

Practice Standard

For Registered Certifiers

October 2022

Volume One – new residential
apartment buildings



Title:

Practice Standard – For Registered Certifiers

Published by:

Fair Trading

346 Panorama Avenue

Bathurst NSW 2795

T: (02) 6332 8238

fairtrading.nsw.gov.au

Copyright

© Department of Customer Service. Users are welcome to copy, reproduce and distribute information contained in this standard for non-commercial purposes only, provided acknowledgment is given to the Department of Customer Service as the source.

This standard is a living document that will be updated as required. Feedback is welcome at any time and may be sent to the Department of Customer Service: certifierstrategy@customerservice.nsw.gov.au.

Cat No. FT05007CM

Version 0922

Contents

Introduction and Purpose	10
1. Certifiers as public officials	13
1.1 Introduction	13
1.1.1 Under which legislation are certifiers public officials?	13
1.1.2 What is corrupt conduct?	13
1.1.3 How is the public official role recognised in the <i>Building and Development Certifiers Act</i> ?	13
1.2 The public interest	14
1.2.1 What is the public interest?	14
1.2.2 What is the public interest in relation to certification work?	14
1.2.3 Potential conflicts between the public interest and the interests of owners, developers and builders	15
1.2.4 How can certifiers act in the public interest?	16
2. Conflicts of interest	17
2.1 What is a conflict of interest?	17
2.1.1 Why is it important to avoid conflicts of interest?	17
2.1.2 The Code of Conduct requires certifiers to avoid conflicts of interest	17
2.2 When does a certifier have a conflict of interest?	17
2.2.1 Prescribed conflicts of interest	18
2.2.2 Two-step process for scenarios that are not prescribed	18
2.2.3 The reasonable person	18
2.3 Private interests	19
2.3.1 A certifier cannot be the applicant for (i.e. obtain benefit from) the work	19
2.3.2 Council can be both applicant and certifier – up to a point	19
2.3.3 A certifier cannot have a pecuniary interest in the work	19
2.3.4 A certifier cannot provide professional services related to design or construction	19
2.3.5 What are professional services related to design or construction?	20
2.3.6 A private certifier cannot be associated with the local council	21
2.3.7 A certifier cannot have relationships that could compromise their impartiality	21
2.3.8 Improper benefits	22

2.4	Managing conflicts of interest	23
2.4.1	Tips for managing conflicts of interest	23
2.4.2	Disclosing a conflict of interest	24
2.4.3	Seeking an exemption from the conflict of interest provisions	24
3.	Construction certificates for building work	25
3.1	Introduction	25
3.1.1	What is a construction certificate?	25
3.1.2	When is a construction certificate required for building work?	26
3.1.3	A certifier's role	27
3.1.4	Documenting decision making	28
3.2	Application for a construction certificate	29
3.2.1	What information is required in an application for a construction certificate?	29
3.2.2	What documents are required to accompany an application for a construction certificate?	29
3.2.3	What are appropriate plans and specifications?	30
3.2.4	Initial check of an application for a construction certificate and its accompanying documents	32
3.2.5	Where the information provided with the application is insufficient	33
3.3	Evaluating an application for a construction certificate	34
3.4	Consistency	35
3.4.1	Assessing consistency	36
3.4.2	What if the proposal is not consistent?	38
3.5	BCA compliance	39
3.5.1	How much detail is required to determine BCA compliance?	40
3.5.2	Assessing proposed building work for BCA compliance	41
3.6	Conditions of the development consent	42
3.6.1	Preconditions to the issuing of a construction certificate	43
3.6.2	Condition of consent wording	43
3.7	BASIX	44
3.8	Performance Solutions	45
3.9	Fire Safety	46
3.9.1	Fire safety systems	46
3.9.2	Performance solutions relating to fire safety requirements	47

3.9.3	Referrals to Fire and Rescue NSW for an initial fire safety report	49
3.9.4	Fire safety schedules	50
3.9.5	Preparing a fire safety schedule	50
3.9.6	Fire resistance	52
3.10	Compliance Declarations	53
3.10.1	Compliance declarations and designs to be provided before the issue of a construction certificate	53
3.11	Site Inspections	54
3.11.1	Site inspections	54
3.11.2	Applications for a construction certificate where the building work to which it relates has commenced	54
3.12	Determining an application for a construction certificate	55
3.12.1	The determination of an application for a construction certificate	55
3.12.2	Certifiers must not issue a certificate that is likely to confuse or mislead	55
3.12.3	Where construction certificates are issued for a stage of building work	56
3.13	Regulatory checklist	57
3.13.1	Key statutory requirements for assessing an application for a construction certificate	57
3.13.2	Key statutory requirements for determining an application for, and issuing a construction certificate	58
4	Inspections of building work	59
4.1	Introduction	59
4.1.1	What is the purpose of an inspection?	59
4.1.2	What inspections are required?	60
4.1.3	Notifications	60
4.1.4	Other inspections	61
4.1.5	Who can carry out inspections of building work?	62
4.1.6	A certifier's role in carrying out inspections	62
4.1.7	What are the prescribed critical stage inspections?	63
4.2	Carrying out inspections	64
4.2.1	What is required to carry out an inspection?	64
4.2.2	What is the scope of an inspection?	64
4.2.3	Building work and the Building Code of Australia	65

4.2.4	Considerations when carrying out inspections of a completed building	66
4.2.5	Non-compliances and acting in the public interest	67
4.3	Inspection outcomes	67
4.3.1	Where an inspection is satisfactory	67
4.3.2	Where an inspection is unsatisfactory	68
4.3.3	When is it appropriate to request a reinspection?	69
4.3.4	When is documentary evidence required?	69
4.4	Post inspection	70
4.4.1	Making records of inspections	70
4.4.2	Where a progress inspection is unavoidably missed	70
4.5	Indicative Considerations for Critical Stage Inspections	71
4.5.1	After the commencement of the excavation for, and before the placement of, the first footing	72
4.5.2	Prior to covering of fire protection at service penetrations to building elements that are required to resist internal fire or smoke spread	72
4.5.3	Prior to covering the junction of any internal fire-resisting construction bounding a sole-occupancy-unit, and any other building element required to resist internal fire spread	73
4.5.4	Prior to covering waterproofing in any wet areas	73
4.5.5	Prior to covering any stormwater drainage connections	74
4.5.6	After the building work has been completed and prior to any occupation certificate being issued in relation to the building	74
5	Occupation certificates	77
5.1	Introduction	77
5.1.1	What is an occupation certificate?	77
5.1.2	When is an occupation certificate required?	78
5.1.3	A certifier's role	79
5.1.4	Documenting decision making	80
5.2	Applications for an occupation certificate	80
5.2.1	What information is required in an application for an occupation certificate?	80
5.2.2	What documents are required to accompany an application for an occupation certificate?	81
5.2.3	Initial check of an application for an occupation certificate and its accompanying documents	81
5.2.4	Information required to enable the proper consideration of an application for an occupation certificate	82

5.2.5	Where the information provided with the application is insufficient	83
5.3	Evaluating an application for an occupation certificate	83
5.4	Preconditions to the issuing of an occupation certificate	85
5.4.1	Condition of consent wording	86
5.5	Ensuring the building has relevant approvals	87
5.6	Suitability for occupation and use	87
5.6.1	The state of completion of the building	87
5.6.2	Suitability for occupation in accordance with the building's classification	88
5.6.3	Where the application for an OC is for part of a partially completed building (partial OC)	89
5.6.4	Minor departures arising during construction	90
5.7	Inspections of the building work	91
5.7.1	Inspections of the completed building	92
5.7.2	What if required inspections have been missed?	92
5.8	Consistency	92
5.8.1	Assessing consistency	93
5.8.2	What happens if the building is not consistent?	94
5.1	BASIX	94
5.9.1	Certifying BASIX commitments	94
5.9.2	BASIX completion receipts	94
5.9	Fire safety	95
5.9.1	Fire safety system report	95
5.9.2	Final fire safety report	96
5.9.3	Performance solutions in respect of a fire safety requirement	96
5.9.4	Fire safety certificates	97
5.10	Determining an application for an occupation certificate	98
5.10.1	The determination of an application for a construction certificate	98
5.10.2	Certifiers must not issue a certificate that is likely to confuse or mislead	98
5.10.3	The making of the statement on the occupation certificate	98
5.11	Regulatory Checklist	99
5.11.1	Key statutory requirements for assessing an application for an occupation certificate	99
5.11.2	Key statutory requirements for determining an application for, and issuing an occupation certificate	100

6	Documentary evidence	102
6.1	Introduction	102
6.2	Types of documentary evidence	102
6.2.1	Compliance certificates	103
6.2.2	BASIX requirements for class 1a building	104
6.2.3	BCA - Evidence of suitability	105
6.2.4	Other forms of documentary evidence	106
6.3	The appropriateness of documentary evidence	107
6.4	Assessing documentary evidence	108
6.4.1	Checks of documentary evidence	109
6.4.2	Critical assessment of documentary evidence	109
6.4.3	Documentary evidence including a nexus with the building	110
7	Compliance	111
7.1	Complaints handling	111
7.1.1	Erect and maintain a site sign	111
7.1.2	Acknowledge, investigate and respond to the complaint	111
7.1.3	Emergency Situations	111
7.2	Written Direction Notices	112
7.3	Other non-compliances	113
7.4	Keeping records of complaints	114
Appendix A - Glossary		115
Appendix B – Reference Panel and Working Groups		116

Legal status

This certifier 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.

Under section 13(1)(a) it is a prescribed condition of registration of a registered certifier that the certifier must carry out certification work in accordance with this Practice Standard as follows:

- For a registered certifier 'building surveyor – unrestricted' and 'building surveyor – restricted (all classes of building)' the whole Practice Standard.
- For all other registered certifiers chapters 1 and 2 of the Practice Standard.

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](#).

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 new residential apartment buildings, being class 2 buildings under the Building Code of Australia (BCA) including multi-classified buildings, which contain a class 2 part that are approved through the development application process.

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 recent reforms 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.

The decision was taken for the first Practice Standard to focus on residential apartment buildings for two reasons:

- The majority of problems and complaints have occurred with these buildings, and
- For these buildings there is a separation between the developer who assumes the role of owner during planning and construction and the ultimate unit owners who are not represented during the building phase and generally do not have the expertise to assess the quality of the building and its conformity with building standards.

It is intended to produce Practice Standards covering the other building classes and Complying Development, which will draw on this initial Standard.

The Practice Standard has been developed in full consultation with a reference panel that covers all the major relevant areas of the building sector and building regulation. The persons on the reference panel and the organisations that nominated them are provided at **Appendix B**, together with the members and nominating organisations of four working groups that provided valuable input on four areas requiring particular focus, namely:

- Fire Protection.
- Wet Areas and Waterproofing.
- Consistency of Construction and Occupation Certificates with Development Consent.
- Occupation Certificates.

The valuable contribution of all members of the reference panel and the working groups is fully acknowledged.

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 relevant updated version is referenced in ...

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.

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* (EP&A Act) and Parts 8 (Certification of development) of the *Environmental Planning and Assessment Regulation* (EP&A (Development Certification and Fire Safety) Regulation) 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 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 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'¹. 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 administration².

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 certifiers³) 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.
- 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.

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

- 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)⁴.
- 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 them⁵.
- 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’⁶.

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.

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 occupants⁷.

⁴ Section 29 of the B&DC Act

⁵ Section 42 of the B&DC Act

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

⁷ Section 1.3 of the EP&A Act

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 amenity⁸.

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 property⁹.

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.¹⁰

A principal certifier can be replaced if the owner, existing certifier and replacement certifier agree and the council and consent authority are notified¹¹. 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 inconvenience¹² 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 Act¹³.

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 Act¹⁴.

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 matter¹⁵.

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 period¹⁶.

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 certifier¹⁷.

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

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

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

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 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 Act¹⁸.

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 attention¹⁹.

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.

¹⁸ Section 45(a) of the B&DC Act

¹⁹ 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 disrepute²⁰. 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 interest²¹ and avoid conflicts of interest²² confer a duty on certifiers to proactively 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.

²⁰ Clause 3 of Schedule 5 of the B&DC Regulation

²¹ Clause 2 of Schedule 5 of the B&DC Regulation

²² 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 interest²³ (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'²⁴ 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 Act²⁵ 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.

