Certification under the *Environmental Planning and Assessment Act 1979*

Seminar presented to Clarence Professional Group

20 July 2009

Presented by Michael Mantei

Solicitor and town planner

Accredited specialist in local government and planning law

Planning Law Solutions Pty Ltd

T: 8215 1558

M: 0423 495 910

E: michael@planninglawyer.com.au
About Planning Law Solutions and Michael Mantei

1. Planning Law Solutions Pty Ltd is a law firm specialising in providing legal services to small and medium sized corporations in the areas of town planning and environmental law, local government law and Land and Environment Court litigation.

2. Michael Mantei is a lawyer and director of Planning Law Solutions. He is a qualified town planner, having achieved a Bachelor of Town Planning from the University of New South Wales in 1990. Prior to his admission to practice law, Michael was employed for a period of 10 years as a practicing town planner by various local government authorities. During this time his principal roles were assessing development applications and policy development. Michael has been a member of the Planning Institute of Australia since 1991. Michael presented a paper at the Institute’s 2008 annual conference of the NSW Chapter on probity in the planning process.

3. As a lawyer, Michael practices exclusively in the field of town planning, local government and environmental law. Before founding Planning Law Solutions in 2009 Michael was a partner in a large regional law firm whose principal clients were local government authorities. Michael regularly appears in the Land and Environment Court. He also advises clients on matters associated with the assessment and determination of development applications, dealings with government authorities and prosecutions for environmental offences.

4. Michael is one of 36 accredited specialists in local government and planning law in NSW. He is married to Jessica and has 3 children.
Introduction

1. The regulatory process for the assessment and approval of building and subdivision work involves a 2 stage process. The first stage is planning approval (or development consent) at which time the impacts of the development and suitability of the site are assessed. The second stage is the building or subdivision approval, which is when the structural integrity and safety of the building or subdivision works are assessed. Both stages must be completed before building work may commence. Certification sits predominately, but not exclusively, in the second stage.

2. This paper deals with certification of building and subdivision works under the Environmental Planning and Assessment Act 1979 (EP&A Act). “Certification” in the context of this paper means the approval process for building or subdivision work where the approval is issued by either a council or a private individual who is accredited to do so. More specifically, these “approvals” are defined under the EP&A Act as complying development certificates, construction certificates, compliance certificates, occupation and subdivision certificates.

3. This paper also gives a brief history of private certification in NSW, highlights key provisions of, and proposed amendments to, the EP&A Act relating to private certification and discusses relevant case law. Lastly, a brief overview of the recently gazetted State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP) is provided.

Brief history of private certification in NSW

4. The concept of certification by a person other than a consent authority was first introduced in NSW by the Environmental Planning and Assessment Amendment Act 1997, which commenced on 1 July 1998. Prior to 1998, a minor form certification of building work, described as “accreditation”, existed under the Local Government Act 1919 and its 1919 predecessor.1 Accreditation under the Local Government Act 1919 allowed the Building Accreditation Authority to accredit “a material, method of construction, design or component relating to building”. However the approval to

---

1 Sections 309C to 309M LG Act 1919
construct a building could only be granted by the relevant council for the Local Government Area.2

5. NSW was not the first Australian State to introduce certification of development and building works. Certification had already been operating, successfully it was claimed, in South Australia, Tasmania and the Northern Territory prior to its introduction in NSW in 1998.

6. One of the purposes of certification is to “remove unnecessary regulations and streamline the assessment process” which (it was hoped) would “result in reduced approval response times, reduced holding costs, and improvements in the service provided to applicants.”3 Ten years on, one could say that the Government’s objective has not been met, at least if development application numbers is any guide. In the 10 years since 1998 the number of development applications processed by NSW Councils has more than doubled from 45,000 to 108,000 annually.4 Although, to be fair to the Government, this dramatic increase in DA numbers might be a result of increased property development rather than the 1998 reforms.

7. Significantly, the 1998 reforms extended the concept of accreditation from building works to land use. Development applications were traditionally the domain of local government authorities, and to a lesser extent the Minister for Planning. The 1998 reforms allowed minor, non-controversial forms of development, that might otherwise require a development application, to be dealt with by a person or body other than the local council (as complying development).

