

**Submission
No 18**

INQUIRY INTO FURTHER INQUIRY INTO THE REGULATION OF BUILDING STANDARDS

Organisation: The Hills Shire Council

Date Received: 26 August 2021



27 August 2021

The Director
Public Accountability Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Sir/ Madam

Re: Further Inquiry into the regulation of building standards

Thank you for allowing Council to make a submission on the parliamentary enquiry into the regulation of Building Standards in NSW. Please note that due to time constraints this submission has not been the subject of a report to Council and therefore has not been endorsed by Council. Instead it reflects the concerns raised by Council staff.

I note the terms of reference that the Public Accountability Committee inquire into and report on are:

- (a) the efficacy and adequacy of the government's regulation of building standards and specifically,
 - (i) the cost, effectiveness and safety concerns arising from the use of flammable cladding,
 - (ii) private certification of and engineering reports for construction projects, and
- (b) any other related matter.

The submission has adopted the headings as identified in the terms of reference. To assist the committee we have also included a details, opinions and suggested recommendations.

1. EFFICACY AND ADEQUACY OF THE GOVERNMENT'S REGULATION OF BUILDING STANDARDS

1.1. BUILDING CODE OF AUSTRALIA

The Building Code of Australia ("BCA") is and always has been clear that external walls of certain buildings must be non-combustible.

The BCA was first adopted in New South Wales on 1 January 1992 (BCA 1990) and was entirely prescriptive. The first performance based version adopted was BCA 1996 which took effect on 1 July 1997. The following is an extract taken from Clause 3.1(b) of Specification C1.1 of BCA 1990; "*external walls, common walls and the flooring and floor framing of lift pits must be non-combustible*". It is of note that the term "non-combustible" was a defined term and was also

required for certain type of external walls under the previous building legislation in NSW, this being Ordinance No.70 (1973-1992).

The BCA is an acceptable document, adopted by all States and Territories (subject to variations) that can produce the desired result of providing effective and proportional regulations that are no more restrictive than necessary in the public interest.

1.2. NSW LEGISLATION

The BCA is adopted under the Environmental Planning and Assessment Act, 1979 (“EP&A Act”) and the Environmental Planning and Assessment Regulation 2000 (“EP&A Regs”).

All proposed building works must be assessed by a certifier and confirmed that it complies with the BCA before issuing a construction certificate. The role of a certifier is of the utmost importance as they are the only public official responsible for assessing the plans, specifications and reports to determine if the proposed building work will comply with the BCA. Any error or omission by the certifier may not only result in the building failing to meet compliance with the approved plans but not complying with the BCA.

The EP&A Regs clearly state that proposed building work must comply with the BCA and confirms who is responsible for determining compliance before the construction certificate is issued. This provides clear and adequate regulation that promotes the proper construction of buildings, including the protection of the health and safety of their occupants.

1.3 GUIDANCE MATERIAL PRODUCED BY GOVERNING BODIES

Numerous governing bodies across Australia are interested in ensuring the BCA is well understood and produce guidance material from time to time, including the Australian Building Codes Board, NSW Government departments and relevant fire brigades.

In April 2015, the Metropolitan Fire Brigade issued a Post Incident Analysis Report into the Lacrosse building fire in Melbourne. The report concluded the combustible external aluminium composite panel on the building contributed to the spread of fire and was not compliant with the BCA.

In August 2015, the NSW Department of Planning & Environment issued a planning circular BS 15-001 titled “External walls and cladding”. The circular raised awareness and provided advice regarding matters that needed consideration when assessing the suitability of external wall systems and attachments to external walls, including aluminium composite panels.

In April 2016, the CSIRO issued a detailed document titled “Fire safety guideline for external walls”. The guideline provided clarification of what is considered an external wall and what is considered an attachment to an external wall. The guideline also identified which fire tests are required by the BCA for the different elements of an external wall.

In August 2016, the Australian Building Codes Board released an advisory note titled “Fire Performance of External Walls and Cladding”. The advisory note provided clarification between an external wall and an attachment to an external wall, confirmed which fire tests apply to external cladding and the key issues that should be considered before accepting a certificate of conformity for aluminium composite panels.

