requested by the certifier and should include an appropriate level of detail. For example, these documents could include matters such as:

- Structural designs and plans
- Hydraulic services design and plans.
- Mechanical services design and plans.
- Electrical design plans.

## Other supporting information:

Further information can be provided with an application for a CC, such as:

- Performance solution reports demonstrating compliance with the BCA.
- Details on proprietary systems to be used in the proposed building where not included in the specification, for example termite management systems, waterproofing systems, footing and floor systems, external and internal wall construction, roof systems (eg. conventional or truss roof)
- Copies of any compliance certificates to be relied upon.
- Documentation, certificates and plans from specialist professions and appropriately qualified persons, such as engineers, architects and land surveyors.
- Reports relating to specific BCA matters such as energy efficiency/BASIX, and sound insulation.
- Details on floor finishes, materials and slip resistance
- Geotechnical reports where appropriate (eg. if there are concerns about soil type and its impact on foundations)
- A site/soil/wind classification report
- Other relevant site specific details (eg. snow, earthquake, marine).

Note: The level, type and quality of information accepted and relied upon by a certifier is where a certifier has significant bearing on a proposed development. The acceptance or otherwise of documentation and other information supporting an application for a CC is a significant discretionary power afforded to certifiers. A certifier is required to always act in the public interest<sup>76</sup> and the consideration by a certifier of the suitability of documentation needs to be viewed through this lens and not the interests of the applicant or for expediency.

### 3.2.4 Initial check of an application for a construction certificate and its accompanying documents

The Code of Conduct<sup>77</sup> requires certifiers to apply all relevant building laws and regulations and exercise reasonable care and attention. The diligent checking by a certifier of an application for a CC and its accompanying documentation is consistent with the professional standards expected by a member of the public of a reasonably competent certifier.

Note, the NSW Planning Portal is not a compliance check tool. The fact that an application has been submitted to the Portal does not indicate of itself that the application meets all applicable regulatory requirements. Importantly, the lodgement of does not remove the need for the certifier to carefully assess the application and determine compliance against the regulatory requirements.

Upon receipt of an application a certifier may not have a full appreciation as to whether the statutory requirements for issuing a CC have been met. A certifier should undertake an initial check of the application and accompanying documents to determine whether they are adequate to enable the proper assessment of the application.

As a first step a certifier must ascertain whether the minimum prescribed information has been provided and then determine what additional information or documentation is required (if any).

#### What is expected of a certifier?

When carrying out an initial check of an application for a CC and its accompanying documentation a certifier should check that the:

<sup>76</sup> Section 45(e) of the B&DC Act  
<sup>77</sup> Schedule 5 of the B&DC Regulation

- Application form includes all the required information, is complete and is made by a person authorised to do so.
- Description of the proposed building work on the application is clear and unambiguous.
- BCA classification contained in the application aligns with the description of the building works and the intended use of the building.
- Documents accompanying the application for the CC accord with the description of the building works.
- Documents are in accordance with the list on the application. Documents prescribed in Section 8 of the EP&A (Development Certification and Fire Safety) Regulation 2021 have been included.
- Plans, elevations and details correspond with the description of the proposed building works.
- Building specification specific to the proposed building works is included.
- The scope of the plans and specifications is commensurate with the proposed building work.

The initial check is also an opportunity to identify if there is any potential additional information about the application that needs to be requested from the applicant.

### 3.2.5 Where the information provided with the application is insufficient

The information provided with an application may be insufficient where:

- The minimum information has not been provided.
- Documentation is unsuitable for the intended purpose or lacking information.
- Insufficient information has been provided to enable a proper assessment of the application.

A certifier has authority to require an applicant to provide any additional information that is essential to the certifier's proper consideration of the application. The authority to require information from the applicant is not limited, and if a further or more detailed assessment reveals the need for additional information, a certifier should request that information.

#### What is expected of a certifier?

Certifiers should require the applicant to provide additional information where the additional information is essential to the certifier's proper consideration of the application<sup>78</sup>, such as when:

- The provided information is unclear, ambiguous or deficient.
- The satisfaction of statutory requirements cannot be determined from the information provided.
- A reasonable determination of the application cannot be made.

Alternatively, where the application is deficient a certifier may determine it by way of refusal.

Note: The description of the proposed building work on the application for a CC is important as it forms the basis for any CC issued and any future OC. As a threshold test a certifier should consider whether an independent person reading the application would know what building works the application relates to. If not, the description should be clarified.

Note: A certifier should not issue a CC where an application is vague. It is the responsibility of the applicant to identify what building works they are seeking a CC for. A CC and its accompanying application must be clear about what it relates to.

<sup>78</sup> ibid

Note: A CC cannot overcome deficiencies in the application for a CC. This means that a certifier cannot make assumptions where there are ambiguities in the application. It is also not the role of a certifier to amend plans to overcome deficiencies, or include additional information not provided by the applicant.

### 3.3 Evaluating an application for a construction certificate

A certifier is a public official and this is a critical factor in carrying out certification work. The statutory scheme places no positive obligation on a certifier to issue a CC, i.e. nothing explicitly states that a CC must be issued in certain circumstances, rather the statutory scheme identifies circumstances in which a CC must not be issued. A certifier's role is to determine an application for a CC against the statutory scheme with the mindset of a public official i.e. in the interests of the public.

There are a number of circumstances where a certifier 'must not' issue a CC unless certain matters have been satisfied, including that:

- The relevant building work plans and specifications include the matters required by a relevant BASIX certificate, if any (see part 3.7)<sup>79</sup>.
- The design and construction of the building is consistent with the development consent<sup>80</sup> (see part 3.4).
- The proposed building will comply with the relevant requirements of the Building Code of Australia<sup>81</sup> (see part 3.5).
- Relevant conditions of the development consent have been complied with<sup>82</sup> (see part 3.6).

In issuing a CC a certifier is making a statement attesting that relevant statutory requirements have been met. For a certifier to be able to reasonably determine that these requirements have been met largely depends on the level and quality of information included with an application for a CC and as requested by the certifier, commensurate to the proposed building work.

Certifiers can request an applicant to provide a compliance certificate<sup>83</sup> from other appropriately registered certifiers to confirm compliance for relevant matters, such as the design of a system complying with the BCA.

A certifier relying upon a compliance certificate issued by another certifier, is entitled to assume<sup>84</sup>:

- That the certificate has been duly issued, and
- That all conditions precedent to the issuing of the certificate have been duly complied with, and
- That all things that are stated in the certificate as existing or having been done do exist or have been done respectively.

A certifier is not liable for any loss or damage arising from any matter in respect of which the compliance certificate has been issued by another certifier. Where a certifier intends to require and rely upon compliance certificates this expectation should be conveyed to the applicant at an early stage.

If certifiers choose to carry out certification work without relying upon compliance certificates, they will take responsibility when making the statement and issuing a CC that the matters attested by the CC have been satisfied.

<sup>79</sup> Section 19(1)(a) of the EP&A (Development Certification and Fire Safety) Regulation  
<sup>80</sup> Section 19(1)(b) of the EP&A (Development Certification and Fire Safety) Regulation  
<sup>81</sup> Section 19(1)(c) of the EP&A (Development Certification and Fire Safety) Regulation  
<sup>82</sup> Section 20 of the EP&A (Development Certification and Fire Safety) 2021 Regulation  
<sup>83</sup> Within the meaning of section 6.4(e) of the EP&A Act  
<sup>84</sup> Section 6.30 of the EP&A Act

Note: It is the application and the accompanying information that forms the basis for a CC. A certifier's role is to assess the application for the CC and make a determination by way of either approval<sup>85</sup> or refusal. A CC is only issued by a certifier following the determination of an application by way of approval.

Note: The issuing of a CC includes a reference to the endorsement of the CC on any relevant plans and specifications<sup>86</sup>.

### **What is expected of a certifier?**

When evaluating an application for a CC a certifier must carry out the assessment in the 'public interest', i.e. impartially and based on all relevant facts and should:

- Not issue a CC unless the certifier has carried out an assessment of the application and the statutory requirements have been satisfied.
- Ensure that all documentation and supporting information related to the application has been critically assessed and is suitable in all relevant circumstances (see Chapter 6).

Note: A certifier is liable to disciplinary action if the certifier does not carry out their certification role to the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent registered certifier.

## **3.4 Consistency**

As highlighted in section 3.3 a certifier must not issue a CC unless "the design and construction of the building, as described in the relevant building work plans and specifications and in other information given to the certifier under section 12, is consistent with the development consent"<sup>87</sup>.

This statutory requirement is often referred to as 'the consistency test'.

### **Why is there a consistency test and why is it important?**

The consistency test recognises that there will inevitably be changes between the development consent approved plans, and the building work plans and specifications suitable for a CC. The reason being that CC plans and specifications typically require far more detail than plans used to support a development application.

The consistency test can also require changes to be made to building work plans and specifications where expressly required by the development consent.

Development application (DA) plans enable the consent authority to assess the planning impacts of a proposal and therefore do not necessarily require detailed building information. These plans can be more conceptual than building work plans and is why they sometimes require changes to be made through the terms of the consent.

The lesser level of building detail in DA plans is also reflected in the legislation, as a consent authority cannot require an applicant to provide additional information if it is information that would be required for an application for a CC.<sup>88</sup> The information required for CC plans and specifications is the detailed design to demonstrate BCA compliance (refer to sections 3.2 and 3.5 for further information on CC plan and specification details).

<sup>85</sup> Section 13 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>86</sup> Section 13 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>87</sup> Section 19 of the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021

<sup>88</sup> Section 36(2) of the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021

Applying the consistency test is an important function of a certifier. When a certifier approves variations to a building design by issuing a CC, they are performing a public function involving immense trust. Variations made at CC stage mean the consent authority and the wider community are not given an opportunity to consider or comment on the changes proposed.<sup>89</sup>

While the consistency test is a function of the certifier, the importance of it to all parties involved is reflected in the legislation where power is given to the Land and Environment Court to declare a CC invalid if the building work plans and specifications for the CC are not consistent with the development consent.<sup>90</sup>

Note: Since 1 December 2019 the design and construction of a building is required to be 'consistent' with the development consent, replacing the previous 'not inconsistent' test. The new consistent test is a stricter test and means building work approved by a CC must more closely align with the development consent. The intent of the change is to provide the community with greater confidence in the certification process and avoid illegitimate changes to the plans and specification after the development consent has been granted.

Case study: The NSW Land and Environment Court declared that a CC issued by a certifier was invalid and of no effect due to the certified building work being markedly different to the approval granted by council. The CC approved plans included an additional unit to that approved by the development consent. The judgment stated with regard to the inconsistent certification '... regrettably this is becoming an all-too-common occurrence in this Court. It must not be tolerated. It brings the certification system into disrepute and undermines the planning regime in this State.'<sup>91</sup>

### 3.4.1 Assessing consistency

It is a statutory requirement for a certifier to not issue a CC unless the design and construction of the building is consistent with the development consent. In addition to the statutory duty, certifiers are subject to conduct standards in carrying out certification work and are public officials (as outlined in Chapter 1).

This means that certifiers must use professional judgement to reasonably determine if the proposed building as depicted on the plans and described in the application is consistent with the development consent in the specific context of that building.

When applying the consistency test and exercising decision-making powers the following code of conduct requirements<sup>92</sup> are of particular importance:

- act in the public interest (requirement 2),
- abide by standards expected by the community (requirement 3),
- avoid conflicts of interest (requirement 6),
- obtain and consider all facts (requirement 8), and
- document reasons for decision (requirement 9).

### Considerations in determining consistency

To achieve consistency there must be a high degree of correlation between the proposed building work and the development consent. The proposed building work does not have to be identical to the development consent and the consistency test allows for some level of variation.

Where the consent expressly requires changes, these must be reflected on the CC documentation to achieve consistency.

<sup>89</sup> Building Professionals Board v Cogo [2008] NSWADT 119

<sup>90</sup> Section 6.32 of the Environmental Planning and Assessment Act 1979

<sup>91</sup> Kogarah City Council v Armstrong Alliance Pty Ltd (No 2) [2013] NSWLEC 32

<sup>92</sup> Schedule 5 of the Building and Development Certifier Regulation 2020

The consistency test is an objective test. This means that the proposed building work when considered objectively must be consistent with the development consent. As opposed to a subjective test, where it is the opinion of the certifier whether they are satisfied that the building is consistent.

To carry out the consistency test it is important to understand that:

- the development consent includes any plans and documents approved by the consent, as well as any conditions of consent. Therefore, any proposed building work must not only be consistent with the approved plans but also any conditions, and
- the 'design and construction of the building' means the building work as shown on the relevant building work plans, as described in the specifications, and in any other information provided to the certifier with regard to the application for the CC.
- The variety and differences between development consents, buildings, and specific circumstances means that what is consistent cannot be precisely set out. There are however general principles in assessing consistency:
- each application must be considered on its own facts,
- context is important – for example a minor change to the external appearance of a building is more likely to be inconsistent if the building is a heritage item,
- cumulative impacts must be considered – a single minor change on its own may be acceptable, however if there are a number of minor differences the collective impact of these may make it inconsistent, and
- inconsistency can also occur by not including design changes expressly required by the development consent.

### **What matters should be considered?**

When assessing the proposed building for consistency matters that need to be considered include the:

- visual appearance of the building and the building form,
- external configuration,
- building dimensions e.g. the bulk, scale, height, and floor areas,
- siting of the building and the setbacks,
- number of floors and internal layouts,
- approved level e.g. reduced levels, floor and ceiling levels, roof levels,
- proposed uses and movement paths within the building, and
- matters specifically required by the development consent.

### **Changes in design**

This section gives some general guidance on changes that may be considered reasonable when assessing consistency. As discussed earlier, each application for a CC must be determined on its own facts with proper regard to the specific circumstances and the planning context. As such, some of the examples here may be inconsistent in certain circumstances.

The following are typical changes which could be consistent and which could arise from the preparation of more detailed 'suitable for construction' plans and specifications:

- minor changes in dimensions of structural elements - for example a nominal change in the thickness of a wall to meet structural requirements.
- minor internal layout changes to rooms – for example a change in kitchen bench shape, or direction of door swings.



- additional details to show compliance with the BCA – where there are no other planning impacts.

While BCA compliance may necessitate design changes, proper consideration must always be given to the consistency of these changes. The fact a change is required to achieve BCA compliance does not mean it will always meet the consistency test.

Typical circumstances where BCA changes may not be consistent include:

- substantial changes,
- multiple changes with a cumulative impact,
- changes impacting the appearance of the building.

## **Similar statutory processes**

The planning and certification systems have several complementary processes that are similar to each other. It is important for certifiers to be aware of these and to understand that while similar they are not relevant considerations for the consistency test.

A process that can get conflated with the consistency test is the ability for an applicant to seek to have a development consent modified by the consent authority.<sup>93</sup> While a modification may be used to address an inconsistency issue, the threshold test for determining whether a consent should be modified is a different test to the consistency test. As such, a consent authority's consideration in this regard cannot be used to inform the consistency test for a certifier assessing an application for a CC.

## **What is expected of a certifier?**

When assessing the consistency of a proposed building a certifier must ensure that:

- A CC is not issued unless the proposed building work is consistent with the development consent.
- The consistency of the proposed building work is assessed objectively against the development consent.
- Consideration is given to the whole development consent including the plans and any conditions.
- Where exercising decision-making power this is carried out in accordance with the code of conduct for certifiers.
- If clarification is required, the opinion of the consent authority should be sought regarding the consistency of the proposed building work.

In line with the code of conduct the decision making of a certifier must be clearly documented (refer to section 3.1.4). This documentation must be sufficiently detailed so that if any question is raised with a certifier as to how a particular aspect of the design was determined to be consistent, the certifier can readily provide a response that is sound, logical, and reasonable.

### **3.4.2 What if the proposal is not consistent?**

If following the assessment of the building work proposed in the application for a CC the certifier determines that the proposed building work is not consistent with the development consent, a certifier must not issue the CC and may:

- determine the application by way of refusal,
- request the applicant to provide amended plans and/or specifications, which are consistent with the development consent, or
- advise the applicant to contact the consent authority and/or seek planning advice.

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93 Section 4.55 of the Environmental Planning and Assessment Act 1979

It is not a certifier's role to overcome perceived or actual shortcomings in a development consent regarding the ability of a building to be constructed. For example, if the proposed building requires changes to comply with the BCA, but these changes result in the proposed building not being consistent with the consent, it is not the role of the certifier to rationalise these changes or facilitate the development on behalf of the applicant.

Case study: The NSW Civil and Administrative Tribunal in an administrative review of a disciplinary finding found a certifier's conduct unsatisfactory with regard to issuing a CC that was inconsistent with the development consent. The Tribunal found that the variations between the development consent plans and CC plans were readily identifiable and significant.

The Tribunal noted that the certifier appeared to have taken the view that the building as designed and approved by the development consent, if built in accordance with the approval, would not function as intended. The Tribunal made no finding as to whether that was correct but found that even if it was correct it was not up to the certifier to take it upon themselves to ensure the functionality of the building and to decide what method would be employed. The Tribunal also found that the developer had available to them the modification process for the development consent, and that that process was the only appropriate course and should have been advised by the certifier.

The Tribunal took the view that it was not their role to examine why the council issued the development consent in the form that it did. Nor was it the certifier's role to ensure that any errors or omissions in the design phase were corrected through the CC approval process.<sup>94</sup>

### 3.5 BCA compliance

A certifier must not issue a CC unless the proposed building will comply with the relevant requirements of the BCA as in force at the time of the application<sup>95</sup>.

Where an applicant seeks separate CCs for stages of building work, each stage must be the subject of a separate application. The date of each application determines the edition of the BCA that applies to the assessment of that application. The edition of the BCA applied to the first CC application does not 'lock in' the edition applied to any subsequent CC applications. Any subsequent application must be determined against the edition of the BCA that is in force at the time of the making of the application<sup>96</sup>.

#### What is expected of a certifier?

- A certifier must determine whether the proposed building, as depicted in the plans and described in the specifications, will comply with the relevant requirements of the BCA.
- The proposed building must comply with the BCA version that was in force at the time the application was made<sup>97</sup>.
- A certifier must objectively assess the proposed building against the relevant requirements of the BCA.
- Where BCA compliance cannot be determined by the information and documents forming part of the application, further information may be requested from the applicant or the application determined by refusal.

The requirement for a proposed building to comply with the BCA is an objective test. That is, the building work if completed in accordance with the construction certificate plans and specifications will comply with the relevant requirements of the BCA. This means if the certifier decides that the proposed building will comply

<sup>94</sup> Da Silva v Building Professionals Board [2019] NSWCATOD 117

<sup>95</sup> Section 19(1)(c) of the EP&A (Development Certification and Safety) Regulation

<sup>96</sup> Refer to this [link](#) for further information

<sup>97</sup> Section 12 of the EP&A (Development Certification and Fire Safety) Regulation.

with the relevant requirements of the BCA but that decision is not objectively correct, there is a risk that the certificate could be declared invalid.

### 3.5.1 How much detail is required to determine BCA compliance?

The CC plans and specifications must contain sufficient detail and information to determine that the proposed building will comply with the BCA. The level of detail required will always be dependent on the particular building work the subject of the application and the plans, specifications and other supporting documentation must cover the entire scope of the proposed building work.

A certifier must ensure that an application for a CC includes enough information to be able to make a meaningful assessment as to whether the proposed building will meet the requirements of the BCA. Certifiers have powers to require an applicant to provide any additional information that is essential to the certifier's proper consideration of the application<sup>98</sup>.

A meaningful assessment is one where a certifier can reasonably identify on the plans, specifications and other supporting information included with the application, where all relevant requirements of the BCA have been addressed i.e. not an assessment based on assumptions.