²³ Clause 24 of the B&DC Regulation

²⁴ Section 29 of the B&DC Act

²⁵ *ibid*

2.3 Private interests

The B&DC Act has a non-exhaustive list of private interests²⁶ 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.²⁷

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)²⁸.

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.

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.

²⁶ Section 30 of the B&DC Act

²⁷ Clause 25 of the B&DC Regulation

²⁸ Section 30 of the B&DC Act

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’.²⁹

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, or
- 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 work³⁰.

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 work³¹.

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

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

³⁰ Section 28 of the B&DC Act

³¹ Clause 25 of the B&DC Regulation

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 area³². 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.
- 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).

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

- 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 associate³³.

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,
- The frequency of occurrence,
- The degree of openness surrounding the benefit.³⁴

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

³³ Clause 6 of Schedule 5 of the B&DC Regulation

³⁴ NSW Ombudsman, Good conduct and administrative practice guide, 2017

³⁵ ibid

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).

When appointed as a certifier, only carry out certification work³⁶:

- 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.
- 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.

³⁶ Certification work includes advising where 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.

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 apartment buildings, being class 2 buildings including multi-classified buildings, which contain a class 2 part.

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 apartment buildings, 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 for building work approved with development consent to commence. 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*'³⁷.

When a certifier issues a CC they are attesting that the application and its accompanying documentation (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 consent³⁸.
- The proposed building will comply with the relevant requirements of the BCA³⁹.
- Each precondition to the issuing of a CC of the development consent has been complied with⁴⁰.
- 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) Regulation⁴¹.
- Any required fees, contributions and levies⁴² have been paid.

37 Section 6.4 of the EP&A Act

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

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

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

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

42 Section 6.8(1)(b) of the EP&A Act

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 consent⁴³. 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 building⁴⁴. This can include demolition work or activity⁴⁵.

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 1993⁴⁶.

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

- Exempt development⁴⁷.
- Approved by a complying development certificate⁴⁸.
- Crown building work⁴⁹.
- Approved for demolition⁵⁰.

The EP&A legislation does not require a construction certificate for building work where the relevantly approved development is the demolition of a building⁵¹.

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 building⁵². In these circumstances, the demolition work does not fall within the ambit of a construction certificate⁵³.

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 work⁵⁴. To do so would introduce uncertainty in respect of the certification of development.⁵⁵ In these circumstances, a CC is required before building work can commence.

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 certification⁵⁶.

43 Sections 6.3(1) and 6.7(1) of the EP&A Act.

44 Section 6.1 of the EP&A Act.

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

46 Section 1.4(1) of the EP&A Act.

47 Section 6.3(3) of the EP&A Act.

48 Section 6.7(2)(a) of the EP&A Act

49 Section 6.7(2)(b) of the EP&A Act.

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

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

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

53 Sharp v Hunters Hill Council [2002] NSWLEC 27

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

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

56 Votano v Building Professionals Board [2021] NSWCATOD 7

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 work⁵⁷.

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 will comply 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)⁵⁸,
- Not carry out any certification work where a proposal in an application for a CC is beyond their competence or expertise⁵⁹, and
- Where an aspect of a proposal in an application for a CC is beyond their competence or expertise seek and properly consider specialist advice⁶⁰.

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, 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.
- 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.

⁵⁷ Section 6.5(1) of the EP&A Act

⁵⁸ Section 5(1) of the B&DC Act

⁵⁹ Clause 4 of Schedule of the B&DC Regulation

⁶⁰ Clause 4 of Schedule 5 of the B&DC Regulation

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 interest⁶¹.

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 documented.

The CC documentation (being the CC, the associated application and accompanying documentation and other information given to the certifier⁶²) 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, including 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 interest⁶³.
- 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 decision⁶⁴.
- Records are kept of any certificate or other document that have been relied upon for the purposes of issuing an CC⁶⁵. 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.

⁶¹ Da Silva v Building Professionals Board [2019] NSWCATOD 177

⁶² Under section 12 of the EP&A (Development Certification and Fire Safety) Regulation

⁶³ Section 45 of the B&DC Act

⁶⁴ Clause 8 of Schedule 5 of the B&DC Regulation

⁶⁵ Clause 50(d) of the B&DC Regulation

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, and 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 for a new residential apartment building must contain the information that is specified in the approved form⁶⁶. The applicant must be the person who is eligible to appoint the principal certifier for the development⁶⁷ - ie. the person who has the benefit of the development consent.⁶⁸ The application must be lodged where required on the NSW planning portal.⁶⁹

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 issued⁷⁰. 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 development⁷¹ i.e. the person having the benefit of the development consent (or with their approval)⁷² but not a contractor or any person who will carry out the work unless they are the owner of the land⁷³.

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

An application for a CC for building work for a new residential apartment building must at minimum be accompanied by^{74, 75}:

- 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 development⁷⁶,
- Appropriate building work plans and specifications⁷⁷,
- A list of the proposed fire safety measures to be provided in relation to the proposed building, and
- A copy of the BASIX certificate, if required.

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

- A statement as to how the performance requirements of the BCA are to be complied with (for a performance solution).
- A description of any accredited building product or system sought to be relied upon (e.g. a certificate of conformity under the CodeMark scheme).
- Copies of any compliance certificate.
- Any matters a BASIX certificate requires to be included in the plans and specifications.

⁶⁶ Section 7(1) of the EP&A (Development Certification and Fire Safety) Regulation

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

⁶⁸ Section 6.6(1) of the EP&A Act

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

⁷⁰ Section 23(1)(g) of the EP&A (Development Certification and Fire Safety) Regulation

⁷¹ Section 7(2) of the EP&A (Development Certification and Fire Safety) Regulation

⁷² Section 6.6(1) of the EP&A Act

⁷³ Section 6.6(4) of the EP&A Act

⁷⁴ Section 7(1) of the EP&A (Development Certification and Fire Safety) Regulation

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

⁷⁶ Section 8 of the EP&A (Development Certification and Fire Safety) Regulation

⁷⁷ Section 8 of the EP&A (Development Certification and Fire Safety) Regulation

Note: A CC is prohibited from being issued under the D&BP Regulation unless certain compliance declarations and designs have been provided to the certifier⁷⁸.

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 must be drawn to suitable scale, be fully dimensioned and include, but not be limited to:

- A title block, drawing number and revision, date of the drawing, and details of who prepared the drawing, and the project address and lot details.
- A key for abbreviations, colouring and hatchings and a north point.

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, and fire source features.
- 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 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 sound insulation, fire resistance or the like.
 - Locations of door and window openings.
 - Floor coverings.
 - Reflected ceiling layout.
 - Layouts or rooms within the building and location of fixtures.
 - Locations of services.
 - 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.

⁷⁸ Clause 29 of the D&BP Regulation

Architectural sections:

- Sections of the proposed building of at least two intersecting sections showing building elements and construction methods, which should include:
 - Sections of 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.
 - Building services and equipment.
 - 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 junctions and interfaces between and within major building elements.
 - Details of key areas of the building such as a glass curtain wall interface with the floor slab.
 - Details of penetrations and proposed protections methods.
 - Methods of weatherproofing and attaching building elements.
 - Waterproofing details.
 - Tanking and damp-proofing details.
 - Wall details such as for fire resistance and sound insulation.
 - Access ramp, landing, threshold details.
- Provision for fire safety and fire resistance, showing which elements are fire resisting, the proposed level of fire resistance, and any fire compartmentation. Ideally plans should be colour coded differentiating all the fire-resisting elements and clearly identifying fire compartmentation and bounding construction for the building.

Building specification:

Many design decisions and building details cannot be expressed in graphic form and therefore rely upon words for their expression. 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.
- Fire safety services designs and plans.
- Lift services design and 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, for example termite management systems, and waterproofing systems (where not included in the specification).
- 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 access, energy efficiency/BASIX, and sound insulation.
- Details on floor finishes, materials and slip resistance.

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 significant discretionary power afforded to certifiers. A certifier is required to always act in the public interest⁷⁹ 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 Conduct⁸⁰ 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.

⁷⁹ Section 45(e) of the B&DC Act

⁸⁰ Schedule 5 of the B&DC Regulation

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:

- 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 Part 3 of Schedule 1 of the EP&A (Development Certification and Fire Safety) Regulation have been included.
- Plans, elevations and details correspond with the description of the proposed building works.
- Building specification specific to for 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 application⁸¹. 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 this.

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, 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.

81 *ibid*

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.

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:

- The design and construction of the building is consistent with the development consent⁸² (see part 3.4).
- The proposed building will comply with the relevant requirements of the Building Code of Australia⁸³ (see part 3.5).
- Relevant conditions of the development consent have been complied with⁸⁴ (see part 3.6).

A CC is also prohibited from being issued unless certain compliance declarations and designs under the D&BP Regulation that are required by the certifier to issue the CC have been provided.

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 certificate⁸⁵ 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 assume⁸⁶:

- 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.

⁸² Section 19(1)(b) of the EP&A (Development Certification and Fire Safety) Regulation

⁸³ Section 19(1)(c) of the EP&A (Development Certification and Fire Safety) Regulation

⁸⁴ Section 20 of the EP&A (Development Certification and Fire Safety) Regulation

⁸⁵ Within the meaning of section 6.4(e) of the EP&A Act

⁸⁶ Section 6.30 of the EP&A Act

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.

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 or refusal⁸⁷. 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 specifications⁸⁸.

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).

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"*.⁸⁹

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 mean that changes are required 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.⁹⁰ The information required for CC plans and specifications is the detailed design to

⁸⁷ Section 13(1)(b) of the EP&A (Development Certification and Fire Safety) Regulation

⁸⁸ Section 13(4) of the EP&A (Development Certification and Fire Safety) Regulation

⁸⁹ Section 19 of the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021

⁹⁰ Section 36(2) of the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021

demonstrate BCA compliance (refer to sections 3.2 and 3.5 for further information on CC plan and specification details).

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 that the consent authority and the wider community are not given an opportunity to consider or comment on the changes proposed.⁹¹

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.⁹²

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.’⁹³

3.4.1 Assessing consistency

It is a statutory requirement that a certifier 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 requirements⁹⁴ 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.

⁹¹ Building Professionals Board v Cogo [2008] NSWADT 119

⁹² Section 6.32 of the *Environmental Planning and Assessment Act 1979*

⁹³ Kogarah City Council v Armstrong Alliance Pty Ltd (No 2) [2013] NSWLEC 32

⁹⁴ Schedule 5 of the Building and Development Certifier Regulation 2020

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

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.⁹⁵ 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 proposed building work in the CC application the certifier then determines that the proposal 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.

⁹⁵ 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.⁹⁶

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 application⁹⁷.

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.⁹⁸

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 made⁹⁹.
- 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 determines that the proposed building will comply 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.

⁹⁶ Da Silva v Building Professionals Board [2019] NSWCATOD 117

⁹⁷ Section 19(1)(c) of the EP&A (Development Certification and Fire Safety) Regulation

⁹⁸ Refer to this [link](#) for further information

⁹⁹ *ibid*

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 application¹⁰⁰.

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 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.

¹⁰⁰ 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 – i.e. 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 developed in accordance with the BCA¹⁰¹ 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.

¹⁰¹ 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 BCA¹⁰².
- 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.

There are additional requirements for performance solutions involving fire safety (see part 3.7).

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 energy efficiency 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.¹⁰³

Note: Performance solutions are regulated designs under the D&BP legislation and subject to the requirements under that legislative scheme.

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 met¹⁰⁴:

¹⁰² A2.2(2) - National Construction Code 2019 - Volume One Amendment 1

¹⁰³ Schedule 5 of the B&DC Regulation

¹⁰⁴ Section 20 of the EP&A (Development Certification and Fire Safety) Regulation

- 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 effect¹⁰⁵.

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 work¹⁰⁶, 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 consent 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.

¹⁰⁵ Section 6.16(2) of the EP&A Act

¹⁰⁶ Clause 8 of Schedule 5 of the B&DC Regulation

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)¹⁰⁷.

The prescribed matters in relation to which a certifier may be satisfied in lieu of a council or consent authority are¹⁰⁸:

- 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:
 - Earthwork
 - Road work, including road pavement and road finishing
 - Stormwater drainage work
 - Landscaping work
 - Erosion and sedimentation control work
 - 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.

¹⁰⁷ Section 6.29 of the EP&A Act

¹⁰⁸ Section 73 of the EP&A (Development Certification and Fire Safety) Regulation

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.¹⁰⁹

A performance solution report for a fire safety requirement, other than a prescribed report, must be prepared by or on behalf of an accredited practitioner (fire safety).¹¹⁰

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'¹¹¹ 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 about where there is no person reasonably available who holds an accreditation to perform certain regulated work¹¹². 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 requirements¹¹³.