These documents were produced in response to the Lacrosse building fire that occurred in November 2014. The documents all pre-date the tragic fire that occurred at the Grenfell Tower in London in June 2017.

The guidance material produced by the governing bodies was clear, concise and aligned with the requirements of the BCA. However, the documents were reactionary and only produced after a significant fire occurred in a prominent location. This was approximately 20 years after aluminium composite panels began to be installed on buildings.

Recommendation:

1. A process be setup where builders, building designers, product suppliers, certifiers, Councils etc can advise NSW Fair Trading or the Department of Planning, Industry and Environment when there is a broad issue occurring as a result of the industry (or segments of the industry) not complying with the BCA or legislation.

1.4. COST OF EXTERNAL COMBUSTIBLE CLADDING

The cost incurred by The Hills Shire Council to investigate, assess and regulate the remediation of approximately 80 buildings with external combustible cladding is expected to be approximately \$500,000.

Building owners with external combustible cladding have advised investigation, testing and obtaining professional advice to identify the external combustible cladding ranges from approximately \$10,000 to \$40,000 per building. This depends on the number of different external combustible cladding materials, location of the cladding and the size of the building.

24 development applications have been approved by The Hills Shire Council for the replacement or upgrading of external combustible cladding. The cost of building works ranges from approximately \$50,000 to \$2,200,000, with most falling within \$100,000 to \$500,000 (excluding the cost of professional advice, design or certification).

Building owners with external combustible cladding have advised building insurance premiums have doubled or tripled, and the excess has risen by 10 to 100 times, some up to \$1,000,000.

1.5. SAFETY CONCERNS ARISING FROM THE USE OF COMBUSTIBLE CLADDING

The safety concerns arising from the use of combustible cladding are well known and documented, including an increased risk of:

- Fire spread externally via the façade of the building between storeys, fire compartments, public corridors and fire exits,
- Fire spread to adjoining buildings,
- Fire exits being unusable in the event of a fire and reduced time of safe occupant egress,
- Structural collapse and falling debris causing injury, property damage or the spread of fire,
- Fire services not being usable due to fire spread, radiant heat or falling debris.

2. PRIVATE CERTIFICATION AND ENGINEERING REPORTS FOR CONSTRUCTION PROJECTS**2.1. PRIVATE CERTIFICATION – CONFLICT OF INTEREST**

The Hills Shire Council remains opposed to the private certification system in the current form due to the inherent perceived and real conflicts of interest that have been unable to be efficiently overcome.

The role of the private certifier (as the public official) is to ensure the proposed building works comply with the BCA and the completed building is suitable for occupation. This is an important public function with potential impacts on public health, safety and amenity that must be carried out impartially, ethically and in the public interest. The certifier is the public official responsible for identifying the non-compliances and withholding the occupation certificate until rectified.

This is not occurring to the standard expected by the public and occupation certificates are being issued for buildings that are not suitable for occupation. The non-compliances are identified when an inspection is conducted by NSW Fair Trading inspectors, FRNSW inspectors, Council staff or other third parties engaged by the owners. This typically occurs months or years after the occupation certificate was issued.

Significant non-compliances are identified by Government inspections and by Council staff, based on a visual inspection of the completed building. In contrast, the private certifier inspects the

building multiple times during construction and at completion and must be satisfied the building is suitable for occupation, yet somehow fails to identify the issues.

The problem does not arise from a lack of skill or knowledge on behalf of the private certifier. There is a lack of willingness to act impartially, ethically and in the public interest due to an inherent conflict of interest - the developer appoints the private certifier.

The developer's primary interest is obtaining a return on their investment. The private certifier is reliant upon the developer for the success of their business and livelihood. The private certifier has been appointed on the current development but also wants to be engaged for future developments.

This was identified as an issue in the Parliamentary Briefing Paper 9/97 in 1997, which stated that private certifiers do have a financial interest in the process of approving applications, in the sense that they may be under pressure to issue an approval to ensure their services are used in the future.

The white paper that introduced the private certification system argued that private certifiers will be held accountable through the marketplace as their employment opportunities will be determined by their reputation. This is true; however, it has tended to operate in the opposite way to how it was intended.