#### What is expected of a certifier?

- The plans, specifications and supporting documents to be relied upon are sufficiently detailed commensurate to the proposed building work.
- Enough information is provided to make a meaningful assessment as to compliance with all relevant parts of the BCA.
- Novel or unique design features are identified, and appropriate details of these features are provided.
- The endorsed plans and specifications are suitable for persons relying upon the CC to use i.e. the proposed building can be built in accordance with the plans and specifications and if built in accordance with these will comply with the BCA.

The BCA is a holistic document which includes interacting and interdependent requirements. A certifier is required to have knowledge of the BCA as a whole and must always have a holistic regard to the BCA and not consider matters in isolation.

Poor information includes documents with broad statements of intent to meet the requirements of the BCA, such as:

- Plans simply stating that all building work will be carried out in accordance with the BCA.
- Plans restating the table of contents of the BCA.
- Plans only identifying Sections or Parts of the BCA.

Whilst all relevant clauses in the BCA should be nominated and identified on plans and specifications, this alone is not sufficient to certify that a building will comply with the relevant requirements of BCA.

An example of good documentation is where plans include appropriately scaled sections and details showing the building elements, with specific construction details. Any details that cannot be shown on the plans need to be included in the building specification or covered by design certification or statements.

Note: It is not acceptable for a certifier to issue a CC based on an incomplete application or one lacking sufficient documentation. A certifier is a public official and it is not a certifier's role to make any assumptions where there are gaps in information with an application for a CC, nor is it a certifier's role to facilitate a CC being issued for a deficient application. If an application does not include clear documentation regarding BCA compliance, then a CC must not be issued by a certifier.

<sup>98</sup> Section 12 of the EP&A (Development Certification and Fire Safety) Regulation.

### 3.5.2 Assessing proposed building work for BCA compliance

The BCA is a performance-based code which allows non-standard designs to demonstrate compliance with the performance requirements through a performance solution. The mandatory provisions of the BCA are the Governing Requirements and the Performance Requirements. Compliance with the Performance Requirements can be achieved by a performance solution, a deemed-to-satisfy solution, or combination of both.

One of the fundamental roles of a certifier is to determine whether proposed building works, the subject of an application for a CC will comply with the relevant requirements of the BCA. When a certifier issues a CC they are providing a statement that the building work, if carried out in accordance with the documentation accompanying the application, will comply with the BCA.

The details of BCA compliance will be depicted on plans, described in a building specification or addressed in other documentation accompanying the application for a CC. A certifier is required to objectively assess all of the documents to determine whether the building, if built in accordance with these documents, will comply with the BCA.

Compliance with the BCA needs to be interpreted with regard to its wider policy objectives i.e. ensuring healthy, safe, amenable, accessible and sustainable buildings. Where the BCA could be interpreted in a number of ways, a certifier should adopt the interpretation that best aligns with the intention of the particular BCA provision, as informed by the context (e.g. does it relate to fire safety). A certifier must interpret the BCA in the public interest and consistent with the intent of the provisions.

#### Deemed-to-Satisfy Provisions

A certifier assessing BCA compliance against the Deemed-to-Satisfy Provisions (DtS) should:

- Carry out a clause by clause assessment of every relevant part of the BCA.
- Not defer their responsibilities onto others.
- Ensure matters that are reasonably able to be depicted are shown on the relevant plans.
- Ensure that matters that cannot be depicted are adequately described in the specification, other documentation or information forming part of the application.

*Example: To demonstrate the proposed method of compliance with the BCA may require the CC application to include the input of a professional engineer. Whilst the engineer's design and opinion can be relied upon by a certifier in determining the CC application, a certifier still has the role of checking that the engineer has in the submitted material shown that the relevant requirements of the BCA have been addressed – ie. that the basis of the design is to the appropriate importance level, the relevant BCA actions have been considered, and the relevant standards have been used with regard to materials and forms of construction.*

#### Performance solutions

Performance solutions must be prepared in accordance with the BCA<sup>99</sup> using the following steps:

- A performance-based design brief has been prepared in consultation with relevant stakeholders.
- An analysis is carried out using one or more assessment methods, as proposed by the performance-based design brief.
- The results have been evaluated against the acceptance criteria in the performance-based design brief.
- A final report is prepared that includes:
  - Details of the three steps above i.e. the preparation of a brief, the analysis and evaluation of results.
  - The identification of all relevant performance requirements and DtS provisions.

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99 A2.2(4) - National Construction Code 2019 - Volume One Amendment 1)

- The identification of all assessment methods used.
- Confirmation that the performance requirements have been met.
- Details of conditions or limitations, if any exist, regarding the performance solution.

A certifier assessing whether a performance solution complies with the BCA should:

- Assess the performance solution having regard to the BCA as a whole. This assessment should include ensuring assumptions and methodologies are appropriate and that the solution is adequately described and shown i.e. is it clear within the performance solution exactly what is proposed and required.
- Determine that the performance solution correctly identifies all relevant performance requirements and DtS provisions.
- Ensure that the performance solution is 'shown to comply' with the relevant performance requirements of the BCA<sup>100</sup>.
- Have regard as to whether the performance solution will affect other parts of the building and requirements of the BCA.
- Where appropriate request a peer review of the performance solution.

*Example: A certifier is assessing a performance solution provided by the applicant to show compliance with several performance requirements related to fire safety in the BCA. The certifier is satisfied that the performance solution is shown to comply with the nominated fire safety performance solutions. However, during the assessment the certifier identifies that one of the proposed performance solutions will create a non-compliance with the health and amenity requirements of the BCA. Accordingly, this needs to be addressed because the building work if carried out as proposed would not comply with the BCA.*

Note: If a certifier determines that a performance solution is of a level of complexity that they cannot critically assess it, this is certification work outside of the level of competence of that certifier and must not be carried out by them<sup>101</sup>.

### 3.6 Conditions of the development consent

A development consent for building work is issued subject to conditions, being conditions imposed by the consent authority or those prescribed by legislation. Conditions of consent play an important role in the certification process as they can:

- Place an obligation on a certifier.
- Require the modification of plans or the proposed building.
- Require the provision of additional information prior to the issuing of certificates.

A certifier must not issue a CC unless the following conditions of the development consent have been met<sup>102</sup>:

- Each condition or agreement requiring the provision of security before work is carried out.
- Each condition requiring the payment of a monetary contribution or levy before work is carried out.
- Each condition that must be complied with before a CC may be issued.

Note: A development consent is not to include any condition requiring that a compliance certificate be obtained in respect to the development. Where such a condition is included it is of no effect<sup>103</sup>.

<sup>100</sup> A2.2(2) - National Construction Code 2019 - Volume One Amendment 1

<sup>101</sup> Schedule 5 of the B&DC Regulation

<sup>102</sup> Section 20 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>103</sup> Section 6.16(2) of the EP&A Act

### 3.6.1 Preconditions to the issuing of a construction certificate

A certifier must not issue a CC unless any condition that is a precondition to the issuing of the CC has been met.

A condition may be a precondition to the issue of a CC where it includes in its terms 'prior to the issue of a construction certificate' or similar language. There may also be other forms of words used to convey the fact that a condition is a precondition to the issuing of a CC and certifiers should always review the development consent in full to determine this.

Conditions of development consent are typically grouped in a logical order based on the construction process e.g. prior to works commencing, prior to the issue of a construction certificate, prior to the issue of an occupation certificate, or the like.

Where a condition is ambiguous, a certifier can seek clarification by writing to the consent authority.

The requirement to comply with a precondition is often the responsibility of other parties and a certifier will determine compliance based on the evidence provided to them. Evidence of compliance of preconditions must be documented and recorded by the certifier. A certifier is also required to take all reasonable steps to obtain all available facts relevant to the carrying out of certification work<sup>104</sup>, which could include a fact relevant to the satisfaction of a precondition.

### 3.6.2 Condition of consent wording

Certifiers need to read each condition of the development consent in full to understand the context of each condition and to determine if the condition is a precondition to the issuing of a CC. Some common condition wording includes:

#### **Where a condition refers to prior to the issue of 'any relevant' CC or similar.**

This may be interpreted by the certifier using their judgement as to whether the condition relates to the particular CC the subject of the application the certifier is assessing.

*Example: A condition of consent requires that prior to the issuing of a relevant CC details of all external materials are to be submitted to the principal certifier. This condition would not need to be satisfied prior to a CC being issued that relates to basement levels as there are no external materials for the aspect of the building work.*

If there is no staged CC, all DA conditions that need to be met before the issue of a CC must be complied with.

#### **Where a condition refers to prior to the issue of 'any' CC or similar.**

These conditions must be satisfied before the issue of any CC with regard to the development.

*Example: A condition requires that prior to issuing any CC design changes need to be made and approved by the consent authority. These changes need to be approved by the consent authority prior to any CC being issued for the building work. If there is no staged CC, all consent conditions that need to be met before the issue of a CC must be complied with.*

#### **Where a condition states that the matter needs to be to the satisfaction of the council or consent authority.**

For the purpose of issuing a CC, where a condition of consent includes a requirement that a council or consent authority is to be satisfied as to certain matters, this is taken to have been complied with if the certifier is satisfied about the matter (for prescribed matters)<sup>105</sup>.

The prescribed matters in relation to which a certifier may be satisfied in lieu of a council or consent authority are<sup>106</sup>:

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<sup>104</sup> Clause 8 of Schedule 5 of the B&DC Regulation

<sup>105</sup> Section 6.29 of the EP&A Act

<sup>106</sup> Section 73 of the EP&A (Development Certification and Fire Safety) Regulation

- Matters that relate to the form or content of the plans and specifications in connection with the erection of a building, for the following kind of work:
  - Earthworks
  - Road work, including road pavement and road finishing
  - Stormwater drainage work
  - Landscaping work
  - Erosion and sedimentation control works
  - Excavation work
  - Mechanical work
  - Structural work
  - Hydraulic work
  - Work associated with driveways and parking bays, including road pavement and road finishing
- Matters that relate to the external finish of a building.

### 3.7 BASIX

Where a DA requires a BASIX certificate, the application for a CC must also be accompanied by a BASIX certificate.

BASIX commitments marked in the CC column of the BASIX certificate must be shown on all accompanying plans and specifications. The CC must be consistent with the approved DA.

As at the DA stage, drawings, as well as commitments indicated in tables, should also be used to show those commitments that have an impact on the design and construction. For example, solar hot water systems must be to scale and have a specific location on the roof. Drawings will also show integration of BASIX with other aspects of the design to avoid issues during construction.

Details such as heating system type and efficiency can be included in a table rather than nominated on drawings. Typically any commitment that is part of the design should be on the drawings.

Certifiers should also ensure the relevant technical standards in the energy efficiency parts of the Building Code of Australia (BCA) that apply in NSW in addition to BASIX will be met by the design before issuing a CC or CDC.

The applicant can change some commitments on their BASIX certificate after the CC has been issued, provided those aspects have not yet been constructed or installed. If major changes are proposed, a modification to the DA is required, a new BASIX certificate is required to reflect those changes.

### 3.8 Performance Solutions

A certifier must not issue a construction certificate for building work that involves a performance solution unless the certifier has obtained or been given a performance solution report, and is satisfied that:

- The report was prepared in accordance with the requirements in A2.2(4) of the Building Code of Australia and
- The relevant building plans and specifications show and describe the physical elements of the performance solution if possible<sup>107</sup>.

A performance solution report for a fire safety requirement, other than a prescribed report, must be prepared

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<sup>107</sup> Section 18 of the EP&A (Development Certification and Fire Safety) Regulation



by or on behalf of an accredited practitioner (fire safety).<sup>108</sup>

A fire safety requirement is a requirement under the BCA that relates to:

- a fire safety system, as defined in the BCA, and components of a fire safety system, or
- the safety of persons in the event of a fire, or
- the prevention, detection or suppression of fire.

The performance solution report must:

- Be prepared by or on behalf of an accredited practitioner (fire safety),
- Include a statement that the performance solution complies with the relevant performance requirements of the BCA,
- Where relevant, identify the DtS provisions of the BCA being varied by the performance solution,
- Describe and justify the performance solution, including acceptance criteria and parameters on which the justification is based and any restrictions or conditions on the performance solution, and
- Include a copy of the brief on which the justification of the performance solution is based.

The carrying out of work as an accredited practitioner (fire safety) is 'regulated work'<sup>109</sup> and this work must be carried out by a person holding the relevant accreditation to carry out the work (where there are relevant accreditation holders). There are not currently accreditation holders to carry out regulated work for performance solutions.

The Commissioner for Fair Trading has given notice that there is no person reasonably available who holds an accreditation to perform certain regulated work<sup>110</sup>. Where there aren't any relevant accreditation holders, certifiers must certify in writing, prior to appointing the person, that in their reasonable opinion the person who is exercising the function of an accredited practitioner (fire safety) is competent to carry out the work. This written opinion by the certifier is a 'competency certificate' and the making of a competency certificate is certification work and subject to record keeping requirements<sup>111</sup>.

Note: A performance solution is a prospective solution that will comply with the relevant performance requirements of the BCA. The issuing of a CC is also prospective in that the proposed building work will comply with the BCA. Accordingly, performance solutions should be included with and relate to an application for a CC.

## 3.9 Fire Safety

### 3.9.1 Fire resistance

Fire resistance refers to the passive (static) components of a building that provide fire protection i.e. construction that contains or slows the spread of fire throughout a building. Passive fire protection includes fire separation, fire-resisting construction and the like. Passive fire elements can include, walls, floors, columns, beams, and shafts and also includes the fire stopping and protecting of openings and penetrations through these elements.

A building may be designed in numerous ways to comply with the passive fire safety requirements of the BCA. It is therefore imperative that any endorsed plans and specifications for a CC are clear on the approach adopted for compliance with the provisions of the BCA. The design and construction of fire resistance is required to be included with an application for a CC<sup>112</sup>.

<sup>108</sup> Section 18(2)(b) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>109</sup> Clause 52 of the B&DC Act

<sup>110</sup> Government Gazette of the State of NSW, Number 166, 31 July 2020 (ref. n2020-3431 and n2020-3432)

<sup>111</sup> Clause 65 of the B&DC Regulation

<sup>112</sup> Section 8(4)(a)(iv) of the EP&A (Development Certification and Fire Safety) Regulation

A certifier should have sufficiently detailed plans and information for passive fire resistance including:

- Plans clearly depicting every element of the building that is required to achieve a fire resistance level (FRL), have a resistance to the incipient spread of fire, be non-combustible, or be concrete or masonry.
- Plans that identify the minimum required FRLs for each element required to be fire resisting.
- Evidence to demonstrate that every element objectively meets the minimum required FRL, fire resistance, or non-combustibility requirements in accordance with the BCA.
- Plans and specifications that depict and describe the specific construction of each building element in reasonable detail.
- Construction details where walls and floors are not continuous including, construction joints, intersection of building elements, openings and the like.
- Details of proposed tested systems including relevant test reports (as relevant).

A certifier must have regard to not only that each element will achieve the relevant fire resistance, but the construction details demonstrate that this will be achieved when constructed. The detail of how fire resisting construction will be achieved may be included in the specifications and other supporting documents.

Note: CC plans must clearly identify which elements are required for passive fire safety and what the minimum requirement is. This is especially important to ensure that these elements aren't compromised. If not clearly identified on plans it may not be readily apparent to all persons carrying out building work that the particular elements are required to achieve a level of fire resistance.

Note: The BCA provides specific procedures for determining the fire resistance of building elements.

### 3.9.2 Bushfire Protection

It is important to note the NSW variation to BCA Volume 2 Part 3.10.5 and also refer to any requirements in the development consent<sup>113</sup>. It is critical to ensure the Bushfire Attack Level (BAL) has been identified through an appropriate bush fire risk assessment report by an appropriate person<sup>114</sup>, with detailed plans, and has been approved. This determines the risk rating, or BAL, that the dwelling will need to comply with.

Protection against bush fire includes active and passive bush fire protection measures that will:

- limit exposure for the occupants of a dwelling either by creating safe refuge or provide designated pathways for escape;
- minimise or eliminate the impacts on the building.

Passive bush fire protection incorporates site preparation that slows or stops an approaching fire. Passive fire protection includes vegetation removal and management and fire-resisting construction, including use of rated materials, screens, and barriers.

A building may be designed in numerous ways to comply with requirements for construction in bushfire prone areas as detailed in the BCA. It is therefore imperative that any endorsed plans and specifications for a CC are clear on the approach adopted for compliance with the provisions of the BCA. The detailed building work plans and specifications accompanying a CC application must include details of the height, design, construction and provision for fire safety and fire resistance, if any<sup>115</sup>.

<sup>113</sup> For example, section 4.14 of the EP&A Act requires conformance with the current version of the NSW Rural Fire Service document "Planning for Bush Fire Protection" to be assessed by the consent authority as part of the development consent approval process.

<sup>114</sup> Such as a Bushfire Fire Consultant

<sup>115</sup> Section 8(4)(iv) of the EP&A (Development Certification and Fire Safety) Regulation

## 3.10 Site Inspections

### 3.10.1 Site inspections

If the CC is for a development on a site that affects an existing building a certifier must not issue a CC unless they have carried out an inspection of the building<sup>116</sup> and a record made of this<sup>117</sup>.

Where an application relates to a new building, certifiers should carry out an inspection of the site prior to determining the application for a CC and make a record of this. There are many imperatives for a certifier to carry out a site inspection where an application relates to a new building, and appropriate matters for a certifier to consider and record could include:

- The address of the property at which the inspection was carried out.
- The date on which the inspection was carried out.
- The identity of the certifier who carried out the inspection and their registration number.
- Details as to whether or not the plans and specifications accompanying the application for the CC adequately depict the existing site conditions.
- Details as to whether or not any building work authorised by the relevant development consent has commenced on the site.
- Details of any features of the site that would result in a CC for the proposed building work not being able to be issued.

Certifiers should carry out a site inspection within a reasonable time frame prior to issuing the CC. The longer the interval between the certifier inspecting the site and the issuing of the CC, the greater chance that changes may have occurred on site.

### 3.10.2 Applications for a construction certificate where the building work to which it relates has commenced

A CC has no effect if it is issued after the building work to which it relates is physically commenced on the land to which the relevant development consent applies<sup>118</sup>. When assessing an application for a CC, certifiers must be diligent in ascertaining the status of any building work on the land to which the proposed building work will be carried out, so as to avoid issuing a CC that could be of no effect.

In particular, care must be taken where CCs are issued in stages as building work on site may advance to a later stage without the knowledge of the certifier. Certifiers should make enquiries with the applicant regarding the status of the building work. Any site inspections and communications should be recorded by the certifier to record and document matters relevant to the assessment of the application for a CC.

In 2019 the NSW Civil and Administrative Tribunal in an administrative review of a disciplinary finding found a certifier guilty of unsatisfactory professional conduct in circumstances where the certifier issued a CC after building work had commenced. In this case the certifier knew building works on site had commenced and the Tribunal found that this was a fundamental error by the certifier in that they did not demonstrate the qualities of care and diligence reasonably expected<sup>119</sup>.

<sup>116</sup> Section 16 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>117</sup> Section 17 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>118</sup> Section 6.8(2) of the EP&A Act

<sup>119</sup> Lilli v Building Professionals Board [2019] NSWCATOD 119

## 3.11 Determining an application for a construction certificate

### 3.11.1 The determination of an application for a construction certificate

Following the assessment of an application for a CC a certifier must make a determination of the application which must be in writing and must contain<sup>120</sup>:

- The date on which the application was determined.
- Whether the application has been determined by approval or refusal. If by refusal the reasons for refusal must be included.