8. As the recent commencement of the Codes SEPP shows, private certification in NSW is evolving and growing, particularly in the area of complying development. The range of building and development types that are capable of certification is expanding. The NSW Government is also taking a more active role in ensuring that councils have less and less to do with building and development control by centralising the formulation of policy relating to certification.

---

2 Section 311 LG Act 1919
3 NSW Parliament Hansard, Legislative Council 5 December 1997
4 Department of Planning 2008: NSW Housing Code Fact Sheet on Exempt Development
9. The procedures and processes of certification are set out in Part 4A of the EP&A Act. Part 4A creates 4 kinds of certificates that may be issued by a certifying authority. Those certificates, known collectively as “Part 4A certificates”, are:

- construction certificates
- compliance certificates
- occupation certificates
- subdivision certificates

10. Discussed below are key provisions of the EP&A Act relating to construction certificates and complying development certificates. These 2 types of certificates seem to be the most controversial and topical forms of Part 4A certificates.

**Construction certificates**

11. A construction certificate (CC) is defined in section 109C(1)(b) of the EP&A Act as “a certificate to the effect that work completed in accordance with specified plans and specifications will comply with the requirements of the regulations referred to in section 81A (5) [of the EP&A Act].” The subject of the certificate is the “plans and specifications” and not the physical building or subdivision work. The Regulations require a CC to comply with any BASIX requirements, the Building Code of Australia and not be inconsistent with the relevant development consent.

12. Development involving building or subdivision work cannot be commenced until “a construction certificate for the building work has been issued by the consent authority, the council (if the council is not the consent authority) or an accredited certifier” (EP&A Act, section 81A(2)). An “accredited certifier” is an individual or body corporate authorised as such by an accreditation body under section 109T of the EP&A Act.

13. The requirement to obtain a CC only applies to the erection of a building in accordance with a development consent (s81A(2)(a)). If no development consent is required, for example if the building is classified as exempt development, may otherwise be erected without development consent or is
classified as complying development, no CC is required. At one end of the scale, buildings such as garden sheds and pergolas that are exempt development may be constructed without a CC. At the other end, quite substantial buildings such as farm sheds on land where agriculture is a use permitted without development consent may be constructed without a CC.

14. A CC has “no effect” if it is issued after the building work or subdivision work to which it relates is physically commenced (s109F(1A)). This requirement (s109F(1A)) was inserted into the EP&A Act by the Building Professionals Act 2005 to overcome the Land and Environment Court’s decision in Marvan Properties Pty Ltd v Randwick City Council (2005) 138 LGERA 1. In Marvan the Court held that a CC could be issued after building works had commenced. Section 109F(1A) of the EP&A Act creates difficulties if a building is commence and completed without first obtaining a CC because a building cannot be occupied without an occupation certificate and an occupation certificate cannot be issued unless a CC has been issued (s109H(5)). It is an offence to occupy a new building without first obtaining an occupation certificate (s109M(1)). The maximum penalty ranges from $550 for dwellings to $110,000 for other buildings.

15. A CC for building work must not be issued unless the design and construction of the building are “not inconsistent with” the development consent (clause 145(1)(a) of the Environmental Planning and Assessment Regulation 2000). Anyone familiar with the development approval process will no doubt have come across examples of CC plans that show a building of a particular size, shape and location and the corresponding development consent shows a building of different size or shape or in a different location. More common examples include changes to window locations, balconies sizes, levels, retaining walls and filling.

16. The courts have considered clause 145(1)(a) on a number of occasions. The overriding approach taken by the courts is that the certifier has a very wide discretion such that the certifiers judgement cannot be effectively reviewed by the courts. In other words the court will not, except in the most extreme circumstances, stand in the shoes of the certifier and decide for itself whether or not the CC plans are “not inconsistent.” The court will ignore the merits of the certifiers decision, in the sense that the court is not concerned about whether or not the decision was a good or bad decision.
17. The Court will only set aside a certifier’s decision if the court finds that the decision was beyond the power of the certifier to make. A bad decision is not an illegal one. A bad decision is not reviewable by the Courts, but an illegal one is. A decision that is beyond power has been variously described as one that:

- is so unreasonable that not reasonable person could have made it;
- amounts to an abuse of power;
- is devoid of plausible justification.