Where a private certifier is found to be too strict and insists on every part of the development being as it should be, the developer chooses another private certifier who is willing to not be as diligent and is prepared to disregard some significant non-compliances that will save the developer time and money. The certifier who has a reputation of being strict and enforces compliance is not engaged.

Council staff has met with multiple private certifiers that have issued occupation certificates for new apartment buildings that contained significant fire safety non-compliances and required fire safety orders. The common responses were "If I don't approve it, someone else will and I will be out of work" and "I know it doesn't comply but that is industry standard".

Recommendation:

1. The conflicts of interest that exist within the private certification system be reviewed and meaningful changes be made to the engagement process that prevents a private certifier being reliant upon the developer for their next job.

2.2. PRIVATE CERTIFICATION – EXTERNAL COMBUSTIBLE CLADDING

The evidence available to Council staff indicates that some private certifiers knew external combustible cladding did not comply with the BCA but issued the approvals.

As part of an investigation into external combustible cladding on a building in Norwest, Council received a copy of email correspondence between a fire engineer and a private certifier from May 2011. The correspondence confirms the fire engineer advised the certifier the cladding consisted of "25%-30% combustible material" and "it technically does not meet the BCA DTS requirements". Despite the advice, the private certifier chose to approve the construction certificate with the external combustible cladding on the façade of the building without a Performance Solution.

After the Lacrosse building fire in Melbourne and the guidance material was published by the governing bodies detailing the issues, some private certifiers continued to issue approvals for external combustible cladding. Specific examples include:

- A new building in Castle Hill where the construction certificate was issued in October 2014 and the occupation certificate was issued in June 2016.
- A new building in Norwest where the construction certificates were issued between December 2014 to July 2016 and the occupation certificate was issued in December 2016.

- A new building in Rouse Hill where the construction certificates were issued between December 2015 to December 2016 and the occupation certificate was issued in September 2017.

A search of the public register indicates two of the three private certifiers responsible for the buildings had a disciplinary history before issuing the approvals. No disciplinary action was published against any of the certifiers for their involvement in the abovementioned buildings. The three private certifiers are all still registered and can continue issuing approvals.

The BCA and the legislation requiring compliance with the BCA are capable of achieving the desired results. However, the private certification system relies upon private certifiers (as a public official) checking the work of the development industry and NSW Fair Trading (as a regulator) checking the work of private certifiers.

There have been inadequacies identified in both layers. Some private certifiers have failed to fulfil their duties as public officials, breached multiple Acts in doing so and left building owners with huge rectification costs. The regulator could have been more proactive in the audit, investigation and disciplinary action against private certifiers who failed to exercise their functions correctly. This does not achieve the desired outcome of the legislation or ensure the appropriate scrutiny and review of private certifiers is achieved to provide confidence in the system.

Recommendation:

1. NSW Fair Trading review the list of buildings (held by the NSW Cladding Taskforce) that have external combustible cladding. Identify the buildings constructed after 2015, identify the private certifier who issued the construction certificate/ occupation certificate, investigate the breaches of the Act and take the appropriate disciplinary action against the private certifiers responsible.

2.3. APPROVAL OF FIRE ENGINEERING REPORTS

On 1 July 2021, the provisions of A2.2(4) of the BCA came into force. This requires a performance-based design brief to be prepared in consultation with relevant stakeholders before any Performance Solutions being developed (including Performance Solutions developed by a fire engineer).

Fire & Rescue NSW released a position paper stating that the relevant fire service/ brigade is a stakeholder for Class 2-9 developments within NSW where the Performance Solution relates to fire safety.

In response to the position paper, multiple private certification firms published their position statements advising they will not be consulting FRNSW as a relevant stakeholder before issuing Performance Solutions relating to fire safety due to the commercial interests of their clients (ie. the referrals will slow down the approvals).

This is an example of how some private certifiers have failed to balance their role as public officials and private businesses due to the inherent conflict of interest.

2.4. RETROSPECTIVE FIRE ENGINEERING REPORTS (PERFORMANCE SOLUTIONS)

It has become "industry standard" for a fire engineer to be engaged towards the end of a new apartment development to write a fire engineering report (Performance Solutions) to 'justify' or 'rationalise' why the building does not comply with the BCA.