Within 2 days of the determination the certifier must by means of the NSW planning portal<sup>121</sup>:

- Notify the applicant of the determination, and
- Notify the consent authority and the council of the determination and provide them with:
  - The determination, together with the application to which it relates.
  - Any CC issued as a result of the determination (the issuing of a CC includes the endorsement of the CC on any relevant plans and specifications<sup>122</sup>).
  - Any plans and specifications related to the CC.
  - Any other documents lodged with application or given to the certifier.
  - Any other documents or information (additional information) that the certifier required the applicant to provide<sup>123</sup>.
  - The record of any required site inspection.

Note: A CC is only issued following the written determination of an application for a construction certificate by approval.

### 3.11.2 Certifiers must not issue a certificate that is likely to confuse or mislead

Certifiers must ensure that any CC they issue, including the endorsed plans and specification does not confuse or mislead. What a CC relates to, and what it has been issued for, should be apparent to any person seeking to rely upon it.

Examples of where a CC may confuse or mislead include:

- Where various endorsed CC plans are inconsistent with each other, such as the architectural and structural plans depicting different designs, configurations or layouts.
- Where the endorsed plans depict building works or structures that are not part of the development consent, such as depicting a swimming pool where none was approved with the consent or sought as part of the application for a CC.

<sup>120</sup> Section 13(1) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>121</sup> Section 13(2) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>122</sup> Section 13(4) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>123</sup> Being documents given to the certifier under section 12 of the EP&A (Development Certification and Fire Safety) Regulation

## 3.12 Regulatory checklist

### 3.12.1 Key statutory requirements for assessing an application for a construction certificate

When assessing an application for a CC for building work on a residential dwelling, the key statutory requirements for a certifier to consider are:

- a) Has the required long service levy been paid?<sup>124</sup>
- b) Have the building works the subject of the CC been physically commenced on the land to which the development consent relates?<sup>125</sup>
- c) Is the application in the form approved by the Planning Secretary, does it contain all the information specified in the form and is it accompanied by any prescribed documents.<sup>126</sup>
- d) Was the application made by the person having the benefit of the consent?<sup>127</sup>
- e) Do the plans and specifications include all matters required by the BASIX Certificate?<sup>128</sup>
- f) Is the design and construction of the building (as depicted in the plans and specifications and described in other information) consistent with the development consent?<sup>129</sup>
- g) Will the proposed building comply with the relevant requirements of the BCA?<sup>130</sup>
- h) Has each condition requiring the provision of security before work is carried out, been complied with?<sup>131</sup>
- i) Has each condition requiring the payment of a monetary contribution or levy before work is carried out been complied with?<sup>132</sup>
- j) Have the preconditions to the issuing of a CC that are specified in the development consent been complied with?<sup>133</sup>
- k) Where a planning agreement specifies that requirements of the agreement need to be complied with before a CC is issued, have those requirements been complied with?<sup>134</sup>

### 3.12.2 Key statutory requirements for determining an application for, and issuing a construction certificate

When determining an application for a CC, the key statutory requirements for a certifier to consider are:

- a) Does the determination contain the date of determination and whether application has been determined by approval or refusal?<sup>135</sup>
- b) Where the application is refused, does the determination include the reasons for refusal and advise the applicant of their rights of appeal?<sup>136</sup>
- c) Has notification of the determination (within 2 days) been given to the applicant, consent authority and the council by means of the NSW planning portal?<sup>137</sup>
- d) Have the plans and specifications been endorsed?<sup>138</sup>
- e) Does the CC contain<sup>139</sup>:

<sup>124</sup> Section 6.8(1)(b) of the EP&A Act

<sup>125</sup> Section 6.8(2) of the EP&A Act

<sup>126</sup> Section 7(1)(a) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>127</sup> Section 7(2) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>128</sup> Section 19(1)(a) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>129</sup> Section 19(1)(a) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>130</sup> Section 19(1)(c) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>131</sup> Section 20(a) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>132</sup> Section 20(b) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>133</sup> Section 20(c) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>134</sup> Section 21 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>135</sup> Section 13(1) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>136</sup> ibid

<sup>137</sup> Section 13(2) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>138</sup> Section 13(4) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>139</sup> Section 23(1) of the EP&A (Development Certification and Fire Safety) Regulation

- •The identity of the certifier who issued the CC and their registration number?
- •If the certifier is an registered body corporate, the identity of the individual who issued the CC on behalf of the body corporate and their registration number?
- •If the certifier is an individual, their signature?
- •If an individual issued the CC on behalf of the certifier, their signature?
- •The registered number and date of the development consent?
- •The date of the certificate?
- •A statement to the effect that the work if completed in accordance with the documentation accompanying the application for the certificate (with such modifications verified by the certifier as may be shown on that documentation) will comply with the requirements of the EP&A (Development Certification and Fire Safety) Regulation 2021?
- •The BCA classification of the building, including different classifications for different parts?
- •For a performance solution, the prescribed details of the performance solution report?
- •If the building work is exempt from compliance with the BCA, the details of that exemption.

## 4. Inspections of building work

### 4.1 Introduction

The carrying out of inspections of building work during construction and prior to the issuing of an occupation certification are a function of a certifier<sup>140</sup>. The certification inspection regime is aimed at ensuring buildings are inspected at key junctures by certifiers to inform them as to whether an OC should be issued when the building is completed.

This chapter will give guidance on the carrying out of inspections of building work and completed buildings in connection with certification work.

#### 4.1.1 What is the purpose of an inspection?

Inspections by certifiers of building work and completed buildings serve several purposes:

- To assess whether what has been built is consistent with the relevant approvals i.e. the development consent, CC and the endorsed plans and specifications.
- To inform the certifier as to whether an OC can be issued upon completion of the building work and whether the building will be suitable for occupation or use in accordance with its BCA classification upon completion.
- To undertake checks of building work and identify any observable non-compliances.
- To establish whether the broader development, at the various stages, is on track in terms of compliance with the development consent and CC.
- As extra validation (in addition to documentary evidence) that building work is being carried out in accordance with regulatory certification requirements.

Inspecting building work and the development throughout the construction process allows non-compliances and other issues to be identified at earlier stages enabling their subsequent rectification.

Note: In 2013 the NSW Administrative Decisions Tribunal in an administrative review of a disciplinary finding found that a certifier failed to adequately ensure that building work proceeded generally in accordance with the CC approved drawings and the development consent.

The certifier in this case argued there was no statutory duty to ensure these matters. The Tribunal found that the matter related to the responsibilities reasonably to be expected of certifiers, the competence of the certifier, and that the certifier should have ensured during the critical stage inspections that the building was being constructed in accordance with the CC drawings<sup>141</sup>.

#### 4.1.2 What inspections are required?

A principal certifier must assess what inspections are required for the proposed building before work commences and identify who will carry out these inspections.

Inspections relating to certification work are the:

- Inspections prescribed by the statutory scheme i.e. the 'critical stage inspections'<sup>142</sup>, and
- Inspections required by the principal certifier<sup>143</sup>.

<sup>140</sup> Section 6.5(1) of the EP&A Act

<sup>141</sup> Fitzgerald v Building Professionals Board [2013] NSWATD 299

<sup>142</sup> Section 61 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>143</sup> Section 6.6(2)(b) of the EP&A Act & Section 58 of the EP&A (Development Certification and Fire Safety) Regulation



The prescribed critical stage inspections are mandatory however, a certifier should not treat these inspections as limiting the only time inspections can occur. Before the commencement of building work a principal certifier needs to determine what inspections will be required for the various aspects of the building work.

Due to the variety of construction methods employed in modern construction it is not practical for all inspections to be prescribed. Certifiers should adopt a risk-based approach in determining any additional inspections based on the subject building. In determining the required inspections beyond the prescribed inspections, a certifier should consider:

- The complexity of the design.
- The proposed construction methods (i.e. is it a traditional and proven method or innovative design/construction?).
- Any unique or innovative design features.
- The nature of any performance solutions.
- When particular elements are able to be inspected.
- Any critical elements of the building.

When employing a risk-based approach, certifiers may choose to inspect specific building elements considered high risk or generally inspect the building at certain construction milestones or stages due to the risk involved or critical nature of the element.

*Example: A certifier has accepted appointment as the principal certifier for a 4 storey dwelling with a complex design incorporating a lift and which is located in a coastal area so subject to high wind loads. In this circumstance the principal certifier could require additional inspections at various stages of the building work.*

Note: A contract for certification work must contain the identifying particulars of any individual who it is proposed, at the date of the contract, will undertake any inspections in connection with the certification work<sup>144</sup>.

### 4.1.3 Notifications

There is a necessary dialogue that occurs between the principal certifier, principal contractor and person having the benefit of the development consent, before work commences viz.:

- Building work cannot commence on site until a certifier has been appointed as the principal certifier for the work, by (or with the approval of) the person having the benefit of the development consent<sup>145</sup>.
- The person having the benefit of the consent must<sup>146</sup>:
  - Appoint a principal contractor (if not carrying out the work as an owner-builder) who is a holder of a contractor licence for residential building work. (Note: The person having the benefit of the development consent may be the principal contractor if they are the owner of the land on which the work is to be carried out).
  - Notify the principal certifier of the appointment
  - Notify the principal contractor of the inspections required to be carried out in respect of the building work.

No later than 2 days before work commences, a principal certifier is required to notify the person having the benefit of the development of any inspections that are required to be carried out in respect of the building work<sup>147</sup> and the notice must contain<sup>148</sup>:

<sup>144</sup> Clause 28(f)(v) of the B&DC Regulation

<sup>145</sup> Section 6.6(1) of the EP&A Act

<sup>146</sup> Section 6.6(2)(d) of the EP&A Act

<sup>147</sup> Section 6.6(2)(b) of the EP&A Act

<sup>148</sup> Section 58 of the EP&A Regulation

- The name and registration number of the principal certifier.
- The phone number on which the principal certifier can be contacted.
- The registered numbers of the development consent and CC.
- A description of the work to be carried out.
- The address of the land at which the work is to be carried out.
- A list of the critical stage and other inspections required to be carried out in respect of the work.

More generally, the principal certifier must be satisfied before work commences that<sup>149</sup>:

- a construction certificate, subdivision works certificate of complying development certificate, where relevant, has been issued
- the principal contractor for the work holds an appropriate licence and insurance, if required, under the Home Building Act
- that the owner builder, where relevant, holds an owner-builder permit required under the Home Building Act.

#### 4.1.4 Other inspections

The public official nature of the role of a principal certifier can require them to undertake inspections of building work or the building that have not been notified as mandatory inspections to the person having the benefit of the consent. It may be also appropriate for a principal certifier to carry out random audits of a building during construction, in keeping with this public official role.

It may be necessary to inspect a site on occasions other than those notified to the person having the benefit of the development consent, such as:

- In response to a complaint.
- Due to unforeseen circumstances that have arisen during construction.
- To assess the site with regard to an application for a CC for staged building work.
- A reinspection of a critical stage inspection or inspection required by the principal certifier.
- If requested by other authorities such as the local council
- Assessing compliance with a written direction notice.
- Attending to and verifying compliance matters.

Principal certifiers should also give consideration as to whether inspections of building work are required and appropriate for components of the building constructed off-site, where practical and where access is available.

Note: Certifiers should include in their contract for certification work suitable clauses with regard to unforeseen inspections.

#### 4.1.5 Who can carry out inspections of building work?

The carrying out of inspections of building work is a function of a certifier under the EP&A Act<sup>150</sup> and is certification work under the B&DC legislation<sup>151</sup>.

- Inspections must be carried out by the principal certifier, or if the principal certifier agrees by another certifier.

<sup>149</sup> Section 67 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>150</sup> Section 6.5(1)(b) of the EP&A Act

<sup>151</sup> Section 4 of the B&DC Act

- The certifier carrying out the inspection must hold the relevant class of registration to inspect the building work. The principal certifier must ensure that a certifier carrying out an inspection on their behalf is appropriately registered to carry out the inspection.
- The last critical stage inspection (i.e. prior to an OC being issued) must be carried out by the principal certifier.

A principal certifier cannot delegate their inspection function to another person who is not a certifier to carry out inspections on their behalf.

Note: In 2009 the Land and Environment Court found that certain subdivision certificates were invalid and of no effect due to inspections required to be undertaken by the principal certifying authority being carried out by a person who wasn't an accredited certifier<sup>152</sup>.

Note: Certifiers must meet experience and competency requirements, hold professional indemnity insurance and comply with the code of conduct in order to obtain registration. Non-certifiers may not have been subject to the same level of assessment and scrutiny to practice in their chosen area.

#### 4.1.6 A certifier's role in carrying out inspections

A certifier's role in carrying out inspections is to conduct checks during construction to verify matters as far as practicable and to inform themselves as to the potential future suitability of the building for occupation. That is, a function of a principal certifier is issuing OCs<sup>153</sup>, and the inspection regime serves to inform the certifier in carrying out this function.

A certifier carrying out an inspection (of both building work and a completed building) is there to first and foremost check that what is being constructed on site is what has been approved i.e. consistent with a development consent, CC, and the endorsed plans and specifications. The other key considerations for a certifier carrying out an inspection is to determine whether statutory requirements have been met and whether the building will be suitable for occupation and use in accordance with its classification under the BCA.

Note: A certifier's role in carrying out an inspection is not to certify compliance with the BCA or other matters (unless they are intending to issue a compliance certificate). A certifier can determine or verify BCA compliance as far as practicable and as far as can be determined at the time of inspection, but certifying absolute compliance with the BCA is not possible given potential limits of a certifier's knowledge, the inspection regime and their legislated role. The responsibility to build the building in conformity with the relevant approvals and the BCA is with the principal contractor and those involved in carrying out the work.

Whilst a certifier is not expected to be an expert in all matters of construction, they are required to have knowledge of, and be able to evaluate building construction. A certifier is expected to have a requisite level of professional skill, expertise, and judgment to be able to make a reasonable determination as to the suitability of certain matters based on their inspection.

If the certifier undertaking an inspection does not have the technical expertise to verify a specialist matter that needs to be evaluated, such as a structural element, they should obtain a compliance certificate<sup>154</sup> or other documentary evidence in respect of that matter. However, a compliance certificate or other documentary evidence is not permitted to be used in lieu of a certifier carrying out an inspection and checking matters as a professional generalist.

<sup>152</sup> Newcastle City Council v Northern Residential Pty Limited & (3) Others [2009] NSWLEC 10

<sup>153</sup> *ibid*

<sup>154</sup> Within the meaning of section 6.4(e) of the EP&A Act

*Note: Further information on documentary evidence is provided in Chapter 6.* Where building work is found to be unsatisfactory during an inspection it is part of the role and function of the certifier to address the matter through the certification process by bringing the matter to the attention of the person having the benefit of the development consent and the principal contractor e.g. through the inspection record.

Note: The Supreme Court of NSW when considering the liability of a principal certifying authority has found that the certifier owed a duty to exercise reasonable care in the discharge of its statutory functions which were to be exercised to promote the health and safety of future occupiers and users of the building to avoid injury to such occupants and occupiers from erroneous certification of compliance by the various professional and trades engaged with the building work. The Court found that this duty did not extend to the certifier themselves checking for compliance but that they had a duty to exercise reasonable care in checking the matters of which the certifier is to be satisfied before issuing a certificate<sup>155</sup>.

#### 4.1.7 What are the prescribed critical stage inspections?

Inspections of building work at certain critical stages are prescribed<sup>156</sup> being the 'critical stage inspections'. For residential dwellings the occasions on which building work must be inspected are:

- After the commencement of the excavation for, and before the placement of, a footing.
- Before pouring an in-situ reinforced concrete building element
- Before covering the framework for a floor, wall, roof or other building element,
- Prior to covering of waterproofing in any wet areas.
- Prior to covering any stormwater drainage connections.
- After the building work has been completed and prior to any occupation certificate being issued in relation to the building.

Note: Certification inspections may also be carried out of the site prior to issuing of a CC. If the development affects an existing building, this inspection is mandatory<sup>157</sup>. Guidance regarding site inspections is included in Chapter 3 of this standard.

## 4.2 Carrying out inspections

### 4.2.1 What is required to carry out an inspection?

Where the principal contractor notifies the principal certifier that a required inspection needs to be carried out, that inspection is to be carried out by the principal certifier or another certifier with the agreement of the principal certifier (except for the final inspection). To enable the carrying out of an inspection a certifier should have:

- A copy of or access to the development consent.
- A copy of or access to the endorsed CC plans and specifications.
- A copy of the relevant certification file, including the results of any previous inspections.
- A copy of or access to the BCA and relevant referenced documents.

<sup>155</sup> Hossain v Unity Grammar College Ltd and Ors [2019] NSWSC 1313

<sup>156</sup> Section 61(2) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>157</sup> Section 16 of the EP&A (Development Certification and Fire Safety) Regulation

- Details of documentary evidence relevant to the inspections, such as manufacturers' installation requirements, technical manuals, component certificates, compliance certificates, other documents from third parties attesting to compliance, BASIX certificates.
- A device capable of taking and recording photographs.
- A method of recording whether the inspection is satisfactory or not.
- Tools and instruments as relevant to the inspection, such as tape measure, spirit level, and the like.

In carrying out an inspection a certifier needs to be physically present on site and should:

- Take suitable photographs, records and notes during and as a result of the inspection.
- Allow suitable time to reasonably carry out the inspection.

#### **4.2.2 What is the scope of an inspection?**

Inspections are linked to the functions of a principal certifier and their role as a public official. The scope of an inspection should encompass the building work the subject of the inspection and also consider the broader development for which they are the principal certifier (or acting on behalf of).

##### **What is expected of a certifier?**

A certifier undertaking an inspection should:

- Determine whether the work the subject of the inspection has been installed or completed.
- Determine whether the work the subject of the inspection is consistent with the relevant approvals i.e. the development consent and CC endorsed plans and specifications.
- Determine whether the inspection was satisfactory or unsatisfactory and record the reasons for this.
- Determine whether the broader development is progressing in accordance with the relevant approvals.
- what type of documentary verification is reasonable in the circumstances (where relevant) (eg. have third party attestations of compliance been provided to the certifier before the inspection and do reasonable visual checks indicate that they are consistent with what the certifier has observed during the inspection?).
- Carry out visual and general compliance checks to the extent possible.
- Identify any observable non-compliances with the BCA or approved plans, or other issues with the building.
- Identify if there are any matters that would prevent the issuing of any future OC

Certifiers should take a holistic approach to inspections of building work and conduct a reasonable audit of the site. This is not to say that every aspect of a development must be inspected every time a certifier is on site. However, the inspection of building work at each stage needs to adequately take into account the broader context in which the work is occurring.

During construction, the certifier should be aware of the commitments listed in the BASIX certificate when conducting critical stage inspections. Some BASIX commitments (such as insulation) will be easier to check at this stage, rather than when the dwelling is built and ready for an occupation certificate.

A certifier carrying out an inspection with the agreement of the principal certifier must also take a holistic approach as they are acting on behalf of the principal certifier whilst carrying out inspections.

An inspection provides an opportunity for certifiers to check the accuracy of documentary evidence they have received and can inform whether more robust evidence or additional inspections are required.

*Example: If the certificate/document to be relied upon by the certifier says 'work per the approved plans', certifiers should check they have a copy of the plan, verify the plan is acceptable, and ascertain at inspections that visible aspects of the work on site correspond to it.*

### 4.2.3 Building work and the Building Code of Australia

A key purpose of certifiers carrying out inspections of building work is to inform a certifier as to the building's suitability for occupation and use in accordance with its classification under the BCA<sup>158</sup>.