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.

¹⁰⁹ Section 18 of the EP&A (Development Certification and Fire Safety) Regulation

¹¹⁰ Section 18(2)(b) of the EP&A (Development Certification and Fire Safety) Regulation

¹¹¹ Clause 52 of the B&DC Act

¹¹² Government Gazette of the State of NSW, Number 166, 31 July 2020 (ref. n2020-3431 and n2020-3432)

¹¹³ Clause 65 of the B&DC Regulation

3.9 Fire Safety

3.9.1 Fire safety systems

There are specific requirements for plans and specifications of ‘relevant fire safety systems’, which are defined in the EP&A (Development Certification and Fire Safety) Regulation¹¹⁴ as:

relevant fire safety system means any of the following-

- a hydraulic fire safety system within the meaning of clause 165,
- a fire detection and alarm system,
- a mechanical ducted smoke control system.

hydraulic fire safety system means-

- a fire hydrant system
- a fire hose reel system
- a sprinkler system (including a wall-wetting sprinkler or drencher system), or
- any type of automatic fire suppression system of a hydraulic nature,

that is installed in accordance with a requirement of, or under, the Act or any other Act or law (including an order or a condition of an approval or some other sort of authorisation).

The requirements for relevant fire safety systems in class 2 to 9 buildings reflect that detail and design information for these systems may not be available at the time of the application for a CC. Therefore, an applicant may submit the plans and details for the relevant fire safety systems with the application for a CC, or they may be provided them to the principal certifier before the works commence.

The plans for a relevant fire safety system must identify:

- the layout of the fire safety system, and
- the extent and location of key components of the fire safety system.

The specifications for a relevant fire safety system must:

- describe the basis for the design, installation and construction of the fire safety system, and
- identify the provisions of the BCA upon which the design of the system is based.

The plans and specifications must also be certified by a compliance certificate¹¹⁵ or endorsed by an accredited practitioner (fire safety),¹¹⁶ as complying with the relevant requirements of the BCA. The carrying out of work as an accredited practitioner (fire safety) is ‘regulated work’¹¹⁷ 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).

The below classes of registered certifier are also authorised to carry out ‘regulated work’¹¹⁸, being the endorsing of plans and specifications for relevant fire safety systems

- a registered certifier who holds an engineer—electrical class of registration may carry out regulated work comprising the endorsing of plans and specifications for relevant fire safety systems comprising a fire detection and alarm system, and
- a registered certifier who holds an engineer—mechanical class of registration may carry out regulated work comprising the endorsing of plans and specifications for relevant fire safety systems comprising a mechanically ducted smoke control system, and

¹¹⁴ Section 22 of the EP&A (Development Certification and Fire Safety) Regulation

¹¹⁵ Schedule 2 of the EP&A (Development Certification and Fire Safety) Regulation

¹¹⁶ Within the meaning of section 6.4(e) of the EP&A Act

¹¹⁷ Within the meaning of schedule 2 of the EP&A (Development Certification and Fire Safety) Regulation

¹¹⁸ Clause 65 of the B&DC Regulation

- c. a registered certifier who holds a certifier—hydraulic (building) class of registration may carry out regulated work comprising the endorsing of plans and specifications for relevant fire safety systems comprising a hydraulic fire safety system.

There are currently accreditation holders to carry out many types of regulated work¹¹⁹. For circumstances where there are no relevant accreditation holders, the Commissioner for Fair Trading has given notice that there is no person reasonably available who holds accreditation to perform this regulated work¹²⁰. Where there aren't any relevant accreditation holders, certifiers must certify in writing 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 requirements¹²¹.

Where plans and specifications of a relevant fire safety system form part of the application for a CC each of them must be endorsed by the certifier with a statement that the certifier is satisfied that it correctly identifies both the performance requirements and DtS provisions of the BCA¹²².

Where a CC is issued prior to plans and specifications of a relevant fire safety system being provided, the certifier must include a condition on the CC to the effect that building work on the relevant fire safety system cannot commence unless the plans and specifications have been submitted to the principal certifier and that they have been certified by either a compliance certificate or endorsed by an accredited practitioner (fire safety)¹²³. In this circumstance the plans and specifications must be endorsed by the principal certifier with a statement that the principal certifier is satisfied that it correctly identifies both the performance requirements and DtS provisions of the BCA¹²⁴.

Notwithstanding that the full design of relevant fire safety systems are not required until building work involving the installation of the system commences, a certifier must not issue a CC unless the proposed building will comply with the relevant requirements of the BCA¹²⁵. In the context of relevant fire safety systems this means an application for a CC must still contain sufficient information to identify that the relevant system will comply with the relevant requirements of the BCA. A certifier must not issue a CC for building work that involves a relevant fire safety system where there is no information about the system or there is only a general statement of intent to comply. The fact that the regulation permits the design to be provided after the CC is issued does not mean that no information is required at CC stage.

Note: Fire safety system designs are regulated designs under the D&BP Regulation and subject to the requirements under that legislative scheme.

Note: The BCA is a holistic document and this holistic nature also applies to fire safety systems. In most cases it is not possible to consider fire safety systems in isolation as they are intrinsic to the building design and affect other elements and BCA provisions and therefore must be considered at an early stage of the building design.

3.9.2 Performance solutions relating to fire safety requirements

The EP&A (Development Certification and Fire Safety) Regulation includes requirements that apply to residential apartment buildings where a performance solution for a fire safety matter is proposed¹²⁶.

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

¹¹⁹ Clause 52 of the B&DC Act

¹²⁰ For more information, see: <https://www.fairtrading.nsw.gov.au/trades-and-businesses/business-essentials/information-for-specific-industries/fire-safety-practitioners>

¹²¹ Government Gazette of the State of NSW, Number 166, 31 July 2020 (ref. n2020-3431 and n2020-3432)

¹²² Clause 64 of the B&DC Regulation

¹²³ Section 22(1)(d) of the EP&A (Development Certification and Fire Safety) Regulation.

¹²⁴ Section 22(1) of the EP&A (Development Certification and Fire Safety) Regulation.

¹²⁵ Section 22(1)(e) of the EP&A (Development Certification and Fire Safety) Regulation.

¹²⁶ Section 19(1)(c) of the EP&A (Development Certification and Fire Safety) Regulation.

- the safety of persons in the event of a fire, or
- the prevention, detection or suppression of fire.

A certifier must not issue a CC for building work for a residential apartment building that involves a performance solution in respect of a fire safety requirement unless they have obtained a performance solution report prepared by a person with the relevant qualifications.

The performance solution report must at minimum:

- Be prepared by a person with the relevant qualifications,
- 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.

A person has the relevant qualifications if:

- The person is an accredited practitioner (fire safety) who is also a fire safety engineer¹²⁷ if the performance solution report relates to performance requirement EP1.4, EP2.1, EP2.2, DP4 or DP5 of the BCA for a building that is proposed to have a fire compartment with a total floor area of more than 2000m² or a proposed total floor area of more than 6000m² (as relevant to a residential apartment building); or
- The person is an accredited practitioner (fire safety) in the case of any other performance solution report.

The carrying out of work as an accredited practitioner (fire safety) is 'regulated work'¹²⁸ and this work must be carried out by a person holding the relevant accreditation to carry out the work. There are currently no accreditation holders to carry out regulated work for performance solutions and the Commissioner for Fair Trading has given notice that there is no person reasonably available who holds an accreditation to perform certain regulated work¹²⁹.

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 requirements¹³⁰

A certifier must not issue a CC unless they are satisfied that the performance solution report identifies the relevant performance requirements and DtS provisions of the BCA, and the plans show, and the specifications describe the physical elements of the performance solution.

Example: A performance solution includes a requirement for additional smoke walls to be provided in the building. The smoke walls need to be depicted on the plans and include sufficient detail as to their location and construction. It would not appropriate for the plans to simply refer to the performance solution report.

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.

¹²⁷ A person holding the class of registration 'certifier – fire safety' under the B&DC Act

¹²⁸ Clause 52 of the B&DC Act

¹²⁹ Government Gazette of the State of NSW, Number 166, 31 July 2020 (ref. n2020-3431 and n2020-3432)

¹³⁰ Clause 65 of the B&DC Regulation

3.9.3 Referrals to Fire and Rescue NSW for an initial fire safety report

Where an application for a CC includes a proposed performance solution for certain fire safety provisions, in specified circumstances certifiers are required to refer the application and accompanying documents to FRNSW for the purposes of an initial fire safety report¹³¹.

An initial fire safety report for a building will specify whether or not the Fire Commissioner is satisfied that:

- The performance solution will meet such of the performance requirements it is intended to meet, and
- The fire hydrants in the proposed fire hydrant system will be accessible for use by FRNSW, and
- The couplings in the fire hydrant system will be compatible with those of the fire appliances and equipment used by FRNSW.

For residential apartment buildings a referral to FRNSW must be made where the building:

- Is proposed to have a fire compartment with a total floor area of more than 2000m², where there is a performance solution proposed in relation to one or more of the Category 2 fire safety provisions,
- Is proposed to have a total floor area of more than 6000m², where there is a performance solution proposed in relation to one or more of the Category 2 fire safety provisions, or
- Has a rise in storeys of 2 or more, where there is a performance solution to meet performance requirement CP2, to the extent that it relates to combustible cladding, and where the performance solution does not apply verification method CV3 in its entirety.

Category 2 fire safety provisions means the following provisions of the BCA: CP9, EP1.3, EP1.4, EP1.6, EP2.2, and EP3.2¹³².

Within 7 days after receiving the application for a relevant building the certifier must forward to the Fire Commissioner:¹³³

- A copy of the application.
- A copy of the plans and specifications for the building.
- Details of the performance requirements the performance solution is intended to meet.
- Details of the assessment methods to be used to establish compliance with those performance requirements.

A certifier must not issue a CC unless they have taken into consideration an initial fire safety report for the building that has been provided. A certifier may issue a CC without taking into consideration an initial fire safety report if the Fire Commissioner has¹³⁴:

- Notified the certifier that an initial fire safety report will not be provided, or
- Failed to notify the certifier within 10 days after the document receipt date whether or not an initial fire safety report will be provided, or
- Given notice that an initial fire safety report will be provided, but such a report is not provided within 28 days after the document receipt date.

What is expected of a certifier?

A certifier taking into consideration an initial fire safety report should:

- Identify if there are any items in the report where the Fire Commissioner is not satisfied.
- Consider any recommendations made by the Fire Commissioner in the initial fire safety report.

¹³¹ Sections 25 – 29 of the EP&A (Development Certification and Fire Safety) Regulation

¹³² Schedule 2 of the EP&A (Development Certification and Fire Safety) Regulation

¹³³ Section 27(1) of the EP&A (Development Certification and Fire Safety) Regulation

¹³⁴ Section 28(2) of the EP&A (Development Certification and Fire Safety) Regulation

Certifiers must take all reasonable steps to ensure the application is referred to FRNSW at the appropriate stages of construction. It is not appropriate for an applicant for a CC to defer the consideration of a performance solution to the later stages of construction.

3.9.4 Fire safety schedules

When a certifier issues a CC for a residential apartment building it must be accompanied by a fire safety schedule (FSS) for the building¹³⁵. A FSS relates to the whole building and identifies the fire safety measures required to be installed and subject to ongoing maintenance, being the essential and critical fire safety measures. An OC cannot be issued until all the fire safety measures (as relevant to the building the subject of the application) have been installed, are operational, have been inspected, and a fire safety certificate has been issued.

A fire safety measure is defined as¹³⁶ *any measure (including any item of equipment, form of construction or fire safety strategy) that is, or is proposed to be, implemented in a building to ensure the safety of persons using the building in the event of a fire.*

A FSS can include both essential and critical fire safety measures. An essential fire safety measure means a measure included in the FSS that requires assessment and certification every 12 months. A critical fire safety measure means: *a fire safety measure that is identified on a fire safety schedule as a critical fire safety measure, being a measure that is of such a nature, or is implemented in such an environment or in such circumstances, that the measure requires periodic assessment and certification intervals of less than 12 months*¹³⁷.

A FSS sets the basis for the performance of fire safety measures for a building and their ongoing maintenance, and is therefore a critical part of the certification documentation for the life-cycle of a building. A FSS may also be used by fire brigades to identify what fire safety systems are installed in a building and to what standard of performance.