The non-compliances typically arise from construction defects or non-compliance with the approved plans that were not identified by the private certifier before issuing the construction certificate.

There is no provision in the EP&A Act or EP&A Regs that permit a fire engineer to prepare a retrospective Performance Solution or for the private certifier to approve it. However, it has become “industry standard”.

Dozens of examples can be provided if required, however, a recent example identified by Council staff was a new apartment building in North Kellyville. After the building was constructed, the fire engineer wrote a fire engineering report to “justify” 8 significant non-compliances with the BCA and the non-compliances were not rectified. This is in place of the private certifier identifying the issues during the critical stage inspections and taking the appropriate action to ensure the building is constructed in accordance with the BCA/approved plans.

There are requirements for a private certifier to inspect the site to confirm work has not commenced before issuing a construction certificate. However, there are no requirements for the fire engineer to inspect the site to confirm the work has not commenced before issuing a fire engineering report (performance solution report).

Recommendations:

1. The Environmental Planning and Assessment Act be updated to include a provision that any fire engineer who prepares a Performance Solution relating to fire safety must have conducted a site inspection not less than 2 days prior to issuing the Performance Solution report to confirm the building works subject to the Performance Solution have not commenced.
2. The Environmental Planning and Assessment Act be updated to make it an offence for a fire engineer to issue a Performance Solution for building work that has already commenced.

2.5. CONFIRMING COMPLIANCE WITH FIRE ENGINEERING REPORTS

A certifier is responsible for confirming the building is suitable for occupation before the building can be occupied. Before issuing the occupation certificate, the certifier is required to conduct a final inspection.

However, it has become “industry standard” to collect certificates from other parties that declare certain parts of the building comply with the relevant building standards instead of conducting a physical inspection of that part of the building. The certificates are issued by the developer, fire engineer, building designers and tradespeople who did the work. This process has been referred to as “self-certification” in recent years (ie. the person who completed the work writes a certificate stating their work complies and finalises the matter).

This practice of “self-certification” was the subject of multiple disciplinary decisions involving the NSW Building Professionals Board around 2010. It was concluded by the Tribunal that a private certifier cannot blindly rely upon a certificate. The certifier must conduct independent checks, such as a visual inspection of the item if it is exposed.

Private certifiers continue to issue occupation certificates based upon layers of “self-certification” certificates that may not reflect the physical building. Council staff have inspected many recently completed apartment buildings that have occupation certificates issued by private certifiers. During these inspections, it has been confirmed the layers of “self-certification” certificates do not reflect the physical building and provisions for fire safety (particularly fire engineering reports) are inadequate despite certificates being issued that state otherwise.

For example, Council staff recently conducted an inspection of an apartment building in North Kellyville where an occupation certificate had been issued. The fire engineer’s report related to external cladding and required the walls to be constructed in a very specific way with very specific materials. The external walls were not constructed following the requirements of the fire engineers report.

The private certifier issued the occupation certificate relying upon a certificate from the fire engineer. The fire engineer issued their certificate relying upon a certificate from the plasterer that stated the external walls had been constructed in a very specific way and used complex language involving fire safety concepts that a typical plasterer would not be expected to know. The plasterer advised Council staff that the fire engineer had written the certificate and he was requested to sign it.

Another example includes a recently completed apartment building in North Kellyville where the fire engineer's report required the smoke detectors to be located within 1.5 m of a door. The smoke detectors were attached to the ceiling and were visible to anyone who took the time to conduct an inspection. The smoke detectors were located approximately 4 m away from the door instead of 1.5 m as per the requirements of the fire engineers report. However, the occupation certificate was issued referencing a certificate from the fire engineer who in turn referenced a certificate from the installer of the smoke detectors.

Recommendations:

1. The Environmental Planning and Assessment Act be updated to include a requirement that a report or certificate be obtained from the fire engineer that confirms compliance with the fire engineering report has been achieved prior to an occupation certificate being issued.
2. The Environmental Planning and Assessment Act be updated to include an offence for a fire engineer to issue the abovementioned report or certificate when the building work has not been completed in strict accordance with the fire engineering report.
3. NSW Fair Trading audit the work of private certifiers, particularly developments that include Performance Solutions to confirm the completed development actually complies with design specified in the approved fire engineering report.