Certifiers should not consider the 'suitability test' and the BCA in isolation and should have proper regard to the certification system as well, such as the requirements that:

- A CC must not be issued unless the proposed building will comply with the relevant requirements of the BCA<sup>159</sup>, and
- An OC must not be issued unless the design and construction of the new building is consistent with the development consent<sup>160</sup>. A CC and any approved plans and specifications are taken to form part of the development consent<sup>161</sup>.

That is, the building work is required to be constructed consistent with the approved CC plans and specifications, which if done will therefore meet the relevant requirements of the BCA.

Therefore, an initial consideration for all inspections (not only with regard to the BCA) is whether or not the building work is in accordance with and consistent with the approved plans and specifications.

When carrying out an inspection, certifiers can assess BCA matters by either:

- Determining a relevant BCA matter (where it is within the skillset of the certifier and the matter is able to be determined) for example – room heights, size of windows, air movement, setbacks, stairway and ramp construction; or
- Identifying whether there are any observable non-compliances, issues, or other indicators for relevant BCA matters, which would result in the building not being suitable for occupation or use.

*Example: A certifier could determine the BCA compliance for a stairway balustrade in regard to the location, height and maximum openings.*

*Example: During a final inspection, the principal certifier should perform reasonable checks when onsite to ensure that the smoke alarms installed in the building are hardwired, interconnected and sound upon activation. This could include removing the smoke alarm cover to check they are hardwired and pushing the test button to check that the alarms sound and are interconnected.*

### 4.2.4 Considerations when carrying out inspections of a completed building

A fundamental consideration in determining the suitability of a building for occupation and use is informed by the last critical stage inspection carried out by the principal certifier.

A certifier carrying out the inspection after the building work has been completed should:

- Inspect all parts of the building related to the application for an OC.
- Carry out the inspection in a reasonable timeframe prior to the issuing of an OC. A longer period between an inspection and the issuing of an OC reduces the ability of a certifier to reasonably determine the state of the building, as changes may have occurred during this interval.
- For an OC which only relates to a completed part of the building work, include all parts of the building and site that may affect the completed part of the building.

The last inspection is an opportunity for certifiers to determine certain matters with the building, including:

- Determining whether the building or part the subject of the application is completed.
- Verifying that the building is consistent with what has been approved, i.e. the development consent and CC approved plans and specifications.

<sup>158</sup> Section 6.10(2)(c) of the EP&A Act

<sup>159</sup> Section 19(1)(b) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>160</sup> Sections 42(3)-(4) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>161</sup> Section 4.16(12) of the EP&A Act

- To identify if there are any observable matters that would result in the building not being suitable for occupation and use in accordance with its classification under the BCA.
- To visually confirm that critical items are installed in the building.
- To follow up on matters identified in previous inspections, including a previous unsatisfactory inspection of the completed building.
- To visually verify third party attestations regarding compliance of installation or other matters requiring verification.

Where an inspection relates to a completed part of the building works, a certifier must inspect and assess the incomplete building and site for any hazard to the health and safety of the occupants of the building.

### **What is expected of a certifier?**

A certifier assessing the hazards to the health and safety of the occupants from a partially complete building and site should consider matters including whether:

- the egress system for the completed building work isn't adversely affected by the remaining incomplete work or site.
- access to and from the site is safe and does not present a hazard to occupants.
- there are any features of the site that would present a hazard to the occupants of the completed part of the building work.

*Example: The completed portion of a dwelling complies with the BCA. However, the required stairway providing access to the street frontage is still incomplete and temporary access is provided by a ladder. A certifier determining an application for an occupation certificate for the complete portion would consider that there is a hazard to the occupants of the building and would not issue an OC.*

To enable the proper consideration of an application for an OC a certifier may need to carry out more than one inspection of a completed building, such as where the inspection was not satisfactory. A certifier may consider that an inspection was not satisfactory due to many reasons such as non-compliances, or the building not being completed at the time of the inspection.

## **4.2.5 Non-compliances and acting in the public interest**

### **What is expected of a certifier?**

A certifier carrying out an inspection must always act in the public interest and can act in the public interest during inspections by:

- Acting on non-compliances observed whilst on site.
- Acting on breaches of legislation observed whilst on site, such as unauthorised works.
- Raising issues with relevant parties where issues are identified during the construction process.
- Advising the person having the benefit of the development consent of any issues that would result in an OC not being able to be issued at the completion of building work.
- Advising the person having the benefit of the development consent of any matters that are observed during the inspection, or the certifier is made aware of, that is or would result in a breach of legislation.

*Example: while on site for a waterproofing inspection, a certifier notices damage to a common party wall where multiple class 1a buildings are joined. A certifier should raise this issue with the principal contractor, notify the person who appointed them, make a record of the issue and follow up the matter.*



## 4.3 Inspection outcomes

### 4.3.1 Where an inspection is satisfactory

An inspection could be considered satisfactory where in the opinion of the certifier:

- The building or building work is completed, consistent with the approvals i.e. the development consent, CC, and the endorsed plans and specifications;
- The building or building work will be suitable for occupation and use in accordance with its building classification under the BCA or there is no reasonable indication that the building or building work won't be suitable for occupation and use;
- The broader development is progressing in a manner which is consistent with the development consent and CC endorsed plans and specifications; and
- No issues are identified that would potentially result in an OC not being able to be issued for the building upon completion.

Where the principal certifier determines that an inspection is satisfactory, either by personally carrying out the inspection or relying upon the inspection record from another certifier, this must be recorded in the relevant certification file.

It is also good practice to provide a copy of the record of inspection to the person having the benefit of the development consent and the principal contractor. A certifier may also take this opportunity to remind these parties of what future inspections are required.

### 4.3.2 Where an inspection is unsatisfactory

An inspection could be considered unsatisfactory where in the opinion of the certifier:

- The building or building works are incomplete or not all components of the building work were able to be inspected.
- The building works are not consistent with the development consent or the CC endorsed plans and specifications.
- The building or building works are not suitable for occupation and use in accordance with the BCA.
- The broader development is not progressing in a manner which is consistent with the development consent and CC endorsed plans and specifications.
- Further confirmation or verification is required with regard to the installation method, products used or the like.

An inspection alone may not be able to confirm that the building work and materials used are satisfactory without the provision of further documentary evidence. A certifier needs to determine what type of documentary verification, if any, is reasonable in the circumstances. Certifiers must make clear to the person having the benefit of the consent where an inspection is subject to supplementary information.

*Example: A certifier has visually inspected the waterproofing membrane to a wet area. Visually the installation looks satisfactory and in the opinion of the certifier the inspection is satisfactory. However, to verify the compliance of the building work the certifier has requested the person having the benefit of the development consent provide evidence of what waterproofing membrane has been used, evidence to demonstrate how it complied with the BCA and verification that the product was installed in accordance with the manufacturer's specifications and the BCA.*

Where the principal certifier determines that an inspection is not satisfactory, either by personally carrying out the inspection or relying upon the inspection record from another certifier, the certifier must:

- Record the result in the relevant certification file.
- Identify why the inspection result was unsatisfactory.
- Determine the steps required to address the reasons why the inspection was unsatisfactory.

- Consider if the building work needs to be reinspected.
- Consider whether additional inspections are required due to the nature of the unsatisfactory inspection. For example, if similar building works are found to be non-compliant during subsequent inspections, this may warrant additional inspections of this type of work.
- Notify the person having the benefit of the development consent and the principal contractor of the unsatisfactory inspection and the reasons why.

To enable the issuing of an OC every unsatisfactory inspection result must be addressed in some manner, for instance by reinspection, provision of documentary evidence or a combination of both.

Where an inspection result is unsatisfactory the principal certifier must notify the person having the benefit of the development consent and the principal contractor of this and the reasons why the inspection is unsatisfactory. Both the person having the benefit of the consent and the principal contractor have obligations to carry out building work in accordance with the BCA and comply with the requirements of the relevant approvals. A certifier must be clear in their communication as to the roles and responsibilities of each party and the consequences of not adhering to these requirements, for instance that an OC may not be issued at the end of the project.

Where an unsatisfactory inspection is left unresolved this would prevent an OC being issued for the building. If a certifier is not satisfied that the building work has been carried out in accordance with the regulatory requirements during construction, they will not be able to reach the requisite degree of satisfaction as to the appropriateness of the work, and therefore would not be able to determine that the building is suitable for occupation and use (or meet other statutory requirements).

### **4.3.3 When is it appropriate to request a reinspection?**

Certifiers must consider the circumstances of each inspection and their observations to determine whether a reinspection is required.

Whether a reinspection is required relates to the risk and nature of the reason for the unsatisfactory result. A certifier should consider the following questions when determining whether a reinspection is required:

- Was the unsatisfactory result due to the building work being incomplete or unable to be inspected?
- Was the result not satisfactory due to a matter that if not rectified would adversely affect the health, safety, or amenity of the occupants of the building?
- Were multiple or serious non-compliances or issues observed during the inspection?
- Have similar non-compliances or issues been observed during the project or for the same type of building work?
- Will the non-compliance or issue be covered and unable to be inspected later in the construction phase?
- Was suitable access not provided to reasonably undertake the inspection?

If the answer is yes to any of the above, then the expectation is that a reinspection be carried out. A reinspection may occur as a separate inspection or may be in conjunction with a future inspection.

*Example: A certifier carrying out an inspection detects that steel reinforcement for a concrete slab does not meet requirements. The certifier should reinspect this later to check that non-compliance has been rectified.*

### **4.3.4 When is documentary evidence required?**

The building works the subject of most inspections will be supported and supplemented by documentary evidence to verify what was built or installed and to what standard. Documentary evidence can be obtained through the construction process, where this is able to be done, or after the works have been completed. Any documentary evidence obtained throughout the construction process informs and assists the principal certifier when determining an application for an OC.

A certifier carrying out an inspection is required to form the opinion as to whether the inspection was satisfactory or not, and in doing so may rely upon documentary evidence. This documentary verification could include statements by a trade for their component of the work or a compliance certificate from another certifier. In certain cases, it may be appropriate to require both verification from a trade or installer and a compliance certificate.

Note: Documentary evidence serves as validation or assurance to the certifier as to what they observed on site and is not a substitute for the carrying out of a mandatory inspection.

Documentary evidence could be provided prior to an inspection being undertaken, following an inspection or with the application for an OC, depending on the circumstances. Where a certifier requests documentation following an inspection to verify relevant matters, this should be obtained as soon as practicable after the inspection and prior to the building work being covered so that the certifier can inspect the work on site.

Where evidence is available, a certifier should consider this prior to an inspection so that the certifier can carry out reasonable visual checks regarding the suitability of the evidence provided.

## 4.4 Post inspection

### 4.4.1 Making records of inspections

As soon as practicable after carrying out an inspection in connection with certification work, a certifier must make a record of the inspection<sup>162</sup>. If the certifier carried out the inspection on behalf of the principal certifier, a copy of the record must be provided to the principal certifier within 2 days after the record is made<sup>163</sup>.

The record must include details of:

- The registered number of the development consent and of the construction certificate.
- The address of the property at which the inspection was carried out.
- The type of inspection.
- The date the inspection was carried out.
- The identity of the certifier who carried out the inspection including their registration number.
- Whether or not the inspection was satisfactory in the opinion of the certifier who carried it out.

Compliance would also be promoted if certifiers also recorded any follow up inspections needed in relation detected non-compliance.

Every record of inspection should include sufficiently detailed particulars of the inspection, These particulars will be necessary where a principal certifier issues an OC as they need to be satisfied that the required inspections were carried out<sup>164</sup> i.e. without a detailed record a certifier could not reach the requisite level of satisfaction.

A certifier is required to make a decision after carrying out an inspection in connection with certification work i.e. was the inspection satisfactory or not. In accordance with the code of conduct<sup>165</sup> a certifier must clearly document reasons for decisions made when carrying out certification work, that include:

- The decision that was made.
- The reasons for making that decision.
- The findings of fact that the reasons were based upon.

<sup>162</sup> Section 63(1) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>163</sup> Section 63(2) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>164</sup> Section 67(5)(a) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>165</sup> Clause 9 of Schedule 5 of the B&DC Act

- The evidence for those findings.

In addition to the prescribed record of inspection a certifier must document the reasons for their decisions in carrying out certification work, any decision reasons may be included in an adequately detailed record of inspection. This is particularly important where an inspection is not satisfactory or further documentary evidence is required to verify compliance.

#### **4.4.2 Where a progress inspection is unavoidably missed**

There are occasional circumstances where an inspection will be unavoidably missed. However, these circumstances do not relieve the certifier of assessing the building work the subject of the missed inspection.

With the exception of the last inspection, which must be carried out prior to any OC being issued, if certain circumstances apply a mandatory inspection may not need to be carried out if the inspection was unavoidably missed<sup>166</sup>. The circumstances are:

- The inspection was missed because of circumstances that the principal certifier considers were unavoidable, and
- The principal certifier is satisfied that the work that would have been the subject of the missed inspection was satisfactory, and
- The principal certifier, within 2 days after becoming aware of the circumstances that caused the inspection to be missed makes a record.

*Example: An inspection might be considered unavoidably missed where:*

- Due to a public safety risk, a builder quickly has to cover up the work to be inspected, and there is a good reason why this work could not be uncovered at a later time.
- The certifier is suddenly unavailable through illness or misadventure, and there is a compelling reason why the inspection cannot be rescheduled.

The record of a missed inspection must contain:

- A description of the development and the classification of the building.
- The address, lot and DP numbers of the property concerned.
- The registered number of the development consent and construction certificate.
- The name and registration number of the principal certifier.
- The name, address and telephone number of the principal contractor or owner builder and their licence or permit number.
- Particulars of the inspection that was missed and of the circumstances that the principal certifier considers were unavoidable that caused it to be missed.
- A statement that the principal certifier is satisfied that the work that would have been the subject of the missed inspection was satisfactory.
- The documentary evidence that was relied upon to satisfy the principal certifier that the work was satisfactory, including documentary evidence of a kind referred to in Part A5 of the BCA.

The principal certifier must notify the person who appointed them and the principal contractor that an inspection has been missed within 2 days after becoming aware of the fact. A principal certifier must also provide a copy of the required record to the person who appointed them<sup>167</sup>.

Where a certifier considers that an inspection has been unavoidably missed, they take the responsibility of stating that the works the subject of the inspection were satisfactory. The documentary evidence necessary to enable this statement to be made must be sufficiently robust.

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<sup>166</sup> Section 64 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>167</sup> Section 64(2) of the EP&A (Development Certification and Fire Safety) Regulation

If the missed inspection is not considered unavoidable or the principal certifier is not satisfied that the work the subject of the inspection was satisfactory, the subject work may need to be opened up so the inspection can occur, or the relevant OC cannot be issued.

## 4.5 Indicative Considerations for Critical Stage Inspections

Due to nature of modern buildings and certification work being different in each circumstance it is not possible to prescribe what needs to be considered when carrying out an inspection of building work or a completed building. The following seeks to provide some context as to the purpose of each critical stage inspection and identify common aspects that a certifier could consider whilst carrying them out.

The considerations relate to the specific building work the subject of the inspections and do not include the broader considerations a certifier must have regard to when carrying out any inspection (refer to part 4.2 for further guidance). The considerations are also non exhaustive.

For inspections required by the principal certifier, the certifier should prepare a list of matters to be considered before undertaking the inspection.

### 4.5.1 After the commencement of the excavation for, and before the placement of, a footing

The primary purpose of this inspection is to establish that the building has been set out in accordance with the development consent, CC, the endorsed plans, and that footing excavation is in accordance with the engineer's design.

Indicative considerations could include (but are not limited to):

- Is the set out of the building consistent with the approved documents?
- Does the excavation area accord with the approved documents?
- Is the footing excavation, size and depth as per the engineer's design?

### 4.5.2 Before pouring an in-situ reinforced concrete building element

The primary purpose of this inspection is to determine the extent to which the reinforced concrete building element complies with the BCA to withstand all loads.

Indicative considerations could include (but are not limited to):

- Is the set out of the building consistent with the approved documents?
- Does the excavation area accord with the approved documents?
- Size and location of steel reinforcement or mesh
- Cover to steel reinforcement or mesh
- Overlaps of reinforcing at junctions
- If reinforced element is stepped the appropriateness of the gradient change
- Any penetrations such as plumbing still allow the element to perform as designed and withstand relevant loads
- Damp proof barrier (eg.membrane)
- Any step downs in the steel reinforcement or mesh have been executed as designed
- Levels and set out – proposed height above ground level consistent with the approved plans, together with consent conditions

### 4.5.3 Before covering the framework for a floor, wall, roof or other building element,

The primary purpose of this inspection is to determine the extent to which the framework for a floor, wall, roof or other building element complies with the BCA to withstand all loads.

Indicative considerations could include (but are not limited to):

- Is the layout and configuration of the building and construction consistent with the approved documents?
- Size and span of timbers, stress grading of timbers; durability of timbers
- Loads on timbers
- Supports to timbers<sup>168</sup>
- Notching and penetrations of framing elements,
- Cavity width
- Flashings and dampproof courses
- Provision of articulation joints in brickwork
- Bracing
- Location, fixing and correct type of wall ties (eg. coastal areas)
- Location, fixing and correct type of Tie downs, especially in cyclonic or high wind areas
- Snow loads in alpine areas

### 4.5.4 Prior to covering waterproofing in any wet areas

The primary purpose of this inspection is to check the waterproofing membrane installation and components of internal wet areas. Waterproofing is a critical element in a building and is required to protect the structure and maintain the amenity of the occupants, by preventing water penetrating behind fittings and linings and into concealed spaces.

Indicative considerations could include (but are not limited to):

- Is the location and type of wet areas consistent with the approved documents?
- Is the waterproofing of wet areas consistent with the approved documents?
- Has a waterproofing membrane been installed to the wet areas and to the extent required?
- Is the substrate material appropriate for its intended use?
- Is the waterproofing membrane system appropriate for its intended use?
- Is the waterproofing membrane system installed in accordance with the manufacturers' specification/requirements as far as can be ascertained?
- Has the waterproofing membrane been installed in a good and competent manner e.g. no observable holes or other damage to the waterproofing membrane?

### 4.5.5 Prior to covering any stormwater drainage connections

The primary purpose of this inspection is to establish if the stormwater collection system has appropriate drainage connections.

Indicative considerations could include (but are not limited to):

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<sup>168</sup> It is noted that frames could also be constructed of steel

- Is the stormwater drainage connection/s consistent with the approved design?
- Are stormwater drainage connections visible and able to be inspected?
- Are the pipe sizes, locations and gradients consistent with the approved design?
- Are the type of pipes consistent with the approved design?
- Where an on-site stormwater drainage system is installed are the works as executed including any pits consistent with the design?

#### **4.5.6 After the building work has been completed and prior to any occupation certificate being issued in relation to the building**

The primary purpose of this inspection is to establish if the completed building is suitable for occupation or use in accordance with the development consent and in accordance with its BCA classification, i.e. to determine whether the building meets the required levels of health, safety, amenity and sustainability for any occupants of the building.

Note: The broader principles for evaluating and determining an application for an OC are included in Chapter 5, which include matters that should be considered by a certifier during this inspection.

Indicative considerations could include (but are not limited to):

- Is the building (or part) the subject of the inspection completed?
  - The structure of the building is complete.
  - The building has a fully completed envelope.
  - The building includes all facilities and features required by the BCA and these are all operational.
  - The building is no longer a building site.
- Are there any observable matters to suggest that requirements of the regulations that need to be complied with prior to issuing an OC have not been met?
- Is the building consistent with the development consent and CC?
  - The design, configuration and layout of the building is consistent with the approved plans.
  - The external appearance of the building is consistent with approved plans.
  - There is no unauthorised work on site.
- Are there any preconditions of the development consent to the issuing of an OC that need to be verified on site?
- Are there BASIX commitments that are required to be monitored that need to be verified on site? Have the BASIX requirements been met, including visual checks of any documentary evidence relied on for those matters?
- Has building work been constructed in accordance with a performance solution report that accompanied a CC for the building?
- Are there any observable matters, as far as practicable, to indicate that the building is not suitable for occupation and use in accordance with its classification under the BCA (note: not all BCA matters will be observable)?