3.9.5 Preparing a fire safety schedule

A certifier is responsible for issuing a FSS for a building premises, which is typically prepared by the certifier. An application for a CC is required to include a list of proposed fire safety measures¹³⁸, which assists in the preparation of a FSS.

Note: Preparing a FSS is a separate task to determining an application for a CC. A FSS itself is not part of an application and is therefore not evidence as to BCA compliance with regard to the building work.

For a new building a FSS must:

- Deal with the whole building, not merely the part of the building to which the CC relates (e.g. in circumstances where CCs are issued in stages).
- Include the fire safety measures proposed or required to be implemented in the building.
- Include the fire safety measures that are statutory fire safety measures¹³⁹.
- Identify each measure that is a critical fire safety measure and the intervals (being less than 12 months) at which supplementary fire safety statements must be given to council.
- Specify the minimum standard of performance for each fire safety measure in the schedule.

¹³⁵ Section 23(2) of the EP&A (Development Certification and Fire Safety) Regulation

¹³⁶ Schedule 2 of the EP&A (Development Certification and Fire Safety) Regulation

¹³⁷ Schedule 2 of the EP&A (Development Certification and Fire Safety) Regulation

¹³⁸ Section 9(1) of the EP&A (Development Certification and Fire Safety) Regulation

¹³⁹ Section 79 of the EP&A (Development Certification and Fire Safety) Regulation

Identifying fire safety measures:

A FSS will be prepared after an application for a CC has been assessed by a certifier and the fire safety systems proposed and required for the building are known. The applicant is required to include with the application for a CC a list of the proposed fire safety measures.

In addition to the statutory fire safety measures (which must be included) a certifier will include in the FSS any other fire safety measures for the building that are essential or critical fire safety measures.

A performance solution report itself can be a fire safety measure (as it can be a fire safety strategy) and in these circumstances it needs to be listed as a fire safety measure on the FSS. A performance solution report may also be a standard of performance for another fire safety measure and in these circumstances should be included as a standard of performance on the FSS for that measure. The referencing of a performance solution on a FSS will be dependent on the context, for example is it a fire safety strategy, a standard of performance for another fire safety measure or a combination of these.

Where fire safety measures from a performance solution report are identified in the FSS they should:

- Identify each fire safety measure separately.
- Include a detailed description of each fire safety measure.
- Identify whether the fire safety measure applies to the whole or a part of the building (and identify the part where relevant).
- Include details of the performance solution report.

It is not adequate for a FSS to broadly specify that the fire safety measure is a 'performance solution' and that the standard of performance is the 'performance solution report'. References in this manner do not clearly state what the fire safety measure is or identify the relevant standard of performance.

A certifier must consider whether the description of the fire safety measure (from the performance solution) on the FSS has sufficient detail to enable a person relying upon the FSS to reasonably identify what the measure is and its standard of performance.

Note: A FSS is not intended to replace a fire engineering report as these reports are typically quite detailed and complex, the details of which cannot be condensed into a FSS. However, the FSS must contain sufficient detail to enable those viewing and relying upon it in the future to identify which fire safety measures are impacted and if only affecting part of the building which parts it affects.

Note: A required skill for registration as a certifier is being able to prepare a fire safety schedule¹⁴⁰.

Note: A FSS fire schedule is not a specification and it is not appropriate for a certifier to rely upon a FSS for the purposes of determining the compliance of a building with the requirements of the BCA. In 2020 the NSW Civil and Administrative Tribunal in an administrative review of a disciplinary finding found that a certifier could not be reasonably satisfied that a proposed building would comply with fire service requirements on the basis that the measures were listed on a fire safety schedule prepared by the certifier, and were not referenced or included on the documents forming part of the application¹⁴¹.

Referencing fire safety measures and minimum standards of performance

A FSS needs to identify each fire safety measure and the minimum standard at which the measure is required to perform to (among other things). The FSS needs to be sufficiently detailed to ensure that any person intending to rely upon it (such as the builder, building owners and subsequent owners and accredited practitioners, and the like) fully understand what the fire safety measure is and the relevant standard of performance.

¹⁴⁰ Clause 3 of Schedule 3 of the B&DC Regulation

¹⁴¹ Freixas v Building Professionals Board (No 1) [2020] NSWCATOD 27

An example of how fire safety measures and the minimum standard of performance could be referenced:

Fire safety measure	Standard of performance
Automatic fire suppression system (sprinklers)	BCA 2019 (Amdt 1), E1.5, Specification E1.5, AS2118.1-2017
Automatic fire detection and alarm system	BCA 2019 (Amdt 1), E2.2, Clause 3 of Spec E2.2a, AS 3786-2014, Performance solution report XXXX, Rev XXXX prepared by XXXX, dated XXXX.
Evacuation management plan	Performance solution report XXXX, Rev XXXX prepared by XXXX, dated XXXX.
Lightweight Construction	BCA 2019 (Amdt 1), C1.8, Specification C1.8
Line marking of the paths of travel to the exits in the basement carpark	Performance solution report XXXX, Rev XXXX prepared by XXXX, dated XXXX.

3.9.6 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 compartmentation, bounding construction, 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 CC¹⁴².

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

- Plans clearly depicting every element in 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).
- Plans depicting the fire compartmentation and bounding construction for the building.

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.

¹⁴² Section 8(4)(a)(iv) of the EP&A (Development Certification and Fire Safety) Regulation

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

Note: Sufficiently detailed plans for passive fire safety will assist the principal certifier in carrying out the passive fire safety critical stage inspections during construction.

3.10 Compliance Declarations

3.10.1 Compliance declarations and designs to be provided before the issue of a construction certificate

A CC is prohibited from being issued unless certain design documents under the D&BP Regulation are provided to the certifier who proposes to issue the CC¹⁴³. These design documents are in addition to the information and documentation required to be included with an application for a CC.

The required documentation relates to the building work the subject of the application for the CC and includes:

- Each design compliance declaration that is required by the certifier to issue the CC; and
- For each design compliance declaration the corresponding regulated design.

A design compliance declaration is a declaration with regard to matters in the D&BP legislation and includes whether or not a regulated design complies with the BCA¹⁴⁴.

A regulated design is¹⁴⁵:

- A design that is prepared for a performance solution; or
- A design prepared for a building element of building work

A building element is:

- The fire safety systems for a building (within the meaning of the BCA).
- Waterproofing.
- An internal or external load-bearing component of a building that is essential to the stability of the building, or a part of it.
- A component of a building that is part of the building enclosure.
- Those aspects of the mechanical, plumbing and electrical services for a building that are required to achieve compliance with the BCA.

What is expected of a certifier?

A certifier must ensure that they do not issue a CC unless they have been provided with each declaration and design required to issue the CC i.e. those declarations and designs that relate to the building work the subject of the CC.

Where a certifier is relying upon designs prepared under the D&BP regulation they should:

- Scrutinise the designs to ensure that they meet the relevant requirements of the certification legislation, such as being consistent with the development consent.
- Identify that the designs have been relied upon, either by the endorsement of the CC on the plans, or by identifying them on the CC.

¹⁴³ Clause 29(1) of the D&BP Regulation

¹⁴⁴ Section 8(1) of the D&BP Act

¹⁴⁵ Section 5(1) of the D&BP Act

3.11 Site Inspections

3.11.1 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 building¹⁴⁶ and a record made of this¹⁴⁷.

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.

3.11.2 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 applies¹⁴⁸. 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 expected¹⁴⁹.

¹⁴⁶ Section 16 of the EP&A (Development Certification and Fire Safety) Regulation

¹⁴⁷ Section 17 of the EP&A (Development Certification and Fire Safety) Regulation

¹⁴⁸ Section 6.8(2) of the EP&A Act

¹⁴⁹ Lilli v Building Professionals Board [2019] NSWCATOD 119

3.12 Determining an application for a construction certificate

3.12.1 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 contain¹⁵⁰:

- 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.
- If a CC has been issued subject to conditions of the kind referred to in section 115-117 and section 111 of the EP&A (Development Certification and Fire Safety) Regulation – the reasons for the conditions.

Note: Section 115-117 and section 111 of the EP&A (Development Certification and Fire Safety) Regulation relate to objections to compliance with the BCA and exemptions from fire safety standards.

Within 2 days of the determination the certifier must by means of the NSW planning portal¹⁵¹:

- 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 specifications¹⁵²).
 - Any plans and specifications related to the CC.
 - The fire safety schedule.
 - 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 provide¹⁵³.
 - 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.

3.12.2 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.

¹⁵⁰ Section 13(1) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁵¹ Section 13(2) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁵² Section 13(4) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁵³ Being documents given to the certifier under section 12 of the EP&A (Development Certification and Fire Safety) Regulation

3.12.3 Where construction certificates are issued for a stage of building work

It is common industry practice for CCs to be issued for stages of building work. Where an applicant seeks CCs in stages for building work a certifier must apply diligence to ensure the building work for each stage is appropriate in the context of the overall proposed building.

Note: Under the EP&A Act, it is the applicant who must specify in the CC application what the proposed building work/stage is and to include appropriate building work plans and specifications. It is not the role of the certifier to issue a CC for a stage of building work that was not applied for under the CC application.

In general, parts of a building cannot be treated discretely or in isolation, particularly for multi storey construction. A certifier assessing a CC for a stage of building work must have proper consideration of the building as a whole and the impacts each stage of building work may have on the building.

Where an application is made for a stage of building work of a building, the major elements of the building should be designed and resolved before any CC is issued to be able to satisfy the relevant BCA requirements.

Example: A certifier receives an application for a CC for building work involving three basement levels. The overall building approved by the development consent is a residential flat building comprising 15 above ground storeys atop three basement levels. In assessing the structural requirements the certifier needs to consider the structural requirements of the entire building and not just the basement levels.

It is most often inappropriate to delay BCA requirements and performance solutions to later stages of building work in circumstances where CCs are staged. The holistic nature of both building and the BCA means that often BCA requirements affect early stages of work and if these early stages are approved without proper consideration of all relevant BCA requirements this could result in non-compliances further on.

Fire safety and fire safety systems need to be treated holistically and are intrinsic to the fabric and design of a building. It is essential that a certifier considers the impact of fire safety requirements as they relate to the particular stage of building work the subject of the staged CC, in particular where the installation of fire services will be staged.

Staged CCs include a greater risk of building work progressing beyond the issued CC as the building is typically under construction when further applications are lodged. Certifiers must take all reasonable steps to inform themselves as to the progress of building works when they are assessing a staged CC.

Note: It is not appropriate to utilise staged CCs as a means of delaying statutory requirements, such as compliance with conditions of the development consent or the referral of plans to FRNSW.