3. OTHER RELATED MATTERS

3.1. NOTIFICATION OF SIGNIFICANT FIRE SAFETY ISSUES

As public officials, private certifiers are required to give written notice to Council within 2 days of becoming aware of a 'significant fire safety issue' with an existing building under Clause 129D and Clause 162D of the EP&A Regs. This includes issues that are identified before issuing a complying development certificate, construction certificate or occupation certificate.

Between 2014 and 2021, hundreds of approvals have been issued by private certifiers for existing buildings that have been identified as having an external combustible cladding. This includes shopping centres, office buildings and mixed-use developments.

A search of Council's records was unable to locate any evidence of a private certifier issuing a written notice to Council advising of the presence of external combustible cladding on any buildings despite being an obvious 'significant fire safety issue'.

It is the experience of Council staff that private certifiers fail to meet their obligations and notify Council of a 'significant fire safety issue' while fulfilling their role as a public official.

In December 2014, the NSW Department of Planning & Environment issued a technical guideline concerning the notification of significant fire safety issues. The guideline states that "sufficient information should be provided by the certifier in the notification to allow the council to effectively fulfil its responsibilities. It is not sufficient to issue a generic notification that, for example, simply states that the entire building does not comply with the current version of the Building Code of Australia. Also, a generic notification does not satisfy the requirements of the Regulation."

Despite the guidelines issued by the Department of Planning & Environment, from our experience, we rarely received written notification of fire safety issues and if they are received, it is in the form of a generic template letter which is understood to have been prepared by the Association of Accredited Certifiers (recently changed their name to the Association of Australian Certifiers).

The generic template states the entire building does not comply with the current BCA. The notification has been sent to Council to remove a perceived insurance risk by the certifier. The council should consider the written notification “confidential”, (ie. not advise the building owner that the certifier made a statement that the whole building does not comply with the BCA).

Recommendation:

NSW Fair Trading to conduct regular audits of private certifiers to ensure they are complying with the obligations as public officials.

3.2. STAGED CONSTRUCTION CERTIFICATES

Some developers choose to have multiple construction certificates issued for a single development. A typical example is a construction certificate being issued for the basement and a second construction certificate for the storeys above ground. This practice became popular in the mid-2000s and is normally the desired pathway as the developer wishes to commence construction on part of the building before the design has been finalised for the whole building.

Clause 145(1)(b) of the EP&A Regs prohibits a certifier from issuing a construction certificate for building work unless the proposed building will comply with the relevant requirements of the BCA (as in force at the time of the application for the CC was made).

In the mid-2000s, it became “industry standard” for a developer to lodge a construction certificate application to a private certifier for footings just before a new version of the BCA was about to be adopted that introduced additional safety requirements. The private certifier then “locked-in” the current BCA for the whole development, therefore avoiding the costs associated with complying with the BCA that was about to be adopted.

The NSW Building Professionals Board addressed this issue in September 2010. It was clarified that each construction certificate application is a new application and the BCA that is in force at the time the application applies to the building work subject to that application. This prevented developers and private certifiers from “locking in” the current BCA for a whole development by applying a footing.

Council staff has recently identified that this practice is still continuing to occur in the certification industry. In a recent example, it was identified the private certifier “locked-in” an outdated version of the BCA on a new apartment building development. As a consequence, the building was not constructed to comply with the BCA in force at the time the application for the construction certificate was made and a sprinkler system was not provided throughout the residential part of the building. Council is now required to issue a fire safety order to the owners of the new apartment building to install a sprinkler system.

This is a typical example that arises from the inherent conflict of interest with the current private certification system. Similar to the use of external combustible cladding, this may have been avoidable if the regulator had been auditing the work of private certifiers. It may have identified this practice was occurring and taken regulatory action to prevent it before it became “industry standard”.

Recommendation:

NSW Fair Trading conduct regular audits of private certifiers to ensure they are complying with the obligations as public officials.