Considerations could include (but not be limited to):

**Structure**

- Any observable issues with the structure, such as cracking, deflection, departure from design, or other obvious defects.

**Fire resistance**

- Building elements (including lightweight construction) required to be fire-resisting are sound and in accordance with approved plans.
- External wall construction and materials are in accordance with approved plans e.g. non-combustible and fire-resisting as required.
- Reasonable visual checks have been carried out regarding any fire resistance or bushfire protection measures, including visual checks of any documentary evidence relied on for those matters.

**Fall prevention**

- Barriers, handrails and fall prevention provided and installed.

**Fire-detection equipment**

- Smoke alarms installed

**Weatherproofing**

- Are there any observable issues with the weatherproofing of the external envelope of the building?

**Facilities**

- The building and units include the required sanitary, laundry and kitchen facilities.
  - Light and ventilation is in accordance with the approved plans.
  - Have any BASIX requirements been met, including where visual checks of any documentary evidence relied on for those matters.
- If there is a swimming pool on the building site, has the swimming pool barrier been reinspected at the time of the final inspection to ensure that it is compliant with the requirements under the Swimming Pools Act? For example, has any other building work had an impact on the barrier. An occupation certificate is equivalent to a compliance certificate under the Swimming Pools Act and may be relied upon from the particular day it is issued.
  - For an OC for a partially completed building, are there any hazards to the health and safety of the occupants due to the site or incomplete building works?
    - Access to and from the building is safe and does not present a hazard to occupants.
    - There are no features of the site that would present a hazard to the occupants of the completed part of the building.

## 5. Occupation certificates

### 5.1 Introduction

The issuing of an OC is the final stage in the certification process and this chapter relates to a certifier's role in determining an application for, and issuing an OC for dwellings, being class 1a buildings.

A certifier determining an application for an OC is carrying out an important public function and the issuing of an OC can have potential impacts on the health, safety and amenity of the public. Certifiers must act in accordance with the law, in the public interest, and are responsible for maintaining high standards in carrying out certification work.

A certifier has significant obligations and influence on the certification process in:

- Ensuring that the statutory requirements for the issuing of an OC have been met;
- The quality and type of documentation and evidence relied upon to issue an OC;
- Applying judgement in decision making, such as determining a building's suitability for occupation and use.

This chapter will provide guidance on the requirements for a principal certifier in determining and issuing an OC for dwellings, and will provide:

- A general overview of key statutory obligations for certifiers assessing an application for, and issuing an OC.
- Guidance for certifiers in exercising their functions to the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent certifier.
- Guidance where certifiers are required to exercise professional judgement in their decision making when assessing an application for, and issuing an OC.

Note: An occupation certificate can only be issued by a certifier if they are the principal certifier for the development.

#### 5.1.1 What is an occupation certificate?

An OC is the authorisation for a person to commence occupation or use of a building<sup>169</sup>. An OC can relate to the whole building or it may relate to a part of the building. Where an application for an OC relates to a part of a partially completed building, the part must be described on the application.

An occupation certificate is defined as:

'a certificate that authorises-

- (i) the occupation and use of a new building in accordance with a development consent, or
- (ii) a change of building use for an existing building in accordance with a development consent.

When issued, an occupation certificate is taken to be part of the development consent to which it relates<sup>170</sup>.

When a certifier issues an OC, they are attesting that the building meets certain standards and that statutory requirements have been satisfied, including but not limited to:

- The completed building is suitable for occupation or use in accordance with its classification under the BCA.<sup>171</sup>

<sup>169</sup> Section 6.3(1)(c) of the EP&A Act

<sup>170</sup> Section 6.4(c) of the EP&A Act

<sup>171</sup> Section 6.10(2)(c) of the EP&A Act

- The design and construction of the building is consistent with the development consent<sup>172</sup>.
- The health and safety of the occupants have been taken into consideration<sup>173</sup> (for a partial OC).
- A development consent is in force with respect to the building<sup>174</sup>.
- A CC has been issued with respect to the plans and specifications for the building<sup>175</sup>.
- The preconditions specified in the development consent have been complied with<sup>176</sup>.

Note: A certifier can be held responsible for their actions through the liability they carry when carrying out certification work. A certifier, certifying that a proposed building complies with a statutory requirement or standard may be liable if they are negligent in doing so.

These are potential areas where applicants or other parties may seek to influence the decision making of the certifier. Certifiers must be alert to their requirement to always act in the public interest, in accordance with the law and adhere to the code of conduct<sup>177</sup>.

### 5.1.2 When is an occupation certificate required?

An OC is required to commence the occupation or use of a whole or a part of a new building<sup>178</sup>; or to commence change of building use for the whole or any part of an existing building. An OC for a new residential building will typically relate to

- The whole of the building; or
- the completed part of the building (i.e. staged occupation).

An OC is not required if the proposed development is exempt development, development that does not require consent, or development that is erected by or on behalf of the Crown.

Note: For development consents granted from 1 December 2019 the former provisions which related to interim OCs no longer apply<sup>179</sup>.

### 5.1.3 A certifier's role

A certifier's role is an important public function with potential impacts on public health, safety and amenity. The determining of applications for and the issuing of OCs is a function of a certifier in carrying out certification work<sup>180</sup>.

The role of the certifier is broad, and certifiers are required to have a suitable level of knowledge and understanding of all relevant aspects of the planning system and building construction. Because the role of a certifier is generalist in nature, they can rely upon specialists for relevant matters and disciplines, e.g. structural engineering, fire safety and energy efficiency. However, a certifier's role is to holistically consider a development, and this requires consideration of matters both individually and collectively e.g. the fact that a specialised component of a building complies with specific requirements does not mean that the component complies with all relevant requirements or the broader development consent.

A certifier must be aware of their own skills and limitations and they must:

- Not carry out certification work unless authorised by their registration (including any conditions)<sup>181</sup>,

<sup>172</sup> Sections 42(3)-(4) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>173</sup> Section 49(1)(h) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>174</sup> Section 6.10(2) of the EP&A Act

<sup>175</sup> *ibid*

<sup>176</sup> Section 6.10(1) of the EP&A Act

<sup>177</sup> Schedule 5 of the B&DC Regulation

<sup>178</sup> Section 6.9(1) of the EP&A Act

<sup>179</sup> Clause 18A of the EP&A (Saving, Transitional and Other Provisions) Regulation

<sup>180</sup> Section 6.5(1) of the EP&A Act

<sup>181</sup> Section 5(1) of the B&DC Act

- Not carry out any certification work where a proposal in an application for an OC is beyond their competence or expertise, and
- Where an aspect of a proposal in an application for an OC is beyond their competence or expertise, they must seek and properly consider specialist advice<sup>182</sup>.

An OC can only be issued by a certifier who is the principal certifier for the development<sup>183</sup>. The determination of an application for an OC is linked to the role of the principal certifier, in particular regarding inspections of building work and the building<sup>184</sup>, and consideration of relevant facts they have been made aware of during construction. Principal certifiers acting as a public official must have regard to their duties as a principal certifier in conjunction with their determination of an application for, and the issuing of any OC.

The role of a certifier is predominately regulated by two statutory schemes, with regard to OCs a certifier must:

- Follow the statutory requirements, as set out in the EP&A Act and regulations, relevant to the determination of an application for, and the issuing of an OC, and
- Carry out certification work and exercise their functions as a certifier in accordance with the requirements of the B&DC Act and regulations.

Failing to comply with either of these statutory schemes can be grounds for taking disciplinary action against a certifier.

It is essential that any OC issued by a certifier is issued in accordance with the statutory requirements, and:

- Based on decision making that is impartial, honest and in the public interest.
- Within the authorities conferred by their class of registration and any conditions of registration.

An OC that is issued in accordance with the statutory requirements:

- Gives assurance as to the suitability of the building to be occupied.
- Is in accordance with what a member of the public is entitled to expect from a reasonably competent certifier.
- Enhances public confidence in the certification system.
- Limits the exposure to potential legal challenge.
- Reduces the likelihood of complaints against a certifier.

Conversely, an OC that is issued contrary to the statutory requirements:

- Potentially compromises the carrying out of development in accordance with acceptable standards.
- Undermines public confidence in the certification system.
- Exposes the certificate to challenge or declaration of invalidity.
- May expose persons to potentially unsafe or unhealthy situations.
- Could be grounds for professional liability and disciplinary findings.

### **5.1.4 Documenting decision making**

A certifier's role is inherently a decision making one. Whilst the statutory requirements provide the framework for a certifier's role and their decision making, the nature of modern buildings necessitates a certifier making decisions using their professional judgement based on the available facts and evidence. An OC issued by a certifier may be relied upon by various parties including developers, owners, occupiers and other related professionals. Accordingly, any decisions made by the certifier in issuing the OC must be documented.

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<sup>182</sup> Clause 4 of Schedule 5 of the B&DC Regulation

<sup>183</sup> Section 6.5(1)(c) of the EP&A Act

<sup>184</sup> Section 67(5)(a) of the EP&A (Development Certification and Fire Safety) Regulation

The OC documentation (being the OC, the associated application and accompanying documentation and other information relied upon to determine the application) may also be scrutinised by the Government, councils, affected parties or in legal proceedings, where the decision making of the certifier will be relevant.

The Code of Conduct requires a certifier to clearly document reasons for decisions made when carrying out certification work, that include the:

- Decision that was made.
- Reasons for making that decision.
- Findings of fact that the reasons were based upon.
- Evidence for those findings.

## What is expected of a certifier?

When making decisions a certifier should ensure that:

- Any decision making is in accordance with the statutory requirements, including acting in the public interest.
- All required information and documentation has been provided and is in a suitable form.
- Reasonable steps are taken to obtain all relevant available facts and that these facts are considered before making a decision.
- Records are kept of any certificate or other document that have been relied upon for the purposes of issuing an OC<sup>185</sup>. This record keeping would encompass the documenting of decision making.
- Where the development consent includes preconditions to the issuing of an OC, the satisfaction of these preconditions must be documented by the certifier.

## 5.2 Applications for an occupation certificate

### 5.2.1 What information is required in an application for an occupation certificate?

An application for an OC must contain the information that is specified in the approved form<sup>186</sup> and be lodged via the NSW planning portal.

Note: The level, type and quality of information accepted and relied upon by a certifier is where a certifier has significant impact in the certification process. The reliance on documentation and other information supporting an application for an OC is significant discretionary power afforded to certifiers. A certifier is required to always act in the public interest<sup>187</sup> and the consideration by a certifier of the suitability of documentation needs to be viewed through this lens and not through the interests of the applicant.

### 5.2.2 What documents are required to accompany an application for an occupation certificate?

An application for an OC must at minimum be accompanied by a copy of the following documents<sup>188</sup>:

- The relevant development consent,

<sup>185</sup> Clause 50(d) of the B&DC Regulation

<sup>186</sup> Section 37(1) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>187</sup> Section 45(e) of the B&DC Act

<sup>188</sup> Section 37(2) of the EP&A (Development Certification and Fire Safety) Regulation

- The CC or CCs for the building work (a copy of the CC includes the plans and specifications endorsed with the CC)<sup>189</sup>,
- Any relevant compliance certificate, and
- The BASIX certificate.

If the application relates to a development with a proposed cost (as indicated on the DA) of \$10 million or more the application must also include<sup>190</sup>:

- A copy of a document from a relevant council or the Planning Secretary (depending on the circumstances) certifying that a development contribution or levy is not required before the issue of an OC, or it is required and has been met.

Certifiers must consider the circumstances of each building and ensure that all necessary documents have been provided to enable the certifier to undertake a proper assessment of the application. Certifiers should communicate their expectations with the applicant regarding the types of documentary evidence that will be required for their proper assessment of the application.

Note: Dependant on whether compliance certificates, being non-mandatory, are provided with an application for an OC, the minimum prescribed information alone will generally not be sufficient for a certifier to be able to reasonably determine the suitability of a building for occupation.

### 5.2.3 Initial check of an application for an occupation certificate and its accompanying documents

The Code of Conduct<sup>191</sup> requires certifiers to apply all relevant building laws and regulations and exercise reasonable care and attention. The diligent checking by a certifier of an application for an OC and its accompanying documentation is consistent with the professional standards expected by a member of the public of a reasonably competent certifier.

Upon receipt of an application a certifier may not have a full appreciation as to whether the statutory requirements for issuing an OC have been met. A certifier should undertake an initial check of the application and accompanying documentation to determine whether the information is adequate to enable their proper assessment of the application.

As a first step a certifier must ascertain whether the minimum prescribed information has been provided and then determine what further additional or documentation is required (if any).

#### What is expected of a certifier?

When carrying out an initial check of an application for an OC and its accompanying documentation a certifier should check that:

- The application form includes the prescribed information, is complete, and is made by a person authorised to do so.
- The description of the building or part of the building (for a partial OC) to which the application relates is clear and unambiguous.
- All documents identified in the list of documents have been provided.

The initial check is also an opportunity to identify if there is any potential additional information about the application that needs to be requested from the applicant.

<sup>189</sup> Section 13(4) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>190</sup> Section 37(3) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>191</sup> Schedule 5 of the B&DC Regulation

## 5.2.4 Information required to enable the proper consideration of an application for an occupation certificate

When issuing an OC, a certifier is making a statement on the OC as to certain matters, including that the building is suitable for occupation and use in accordance with its classification under the BCA. To issue an OC a certifier must have sufficient basis to make this statement on the OC.

To enable the proper consideration of an application for an OC a certifier will generally need to rely upon documentary evidence beyond the minimum prescribed. This evidence can include a compliance certificate or evidence of the kind referred to in A5.2 of the BCA<sup>192</sup>.

### What is expected of a certifier?

When considering the evidence and information necessary to determine an application for an OC a certifier should consider whether they have suitable evidence to reasonably determine:

- Compliance with the relevant terms of the development consent.
- That the building will be suitable for occupation and use in accordance with its classification under the BCA.
- Compliance with other statutory requirements for the issuing of an OC.

The type of further documentation and evidence necessary may also be affected by circumstances that have occurred during the principal certifier role, such as:

- The result of the last critical stage inspection of the completed building or part.
- The results of critical stage and mandatory inspections during construction. Depending on the results of inspections, more robust evidence may be required to satisfy particular matters.
- Whether compliance action has been taken during construction such as development control orders issued by a local council.
- Other facts or information that the certifier has become aware of during construction.
- Complaints made by the public.

## 5.2.5 Where the information provided with the application is insufficient

The information provided with an application may be insufficient where:

- The minimum information has not been provided.
- The documentation is unsuitable for the intended purpose or is lacking detail.
- Insufficient information has been provided to enable a proper assessment of the application.

A certifier has authority to require the applicant to provide any additional information that is essential to the certifier's proper consideration of the application<sup>193</sup>. The authority to require information from the applicant is not limited, and if a further or more detailed assessment reveals the need for additional information, a certifier may request this.

### What is expected of a certifier?

Certifiers should require the applicant to provide additional information the additional information is essential to the certifier's proper consideration of the application, such as when:

- The provided information is unclear, ambiguous or deficient.

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<sup>192</sup> Section 39(2)(b)(v) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>193</sup> Section 38(1) of the EP&A (Development Certification and Fire Safety) Regulation



- The satisfaction of statutory requirements cannot be determined from the information provided.
- Matters that have arisen during the principal certifier role have not been addressed.
- A reasonable determination of the application cannot be made.

Alternatively, where the application is deficient a certifier may determine it by refusal.

Note: Where the information in an application for an OC is not clear, clarification should be sought from the applicant and, where required, an amended application provided. A certifier must not make assumptions about the building the subject of an application for an OC.

Note: Where an application relates to part of a partially completed building the description on the application is particularly important. This description forms the basis of any OC issued in relation to the application and therefore it must be clear to any person reading or relying upon any OC precisely what it relates to. As a threshold test a certifier should consider whether an independent person reading the application would reasonably know what part of the building the application relates to. If not, the description should be clarified.

### 5.3 Evaluating an application for an occupation certificate

A certifier is a public official and this is a critical factor in carrying out certification work. The statutory scheme places no positive obligation on a certifier to issue an OC, i.e. nothing explicitly states that an OC must be issued in certain circumstances. Rather the statutory scheme identifies circumstances in which an OC must not be issued. A certifier's role is to determine an application for an OC and the building against the statutory scheme with the mindset of a public official i.e. in the interests of the public.

There are a number of circumstances where a certifier 'must not' issue an OC unless certain matters have been satisfied, including that:

- Preconditions to the issue of an OC specified in the development consent have been complied with<sup>194</sup> (see part 5.4).
- A development consent is in force and a CC has been issued with respect to the plans and specifications for the building<sup>195</sup> (see part 5.5).
- The completed building is suitable for occupation and use in accordance with its classification under the BCA<sup>196</sup> (see part 5.6).
- Where an OC relates to a partially completed building, the building will not constitute a hazard to the health and safety of the occupants<sup>197</sup> (see part 5.6).
- The required critical stage and other inspections required by the principal certifier have been carried out<sup>198</sup> (see part 5.7).
- The design and construction of the building is consistent with the development consent<sup>199</sup> (see part 5.8).

In issuing an OC a certifier is making a statement attesting that the building meets certain requirements and that relevant statutory requirements have been met. For a certifier to be able to reasonably determine that these requirements have been met largely depends on the level and quality of information included with an application for an OC and as requested by the certifier.

<sup>194</sup> Section 6.10(1) of the EP&A Act

<sup>195</sup> Section 6.10(2)(a) and (b) of the EP&A Act

<sup>196</sup> Section 6.10(2)(c) of the EP&A Act

<sup>197</sup> Section 42(1) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>198</sup> Section 6.10(2)(d) of the EP&A Act and section 67(5)(a) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>199</sup> Sections 42(3)-(4) of the EP&A (Development Certification and Fire Safety) Regulation

Certifiers can request an applicant to provide a compliance certificate<sup>200</sup> from other appropriately registered certifiers to confirm compliance for relevant matters, such as an installed system complying with the BCA.

A certifier relying upon a compliance certificate issued by another certifier, is entitled to assume<sup>201</sup>:

- That the certificate has been duly issued, and
- That all conditions precedent to the issuing of the certificate have been duly complied with, and
- That all things that are stated in the certificate as existing or having been done do exist or have been done.

A certifier is not liable for any loss or damage arising from any matter in respect of which the compliance certificate has been issued. Where a certifier intends to require and rely upon compliance certificates this expectation should be conveyed to the applicant at an early stage.

The onus is on the certifier to determine what type of documentary verification is reasonable in the circumstances, which should be directly proportionate to the level of complexity of the matter being considered as well as the risk.

### What is expected of a certifier?

When evaluating an application for an OC a certifier should:

- Carry out the assessment of an application in the 'public interest', i.e. impartially and based on all relevant facts.
- Ensure that sufficient documentation and information has been provided to enable a proper determination of the application, in particular where matters cannot be visually verified.
- Not issue an OC unless the certifier has carried out an assessment of the application and the statutory requirements have been satisfied.
- Ensure that an inspection is carried out of the whole building, the subject of the application, prior to the issuing of any OC.
- Ensure that all documentation and supporting information related to the application has been assessed and is suitable in all relevant circumstances.
- Consider whether any compliance matters that have arisen during construction have been addressed, where it relates to the issuing of an OC.