3.13 Regulatory checklist

3.13.1 Key statutory requirements for assessing an application for a construction certificate

When assessing an application for a CC for a new residential apartment building, the key statutory requirements for a certifier to consider are:

- a. Has the required long service levy been paid?¹⁵⁴
- b. Have the building works the subject of the CC been physically commenced on the land to which the development consent relates?¹⁵⁵
- 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 the documents specified in Part 3 of Schedule 1 of the EP&A (Development Certification and Fire Safety) Regulation?¹⁵⁶
- d. Was the application made by the person having the benefit of the consent?¹⁵⁷
- e. Has the statement from the qualified designer, verifying that the plans and specifications achieve or improve the design quality of the development, having regard to the design quality principles, been provided?¹⁵⁸
- f. Does the application need to be referred to the Fire Commissioner for the purposes of an Initial Fire Safety Report?¹⁵⁹
- g. If an Initial Fire Safety Report has been provided - has it been taken into consideration?¹⁶⁰
- h. If the application is for work that includes a performance solution that relates to a fire safety requirement - has it been prepared by a person with the relevant qualifications and does it include the prescribed information?¹⁶¹
- i. Do the plans and specifications include all matters required by the BASIX Certificate?¹⁶²
- j. 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?¹⁶³
- k. Will the proposed building comply with the relevant requirements of the BCA?¹⁶⁴
- l. Has each condition requiring the provision of security before work is carried out, been complied with?¹⁶⁵
- m. Has each condition requiring the payment of a monetary contribution or levy before work is carried out been complied with?¹⁶⁶
- n. Have the preconditions to the issuing of a CC that are specified in the development consent been complied with?¹⁶⁷
- o. 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?¹⁶⁸

¹⁵⁴ 127 Section 6.8(1)(b) of the EP&A Act

¹⁵⁵ 128 Section 6.8(2) of the EP&A Act

¹⁵⁶ 129 Section 7(1)(a) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁵⁷ 130 Section 7(2) of the EP&A (Development Certification and Fire Safety) Regulation

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

¹⁵⁹ Sections 25 – 29 of the EP&A (Development Certification and Fire Safety) Regulation

¹⁶⁰ *ibid*

¹⁶¹ Section 18 of the EP&A (Development Certification and Fire Safety) Regulation

¹⁶² Section 19(1)(a) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁶³ Section 19(1)(b) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁶⁴ Section 19(1)(c) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁶⁵ Section 20(a) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁶⁶ Section 20(b) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁶⁷ Section 206(c) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁶⁸ Section 21 of the EP&A (Development Certification and Fire Safety) Regulation

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

When determining an application for a CC for a new residential apartment building, 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?¹⁶⁹
- b. Where the application is refused, does the determination include the reasons for refusal and advise the applicant of their rights of appeal?¹⁷⁰
- 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?¹⁷¹
- d. Have the plans and specifications been endorsed?¹⁷²
- e. With regard to relevant fire safety systems:
 - Does the CC include the required condition, or
 - Have the plans and specifications been endorsed by the certifier with the required statement?¹⁷³
- f. Does the CC contain¹⁷⁴:
 - 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?
 - The BCA classification of the building, including different classifications for different parts?
 - For a performance solution, the prescribed details of the performance solution report?
- g. Is the CC accompanied by a fire safety schedule?¹⁷⁵

¹⁶⁹ Section 13(1) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁷⁰ *ibid*

¹⁷¹ Section 13(2) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁷² Section 13(4) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁷³ Section 22 of the EP&A (Development Certification and Fire Safety) Regulation

¹⁷⁴ Section 23(1) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁷⁵ Section 23(2) of the EP&A (Development Certification and Fire Safety) Regulation

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 certifier¹⁷⁶. 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.

Note: Since 2004 Class 2 residential buildings have been the subject of mandatory inspection requirements.

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 inform the principal certifier as to 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 drawings¹⁷⁷.

¹⁷⁶ Section 6.5(1) of the EP&A Act

¹⁷⁷ *Fitzgerald v Building Professionals Board* [2013] NSWATD 299

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'¹⁷⁸, and
- Inspections required by the principal certifier¹⁷⁹.

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?).
- The staging of the building work (where an applicant has applied for CCs in stages).
- 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 20-storey residential flat building which includes a unique and complex façade design comprising multiple building materials that potentially affect BCA requirements regarding non-combustibility, fire compartmentation and weatherproofing.

In this circumstance the principal certifier could require additional inspections during the installation of the façade 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 work¹⁸⁰.

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 consent¹⁸¹.

¹⁷⁸ Section 61 of the EP&A (Development Certification and Fire Safety) Regulation

¹⁷⁹ Section 6.6(2)(b) of the EP&A Act & Section 58 of the EP&A (Development Certification and Fire Safety) Regulation

¹⁸⁰ Clause 28(f)(v) of the B&DC Regulation

¹⁸¹ Section 6.6(1) of the EP&A Act

- The person having the benefit of the consent must¹⁸²:
 - 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 work¹⁸³ and the notice must contain¹⁸⁴:

- 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.

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.
- Accompanying FRNSW personnel on an inspection.
- If requested by other authorities such as the local council or the Office of the Building Commissioner.
- 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.

Example: The developer of a residential building project has chosen to construct the bathrooms off site and then transport them to site for installation. In this circumstance the principal certifier may require inspections to be carried out of the wet areas and waterproofing membranes installed during construction off site.

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

¹⁸² Section 6.6(2)(d) of the EP&A Act

¹⁸³ Section 6.6(2)(b) of the EP&A Act

¹⁸⁴ Section 58 of the EP&A (Development Certification and Fire Safety) Regulation

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 Act¹⁸⁵ and is certification work under the B&DC legislation¹⁸⁶.

- Inspections must be carried out by the principal certifier, or if the principal certifier agrees by another certifier.
- 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 certifier being carried out by a person who wasn't an accredited certifier¹⁸⁷.

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 OCs¹⁸⁸, 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.

¹⁸⁵ Section 6.5(1)(b) of the EP&A Act

¹⁸⁶ Section 4 of the B&DC Act

¹⁸⁷ Newcastle City Council v Northern Residential Pty Limited & (3) Others [2009] NSWLEC 10

¹⁸⁸ ibid

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 certificate¹⁸⁹ 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.

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 certifier 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 certificate¹⁹⁰.

4.1.7 What are the prescribed critical stage inspections?

Inspections of building work at certain critical stages are prescribed¹⁹¹ being the 'critical stage inspections'. For residential apartment buildings the occasions on which building work must be inspected are:

- After the commencement of the excavation for, and before the placement of, the first footing.
- Prior to the covering of fire protection at service penetrations to building elements that are required to resist internal fire or smoke spread. An inspection of a minimum of one of each type of protection method for each type of service, on each storey of the building comprising the building work is required.
- Prior to covering the junction of any internal fire-resisting construction bounding a sole- occupancy unit, and any other building element required to resist internal fire spread. An inspection of a minimum of 30% of sole occupancy units on each storey of the building containing sole occupancy units is required.
- Prior to covering of waterproofing in any wet areas. An inspection of a minimum of 10% of rooms with wet areas within a building is required.
- 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 mandatory¹⁹². Guidance regarding site inspections is included in Chapter 3 of this standard.

¹⁸⁹ Within the meaning of section 6.4(e) of the EP&A Act

¹⁹⁰ Hossain v Unity Grammar College Ltd and Ors [2019] NSWSC 1313

¹⁹¹ Section 61 of the EP&A (Development Certification and Fire Safety) Regulation

¹⁹² Section 16 of the EP&A (Development Certification and Fire Safety) Regulation

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.
- 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.
- Consider 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: Prior to carrying out an inspection of the fire seals on a storey of a residential building the certifier was provided with an installer certificate attesting that all the fire seals on that level had been installed and complied with the BCA. During the inspection the certifier identified several poorly installed and missing fire seals, which questioned the reliability of the installer certificate. Knowing that the certificate couldn't be relied upon allowed the certifier to request more robust documentation and require further assessment of other installed fire seals.

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 BCA¹⁹³.

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 BCA¹⁹⁴, and
- An OC must not be issued unless the design and construction of the new building is consistent with the development consent¹⁹⁵. A CC and any approved plans and specifications are taken to form part of the development consent¹⁹⁶.

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; determining barrier heights, widths of exits, direction of door swings, and the like; 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 BCA compliance for a barrier installed to a stairway landing with regard to its location, height, and maximum openings. A certifier would not be able to determine BCA compliance for an automatic sprinkler system from a visual inspection. However, they could visually identify during an inspection potential non-compliance such as the absence of sprinkler heads from an area required to be sprinkler protected.

¹⁹³ Section 6.10(2)(c) of the EP&A Act

¹⁹⁴ Section 19(1)(c) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁹⁵ Section 42(3)-(4) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁹⁶ Section 4.16(12) of the EP&A Act

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. This includes inspecting all units, not just a sample of units, as well as inspecting all common areas.
- 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.
- 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 visually verify third party attestations regarding compliance of installation or other matters requiring verification.
- To visually check matters raised by Fire and Rescue NSW in a final fire safety report or fire safety system report.

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 whether:

- any fire safety systems serving the completed part of the building are fully operational and commissioned. Components of these systems may be located in, or affected, by the incomplete part of the building.
- essential services serving the completed part of the building are fully operational.
- 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.
- the partially completed building has required means of fire-fighting installed as per the BCA (as relevant)
- 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 part of a building has a fire-isolated exit that complies with the BCA incorporating a compliant discharge to the public road. However, incomplete construction works have obstructed the discharge therefore creating a hazard to the occupants of the completed part of the building. A certifier determining an application for an OC 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 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

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: A certifier is on-site carrying out an inspection of a bathroom wet area. Whilst on site the certifier observes a fire-resisting wall that has been compromised due to mechanical damage in an area that is likely to be covered and not readily observable in the future. 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 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 of fire seals determines that the inspection result is unsatisfactory and requires a reinspection of a particular seal type installed to pvc pipes. The principal contractor has arranged for the next wet area inspection in a few days' time. Assuming the fire seals are still adequately observable, the certifier may reinspect these seals in conjunction with carrying out the wet area inspection.

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 inspection¹⁹⁷. 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 made¹⁹⁸.

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, for example where an inspection is a representative sample, such as the waterproofing for 10% of rooms with wet areas. In these circumstances the specific rooms that were inspected should be recorded. These particulars will be necessary where a principal certifier issues an OC as they need to be satisfied that the required inspections were carried out¹⁹⁹ 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 conduct²⁰⁰ 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.
- 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 missed²⁰¹. The circumstances are:

- The inspection was missed because of circumstances that the principal certifier considers were unavoidable, and

¹⁹⁷ Section 63(1) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁹⁸ Section 63(2) of the EP&A (Development Certification and Fire Safety) Regulation

¹⁹⁹ Section 67(5)(a) of the EP&A (Development Certification and Fire Safety) Regulation

²⁰⁰ Clause 9 of Schedule 5 of the B&DC Act

²⁰¹ Section 64 of the EP&A (Development Certification and Fire Safety) Regulation

- 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 and their licence 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 them²⁰².

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.

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.

²⁰² Section 64(2) of the EP&A (Development Certification and Fire Safety) Regulation

4.5.1 After the commencement of the excavation for, and before the placement of, the first 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 setout 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?
- Has building work occurred on site beyond the first footing stage?

4.5.2 Prior to covering of fire protection at service penetrations to building elements that are required to resist internal fire or smoke spread

The primary purpose of this inspection is to ensure that a reasonable representative sample of fire protection methods at service penetrations are checked on each storey of the building. The site must be visited enough times to ensure that at least one of each type of protection method for each type of service is inspected on each storey.

Typical service penetrations could include:

- Service pipes (typically metal or upvc) for plumbing, fire services, water supply, and the like.
- Electrical, data, fire service cables and the like, in singles, bundles or on cable trays.
- Mechanical and air-conditioning ductwork.

Typical methods of fire protection could include:

- Fire collars and sleeves.
- Fire sealants, mastics and expanding foam.
- Dampers.
- Fire stopping materials, such as mineral fibre and high temperature ceramic fibre, fire pillows, fire wraps, mortars and like.

Note: Services may be fire protected by being located within a fire-resisting shaft or protected at the service penetration.

Note: In many cases it is appropriate for the principal certifier to request a schedule of the fire protection of service penetrations completed as part of the building works prior to carrying out an inspection of those elements. The schedule should be cross referenced to a location plan and including relevant test reports and documentary evidence for products used.

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

- Is each method of fire protection consistent with the approved documents?
- Has each type of service penetration been provided with a method of fire protection?
- Is each method of fire protection appropriate for the wall/floor type e.g. masonry, plasterboard etc?

- Is each method of fire protection appropriate for the service type e.g. upvc pipe, copper pipe, cable etc?
- Are the service penetrations formed in a good and competent manner e.g. regular sizing without chipping etc?
- Are methods of fire protection installed in accordance the manufacturers' specification/ requirements?

4.5.3 Prior to covering the junction of any internal fire-resisting construction bounding a sole-occupancy-unit, and any other building element required to resist internal fire spread

The primary purpose of this inspection is to ensure a reasonably representative sample of fire-resisting construction is checked. This inspection relates to units within a residential building and relates to the gaps where internal fire resisting walls interface with other building elements.

The site must be visited enough times to ensure that at least 30% of units on each storey have been inspected.

The junctions of fire-resisting construction could include:

- The junction between an internal wall of a unit and the wall of another unit, a public corridor, a public lobby or the like.
- The junction between the internal walls of a unit and the floor above (if not a floor within the unit).
- The junction between the floor of a unit and the external wall.
- The junction between internal walls of a unit and the external wall.
- The junction between the doorset and the internal wall of a unit.

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

- Is the fire-resisting construction at each junction consistent with the approved documents?
- Has each junction been provided with a method of fire protection?
- Has each junction been fully sealed or protected for their entire length?
- Are all fire-resisting building elements e.g. walls and floors sound and with no obvious damage?
- Is the sealing or protection method appropriate for the wall type e.g. plasterboard, masonry etc?