3.3. RETROSPECTIVE CONSTRUCTION CERTIFICATES

Section 6.8(2) of the EP&A Act states “A construction certificate has no effect if it is issued after the building work to which it relates is physically commenced on the land to which the relevant development consent applies.”

However, some private certifiers continue to issue retrospective construction certificates for building work which has already commenced or been completed.

A recent example was a building in Norwest that was completed and a final occupation certificate was issued in November 2017. Council staff identified external combustible cladding on the façade of the building. In response, the private certifier instructed the building owner to lodge a construction certificate application to approve a retrospective Performance Solution (fire engineering report) for the completed building works.

The private certifier issued the construction certificate in September 2020, some 3 years after the development was complete and the occupation certificate was issued. The private certifier then issued another final occupation certificate in March 2021, despite the EP&A Act containing no provisions that permit a second final occupation certificate to be issued.

Recommendation:

NSW Fair Trading conduct regular audits of private certifiers to ensure they are complying with the obligations as public officials.

3.4. REGULATION OF PRIVATE CERTIFIERS – AUDITS

Each certifier renews their registration at least once every 5 years and pays an application fee to NSW Fair Trading. A 5-year registration costs approximately \$7,000. The process involves completing a short application form and is processed in a couple of days. The application fee does not reflect the cost of processing the renewal application.

Some of the issues raised in this submission could have been avoided and stopped at an early stage if regular audits of private certifiers were being conducted.

As a consequence of not conducting regular audits of all registered certifiers, the breaches are allowed to become “industry standard” practises. This does not achieve the intended outcome of the legislation as it does not ensure appropriate scrutiny and review of actions taken by persons exercising functions under certification legislation.

Recommendations:

1. NSW Fair Trading be required to audit every private certifier prior to renewing their registration (currently required to be renewed at least every 5 years).
2. NSW Fair Trading be required to publish the number of audits conducted each year on their website.
3. NSW Fair Trading be required to publish common findings of their audits where significant issues are identified to stop poor practises becoming the “industry standard” among private certifiers.

3.5. REGULATION OF PRIVATE CERTIFIERS – COMPLAINTS

The Hills Shire Council is not systematic in its referral of complaints to NSW Fair Trading about private certifiers. We are mindful that Council offers a similar service and where it can; it prefers to solve issues with the private certifier. However, when a complaint is lodged concerning the professional conduct of a private certifier, it should be investigated openly and transparently.

Council staff has lodged multiple complaints to NSW Fair Trading concerning the professional conduct of private certifiers in recent years. The complaints are serious and relate to:

- Issuing construction certificates for buildings where the proposed building work would not comply with the BCA (eg. use of external combustible cladding or required fire safety systems omitted),
- Issuing construction certificates for building work that has been assessed against the wrong (outdated) version of the BCA which results in significant fire safety and structural issues,
- Issuing occupation certificates when the building was not suitable for use (eg. use of external combustible cladding, significant fire safety issues and the provisions for egress being insufficient).
- Issuing development consent for types of development that is not permitted to be approved by a private certifier.

In response to each complaint, Council receives a generic response that states “NSW Fair Trading has assessed the issues you have raised. The information provided will be retained for intelligence purposes. Fair Trading has a range of regulatory options where conduct issues and breaches of legislation are identified. This includes education, investigation, audits and/or disciplinary action taken against the Certifier. The option selected will depend on the circumstances of the breach and will include consideration of the trader’s previous history of compliance, consumer detriment, and the agency’s compliance priorities”.

Council staff has been advised “It is Fair Trading’s policy not to disclose information that is part of investigative and compliance activities. This policy is designed to maintain the integrity of Fair Trading’s law enforcement activities and also protects the reputation of those who may be the target of unsubstantiated allegations”.

Council staff has also been advised by a Senior Investigator from NSW Fair Trading that they “do not have the resources” and Council should consider pursuing criminal charges against a private certifier under Part 9 of the EP&A Act if they are concerned about private certifier’s actions. Once the criminal case has been heard, NSW Fair Trading will then determine if they wish to start an investigation into the certifier’s conduct.