Note: The determination of an application for an OC involves assessing the application as made (or amended). It is not appropriate for a certifier to determine the application in part, or to exclude matters.

## 5.4 Preconditions to the issuing of an occupation certificate

A certifier must not issue an OC unless any preconditions to the issue of the OC that are specified in the development consent have been complied with<sup>202</sup>. It is also a duty of a principal certifier to be satisfied before they issue an OC for building work that any preconditions required by the development consent to be met for the work before the issue of an OC have been met<sup>203</sup>.

A condition may be a precondition to the issue of an OC where it includes in its terms 'prior to the issue of an occupation certificate' or similar language. There may also be other forms of words used to convey the fact that a condition is a precondition to the issuing of an OC and certifiers should always review the development consent in full to determine this.

<sup>200</sup> Within the meaning of section 6.4(e) of the EP&A Act

<sup>201</sup> Section 6.30 of the EP&A Act

<sup>202</sup> Section 6.10(1) of the EP&A Act

<sup>203</sup> Section 67(5)(b) of the EP&A (Development Certification and Fire Safety) Regulation

Conditions of development consent are typically grouped in a logical order based on the construction process e.g. prior to works commencing, prior to the issue of a construction certificate, prior to the issue of an occupation certificate, or the like.

Where a condition is ambiguous, a certifier can seek clarification by writing to the consent authority.

The requirement to comply with a precondition is often the responsibility of other parties and a certifier will determine compliance based on the evidence provided to them. Evidence of compliance of preconditions must be documented and recorded by the certifier. A certifier is also required to take all reasonable steps to obtain all available facts relevant to the carrying out of certification work<sup>204</sup>, which could include a fact relevant to the satisfaction of a precondition.

### 5.4.1 Condition of consent wording

Certifiers need to read each condition of the development consent in full to understand the context of each condition and to determine if the condition is a precondition to the issuing of an OC. Some common condition wording includes:

#### **Where a condition refers to prior to the issue of ‘any relevant’ OC or similar.**

This may be interpreted by the certifier using their judgement as to whether the condition relates to the particular OC the subject of the application the certifier is assessing.

#### **Where a condition refers to prior to the issue of ‘any’ OC or similar.**

These conditions must be satisfied before the issue of any OC with regard to the development.

#### **Where a condition states that the matter needs to be to the satisfaction of the council or consent authority.**

For the purpose of issuing an OC, where a condition of consent includes a requirement that a council or consent authority is to be satisfied as to certain matters, this is taken to have been complied with if the certifier is satisfied about the matter (for prescribed matters)<sup>205</sup>.

The prescribed matters in relation to which a certifier may be satisfied in lieu of a council or consent authority are<sup>206</sup>:

- Matters that relate to the form or content of the plans and specifications in connection with the erection of a building, for the following kind of work:
  - Earthworks
  - Road works, including road pavement and road finishing
  - Stormwater drainage work
  - Landscaping work
  - Erosion and sedimentation control works
  - Excavation work
  - Mechanical work
  - Structural work
  - Hydraulic work
  - Work associated with driveways and parking bays, including road pavement and road finishing

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204 Clause 8 of Schedule 5 of the B&DC Regulation

205 Section 6.29 of the EP&A Act

206 Section 73 of the EP&A (Development Certification and Fire Safety) Regulation

- Matters that relate to the external finish of a building.

Note: Under Part 6 of the EP&A Act where building work approved under a development consent or a complying development certificate (CDC) has been completed, the only occupation certificate (OC) which can be issued is a 'Whole' OC. A 'Partial' OC is for a completed stage of a partially completed building. Where the only OC that can be lawfully issued is a 'Whole' OC, the principal certifier considering the OC application and preconditions required by a development consent or CDC to be met before the issue of the OC, must comply with s.6.10(1) of the EP&A Act and s.67(5)(b) of the EP&A (Development Certification and Fire Safety) Regulation. A 'Partial' OC cannot be issued for a completed building as a means to defer compliance with development consent conditions required to be met before an OC is issued. There is no authority for a certifier to issue a 'Partial' OC to permit occupation of a completed building while awaiting compliance with outstanding preconditions.

## 5.5 Ensuring the building has relevant approvals

A certifier must not issue an OC for a building (or part) unless:

- A development consent is in force for the building, and
- A CC (or CCs) has been issued for the building work<sup>207</sup>.

A certifier needs to establish whether these approvals have been issued and are in force with relation to the application for the OC.

### What is expected of a certifier?

When assessing whether the building has the required approvals in force a certifier should:

- Ensure that the application for the OC includes a copy of the in-force development consent (including any modifications to the consent) and any CCs issued for the building work.
- Check that the development consent provided with the application relates to and encompasses the building the subject of the application.
- Check that the development consent approves the use (or uses) being sought by the application.
- Check that the CC (or CCs) provided with the application encompass the building work for the building which is the subject of the application and that they relate to the development consent.

If the building the subject of the application for an OC does not have both a development consent in force and a CC for the building work, then an OC must not be issued<sup>208</sup>.

Examples of where a building the subject of an OC may not have relevant approvals could include:

- CCs for the building work issued in stages may not have encompassed all the building work e.g. a later stage CC may have not been issued.
- Where the building may not have been built in accordance with the development consent and/or CCs, and the variations are such that the building could no longer be considered to benefit from those approvals.
- The use of the building being sought by the application for an OC is different to the use approved by the development consent.

<sup>207</sup> Section 6.10(2) of the EP&A Act

<sup>208</sup> Section 6.10(2) of the EP&A Act

## 5.6 Suitability for occupation and use

An OC can be issued for the whole building or part of a partially completed building (a partial OC).

Where an OC is for the whole building it may be the:

- first and only OC for the building, or
- last OC where the occupation of the building is staged.

A requirement for the issuing of an OC is that the completed building (or completed part) is suitable for occupation or use in accordance with its classification under the BCA<sup>209</sup>. This 'suitability test' is one where certifiers are required to apply professional judgement in their decision making and is an area of certification work where the decisions of the certifier have an impact on health, safety and amenity of the occupants and public.

### 5.6.1 The state of completion of the building

The first part of the 'suitability test' for an OC for a whole building is that the building is completed i.e. an OC in this circumstance must relate to a 'completed building'. The foremost way a certifier will determine whether a building is completed will be from their observations when carrying out the last critical stage inspection.

Indicators that a building is completed for the purposes of an OC could include:

- The structure of the building is complete.
- The building has a fully completed envelope.
- The building includes all facilities and features required by the BCA and these are all operational and accessible.
- The building is no longer a building site.

A building could be considered 'completed' for the purposes of an OC even though certain building work of a minor nature is unfinished, such as:

- Minor finishing works, such as touching up of painting in common areas.
- Installation of minor ancillary items, such as antennas.
- Finishing quality type issues not related to the BCA and that do not adversely affect the health and safety of the occupants.

Note: A certifier must carry out certification work that accords with the standards of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent certifier. A certifier deciding whether building works are completed must have regard to this standard. A principal certifier's role in the development ceases after the issue of an OC for the whole building, therefore limiting the ability to rectify matters after the OC has been issued.

### 5.6.2 Suitability for occupation in accordance with the building's classification

The second part of the 'suitability test' for an OC for a completed building is that the building (or completed part of the building) is suitable to occupy or use in accordance with its BCA classification. The BCA requirements are the minimum levels of safety, health, amenity, accessibility and sustainability that a building must achieve.

A certifier must apply professional judgement when making the determination as to whether a building is suitable for occupation and use in accordance with its classification under the BCA.

<sup>209</sup> Section 6.10(2)(c) of the EP&A Act

Information that a certifier could rely upon to determine whether a building is suitable for occupation and use include:

- The information and documentary evidence provided with the application for an OC.
- Any additional information provided by the applicant following a request by the principal certifier<sup>210</sup>.
- Evidence obtained from the inspections carried out of building work during construction.
- Evidence obtained from the inspection of the completed building carried out by the principal certifier.
- Advice received from relevant agencies, such as the local council, NSW Rural Fire Service, the Office of the Building Commissioner, and the like.
- Other facts the principal certifier has become aware of during the construction phase.

### **What is expected of a certifier?**

A certifier determining the suitability of a building for occupation or use should consider whether:

- There are identifiable or observable issues that would result in the building not being suitable for occupation and use in accordance with its classification under the BCA.
- Any instances of non-compliance identified during construction have been resolved.
- The building is suitable for occupation or use in accordance with its BCA classification, with consideration to matters including:
  - Structural reliability and resistance.
  - Fire resistance.
  - Means of egress.
  - Smoke alarms.
  - Damp and weatherproofing.
  - Sanitary facilities.
  - Healthy and amenity.
  - Sound transmission and insulation.

Certifiers need to have proper regard to the holistic nature of the BCA when determining the suitability of a building for occupation. An issue with the BCA in one aspect may have flow on effects to other parts of the building or BCA requirements.

The BCA needs to be interpreted with regard to its wider policy objectives i.e. ensuring healthy, safe, amenable, accessible and sustainable buildings. Where the BCA could be interpreted in a number of ways, a certifier should adopt the interpretation that best aligns with the intention of the particular BCA provision, as informed by the context (e.g. does it relate to fire safety). A certifier must interpret the BCA in the public interest and not creatively or search for loopholes to benefit the applicant.

### **5.6.3 Where the application for an OC is for part of a partially completed building (partial OC)**

For new buildings an OC can be issued as a 'partial OC' being an OC for the first completed stage of a partially completed building i.e. to allow the staged occupation of a new building<sup>211</sup>. The completed part of the building the subject of the partial OC application is subject to the same 'suitability test' requirements as an OC for a whole building viz.,

<sup>210</sup> Section 38 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>211</sup> Section 53 of the EP&A (Development Certification and Fire Safety) Regulation

- The part of the building is completed, and
- The completed part is suitable for occupation and use in accordance with its BCA classification.

Where an application for an OC relates to part of a partially completed building, there is an additional requirement that the building must not 'constitute a hazard to the health and safety of the occupants of the building'<sup>212</sup>. Certifiers must consider any hazard the incomplete building and site will have on the health and safety of the occupants that will be using the completed part of the building.

That is, the 'suitability test' for completed parts of the building, relate to the building itself, whereas a partial OC has a further test that relates to the occupants of the building.

Note: An OC for a whole building does not include the additional requirement for a partial OC regarding 'occupant hazard' as a completed building that meets the 'suitability test' requirements will have already been deemed to have met the requirements to not constitute a hazard to the occupants of the building.

### What is expected of a certifier?

A certifier assessing the hazards to the health and safety of the occupants from an incomplete building and site need to carefully consider relevant matters including:

- Ensuring that the egress system for the building isn't adversely affected by the incomplete building site.
- Ensuring that access to and from the building is safe and does not present a hazard to occupants.
- Determining whether there are any features of the site that would present a hazard to the occupants of the completed part of the building.

#### 5.6.4 Minor departures arising during construction

Buildings may have been constructed with minor or technical departures from the approved plans and specifications. This is typically when the endorsed CC plans and specifications indicate that compliance with relevant BCA requirements was to be achieved by compliance with the DtS provisions, but the building has not been constructed strictly in accordance with those prescriptive provisions.

It is not a certifier's role to remedy errors made by a builder or developer. In the first instance a principal certifier on becoming aware of a departure should seek to have the applicant or builder bring the building into conformity with the relevant CC plans and specifications and the BCA. Depending on how the principal certifier becomes aware of the matter a written direction notice may also need to be issued.

Where a matter can be brought into conformity this should always be the course of action. In rare circumstances, built work in all practicality may not be able to be brought into conformity with the DtS provisions of the BCA.

In some circumstances a principal certifier may issue an OC despite there being a minor BCA DtS departure provided:

- All of the statutory requirements for the issuing of an OC are met,
- The departure is minor in nature and it does not affect the health, safety or amenity of the occupants of the building,
- The building is suitable for occupation and use in accordance with its classification under the BCA,
- The principal certifier has been provided with sufficient evidence to demonstrate that the built work complies with the relevant performance requirements of the BCA,
- The departure is such that a reasonable person would consider it impractical to bring the matter into conformity,

<sup>212</sup> Section 42(1) of the EP&A (Development Certification and Fire Safety) Regulation



- The departure does not result in the design and construction of the building being not consistent with the development consent, and
- The departure does not result in a breach of any statutory requirement.

A person having the benefit of a CC may apply to seek to modify the development the subject of the CC to include new building work (subject to the relevant statutory requirements). The certification scheme also requires a performance solution to be prospective in nature and accompany an application for a CC.

If a departure is not minor it must be brought into conformance with the relevant development consent and CC. Depending on the nature of the matter it may also be considered unauthorised work i.e. it is not encompassed by a CC. Non-compliances and unauthorised works are matters that would prevent the issuing of an OC.

Note: Whilst a certifier has statutory responsibilities with regard to carrying out certification work the onus is on the developer to ensure that the carrying out of the development is in accordance with the law.

## 5.7 Inspections of the building work

It is a duty of a principal certifier to be satisfied before they issue an OC for a building that the building work on the site has been inspected on the required occasions<sup>213</sup>. The occasions which building work must be inspected are the prescribed inspections, being the critical stage inspections, and any other inspections required by the principal certifier<sup>214</sup>.

Inspections are required to be carried out by the principal certifier or, if the principal certifier agrees, by another certifier. Where an inspection is carried out by another certifier a copy of the record of the inspection is required to be provided to the principal certifier. A certifier will therefore have records of the inspections carried out on the certification file i.e. these are not included with the application for an OC.

The last critical stage inspection must be carried out by the principal certifier, being after the building work has been completed and prior to any OC being issued.

Note: A principal certifier must notify the person having the benefit of the development consent of any inspections that are required to be carried out in respect of the building work.

A certifier assessing the suitability of a building for occupation and use will be informed by the inspections carried out, that is:

- The inspections carried out of building work during construction,
- Any other inspection of the building or site carried out by the principal certifier or on their behalf, and
- The last inspection carried out by the principal certifier.

In addition to being satisfied that the required inspections have been carried out a certifier must have regard to the results of the inspections carried out during construction i.e. whether or not they were satisfactory in the opinion of the certifier who carried them out.

### What is expected of a certifier?

Where an inspection record identifies that it was not satisfactory in the opinion of the certifier who carried it out, a certifier assessing an application for an OC should:

- Ascertain why the inspection was not satisfactory.
- Determine if the reason for the inspection being not satisfactory has been addressed and resolved.

<sup>213</sup> Section 67(5)(a) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>214</sup> Section 6.6(2)(b) of the EP&A Act and section 58 of the EP&A (Development Certification and Fire Safety) Regulation

- Establish whether additional information is required to determine that the matter is now satisfactory.
- Determine whether the matter needs to be reinspected by the certifier.
- Make a record of any decision made about whether the not satisfactory matter has been resolved, including any documentary evidence relied upon.

### 5.7.1 Inspections of the completed building

A fundamental consideration in evaluating an application for an OC is informed by the last critical stage inspection carried out by the principal certifier.

A certifier carrying out the inspection after the building work has been completed should:

- Inspect all parts of the building related to the application for an OC.
- Carry out the inspection in a reasonable timeframe prior to the issuing of an OC. A longer period between an inspection and the issuing of an OC reduces the ability of a certifier to reasonably determine the state of the building, as changes may have occurred during this interval.
- For a partial OC, include all parts of the building that may affect the completed part of the building.

The last inspection is an opportunity for certifiers to determine certain matters with the building, including:

- Determining whether the building or part the subject of the application is completed.
- Verifying that the building is consistent with what has been approved, i.e. the development consent and CC approved plans and specifications.
- To identify if there are any observable matters that would result in the building not being suitable for occupation and use in accordance with its classification under the BCA.
- To visually confirm that critical items and services are installed in the building.
- To follow up on matters identified in previous inspections, including a previous unsatisfactory inspection of the completed building.

To enable the proper consideration of an application for an OC a certifier may need to carry out more than one inspection of a completed building, such as where the inspection was not satisfactory. A certifier may consider that an inspection was not satisfactory due to many reasons such as non-compliances, or the building not being completed at the time of the inspection. Greater detail on inspections is provided in Chapter 4 of this Standard.

### 5.7.2 What if required inspections have been missed?

An OC must not be issued unless the requirements of the regulations have been complied with<sup>215</sup>. This includes a principal certifier being satisfied that the building work has been inspected prior to an OC being issued. If this state of satisfaction cannot be reached, an OC cannot be issued for the building.

An OC can be issued if the missed inspection (other than the last inspection), was in the opinion of the certifier unavoidably missed<sup>216</sup> (see part 4.4.2). If the inspection was unavoidably missed the certifier must also be satisfied that the work that would have been the subject of the inspection was satisfactory, which must be demonstrated by documentary evidence<sup>217</sup>.

## 5.8 Consistency

A certifier must not issue an OC for a whole building (or a part of a building) unless the design and construction of the building is consistent with the development consent<sup>218</sup>. In this regard:

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<sup>215</sup> Section 6.10(2)(d) of the EP&A Act

<sup>216</sup> Section 64(2)(b) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>217</sup> Section 64(5)(h) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>218</sup> Sections 42(3)-(4) of the EP&A (Development Certification and Fire Safety) Regulation

- A development consent includes both the plans and documents approved as part of the consent as well as the conditions of consent.
- A CC and any endorsed plans and specifications are taken to form part of the development consent<sup>219</sup>.

### What is expected of a certifier?

- A certifier must not issue an OC which is not consistent with the development consent (including the CC endorsed plans and specifications).
- A certifier must objectively assess the consistency of the building against the development consent<sup>220</sup>.

Note: Since 1 December 2019 the design and construction of a building is required to be 'consistent' with the development consent, replacing the previous 'not inconsistent' test. The new consistent test is a stricter test and means building work approved by a CC must more closely align with the development consent. The intent of the change is to provide the community with greater confidence in the certification process and avoid illegitimate changes to the plans and specifications after the development consent has been granted.

## 5.8.1 Assessing consistency

Certifiers need to assess the design and construction of the building against the development consent. An assessment could include matters such as the:

- Visual appearance of the building and the building form.
- The external configuration.
- Building dimensions e.g. the bulk, scale and height.
- Siting of the building and the setbacks.
- Number of floors and internal layouts.
- Approved levels e.g. reduced levels, floor and ceiling levels, roof levels
- The approved use.
- Matters specifically required by the development consent relating to the design and construction.

There should be a high degree of correlation between the building and the development consent (which includes the CC endorsed plans). Particular attention should be given to any matter that is specifically identified in the development consent, such as building levels, dimensions, external finishes and the like.

### What is expected of a certifier?

A certifier assessing the consistency of a building should consider:

- A development consent includes both the plans and documents approved by the consent and any subsequent CC, as well as the conditions of consent.
- The requirement for a building to be consistent is an objective test. This means that the building, viewed objectively, must be consistent with the development consent.
- Due to the nature of construction, variations between the design of a building and the physical construction will inevitably occur. The consistency test recognises this fact by not requiring the building to be strictly in accordance with the development consent.
- A building may be not consistent due to one major change or due to the cumulative effect of multiple small changes. A certifier must have a holistic view of the building and consider all changes to determine consistency.

<sup>219</sup> Section 4.16(12) of the EP&A Act

<sup>220</sup> Section 19(b) of the EP&A (Development Certification and Fire Safety) Regulation.

The Code of Conduct<sup>221</sup> requires certifiers to act in the public interest, apply building laws reasonably and without favour, and act impartially. A certifier assessing the consistency of an application for an OC must always uphold these standards.

### 5.8.2 What happens if the building is not consistent?

If upon assessment of an application for an OC a certifier determines that the building is not consistent with the development consent, a certifier must not issue the OC and may:

- Determine the application by way of refusal,
- Advise the applicant that a modification maybe sought to the development consent from the consent authority, or
- Advise the applicant that the building work can be undertaken so as to be consistent with the relevant CC.