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 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):

- Is the stormwater drainage connection/s consistent with the approved design?
- Are stormwater drainage connections visible and able to be inspected?
- Where an on-site stormwater drainage system is installed are the connections in accordance 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.
 - All essential services are installed and operational (including both fire safety and amenity services).
 - 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?
- Has building work been constructed in accordance with a performance solution report that accompanied a CC for the building?
- Have all fire safety measures listed on the FSS been installed?
 - Visually identify that each fire safety measure is installed in 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 are not 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.
- Spandrels are in accordance with approved plans e.g. located and sized as required.
- Fire doors/solid core doors and associated self-closing and latching mechanisms are installed and operational.
- Service equipment and electricity supply systems are fire separated.
- External openings are fire protected.
- Services are located within fire resting shafts or are fire protected at the penetration.

Means of egress

- Exits and the egress system is consistent with the approvals e.g. number, location, travel distances, discharges etc.
- Exits are fire-isolated as required e.g. not compromised, installations are permitted etc.
- Paths of travel to exits and exits e.g. unobstructed heights and widths.
- Discharge of exits.
- Exit construction e.g. ramps, stair geometry, barriers, handrails and the like.
- Doors in exits and paths of travel i.e. type, swing, self-closing and latching, re-entry etc.
- Signage provided to fire doors.
- Emergency lights and exit signs have been installed.

Access

- Access for persons with a disability is provided to and into the building.
- Access for persons with a disability provided within and throughout the building.
- Accessible features are installed.

Fall prevention

- Barriers, handrails and fall prevention provided and installed.

Fire-fighting services and equipment

- Fire-fighting equipment listed on the FSS has been installed e.g.
 - Fire hydrant system, including on-site pumpset and booster assembly
 - Fire hose reel system

- Automatic sprinkler system
 - Portable fire extinguisher
 - Smoke hazard management system, such as automatic air pressurisation and air handling systems.
- Observable issues with fire-fighting equipment, such as location, coverage and features.
- Automatic fire detection and alarm system, including smoke detectors and occupant warning/alarms installed in each unit and common areas (as relevant).

Lifts

- Lifts are separated by a fire-resisting shaft.
- Stretcher facilities and emergency lifts as required.
- Passenger lifts have accessible features.
- Lift warning signs have been 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.
- Natural light and ventilation is in accordance with the approved plans.

BASIX

- 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 a partial OC, are there any hazards to the health and safety of the occupants due to the site or incomplete building works?
 - Fire safety systems serving or affecting the completed part of the building are fully operational.
 - Essential services serving or affecting the completed part of the building are fully operational.
 - The egress system for the building isn't adversely affected by the incomplete building or site.
 - Access to and from the building is safe and does not present a hazard to occupants.
 - The partially completed building has required means of fire-fighting installed as per the BCA (as relevant).
 - 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 residential apartment buildings, being class 2 buildings including multi-classified buildings, which contain a class 2 part.

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 residential apartment buildings, 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 building²⁰³. 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 relates²⁰⁴.

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 BCA²⁰⁵.

²⁰³ Section 6.3(1)(c) of the EP&A Act

²⁰⁴ Section 6.4(c) of the EP&A Act

²⁰⁵ Section 6.10(2)(c) of the EP&A Act

- The design and construction of the building is consistent with the development consent²⁰⁶
- The health and safety of the occupants have been taken into consideration²⁰⁷ (for a partial OC).
- A development consent is in force with respect to the building²⁰⁸.
- A CC has been issued with respect to the plans and specifications for the building²⁰⁹.
- A fire safety certificate has been issued for the building²¹⁰.
- Any report from the Fire Commissioner has been considered²¹¹.
- The preconditions specified in the development consent have been complied with²¹².

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.

Certifiers should be aware of the implications that flow from issuing an OC in regard to other statutory requirements, in particular:

- The date of completion for new residential strata buildings is considered to be the date of issue of an OC (that relates to the whole of the building)²¹³.
- For strata units bought off the plan, it is a prescribed requirement that an OC be provided for the building 14 days before settlement²¹⁴.

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 conduct²¹⁵.

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 building²¹⁶.

An OC for a new residential apartment building will typically relate to:

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

A common scenario where an OC would be sought for part of a partially completed building is where the building is mixed use e.g. a predominantly residential building that contains a retail part on the ground floor level. In this case the residential part of the building may be completed, and occupation may be sought for this part prior to the completion of the retail part.

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 apply²¹⁷.

²⁰⁶ Section 42(3)-(4) of the EP&A (Development Certification and Fire Safety) Regulation

²⁰⁷ Section 49(h) of the EP&A (Development Certification and Fire Safety) Regulation

²⁰⁸ Section 6.10(2) of the EP&A Act

²⁰⁹ *ibid*

²¹⁰ Section 49(h) of the EP&A (Development Certification and Fire Safety) Regulation

²¹¹ Sections 50 and 51 of the EP&A (Development Certification and Fire Safety) Regulation

²¹² Section 6.10(1) of the EP&A Act

²¹³ Section 3C of the Home Building Act

²¹⁴ Clause 4 of Schedule 2 of the Conveyancing (Sale of Land) Regulation 2017

²¹⁵ Schedule 5 of the B&DC Regulation

²¹⁶ Section 6.9(1) of the EP&A Act

²¹⁷ Clause 18A of the EP&A (Saving, Transitional and Other Provisions) Regulation

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 work²¹⁸.

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 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)²¹⁹,
- 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 advice²²⁰.

An OC can only be issued by a certifier who is the principal certifier for the development²²¹. 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 building²²², 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 three statutory schemes, with regard to OCs a certifier must:

- Follow the statutory requirements, as set out in the EP&A and DBP Acts 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 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.

²¹⁸ Section 6.5(1) of the EP&A Act

²¹⁹ Section 5(1) of the B&DC Act

²²⁰ Clause 4 of Schedule 5 of the B&DC Regulation

²²¹ Section 6.5(1)(c) of the EP&A Act

²²² Section 67(5)(a) of the EP&A (Development Certification and Fire Safety) Regulation

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.

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 OC²²³. 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 for a new residential apartment building must contain the information that is specified in the approved form²²⁴ and lodged via the NSW planning portal.

²²³ Clause 50(d) of the B&DC Regulation

²²⁴ Section 37(1) of the EP&A (Development Certification and Fire Safety) Regulation

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 interest²²⁵ 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 for a new residential apartment building must at minimum be accompanied by a copy of the following documents²²⁶:

- The relevant development consent,
- The CC or CCs for the building work (a copy of the CC includes the plans and specifications endorsed with the CC)²²⁷,
- The fire safety certificate,
- 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 include²²⁸:

- 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.

Under the DBP Act, a person for whom regulated building work is done must provide, before or when the application for an OC is made, the principal certifier with the building compliance declaration issued by the relevant registered building practitioner.²²⁹

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 Conduct²³⁰ 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

²²⁵ Section 45(e) of the B&DC Act

²²⁶ Section 37(2) of the EP&A (Development Certification and Fire Safety) Regulation

²²⁷ Section 37(6) of the EP&A (Development Certification and Fire Safety) Regulation

²²⁸ Section 37(3) of the EP&A (Development Certification and Fire Safety) Regulation

²²⁹ Section 17(5) of the DBP Act

²³⁰ Schedule 5 of the B&DC Regulation

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.

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 BCA²³¹.

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.
- Comments or recommendations by Fire and Rescue NSW.
- 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.

²³¹ Section 39 of the EP&A (Development Certification and Fire Safety) Regulation

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 application²³². 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.
- 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 with²³³ (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 building²³⁴ (see part 5.5).

²³² Section 38(1) of the EP&A (Development Certification and Fire Safety) Regulation

²³³ Section 6.10(1) of the EP&A Act

²³⁴ Section 6.10(2)(a) and (b) of the EP&A Act

- The completed building is suitable for occupation and use in accordance with its classification under the BCA²³⁵ (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 occupants²³⁶ (see part 5.6).
- The required critical stage and other inspections required by the principal certifier have been carried out²³⁷ (see part 5.7).
- The design and construction of the building is consistent with the development consent²³⁸ (see part 5.8).
- A fire safety certificate has been issued for the building²³⁹ (see part 5.9).

Under the DBP legislation:

- An occupation certificate applied for after 1 July 2021 is prohibited from being issued unless a building compliance declaration from the registered building practitioner in relation to the building work has been provided to the principal certifier.²⁴⁰
- The principal certifier must be satisfied that all compliance declarations required for the building work have been lodged in accordance with the DBP Act. The principal certifier must consider any instances of non-compliance specified in the compliance declarations when deciding whether to issue the certificate²⁴¹. If the building compliance declaration sets out steps to ensure compliance with the BCA and other requirements, the registered building practitioner must give written notice containing the steps to the principal certifier.²⁴²
- For regulated building work which has been authorized and commenced before 1 July 2021 but was not completed before that day, the principal certifier must not issue an occupation certificate unless satisfied that the building practitioner for the regulated work has lodged copies of all relevant designs before an application for an OC is made.²⁴³

The Secretary²⁴⁴ may make an order prohibiting the issue of an OC²⁴⁵ in certain circumstances for residential apartment buildings, including:

- The required notification was not given to the Secretary by the developer as to the expected completion of the development, or an amended notice.
- The Secretary is satisfied that a serious defect in the building exists.
- The strata defect building bond has not been given to the Secretary.

Where a prohibition order is issued by the Secretary, notice is given to the principal certifier. A principal certifier must not issue an OC in contravention of a prohibition order.

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.

Certifiers can request an applicant to provide a compliance certificate²⁴⁶ 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 assume²⁴⁷:

- That the certificate has been duly issued, and
- That all conditions precedent to the issuing of the certificate have been duly complied with, and

²³⁵ Section 6.10(2)(c) of the EP&A Act

²³⁶ Section 42(1) of the EP&A (Development Certification and Fire Safety) Regulation

²³⁷ 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

²³⁸ Section 42(3)-(4) of the EP&A (Development Certification and Fire Safety) Regulation

²³⁹ Section 41 of the EP&A (Development Certification and Fire Safety) Regulation

²⁴⁰ Clause 30 of the DBP Regulation

²⁴¹ Section 27 of the DBP Act

²⁴² Section 22(2) of the DBP Act

²⁴³ Schedule 1, clause 3 of the DBP Act

²⁴⁴ The Secretary of the Department of Customer Service

²⁴⁵ Section 9 of the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020

²⁴⁶ Within the meaning of section 6.4(e) of the EP&A Act

²⁴⁷ Section 6.30 of the EP&A Act

- 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 with²⁴⁸. 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 met²⁴⁹.

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.

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 work²⁵⁰, which could include a fact relevant to the satisfaction of a precondition.

²⁴⁸ Section 6.10(1) of the EP&A Act

²⁴⁹ Section 67(5)(b) of the EP&A (Development Certification and Fire Safety) Regulation

²⁵⁰ Clause 8 of Schedule 5 of the B&DC Regulation

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.

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)²⁵¹.

The prescribed matters in relation to which a certifier may be satisfied in lieu of a council or consent authority are²⁵²:

- 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
- 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.

²⁵¹ Section 6.29 of the EP&A Act

²⁵² Section 73 of the EP&A (Development Certification and Fire Safety) Regulation

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 work²⁵³.

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 issued²⁵⁴.

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.*

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 BCA²⁵⁵. This 'suitability test' is one where certifiers are required to apply professional judgment 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.

²⁵³ Section 6.10(2) of the EP&A Act

²⁵⁴ Section 6.10(2) of the EP&A Act

²⁵⁵ Section 6.10(2)(c) of the EP&A Act

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.
- All essential services are installed and operational (including both fire safety and amenity services).
- 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.

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 certifier²⁵⁶.
- 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, FRNSW, 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.

²⁵⁶ Section 38 of the EP&A (Development Certification and Fire Safety) Regulation

- 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 such as:
 - Structural reliability and resistance.
 - Fire resistance.
 - Means of egress.
 - Access for people with a disability.
 - Fire safety services and equipment.
 - Damp and weatherproofing.
 - Sanitary facilities.
 - Healthy and amenity.
 - Sound transmission and insulation.
 - Energy efficiency.

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 building²⁵⁷. 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.,

- 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'²⁵⁸. 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.

²⁵⁷ Section 53 of the EP&A (Development Certification and Fire Safety) Regulation

²⁵⁸ Section 42(1) of the EP&A (Development Certification and Fire Safety) Regulation

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 should:

- Ensure that any fire safety systems serving the completed part of the building are fully operational and commissioned. Components of these systems may be located in, or affected by the incomplete part of the building.
- Ensure that the egress system for the building isn't adversely affected by the incomplete building or site.
- Ensure that access to and from the building is safe and does not present a hazard to occupants.
- Determine whether the partially completed building has required means of fire-fighting installed as per the BCA (as relevant).
- Determine whether there are any features of the site that would present a hazard to the occupants of the completed part of the building.