The private certification system was introduced by the NSW Government and the BADC Act clearly states that NSW Fair Trading is the regulator of certifiers. It is not the role of Council to pursue criminal charges against a private certifier and the regulator should be fulfilling their obligations. This does not meet the aims of the legislation and is not providing the level of appropriate scrutiny and review of the actions taken by the private certifier expected by the public.

Recommendations:

1. The Building Development and Certifiers Act be updated to include a provision that requires NSW Fair Trading to provide a written response to the complainant at the conclusion of the investigation or any audit resulting from the complaint. The response should advise what action has been taken and why.
2. Provide the appropriate resources to NSW Fair Trading so they can conduct the required audits, investigations and discipline private certifiers to restore public confidence to the planning system.

3.6. REPLACEMENT CERTIFIERS - NOTIFICATION

In a recent case, a private certifier based in Epping was disciplined by the NSW Building Professionals Board and his certificate of accreditation was cancelled. The private certifier gave evidence to NCAT that he had 2,199 active construction certificates and complying development certificate files, meaning 2,199 people were required to appoint a replacement certifier.

This is not an isolated incident, a search of the Building Certifiers Public Register indicates approximately 1400 certificates of registration have either been cancelled or expired.

There is currently no obligation for NSW Fair Trading to notify developers, homeowners or Council when the registration of a private certifier has been cancelled or expired. Many developers and building owners are unaware of when this occurs.

As a consequence, homeowners continue building without a principal certifier being appointed. It is difficult for the homeowner to find a private certifier who is willing to be appointed as the replacement certifier when building work continues during this period. This may cause a situation where an occupation certificate cannot be issued for the building, preventing it from being occupied. This is not the intended outcome for the legislation.

Recommendation:

1. The Building and Development Certifiers Act be updated to require NSW Fair Trading to notify the building owner and Council when a private certifier that is appointed as a principal certifier for the development is no longer registered, work must stop and a

replacement certifier is required to be appointed.

3.7. REPLACEMENT CERTIFIERS – DEVELOPMENT CONTINUING

The EP&A Act clearly states that a principal certifier must be appointed before the commencement of building work.

The EP&A Act also includes provisions that indicate a principal certifier must be appointed at all times while the development is occurring and until a final occupation certificate is issued. These provisions include the displaying of a sign with the principal certifiers details on site, Council is required to provide a copy of any development control order to the principal certifier and the principal certifier being responsible for determining the final occupation certificate application.

However, there is no specific clause in the EP&A Regs that explicitly states that a principal certifier who is currently registered must be appointed at all times while the development is occurring until a final occupation certificate is approved.

As a consequence, it has come to the attention of Council staff that some lawyers have formed an opinion that if the registration of a private certifier is cancelled or lapses while appointed as the principal certifier on an active development; a replacement certifier is not required to be appointed. Therefore, development can continue without a principal certifier being appointed who is currently registered. This is not the intended outcome of the legislation.

Recommendations:

1. The Environmental Planning and Assessment Regulation be updated to include a clause that explicitly states a principal certifier with current registration must be appointed at all times throughout the development until a final occupation certificate is approved.
2. The Environmental Planning and Assessment Regulation be updated to include a clause that explicitly states all development must cease when a principal certifier with current registration is not appointed.
3. The Environmental Planning and Assessment Regulation be updated to include an offence for continuing development where a principal certifier with current registration is not appointed.

3.8. REPLACEMENT CERTIFIERS – PAYMENT OF FEES

Clause 29 of the Building and Development Certifiers Regulation 2000 requires all fees to be paid to the private certifier before the commencement of their certification work. This is fair and just as it removes a potential conflict of interest whereby the developer or building owner withholds payment until the approval is issued.

However, this Clause has an unintended consequence when the private certifier is not registered. When their certificate of registration is cancelled or lapses, some private certifiers turn off their phone, close their company and keep all the fees that have been paid upfront for certification work they are no longer registered to complete.

As a consequence, the homeowner is out of pocket and many have expressed frustration at being unable to recover the money. Furthermore, the homeowner is required to appoint a replacement certifier and pay their fees upfront. Homeowners have expressed concerns about paying the fees again to another certifier without a guarantee the replacement certifier will not let their registration lapse and keep the fees. This is not the intended outcome of the legislation and does not appear to be providing adequate protection to the consumer.