It is not a certifier's role to remedy unauthorised changes and variations made during the construction of building through the OC process.

## 5.9 BASIX

### 5.9.1 Certifying BASIX commitments

The principal certifier cannot issue the OC until all relevant commitments in the BASIX certificate (as marked in the certifier check column) are certified<sup>222</sup>. This includes features like showerheads, insulation, rainwater tanks and hot water systems. Items that do not impact on health and safety, such as the area of landscaping or type of oven or cook top that aren't marked in the certifier check column may not need to be certified prior to the issuing of the OC. However, these commitments still remain conditions of consent and can be enforced after the OC is issued.

The principal certifier can take advice from other professionals to confirm commitments are satisfied. Building professionals should be provided with a copy of the relevant part of the BASIX certificate so they can confirm that their work meets that certificate.

It is common for suppliers to provide invoices, receipts and other documentation as evidence that commitments have been met. Some window manufacturers produce certificates that summarises the U-value and Solar Heat Gain Coefficient (SHGC). The principal certifier may also request a Compliance Certificate in certain circumstances.

### 5.9.2 BASIX completion receipts

BASIX completion receipts notify the Department of Planning and Environment know when a BASIX affected building has been constructed and occupied. The receipts help determine the extent to which BASIX is delivering on forecast energy and water savings.

Prior to the issue of an OC the principal certifier must access the BASIX online administration tool and enter the BASIX certificate number, postcode and date of final inspection to complete a receipt.<sup>223</sup> This component of the tool is only available to private certifiers and councils and requires a unique username and password. Most councils and certifiers have been provided access. For assistance, certifiers and councils should contact ServiceNSW on 1300 305 695 or email [info@service.nsw.gov.au](mailto:info@service.nsw.gov.au).

A BASIX completion receipt is not required before issuing an occupation certificate for a partially completed building.

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<sup>221</sup> Schedule 5 of the B&DC Regulation

<sup>222</sup> Section 44 of the EP&A (Development Certification and Fire Safety) Regulation.

<sup>223</sup> Section 45 of the EP&A (Development Certification and Fire Safety) Regulation.

## 5.10 Determining an application for an occupation certificate

### 5.10.1 The determination of an application for an occupation certificate

Following the assessment of an application for an OC a certifier is to make a determination of the application which must be in writing and must contain<sup>224</sup>:

- The date on which the application was determined.
- Whether the application has been determined by approval or refusal. If refusal the reasons for refusal must be included.

Within 2 days of the determination the certifier must by means of the NSW planning portal<sup>225</sup>:

- Notify the applicant of the determination, and
- Notify the consent authority and the council of the determination and provide them with:
  - A copy of the determination.
  - Copies of any documents that were lodged with the application.
  - A copy of any OC issued.
  - A copy of the records of each critical stage inspections, each inspection required by the principal certifier and any unavoidably missed inspection.
  - A copy of any compliance certificate.
  - A copy of any other documentary evidence relied on in issuing the OC.

Note: An OC is only issued following the determination of an application for an OC by approval.

### 5.10.2 Certifiers must not issue a certificate that is likely to confuse or mislead

Certifiers must ensure that any OC they issue does not confuse or mislead. What an OC relates to, and what is has been issued for, should be apparent to any person seeking to relying upon it.

For example an OC must be clear as to whether:

- It relates to the occupation and use of a new building, and
- Whether it is for the whole building, or a part of a partially completed building.
- What part it relates to (where relevant)

Where a partial OC is issued for the first completed stage of a partially completed building, the partial OC must be issued subject to a condition that an OC must be obtained for the whole of the building within 5 years after the issuing of the partial OC<sup>226</sup>.

### 5.10.3 The making of the statement on the occupation certificate

In issuing an OC a certifier is making a statement to the effect:

- The health and safety of the occupants of the building have been taken into consideration.
- A current development consent is in force for the building.

<sup>224</sup> Section 39(1) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>225</sup> Section 39(2) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>226</sup> Section 53 of the EP&A (Development Certification and Fire Safety) Regulation

- For the building work a current CC has been issued with respect to the plans and specifications for the building.
- The building is suitable for occupation or use in accordance with its classification under the BCA

The making of the statement is a certifier's assurance as to these matters when issuing an OC and should not be done without sufficient basis. A certifier must be able to reasonably demonstrate the facts on which the statement is based.

Note: Certifiers should be mindful that any contract they enter into for certification work reflects their statutory role i.e. to determine an application and, if approved, issue the relevant certificate, rather than entering into a contract to issue a certificate.

## 5.11 Regulatory Checklist

### 5.11.1 Key statutory requirements for assessing an application for an occupation certificate

When assessing an application for an OC for a residential dwelling, the key statutory requirements for a certifier to consider are:

- a) Have the preconditions to the issuing of an OC that are specified in the development consent been complied with?<sup>227</sup>
- b) Is a development consent in force with respect to the building?<sup>228</sup>
- c) Has a CC been issued with respect to the plans and specifications for the building?<sup>229</sup>
- d) Is the completed building suitable for occupation or use in accordance with its classification under the BCA?<sup>230</sup>
- e) Is the application in the form approved by the Planning Secretary and does it contain all of the information specified in the form?<sup>231</sup>
- f) Is the application accompanied by<sup>232</sup>:
  - A copy of the development consent?
  - A copy of any relevant CC?
  - A copy of any relevant compliance certificate?
  - A copy of the BASIX certificate<sup>233</sup>?
- g) Does the application include a document from the relevant council or Planning Secretary regarding a development contribution or levy for developments with a cost of \$10 million or more<sup>234</sup>?
- h) If the application includes a performance solution<sup>235</sup>:
  - Is the certifier satisfied that the relevant building work was constructed or installed in accordance with the performance solution report that accompanied the CC?

<sup>227</sup> Section 6.10(1) of the EP&A Act

<sup>228</sup> Section 6.10(2) of the EP&A Act

<sup>229</sup> *ibid*

<sup>230</sup> *ibid*

<sup>231</sup> Section 37(1) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>232</sup> Section 37(2) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>233</sup> Section 37(5) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>234</sup> Section 37(3) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>235</sup> Section 40 of the EP&A (Development Certification and Fire Safety) Regulation

- If the performance solution report was required to be prepared by a person who is both an accredited practitioner (fire safety) and a fire safety engineer, has a compliance certificate or written report been obtained from that person?
- i) Where the application relates to a partially completed building, does the building constitute a hazard to the health and safety of the occupants?<sup>236</sup>
- j) Is the design and construction of the building consistent with the development consent?<sup>237</sup>
- k) Have the BASIX commitments required to be monitored by the certifier been fulfilled?<sup>238</sup>
- l) Where the application relates to the whole building, has an application been made to the Planning Secretary for a BASIX completion receipt?<sup>239</sup>
- m) Where a planning agreement specifies that requirements of the agreement need to be complied with before an OC is issued, have those requirements been complied with?<sup>240</sup>
- n) Where the development has a proposed cost of \$10 million or more has the document included with the application from the relevant council or Planning Secretary been confirmed by the certifier with the relevant council or Planning Secretary?<sup>241</sup>

### 5.11.2 Key statutory requirements for determining an application for, and issuing an occupation certificate

When determining an application for an OC for a residential dwelling, the key statutory requirements for a certifier to consider are:

- a) Does the determination contain the date of determination and whether application has been determined by approval or refusal?<sup>242</sup>
- b) Where the application is refused, does the determination include the reasons for refusal and advise the applicant of their rights of appeal?<sup>243</sup>
- c) Has notification of the determination (within 2 days) been given to the applicant, consent authority and the council by means of the NSW planning portal?<sup>244</sup>
- d) Does the OC contain<sup>245</sup> :
  - The identity of the certifier who issued the OC and their registration number?
  - If the certifier is a registered body corporate, the identity of the individual who issued the OC on behalf of the body corporate and their registration number?
  - If the certifier is an individual, their signature?
  - If an individual issued the OC on behalf of the certifier, their signature?
  - The date of the certificate?
  - Whether the OC relates to the occupation or use of a new building or a partially completed building?
  - A statement to the effect of that provided in section 49 (1)(h) of the EP&A (Development Certification and Fire Safety) Regulation? i.e.
    - o The health and safety of the occupants of the building have been taken into consideration where an OC for a part of a new building (or partially completed building) is being issued, and

<sup>236</sup> Section 42(1) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>237</sup> Sections 42(3)-(4) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>238</sup> Section 44 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>239</sup> Section 45 of the EP&A Regulation

<sup>240</sup> Section 48 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>241</sup> Section 46 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>242</sup> Section 39(1) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>243</sup> *ibid*

<sup>244</sup> Section 39(2) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>245</sup> Section 49(1) of the EP&A (Development Certification and Fire Safety) Regulation



- o A current development consent or complying development certificate is in force for the building, and
  - o If any building work has been carried out, a current CC (or complying development certificate) has been issued with respect to the plans and specifications for the building, and
  - o The building is suitable for occupation or use in accordance with its classification under the BCA, and
- For a performance solution, the prescribed details of the performance solution report i.e.;
- o The title of the report,
  - o The date on which the report was made,
  - o The reference number and version of the report,
  - o The name of the accredited person who prepared the report or on whose behalf the report was prepared,
  - o If the accredited practitioner (fire safety) who prepared the report or on whose behalf the report was prepared is a registered certifier – the registration number of that practitioner.
- e) Where the OC relates to the first stage of a partially completed building, it is issued subject to the condition that an OC must be obtained for the whole building within five years after the date of this OC?<sup>246</sup>

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<sup>246</sup> Section 53 of the EP&A (Development Certification and Fire Safety) Regulation

## 6. Documentary evidence

### 6.1 Introduction

The generalist and broad nature of a certifier's role and the complexity of modern buildings means a certifier relies upon a variety of skilled and specialised trades and professions to provide documentary evidence.

When issuing certificates, certifiers are determining that relevant statutory requirements have been met. For a certifier to be able to reasonably determine that these requirements have been met depends on the level and quality of information included with an application for a certificate and as requested by the certifier.

Aside from conclusions that must be drawn because of unique legal documents such as compliance certificates<sup>247</sup>, the certifier takes responsibility for determining whether matters have been satisfied or not.

#### What is expected of a certifier?

A certifier's role in relation to documentary evidence and information includes:

- Communicating their expectations to the applicant of the type of documentary evidence and information required to determine an application.
- Determining that the requisite level of documentary evidence and information has been provided to enable a proper assessment of an application.
- Carrying out basic checks of documentary evidence and information that is to be relied upon in determining an application.
- Critically assessing documentary evidence and information using professional judgement to determine the suitability and appropriateness of relevant matters.
- Ensuring that the collective documentary evidence relied upon from all sources is holistic and encompasses the complete building.

### 6.2 Types of documentary evidence

Documentary evidence could be any form of documentation that is provided to a certifier as part of the certifier's decision-making process. The appropriate type and author of documentation will be dependent on the particular matter and a certifier must apply reasonable judgement in what documentation they ultimately rely upon to issue a certificate.

Note: After an OC is issued certifiers are required to provide to the consent authority and council copies of any compliance certificate and any other documentary evidence relied upon to issue the OC<sup>248</sup>.

Common types of documentary evidence include:

- Compliance certificates issued under the EP&A Act<sup>249</sup>.
- Evidence of suitability within the meaning of A5.2 of the BCA.
- Certificates or reports from professional engineers or other recognised experts.
- First-party declarations from installers or the like.
- Information provided by the applicant with an application for a certificate.

<sup>247</sup> Within the meaning of section 6.4(e) of the EP&A Act

<sup>248</sup> Section 39(2) of the EP&A Regulation

<sup>249</sup> Section 6.4(e) of the EP&A Act

- Test certificates, reports, information and the like for products, materials or components.
- Information from authorities or service providers.

Certain areas of the statutory scheme prescribe certain documentary evidence, being a compliance certificate or a report endorsed by an accredited practitioner (fire safety). This evidence relates to relevant fire safety systems and performance solutions that relate to a fire safety matter<sup>250</sup>.

Certifiers may also rely upon certain information provided by the applicant, such as the proposed use of a building. This information can be used by a certifier in determining the classification of a building or whether relevant BCA matters have been met.

Some matters may require multiple forms of documentary evidence to demonstrate compliance. This may also be complemented by visual verification by a certifier during an inspection.

*Example: For a development site near a riparian corridor, reports from multiple types of engineers may be required (eg. geotechnical engineer reports for soil material and a structural engineer's report for the piles and the superimposed building). In addition, a flood study may be required if the development is in a flood zone; a glazing compliance certificate may be needed if there is safety glass; and an electrical contractor certificate would be required for any hard-wired smoke alarms.*

Note: It is an offence to provide false or misleading information to a certifier<sup>251</sup> in respect to their carrying out of certification work.

## 6.2.1 Compliance certificates

Certifiers have the option to request an applicant for a certificate or the person having the benefit of the development consent to provide compliance certificates from other appropriately registered certifiers to confirm compliance for relevant matters.

For building work a compliance certificate is a certificate to the effect that<sup>252</sup>:

- Any completed building work complies with particular plans and specifications or with particular standards or requirements, or
- A particular condition with respect to building work (being a condition attached to a planning approval) has been complied with, or
- A building or proposed building has a particular classification identified in accordance with the BCA, or
- Any aspect of development (including design of development) complies with particular standards or requirements.

A certifier relying upon a compliance certificate issued by another person, is entitled to assume<sup>253</sup>:

- That the certificate has been duly issued, and
- That all conditions precedent to the issuing of the certificate have been duly complied with, and
- That all things that are stated in the certificate as existing or having been done do exist or have been done.

A certifier is not liable for any loss or damage arising from any matter in respect of which the compliance certificate has been issued by another certifier<sup>254</sup>.

<sup>250</sup> Sections 22(1)(c) and 40(b) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>251</sup> Section 307B of the Crimes Act

<sup>252</sup> Section 6.4(e) of the EP&A Act

<sup>253</sup> Section 6.30 of the EP&A Act

<sup>254</sup> *ibid*

A compliance certificate may certify strict, substantial or other compliance with a relevant matter<sup>255</sup>, therefore certifiers must apply proper scrutiny to each certificate to determine the context and extent of compliance being attested in each certificate.

Compliance certificates can be issued by certifiers holding the relevant class of ‘certifier’ or ‘engineer’<sup>256</sup> registration. These classes of certifiers are authorised to issue compliance certificates for their class of registration for the design of building work and constructed building work.

Example: A registered certifier ‘engineer – structural’ is authorised to issue a compliance certificate for the design of structural components of building work and for the constructed structural components of building work. A certifier determining an application for a CC may rely upon a ‘design’ compliance certificate and in determining an application for an OC may rely upon a ‘constructed’ compliance certificate.

A certifier checking a compliance certificate must ensure it contains:

- The identity of the certifier that issued it and their registration number.
- If the certifier is an individual, their signature.
- If an individual issued the certificate on a behalf of the certifier, the individual’s signature.
- A description of the development being carried out.
- The registered number and date of any relevant development consent.
- The address and formal particulars of the land on which the development is being carried out.
- The date of the certificate.
- A description of any work that has been inspected, how the work has been inspected, and the date and time when the work was inspected.
- A statement as to the matters in respect of which the certificate is given.

A compliance certificate must be accompanied by any documents referred to in the certificate, being documents concerning matters in respect of which the certificate is given<sup>257</sup>.

### 6.2.2 BASIX requirements for class 1a building

Certifiers examining BASIX certificates should reference online tools and templates from the Department of Planning and Environment:

<https://basix.nsw.gov.au/iframe/new-to-basix/dwelling-types/single-dwelling.html>

[https://basix.nsw.gov.au/iframe/images/BASIX\\_SingleCertificate\\_DataChecklist\\_2017.pdf](https://basix.nsw.gov.au/iframe/images/BASIX_SingleCertificate_DataChecklist_2017.pdf)

### 6.2.3 BCA - Evidence of suitability

The BCA identifies various forms of documentary evidence that can be used to support a claim that a material, product, form of construction or design meets the requirements of the BCA, including both a performance requirement and a deemed-to satisfy provision.

Note: The Australian Building Codes Board has produced a Handbook – Evidence of suitability that includes further guidance on evidence of suitability and the BCA and should be referred to for more information<sup>258</sup>.

There are a number of forms of evidence that can be used as evidence of suitability in the BCA including:

- A current CodeMark Australia or CodeMark Certificate of Conformity.

<sup>255</sup> Section 6.4(e) of the EP&A Act

<sup>256</sup> Clause 2 of Schedule 1 of the B&DC Regulation

<sup>257</sup> Section 4(2) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>258</sup> © Commonwealth of Australia and States and Territories 2021, published by the Australian Building Codes Board

- A current Certificate of Accreditation.
- A current certificate issued by a certification body.
- A report issued by an Accredited Testing Laboratory.
- A certificate or report from a professional engineer, or appropriately qualified person.
- Another form of documentary evidence, such as but not limited to a Product Technical Statement.
- Evidence from a professional engineer or other appropriately qualified person to support that a calculation method complies with an ABCB protocol.

The forms of documentary evidence listed in the BCA are arranged in a framework to reflect a hierarchy of rigour, with the options listed higher providing stronger forms of evidence.

In addition to forms of evidence of suitability the BCA has specific requirements for the determination of fire resistance of building elements<sup>259</sup>.

Evidence of suitability alone is not sufficient with regard to the above fire requirements. For instance, evidence of suitability may be used to support a proposal however the fire requirements must be determined in accordance with the relevant requirement of the BCA e.g. a fire resistance level must be determined in accordance with A5.4 of the BCA.

### **Certificates of Conformity and Certificates of Accreditation**

A certificate of conformity means a certificate issued under the ABCB scheme for products and systems certification stating that the properties and performance of a building material or method of construction or design fulfil specific requirements of the BCA. A certificate of accreditation is the same but issued by a State or Territory accreditation authority.

Certificates may relate to both known and innovative materials, methods of construction or designs.

### **Certificate by a certification body**

A certificate from a certification body relates to the same matters as a certificate of conformity and certificate of accreditation but it is issued by a certification body.

A certification body means a person or organisation operating in the field of material, product, form of construction or design certification that has been accredited by the Joint Accreditation Scheme of Australia and New Zealand (JAZ-ANZ), and is accredited for a purpose other than as part of the CodeMark Australia Certification Scheme.

### **Certificate from a professional engineer or other appropriately qualified person**

A professional engineer means a person who is registered in the relevant discipline on the National Engineering Register of the Institution of Engineers Australia or eligible to become registered and has appropriate experience and competence in the relevant field.

An appropriately qualified person means a person recognised by the certifier as having qualifications and/or experience in the relevant discipline in question.

A certificate or report from a professional engineer or appropriately qualified person verifying the suitability of a building component, form of construction or design must:

- Provide the basis on which verification of suitability has been made in a form that can be subjected to scrutiny; and
- Reference any standards, specifications, software or other publications or documents relied upon in verifying suitability.

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259 A5.4 - National Construction Code 2019 - Volume One Amendment 1

Note: In 2020 the NSW Civil and Administrative Tribunal in an administrative review of a disciplinary finding found that a certifier could not have been reasonably satisfied on the basis of a structural engineer's certificate that a proposed building would comply with the structural provisions of the BCA. The Tribunal found that the certificate did not conform with A2.2(a)(ii) of the BCA (as applicable at the time) as it did not refer to the BCA and set out the basis on which it was given and the extent to which relevant specifications, rules, codes of practice or other publications had been relied upon.<sup>260</sup>.

## Product Technical Statement

Product technical statements are statements from a manufacturer or supplier declaring compliance with relevant requirements of the BCA.