Example: The completed part of a building has a fire-isolated exit that complies with the BCA incorporating a compliant discharge to the public road. However, incomplete construction works have obstructed the discharge therefore creating a hazard to the occupants of the completed part of the building. A certifier determining an application for an OC would consider that there is a hazard to the occupants of the building and would not issue an OC.

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,
- 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 occasions²⁵⁹. 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 certifier²⁶⁰.

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.
- 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.

²⁵⁹ Section 67(5)(a) of the EP&A (Development Certification and Fire Safety) Regulation

²⁶⁰ Section 6.6(2)(b) of the EP&A Act and section 58 of the EP&A (Development Certification and Fire Safety) Regulation

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. This includes inspecting all units, not just a sample of units, as well as inspecting all common areas.
- 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 visually check matters raised by Fire and Rescue NSW in a final fire safety report or fire safety system report.

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 with²⁶¹. 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 missed²⁶² (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 evidence²⁶³.

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 consent²⁶⁴. In this regard:

- 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 consent²⁶⁵.

²⁶¹ Section 6.10(2)(d) of the EP&A Act

²⁶² Section 64 of the EP&A (Development Certification and Fire Safety) Regulation

²⁶³ Section 64 of the EP&A (Development Certification and Fire Safety) Regulation

²⁶⁴ Section 42(3)-(4) of the EP&A (Development Certification and Fire Safety) Regulation

²⁶⁵ Section 4.16(12) of the EP&A Act

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 consent²⁶⁶.
- If clarification is required, a certifier could seek the opinion of the consent authority regarding the consistency of a building

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.

²⁶⁶ Section 19(1)(b) of the EP&A (Development Certification and Fire Safety) Regulation.

The Code of Conduct²⁶⁷ 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.

Note: The EP&A (Development Certification and Fire Safety) Regulation has special requirements relating to the design of residential apartment developments²⁶⁸, which requires a statement from a qualified designer (being a statement that relates to the design quality of the development). A certifier must not issue an OC unless they have received the statement however, the statement is not attesting to the consistency of a building and a certifier cannot rely upon this statement for the purposes of determining consistency.

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.

5.1 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 certified²⁶⁹. 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 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.²⁷⁰ This component

²⁶⁷ Schedule 5 of the B&DC Regulation

²⁶⁸ Section 43 of the EP&A (Development Certification and Fire Safety) Regulation

²⁶⁹ Section 44 of the EP&A (Development Certification and Fire Safety) Regulation.

²⁷⁰ Section 45 of the EP&A (Development Certification and Fire Safety) Regulation.

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.

A BASIX completion receipt is not required before issuing an occupation certificate for a partially completed building.

5.9 Fire safety

5.9.1 Fire safety system report

Where a certifier receives an application for an OC for a residential apartment building, they must as soon as practicable after receiving the application request the Fire Commissioner to furnish them with a fire safety system report for the building²⁷¹. A fire safety system report relates to the 'relevant fire safety systems' in the building and will specify whether or not the Fire Commissioner is satisfied that the relevant fire safety system is capable of performing to at least the standard in the current FSS for the building²⁷².

A certifier must not issue an OC unless they have taken into consideration a fire safety system report for the building that has been provided within 10 days after the Fire Commissioner received the request.

relevant fire safety system means any of the following-

- a. a hydraulic fire safety system within the meaning of clause 165,
- b. a fire detection and alarm system,
- c. a mechanical ducted smoke control system.

hydraulic fire safety system means-

- a. a fire hydrant system
- b. a fire hose reel system
- c. a sprinkler system (including a wall-wetting sprinkler or drencher system), or
- d. any type of automatic fire suppression system of a hydraulic nature,

that is installed in accordance with a requirement of, or under, the Act or any other Act or law (including an order or a condition of an approval or some other sort of authorisation).

Note: The request to the Fire Commissioner for a fire safety system report may be combined with a request to the Fire Commissioner for a final fire safety report (where required).

What is expected of a certifier?

A certifier taking into consideration a fire safety system report should:

- Identify if there are any fire safety systems in the building that the Fire Commissioner isn't satisfied as to their performance.
- Determine what is required to ensure that the fire safety system will achieve the minimum required level of performance.
- Identify if documentary evidence is required to demonstrate the performance of the fire safety system.
- Determine whether a further inspection of the building is required by the certifier.

²⁷¹ Section 51(1)-(2) of the EP&A (Development Certification and Fire Safety) Regulation

²⁷² Section 51(7) of the EP&A (Development Certification and Fire Safety) Regulation

Typically, a principal certifier will accompany officers of FRNSW on any inspection of the building carried out for the purposes of a fire safety system report. FRNSW also indicate that the principal certifier should organise to have representatives from each fire system installer present.²⁷³

5.9.2 Final fire safety report

Where a certifier receives an application for an OC for a residential apartment building that was required to be referred to the Fire Commissioner during the CC stage (i.e. for the purposes of an initial fire safety report), they must as soon as practicable after receiving the application request the Fire Commissioner to furnish them with a final fire safety report for the building²⁷⁴.

A final fire safety report for a building will specify whether or not the Fire Commissioner is satisfied that:

- The building work complies with the performance solution in respect of a Category 2 fire safety provision²⁷⁵ that was the subject of the CC, and
- All of the fire hydrants in the fire hydrant system will be accessible for use by FRNSW, and
- All of the couplings in the fire hydrant system will be compatible with those of the fire appliances and equipment used by FRNSW.

A certifier must not issue an OC unless they have taken into consideration a final fire safety report for the building that has been provided within 10 days after the Fire Commissioner received the request.

What is expected of a certifier?

A certifier taking into consideration a final fire safety system report should:

- Identify if there are any items in the report where the Fire Commissioner is not satisfied.
- Identify if documentary evidence is required to demonstrate that the unsatisfactory matters have been rectified.
- Determine whether a further inspection of the building is required by the certifier.

It is expected that a principal certifier will accompany officers of FRNSW on any inspection of the building carried out for the purposes of a final fire safety report.

5.9.3 Performance solutions in respect of a fire safety requirement

Where the CC for the building work was accompanied by a performance solution report that relates to a fire safety requirement, this report must be considered by the certifier before issuing an OC.

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.

A certifier must not issue an OC in these circumstances unless²⁷⁶:

- The certifier is satisfied that the relevant building work was constructed or installed in accordance with the performance solution report that accompanied the CC, and
- If a fire safety engineer was required to be involved in the preparation of the performance solution report, the certifier has obtained a compliance certificate or written report prepared by the fire safety engineer that includes a statement that the building work relating to the performance solution has been completed and is consistent with the performance solution.

²⁷³ NSW Fire and Rescue, Fire safety guideline – Technical information (D17/61758) – Fire safety system report (FSSR) process

²⁷⁴ Section 50 of the EP&A (Development Certification and Fire Safety) Regulation

²⁷⁵ Schedule 2 of the EP&A (Development Certification and Fire Safety) Regulation

²⁷⁶ Section 40 of the EP&A (Development Certification and Fire Safety) Regulation

What is expected of a certifier?

A certifier assessing a performance solution for a fire safety requirement should:

- Carry out reasonable visual checks during a site inspection to verify that building work identified in the performance solution report has been installed.
- Ensure that documentary evidence has been provided that demonstrates that the building work has been constructed or installed in accordance with the performance solution.
- Ensure that any documentary evidence relied upon is appropriate for the specific matter being attested to.
- Where relevant, verify that fire safety systems have been commissioned and have been interfaced with other systems as necessary.

Note: The performance solution report (related to a fire safety requirement) to be considered by a certifier before issuing an OC must be the same performance solution report that accompanied the CC. That is, the performance solution report must be the one that was previously considered and met the statutory requirements for the issuing of a CC.

5.9.4 Fire safety certificates

A certifier must not issue an OC for a building unless a fire safety certificate has been issued for the building²⁷⁷.

A fire safety certificate is issued by or on behalf of the building owner and confirms that each of the fire safety measures, as listed on the FSS for the building, have been installed and checked by a properly qualified person. A fire safety certificate is a document required to accompany an application for an OC.

Where an application for an OC relates to the whole of the building a final fire safety certificate must be provided. Where the application relates to a partially completed building a final fire safety certificate or an interim fire safety certificate can be provided.

What is expected of a certifier?

A certifier should check a fire safety certificate that has been provided to ensure that:

- Each fire safety measure has been assessed and was found to be capable of performing to at least the standard specified in the current FSS for the building.
- The assessment of each fire safety measure was carried out within 3 months of the date of the certificate.
- Each fire safety measure and their standard of performance corresponds with the current FSS for the building.
- Evidence is provided in addition to the certificate to verify that each measure was installed and checked by a properly qualified person.

A certifier should also undertake basic practical checks when inspecting the building, wherever possible, to confirm that the required fire safety measures have been installed and are operational.

²⁷⁷ Section 41(1) 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 a construction 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 contain²⁷⁸:

- 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 portal²⁷⁹:

- 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.

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 OC²⁸⁰.

5.10.3 The making of the statement on the occupation certificate

In issuing an OC for new residential apartment building a certifier is making a statement to the effect:

- The health and safety of the occupants of the building have been taken into consideration (where a partial OC is issued).
- A current development consent is in force for the building.
- For the building work a current CC has been issued with respect to the plans and specifications for the building.

²⁷⁸ Section 39(1) of the EP&A (Development Certification and Fire Safety) Regulation

²⁷⁹ Section 39(2) of the EP&A (Development Certification and Fire Safety) Regulation

²⁸⁰ Section 53 of the EP&A (Development Certification and Fire Safety) Regulation

- The building is suitable for occupation or use in accordance with its classification under the BCA
- A fire safety certificate has been issued for the building
- A report from the Fire Commissioner has been considered (if required)

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 new residential apartment building, the key statutory requirements for a certifier to consider are:

- Have the preconditions to the issuing of an OC that are specified in the development consent been complied with?²⁸¹
- Is a development consent in force with respect to the building?²⁸²
- Has a CC been issued with respect to the plans and specifications for the building?²⁸³
- Is the completed building suitable for occupation or use in accordance with its classification under the BCA?²⁸⁴
- Is the application in the form approved by the Planning Secretary and does it contain all of the information specified in the form?²⁸⁵
- Is the application accompanied by²⁸⁶:
 - A copy of the development consent?
 - A copy of any relevant CC?
 - A copy of the fire safety certificate?
 - A copy of any relevant compliance certificate?
 - A copy of the BASIX certificate²⁸⁷?
- 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?²⁸⁸
- Is the building the subject of the OC one that needs to be referred to the Fire Commissioner for the purposes of a Final Fire Safety Report?²⁸⁹
- If a Final Fire Safety Report has been provided - has it been taken into consideration?²⁹⁰

²⁸¹ Section 6.10(1) of the EP&A Act

²⁸² Section 6.10(2) of the EP&A Act

²⁸³ *ibid*

²⁸⁴ *ibid*

²⁸⁵ Section 37(1) of the EP&A (Development Certification and Fire Safety) Regulation

²⁸⁶ Section 37(2) of the EP&A (Development Certification and Fire Safety) Regulation

²⁸⁷ Section 37(5) of the EP&A (Development Certification and Fire Safety) Regulation

²⁸⁸ Section 37(3) of the EP&A (Development Certification and Fire Safety) Regulation

²⁸⁹ Section 50 of the EP&A (Development Certification and Fire Safety) Regulation

²⁹⁰ *ibid*

- j. Has a request been made to the Fire Commissioner for a fire safety system report?²⁹¹
- k. If a fire safety system report has been provided, has it been taken into consideration?²⁹²
- l. If the application includes a performance solution²⁹³:
 - Is the certifier satisfied that the relevant building work was constructed or installed in accordance with the performance solution report that accompanied the CC?
 - 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?
- m. Has a fire safety certificate been issued for the building?²⁹⁴
- n. Where the application relates to a partially completed building, does the building constitute a hazard to the health and safety of the occupants?²⁹⁵
- o. Is the design and construction of the building consistent with the development consent?²⁹⁶
- p. Has the statement from the qualified designer, verifying that the development achieves the design quality as shown in the plans and specifications of the CC, having regard to the design quality principles, been provided?²⁹⁷
- q. Have the BASIX commitments required to be monitored by the certifier been fulfilled?²⁹⁸
- r. Where the application relates to the whole building, has an application been made to the Planning Secretary for a BASIX completion receipt?²⁹⁹
- s. 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?³⁰⁰
- t. 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?³⁰¹
- u. Has the building compliance declaration issued by a registered building practitioner under the DBP Act been provided before or when the application for an OC is made?³⁰²
- v. For regulated building work which has been authorized and commenced before 1 July 2021 but was not completed before that day, have copies of all relevant designs been lodged before an application for an OC is made?³⁰³