Recommendation:

1. The Building & Development Certifiers Regulation 2000 be updated to include a requirement for the private certifier to refund all fees paid for certification services that were not supplied within 28 days of not being registered.

3.9. REPLACEMENT CERTIFIERS – PROVISION OF INFORMATION

NSW Fair Trading can force the appointment of Council as the replacement principal certifier for a development. It has occurred on several occasions when the registration of the original private certifier is cancelled. In this circumstance, Council must obtain a copy of the prescribed information (eg. approved plans, inspection results, compliance certificates etc.) from the original private certifier to take over their role. It is the experience of Council staff that the original private certifier is generally uncooperative or unresponsive in providing the information.

Clause 162AA of the EP&A Regs permits NSW Fair Trading to give a written direction to the original private certifier to provide a copy of the prescribed information to Council. Despite being an offence to not provide the prescribed information, if the original private certifier provides a response advising the prescribed information has been damaged or is missing, this finalises the matter and no further action is pursued.

As a consequence, Councils are forced to be appointed as a replacement principal certifier for development without being provided with any relevant documents that would be required to enable the development to continue or an occupation certificate to be issued. This is not the intended outcome of the legislation and does not serve the interests of the homeowner.

Recommendations:

1. The Building & Development Certifiers Regulation 2000 be updated to require a private certifier to supply a copy of all prescribed information to NSW Fair Trading (as the public custodian of the documents until a replacement certifier is appointed) within 48 hours of their registration being cancelled or lapsing.
2. The Building & Development Certifiers Regulation 2000 be updated to make it an offence for a person to not provide a copy of all the prescribed information to NSW Fair Trading.

3.10. PRIVATE CERTIFIERS WALKING AWAY FROM PROJECTS

The EP&A Act and Regs contain provisions for a private certifier to transfer their role as the principal certifier to another certifier. However, there are no provisions for a private certifier, (who is registered) to declare they are no longer the principal certifier ie. walk away from their role in the development.

Council has received correspondence from multiple private certifiers (who are registered) that declare they are no longer appointed as the principal certifier for development, despite not transferring the role to another certifier. This occurs when significant errors are identified with the approvals issued by the private certifier, complaints being lodged against the private certifier and when a private certifier changes company.

As a consequence, homeowners are placed in a circumstance where they are unable to proceed with the development or obtain an occupation certificate as the private certifier refuses to acknowledge they are still appointed as the principal certifier or fulfil their obligations (eg. conduct critical stage inspections or assess the occupation certificate application). This is not the intended outcome of the legislation and does not serve the interests of the homeowner.

Recommendation:

1. The Environmental Planning & Assessment Regulation be updated to include a clause that clearly states a principal certifier (who is registered) is the principal certifier for the development until the role has been transferred to another certifier or the final occupation certificate has been approved.

3.11. PRIVATE CERTIFIERS ACCEPTING INCOMPLETE FIRE SAFETY CERTIFICATES

The EP&A Act and Regs contain provisions that are required before an Occupation Certificate is issued, one being that a Fire Safety Certificate (FSC) is required to be submitted for the building. The FSC must deal with every essential fire safety measure listed on the fire safety schedule,

except where assessed under a previous FSS or annual fire safety statement (AFSS) in the previous six months.

Council staff receives a significant amounts of Occupation Certificates for building additions/alterations where a private certifier has accepted a FSC for a specific part/tenancy of a building. Many of these only considered the works carried out within the tenancy and subject to a Construction Certificate or Complying Development Certificate, where the last FSC or AFSS is over 6 months old.

For example, a new tenancy has been fitted out at a shopping centre and new sprinklers and exit sign were installed in the tenancy. The fire safety certificate has only sprinklers and exit signs listed and ignores every other measure on the fire safety schedule.

As a consequence, the occupation certificate has been issued without adequate regard to the Regulations.

Recommendation:

1. The Environmental Planning & Assessment Regulation be updated to include a clause that clearly states a fire safety certificate must list and assess every fire safety measure listed on the fire safety schedule for the building, unless it is subject to a previous FSC or AFSS issued in the previous 6 months

Yours Faithfully

Craig Woods
MANAGER REGULATORY SERVICES