A product technical statement means a form of documentary evidence stating that the properties and performance of a building material, product or form of construction fulfil specific requirements of the BCA, and describes –

- The application and intended use of the building material, product or form of construction, and
- How the use of the building material, product or form of construction complies with the requirements of the BCA, and
- Any limitations and conditions of the use of the building material, product or form of construction relevant to the above.

### 6.2.4 Other forms of documentary evidence

Certifiers may rely upon any other form of documentary evidence to assist with their determination of an application for a certificate. Unlike the abovementioned forms of evidence these forms do not have prescribed requirements and certifiers are required to use professional judgement when relying upon them.

#### Certificates or reports from professional engineers or other suitably qualified persons

Certifiers may rely upon a certificate or report from professional engineers or other suitably qualified persons that is not evidence of suitability under the BCA e.g. it may relate to a requirement of a condition of consent or be beyond the scope of the BCA.

Certifiers should have regard to the requirements for evidence of suitability when relying upon this form of evidence.

#### First-party documentation

The nature of building work requires certifiers to rely upon documentary evidence provided by a first-party i.e. a declaration or attestation from an installer, manufacturer, supplier or the like.

First-party evidence is appropriate to support that building work and material are in conformance with the relevant requirements of the BCA, particularly for matters that cannot be verified after installation for example the preparation prior to installing a waterproofing membrane.

First-party documentation should:

- Suitably describe the subject of the document.
- Clearly identify the author or person issuing the certificate and their qualifications and/or experience in relation to the content of the document.
- Be signed, dated and include contact details.
- Clearly describe the relevant building work/component and how it relates to the development.

<sup>260</sup> Freixas v Building Professionals Board (No 1) [2020] NSWCATOD 27

- Contain or refer to construction or installation standards where necessary.
- Reference the relevant requirements of the BCA and any standards, test reports, specifications or other publications relied upon.

### **Information provided by the applicant with an application for a certificate.**

Other documentary evidence could be provided by the applicant or person having the benefit of the development consent.

This information could relate to the proposed uses of a building, which may be used by a certifier in determining an application for a certificate.

### **Test certificates, reports, information and the like for products, materials or components.**

Certifiers may rely upon test reports, certificates and the like that are not evidence of suitability under the BCA e.g. it may relate to a requirement of a condition of consent or be beyond the scope of the BCA.

Certifier relying upon these forms of evidence should have regard to the analogous requirements for evidence of suitability.

### **Information from authorities or service providers.**

Some documentary evidence may be from an authority or service provider, such as verification from a consent authority as to relevant matters or from an electricity or water authority.

## **6.3 The appropriateness of documentary evidence**

The type of documentary evidence accepted and relied upon by the certifier is at the certifier's discretion, which should be exercised reasonably. Documentary evidence will have varying degrees of robustness and certainty with which it can be relied upon and it must be reasonable in all the circumstances.

The most appropriate form of documentary evidence will always depend on the specific circumstance. In general the less robust the evidence relied upon by a certifier the more likely it is that the certifier will not have fulfilled their statutory duties.

Note: Under the EP&A Act, a certifier who exercises functions under the Act in reliance on another certificate, such as a compliance certificate issued by another certifier, is specifically protected from liability for loss or damage arising from any matter in respect of which the certificate has been issued<sup>261</sup>

When considering the appropriateness of documentary evidence certifiers could consider factors such as:

- Is the type of documentation commensurate to the matter being attested? For example, if a matter needs to meet a quantitative metric, a test result would be more appropriate than an opinion.
- Is the type of documentary evidence commensurate to the risk associated with the matter being attested? For example, for a proposed first floor addition, evidence from a structural engineer verifying that the existing structure can adequately support the proposed new loads depicted on the structural plans.
- Has documentary evidence from the author or signatory been found to be unreliable, for example where a non-compliance is identified during an inspection that contradicts the documentary evidence?
- Is there demonstrated effectiveness of the matter being attested to e.g. if a component has been commonly used over long periods of time with demonstrated compliance, the documentary evidence may be less robust than required for a newer, less proven component.

<sup>261</sup> Section 6.30 of the EP&A Act



- Any limitations or conditions on the documentary evidence.

*Example: CodeMark Australia Certificates of Conformity for termite management products often include limitations, conditions and specific product technical data. When such a certificate is provided, the certifier should perform reasonable checks to ensure that the installation of termite management products complies with any limitations, conditions and the like. This may include the need for an inspection to be completed for specific aspects of the installation and/or for additional certification to be provided by the installer.*

*Example: A certifier assessing an application for a CC for a residential dwelling has been provided by the applicant with documentation from a supplier of a building product advising that the proposed building product 'has been tested and complies with the relevant requirements of the BCA'. The certifier is unable to rely upon this documentation as it only refers broadly to the BCA and does not include information such as, the specific BCA requirement the product meets, whether there are any limitations or exceptions, a copy of a test report to confirm what standard the product was tested to or whether it passed. The certifier is unable to determine from the documentation whether the building product is suitable for use on the particular building. The documentary evidence is not appropriate and further information should be requested.*

Certifiers are required to obtain and consider all relevant facts when carrying out certification work, this includes taking all reasonable steps to obtain facts<sup>262</sup>. This will include facts about the documentation that the certifier intends to rely upon in making a decision, and if the evidence provided is not sufficient or reliable, certifiers should request the applicant for a certificate to provide additional information.

## 6.4 Assessing documentary evidence

Certifiers must not uncritically accept the work of others and must assess documentation they are intending to rely upon. This does not mean that certifiers are required to interrogate the experts or reproduce their work. Rather it means that certifiers must make reasonable efforts to assure themselves that what the document is attesting to is demonstrated and that the author or signatory of the document is an appropriate person to attest to the particular matter.

All documentary evidence sought to be relied upon by a certifier must be assessed and scrutinised. A certifier is also expected to request further information where there are gaps in the provided information or compliance with particular aspects is unclear.

Note: The role of a certifier is not simply a post box collecting pieces of paper<sup>263</sup>. The assessment and consideration of the information and documentation accompanying an application is a critical part of the certification process.

### 6.4.1 Checks of documentary evidence

A certifier must not rely upon a certificate, report or other form of evidence, that contains an identifiable error or omission, that is within the technical skill or legislated role of a certifier to identify, or evidence that is otherwise deficient.

#### What is expected of a certifier?

Certifiers must not rely upon documentary evidence without checking that:

- The document relates to the subject development.
- The document is dated and signed.
- The document is clear as to what it relates to.
- The document does not contain obvious errors or omissions.

<sup>262</sup> Clause 8 of Schedule 5 of the B&DC Regulation

<sup>263</sup> Joint Select Committee on the Quality of Buildings – report upon the quality of buildings – July 2002

- The subject of the documentary evidence is suitably described.
- The author's details such as their position, qualifications, experience, relevant licences or accreditation is identified.
- The conclusions are clear and unambiguous, including identifying any limitations or conditions.
- Any referenced documents, specifications, plans or the like are included or attached to the document.

### 6.4.2 Critical assessment of documentary evidence

In certain circumstances, a certifier should more extensively and critically assess documentation they intend to rely upon. The level of assessment should be commensurate to the risk.

#### What is expected of a certifier?

In critically assessing evidence the certifier should consider:

- Is the type of documentary evidence appropriate to the particular matter?
- Is the author or signatory appropriate to attest to the particular matter?
- Where a methodology is adopted, is it appropriate in the circumstances?
- Is the information accurate e.g. does it clearly and accurately;
  - Identify the subject matter or what compliance is being attested?
  - Identify what the element is or where it is specifically located in the building?
  - Refer to correct and applicable BCA requirements, standards or manufacturer's requirements?
- Be critical of first-party documents as the document author could be affected by partiality or a lack of detachment.
- Checking the currency of test reports and opinions to verify they have not expired and that they relate to the version of the BCA applicable to the building.

Note: Certifiers must have regard to the author's experience, position, or qualifications for the particular matter. For instance, if a matter relates to an electrical installation it would be reasonable to require documentary evidence from a licensed electrician, and not another person.

Another example would be if the work must be done by a licensed person in NSW or is authorised under the Automatic Mutual Recognition legislation, it would be reasonable to consider the relevance of the person's authorisation in relation to the matters being certified.

### 6.4.3 Documentary evidence including a nexus with the building

Certifiers should take a holistic approach to certification including their reliance upon documentary evidence, such as ensuring documentation includes a nexus with the subject building, such as:

- Documentation that is specific to the subject building, or
- Where documentation is not specific to the subject building, additional documentation is provided verifying that a material or product the subject of other documentary evidence has been installed on the building and in accordance with relevant requirements.

Whilst in certain circumstances generic product information is necessary, this needs to be supplemented with information on how the product is proposed to be used on the building and how it complies in that context. The fact that a product may meet a particular BCA provision is not itself evidence that that product complies in the context it is being proposed on the building. For example, the compliance may be subject to limitations or conditions.

Certifiers need to ensure they have sufficient evidence that what has been built is in accordance with what has been approved. For example, at CC stage it may have been demonstrated that a particular material meets the relevant requirements of the BCA. At OC stage a certifier will require additional documentary evidence to verify that the material has been installed in accordance with any relevant requirements.

## 7. Compliance

### 7.1 Complaints handling

Certifiers may receive complaints in relation to developments for which they are the principal certifier. A certifier must take suitable action to deal with complaints made by a member of the public in relation to work occurring on a development for which they are the principal certifier.

Complaints about development sites are commonplace. Where complaints arise, early intervention by the certifying authority may prevent issues being escalated.

The best way to avoid complaints is to ensure everyone is aware of their responsibilities. The principal certifier should advise the property owner and the builder/developer of their legislative duties, including the need to build in accordance with approved plans, follow the conditions of the development consent, give 48 hours notice of inspections<sup>264</sup> and apply for an occupation certificate certificate.

#### 7.1.1 Erect and maintain a site sign

A sign with the contact details of the principal certifier and the principal contractor must be prominently erected on the development site before work commences to notify neighbours and others of the parties involved in the work, should an issue arise<sup>265</sup>.

#### 7.1.2 Acknowledge, investigate and respond to the complaint

The principal certifier should acknowledge receipt of a complaint to the complainant as soon as possible and must investigate the complaint. This generally involves visiting the site, contacting the builder, and/or checking the approved plans and the conditions of the development consent.

The principal certifier should respond in writing to written complaints, generally within 14 days and can respond verbally to verbal complaints, generally within 48 hours. If a matter is likely to take longer to investigate, the principal certifier should inform the complainant and advise them of the steps being taken.

If the investigation reveals the need for rectification, the principal certifier must first contact the principal contractor who is in a position to physically resolve the problems.

If the matter may affect the person who appointed the principal certifier, or if the principal contractor is reluctant to comply with the principal certifier's directions, the principal certifier should advise the person who appointed them.

A verbal request may be appropriate to address the concerns; however, if the matter is causing significant nuisance, is having significant environmental impact or is potentially dangerous, it may be appropriate to issue written direction notices.

A principal certifier who fails to take timely and appropriate action to address non-compliance issues may fall short of the standards expected.

#### 7.1.3 Emergency Situations

In an emergency situation (eg. a dangerous unguarded excavation along a property boundary), the principal certifier should immediately refer the matter to the council.

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<sup>264</sup> Section 65 of the EP&A (Development Certification and Fire Safety) Regulation

<sup>265</sup> Section 75 of the EP&A (Development Certification and Fire Safety) Regulation

## 7.2 Written Direction Notices

A principal certifier has certain obligations and powers for developments which they are appointed as the principal certifier.

If a principal certifier for an aspect of development becomes aware of a prescribed non-compliance they must issue a written direction notice (WDN), in the case of a private registered certifier, or may issue a written direction notice, in the case of the council being the principal certifier<sup>266</sup>.

A principal certifier will typically become aware of non-compliances by a complaint made by a neighbour, or referral from a regulatory authority such as the local council.

A non-compliance to which a WDN applies involves the carrying out of works otherwise than in accordance with a development consent or complying development certificate, including any approved plans and development consent conditions<sup>267</sup>. A CC and its approved plans and specifications are taken to form part of the development consent<sup>268</sup>.

A WDN does not apply in relation to a non-compliance identified during a critical stage inspection or during an inspection checking compliance with a WDN<sup>269</sup>. Non-compliances identified during a critical stage inspection are dealt with through the certification process (refer to Chapter 4).

A WDN is to be issued by notice in writing to the person responsible for carrying out that aspect of development and must:

- Be in the form approved by the Planning Secretary,
- Be issued within 2 business days of the certifier becoming aware of the non-compliance,
- Identify the matter that has resulted or would result in the non-compliance,
- Direct the person to take specified action to remedy the matter, and
- Specify a compliance period within which the direction must be complied with.

After issuing a WDN, the principal certifier must:

- At the end of the compliance period, inspect the site and assess whether the WDN has been complied with.
- Make a record of the inspection and provide a copy of the record to the person which the WDN was issued to.

If a principal certifier gives a WDN and it is not complied with within the timeframe specified in the WDN, the certifier must send a copy to the consent authority, within 2 days after carrying out an inspection, with a copy of the WDN and notifying them of the fact the WDN has not been complied with<sup>270</sup>. A copy of the notification must also be given to the owner of the land to which the WDN relates<sup>271</sup>.

Note: The Minister for Planning has issued written guidelines which provide information on the mandatory requirements and processes to follow to issue a written direction notice<sup>272</sup>. These guidelines include mandatory requirements for certifiers such as the approved form of a notice.

<sup>266</sup> Section 6.31(1) of the EP&A Act

<sup>267</sup> Section 66(1) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>268</sup> Section 4.16(12) of the EP&A Act

<sup>269</sup> Section 66(2) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>270</sup> Section 6.31(2) of the EP&A Act

<sup>271</sup> Section 66(8) of the EP&A (Development Certification and Fire Safety) Regulation

<sup>272</sup> Available at: <https://www.planning.nsw.gov.au/sites/default/files/2023-04/building-and-subdivision-certification-guidelines-for-written-directions-notices.pdf>

## 7.3 Other non-compliances

A certifier must act in the public interest and, when carrying out certification work, they may identify or become aware of other non-compliances, such as:

- Non-compliances where the requirement (or ability) to issue a WDN does not apply, or
- Non-compliances that are not addressed through carrying out certification work.

Examples of other types of non-compliances could include:

- Unauthorised works e.g. works not benefiting from a development consent or complying development certificate that are not exempt development.
- Non-compliances that are generally enforced by local council such as hours of work, footpath and roadway obstructions, odours and fumes, noise, dust, sediment control and pollution discharges, and public safety issues.

### **What is expected of a certifier?**

Failure to enforce breaches of the planning legislation when observed can reduce compliance, impacting public potentially through reduced public health, safety and amenity.

The conduct of certifiers is regulated by Fair Trading who can investigate breaches of the Code of Conduct that may result in disciplinary action.

The Code of Conduct requires certifiers to act in the public interest and also to abide by standards expected by the community. This requires certifiers to apply the law and exercise reasonable care and attention.

Certifiers should take an active approach in their regulatory role.

*For example, no later than 2 days before building work commences, a principal certifier notifies the person having the benefit of the development of any inspections that are required to be carried out in respect of the building work<sup>273</sup>. Certifiers should actively monitor the notice which they have provided (eg. using a tool to broadly monitor the notified inspections) and contact the home owner if they are not called to these inspections within the broadly expected timeframes. This active monitoring of anticipated inspections will also help reduce the likelihood of missed inspections.*

In addition, WDNs are an effective way for non-compliance to be rectified. Issuing WDNs showcase the unique and independent role that certifiers play on a building project.

A certifier becoming aware of these types of non-compliances should:

- Notify the relevant persons of the non-compliance, such as the owner of the land and the local council (where appropriate) and issue a WDN.
- The WDN should:
  - be in writing to the person responsible for carrying out that aspect of development,
  - be in the form approved by the Planning Secretary (the template for WDNs is available via this [link](#)),
  - be issued within 2 business days of the certifier becoming aware of the non-compliance,
  - identify the matter that has resulted or would result in the non-compliance,
  - direct the person to take specified action to remedy the matter,
  - specify a compliance period within which the direction must be complied with.
- Make a record of any action taken, and

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<sup>273</sup> Section 6.6(2)(b) of the EP&A Act

- If the matter was the subject of a complaint made to the certifier, advise the complainant of any action taken (where relevant).

When dealing with non-compliances, certifiers must be aware of their role as independent regulators and requirement to not be involved in the design or provide design advice i.e., it is not the certifier's role to provide the solution.

After issuing a WDN, the principal certifier must inspect the site and assess whether the WDN has been complied with. They also must make a record of the inspection and provide a copy of the record to the person which the WDN was issued to.

## 7.4 Keeping records of complaints

The principal certifier must make and keep a written record of each complaint they have received in relation to the development<sup>274</sup> and include:

- Any action taken by the principal certifier, or
- Any response made in relation to the complaint.

The record must be kept for 10 years from the date which the complaint was received by the principal certifier.

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<sup>274</sup> Section 70 of the EP&A (Development Certification and Fire Safety) Regulation



## Appendix A - Glossary

Acronym	Meaning
B&DC Act	Building and Development Certifiers Act 2018
B&DC Regulation	Building and Development Certifiers Regulation 2020
BCA	Building Code of Australia
CC	Construction certificate
DtS	Deemed-to-satisfy provisions
EP&A Act	Environmental Planning and Assessment Act 1979
EP&A (Development Certification and Fire Safety) Regulation	Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021
FRL	Fire resistance level
NSW	New South Wales
OC	Occupation certificate

Term	Meaning
Accredited practitioner (fire safety)	Has the same meaning as detailed in the EP&A (Development Certification and Fire Safety) Regulation
Applicant	Means the applicant for a CC or OC being a person who is eligible to appoint a principal certifier for the relevant development
BASIX certificate	Has the same meaning as Schedule 2 of the EP&A (Development Certification and Fire Safety) Regulation
Building Code of Australia	Has the same meaning as section 1.4(1) of the EP&A Act
Building	Has the same meaning as section 1.4(1) of the EP&A Act
Building work	Has the same meaning as section 6.1 of the EP&A Act
Certification work	Has the same meaning as section 4(1) of the B&DC Act
Certifier	Has the same meaning as 'registered certifier' in section 4(1) of the B&DC Act
Class 1a	Means a building classification under Part A6 of the BCA
Code of conduct	Means the code of conduct in Schedule 5 of the B&DC Regulation
Compliance certificate	Means a compliance certificate issued under Part 6 of the EP&A Act
Critical stage inspections	Means the inspections stages prescribed in section 61 of the EP&A (Development Certification and Fire Safety) Regulation
Deemed-to-satisfy provisions	Has the same meaning as in the BCA
Development consent	Has the same meaning as section 1.4(1) of the EP&A Act

Term	Meaning
Disciplinary action	Means disciplinary action against a registered certifier under Part 4 of the B&DC Act
Fire safety requirement	Has the same meaning as detailed in the EP&A (Development Certification and Fire Safety) Regulation
NSW planning portal	Has the same meaning as section 1.4(1) of the EP&A Act
Performance solution	Has the same meaning as in the BCA
Prescribed	Means required by legislation
Principal certifier	Has the same meaning as section 6.1 of the EP&A Act
Regulated work	Has the same meaning as section 52 of the B&DC Act
Relevant fire safety system	Has the same meaning as detailed in the EP&A (Development Certification and Fire Safety) Regulation
Secretary	Has the same meaning as section 4(1) of the B&DC Act

## Appendix B - Consultation

The standard was developed with input from the following stakeholders.

- Association of Australian Certifiers
- Australian Institute of Building Surveyors
- Local Government NSW”