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 new residential apartment building, 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?³⁰⁴
- b. Where the application is refused, does the determination include the reasons for refusal and advise the applicant of their rights of appeal?³⁰⁵

²⁹¹ Section 51 of the EP&A (Development Certification and Fire Safety) Regulation

²⁹² *ibid*

²⁹³ Section 40 of the EP&A (Development Certification and Fire Safety) Regulation

²⁹⁴ Section 41 of the EP&A (Development Certification and Fire Safety) Regulation

²⁹⁵ Section 42(1) of the EP&A (Development Certification and Fire Safety) Regulation

²⁹⁶ Section 42(3)-(4) of the EP&A (Development Certification and Fire Safety) Regulation

²⁹⁷ Section 43 of the EP&A (Development Certification and Fire Safety) Regulation

²⁹⁸ Section 44 of the EP&A (Development Certification and Fire Safety) Regulation

²⁹⁹ Section 45 of the EP&A (Development Certification and Fire Safety) Regulation

³⁰⁰ Section 48 of the EP&A (Development Certification and Fire Safety) Regulation

³⁰¹ Section 46 of the EP&A (Development Certification and Fire Safety) Regulation

³⁰² Section 17(5) of the DBP Act

³⁰³ Schedule 1, clause 3 of the DBP Act

³⁰⁴ Section 39(1) of the EP&A (Development Certification and Fire Safety) Regulation

³⁰⁵ *ibid*

- 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?³⁰⁶
- d. Does the OC contain³⁰⁷:
 - 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
 - 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
 - o A fire safety certificate has been issued for the building, and
 - o A report from the Fire Commissioner has been considered (where required).
 - 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 person who prepared the report or on whose behalf the report was prepared,
 - o If the person who prepared the report is an accredited practitioner (fire safety) and a registered certifier – the certifier's registration number .
- e. Is the OC accompanied by a fire safety certificate and fire safety schedule?³⁰⁸
- f. 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?³⁰⁹
- g. Have all compliance declarations required for the building work under the DBP Act been lodged in accordance with the DBP Act? Have any instances of non-compliance specified in the compliance declarations been considered?³¹⁰

306 Section 39(2) of the EP&A (Development Certification and Fire Safety) Regulation

307 Section 49(1) of the EP&A (Development Certification and Fire Safety) Regulation

308 Section 49(2) of the EP&A (Development Certification and Fire Safety) Regulation

309 Section 53 of the EP&A (Development Certification and Fire Safety) Regulation

310 Section 27 of the DBP Act

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 certificates³¹¹, are not provided or requested, 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 OC³¹².

Common types of documentary evidence include:

- Compliance certificates issued under the EP&A Act³¹³.
- 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.
- Test certificates, reports, information and the like for products, materials or components.
- Information from authorities or service providers.

³¹¹ Within the meaning of section 6.4(e) of the EP&A Act

³¹² Section 39 of the EP&A (Development Certification and Fire Safety) Regulation

³¹³ Section 6.4(e) of the EP&A Act

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 matter³¹⁴.

Certifiers may also rely upon certain information provided by the applicant, such as details of expected population, or the proposed use and operation 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: With regard to an application for an OC a certifier determining the compliance of a fire hydrant system installation may potentially require documentary evidence from:

- *The hydraulic consultant who designed the system,*
- *The fire engineer where there is a relevant performance solution,*
- *The licensed plumber who installed the system,*
- *The licensed electrician who carried out work on the system,*
- *The practitioner who installed fire protection measures or systems to penetrations,*
- *The practitioner who commissioned the system.*

There should also be an overarching document attesting compliance, which may include and reference other supporting documentation. The fire hydrant system will also need to be assessed by a properly qualified person for the purposes of issuing a fire safety certificate.

The certifier should also carry out visual checks of the fire hydrant system during inspections of the building and prior to issuing an OC.

Note: It is an offence to provide false or misleading information to a certifier³¹⁵ 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 that³¹⁶:

- 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.

³¹⁴ Sections 22(1)(c) and 40(2)(b) of the EP&A (Development Certification and Fire Safety) Regulation

³¹⁵ Section 307B of the Crimes Act

³¹⁶ Section 6.4(e) of the EP&A Act

A certifier relying upon a compliance certificate issued by another person, is entitled to assume³¹⁷:

- 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 certifier³¹⁸.

A compliance certificate may certify strict, substantial or other compliance with a relevant matter³¹⁹, 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'³²⁰ 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 given³²¹.

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.html?id=155>

https://basix.nsw.gov.au/iframe/images/BASIX_MultiCertificate_DataChecklist_2017.pdf

317 Section 6.30 of the EP&A Act

318 *ibid*

319 Section 6.4(e) of the EP&A Act

320 Clause 2 of Schedule 1 of the B&DC Regulation

321 Sections 4 and 5 of the EP&A (Development Certification and Fire Safety) Regulation

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 information³²².

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.
- 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 elements³²³;
- Determination of fire hazard properties³²⁴; and
- Ceilings having a resistance to the incipient spread of fire³²⁵.

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

³²² © Commonwealth of Australia and States and Territories 2019, published by the Australian Building Codes Board

³²³ A5.4 - National Construction Code 2019 – Volume One Amendment 1

³²⁴ A5.5 - National Construction Code 2019 – Volume One Amendment 1

³²⁵ A5.6 - National Construction Code 2019 – Volume One Amendment 1

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.

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 upon³²⁶.

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 above mentioned 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.

³²⁶ Freixas v Building Professionals Board (No 1) [2020] NSWCATOD 27

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.
- 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 or the expected occupant numbers, 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

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, evidence attesting to the structural stability of a high-rise building should be sufficiently robust given the potential consequences if failure occurs.
- 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.
- Any limitations or conditions on the documentary evidence.

Example: A certifier is assessing an application for a CC for a 15 storey building. The applicant is proposing to use a unique product to clad large portions of the building's façade. The applicant has provided a certifier with a certificate of conformity attesting to its compliance with the BCA for use as an external cladding. However, the certificate includes a limitation that it can only be used on buildings of Type C construction and therefore does not meet the requirements of the BCA in this particular context.

Example: A certifier assessing an application for a CC for a new 6 storey residential flat building 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 facts³²⁷. 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 paper³²⁸. The assessment and consideration of the information and documentation accompanying an application is a critical part of the certification process.

³²⁷ Clause 8 of Schedule 5 of the B&DC Regulation

³²⁸ Joint Select Committee on the Quality of Buildings – report upon the quality of buildings – July 2002

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.
- 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 inspections³²⁹ 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 arise³³⁰.

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 excavation along a property boundary), the principal certifier should immediately refer the matter to the council.

³²⁹ Section 65 of the EP&A (Development Certification and Fire Safety) Regulation

³³⁰ 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 certifier³³¹.

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 conditions³³². A CC and its approved plans and specifications are taken to form part of the development consent³³³.

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 WDN³³⁴. 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 with³³⁵. A copy of the notification must also be given to the owner of the land to which the WDN relates³³⁶.

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 notice³³⁷. These guidelines include mandatory requirements for certifiers such as the approved form of a notice.

³³¹ Section 6.31(1) of the EP&A Act

³³² Section 66(1) of the EP&A (Development Certification and Fire Safety) Regulation

³³³ Section 4.16(12) of the EP&A Act

³³⁴ Section 66(2) of the EP&A (Development Certification and Fire Safety) Regulation

³³⁵ Section 6.31(2) of the EP&A Act

³³⁶ Section 66(8) of the EP&A (Development Certification and Fire Safety) Regulation

³³⁷ 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 work³³⁸. 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
- If the matter was the subject of a complaint made to the certifier, advise the complainant of any action taken (where relevant).

³³⁸ Section 6.6(2)(b) of the EP&A Act

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 development³³⁹ 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.

³³⁹ 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
D&BP Act	Design and Building Practitioners Act 2020
D&BP Regulation	Design and Building Practitioners Regulation 2021
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 Regulation 2000
FRL	Fire resistance level
FRNSW	Fire and Rescue NSW
FSS	Fire safety schedule
NSW	New South Wales
OC	Occupation certificate

Term	Meaning
Accredited practitioner (fire safety)	Has the same meaning as Schedule 2 of 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 2	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

Term	Meaning
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
Disciplinary action	Means disciplinary action against a registered certifier under Part 4 of the B&DC Act
Fire Commissioner	Has the same meaning as Schedule 2 of the EP&A (Development Certification and Fire Safety) Regulation
Fire safety requirement	Has the same meaning as Schedule 2 of the EP&A (Development Certification and Fire Safety) Regulation
Fire safety schedule	Has the same meaning as Schedule 2 of 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 Schedule 2 of the EP&A (Development Certification and Fire Safety) Regulation
Residential apartment building	Has the same meaning as section 3(1) of the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020
Secretary	Has the same meaning as section 4(1) of the B&DC Act

Appendix B – Reference Panel and Working Groups

The September 2020 edition of the standard was developed with input from the following Reference Group and Working Parties.

Reference Group

Name	Representing
Michael Lambert (Chair)	Self
Jerry Tyrrell	Tyrrells Property Inspections
Stephan Netting	NSW Fire and Rescue
Sean Conway	Property Council of Australia
Peter Rosier	Law Society of NSW

Name	Representing
Tim Tuxford Tim O'Reilly	Australian Institute of Building Surveyors
Andrew Rys Steve Watson Stephen Natilli Robert Marinelli	Association of Accredited Certifiers
Nathan Semos	Fire Protection Association Australia
Tony Grist Michael Hay	Australian Institute of Architects
Robert Whittaker AM FRSN	Australian Institute of Building
Jamie Loader	Development and Environmental Professionals Association
Madeline Laurenson Edmund Ang	Engineers Australia
Brad Armitage Marcus Vartiainen	Housing Industry Association
Nick Soden	Hydraulic Consultants Australasia
Cameron Alexander	Local Government NSW
Alex Henebery	Master Builders Association of NSW
Gordon Stalley	National Fire Industry Association
Rebecca Cleaves	NATSPEC
Kingsley Lunt	Royal Institution of Chartered Surveyors

Name	Representing
Sean McNamara	Strata Community Association
Sam Stone, Urban Development Institute of Australia	Sam Stone, Urban Development Institute of Australia

Fire Safety Working Group

Name	Representing
Michael Lambert (Chair)	Self
Kingsley Lunt	Royal Institution of Chartered Surveyors
Nathan Semos	Fire Protection Association Australia
Stephan Netting	NSW Fire and Rescue
Marcus Vartiainen	Housing Industry Association
Cameron Alexander	Local Government NSW
Gordon Stalley	National Fire Industry Association
Jerry Tyrrell	Tyrrells Property Inspections
Nick Soden	Hydraulic Consultants Australasia
Tom Newton	Engineers Australia
Russell Grove	Australian Institute of Building Surveyors

Wet areas & Waterproofing sub-group

Name	Representing
Michael Lambert (Chair)	Self
Marcus Vartiainen	Housing Industry Association
Kingsley Lunt	Royal Institution of Chartered Surveyors
Cameron Alexander	Local Government NSW
Jerry Tyrrell	Tyrrells Property Inspections
Alex Henebery	Master Builders Association of NSW
Nick Kukulka	Australian Institute of Building Surveyors
Chris Nicolson	Department of Customer Service

Consistency of CC/OC with consent

Name	Representing
Michael Lambert (Chair)	Self

Name	Representing
Kingsley Lunt	Royal Institution of Chartered Surveyors
Emma Strickland	Australian Institute of Building Surveyors
Jerry Tyrrell	Tyrrells Property Inspections
Paul Vergotis	Law Society of NSW

Occupation certificates

Name	Representing
Michael Lambert (Chair)	Self
Tim O'Reilly	Australian Institute of Building Surveyors
Cameron Alexander	Local Government NSW
Sarnia Rusbridge	Engineers Australia