18. The impression conveyed, and intended to be conveyed, by these descriptions is that the difference between the CC plans and the development consent plans must be significant before the Court will interfere with the certifier’s decision. A mere finding of inconsistency is not justification for a finding of illegality.

19. Examples of when the Court has declined to set aside a CC include:

- a major change to the level of a car park, raising of floor levels and a significant number of changes to fenestration (Warringah Council v Moy [2005] NSWLEC 416); and
- changes in support structures, setting forward of a building and a reduction in the level of a swimming (Lesnewski v Mosman Municipal Council [2004] NSWLEC 99);
- the construction of part of a retaining wall encroaching on a neighbours property (Quin v O’Malley t/as Yellamo Building Certifiers and Ors [2005] NSWLEC 503).

20. There is only 1 example that I am aware of where a court has declared a CC invalid on grounds that it was inconstant with the development consent. In that case (Austcorp No. 459 Pty Ltd v Baulkham Hills Shire Council [2002] NSWLEC 90) the Land and Environment Court found the following changes amounted to an impermissible inconsistency:

- deletion of the lower basement level of car parking;
21. On 20 July 2007, clause 145(1)(a) of the EP&A Regulation was amended by omitting the words in bold from the following phrase “[a] certifying authority must not issue a construction certificate for building work unless it is satisfied of the following matters.” The effect of the amendment is that the subjective “satisfaction” of the certifying authority is no longer the applicable test for whether or not a construction certificate is “not inconsistent with” its related development consent. The applicable test is now an objective one. In other words, the design of a building or subdivision works the subject of a construction certificate must now be “not inconsistent” in fact with the development consent (as opposed to in the certifier’s mind).

22. The intent of these amendments was described by the then Minister for Planning, Mr Frank Sartor in the Second Reading Speech, as making it “clear that … in issuing … certificates under the [EP&A Act], accredited certifiers and councils must have regard to an objective test that is based on reasonableness rather than the current subjective tests”.

[2002] NSWLEC 90) all dealt with clause 145(1)(a) as it existed prior to the amendment in July 2007.

24. Theoretically, the change lowers the threshold for a challenge to the validity of a construction certificate. No longer is a challenger required to prove that a certifier’s decision was unreasonable in the Wednesbury sense. The challenger must merely prove that the decision was wrong in a purely factual sense. I cannot find any cases decided by the Land and Environment Court since the above amendment was made, which is rather extraordinary if in fact the threshold for success is lower.

Complying development certificates

25. Data collected by the NSW Department of Planning in 2008 indicted that on average 11% of developments across the State were dealt with as complying development. The best performing local government area was Port Macquarie-Hastings Shire Council where 60% of developments were dealt with as complying development. The Government’s goal is to lift the State-wide average to 30% within 2 years and 50% within 4 years. It plans to do this by the introduction of the Codes SEPP.

26. What is complying development? The expression “complying development” is defined in section 76A(5) of the EP&A Act as a development, or a class of development, that is identified in an “environmental planning instrument” and can be addressed by specified predetermined development standards.


28. Environmental planning instruments generally classify development into the following 3 categories:

   - development that may be carried out without development consent (this includes “exempt development”);

---

5 Environmental planning instrument is defined in the section 4 of EP&A Act as a local environmental plan, a regional environmental plan or a state environmental planning policy.
• development that may be carried out but only with the development consent; and

• development that is prohibited.

29. Complying development is a sub-set of that category of development that “may be carried out but only with development consent.” The principal difference between complying development and other forms of development that require consent, is that an accredited certifier may approve complying development as well as the local council (see section 85A of the EP&A Act). The remaining forms of development in the same category can only be approved by the local council or, in special circumstances, the Minister for Planning.

30. Complying development may only be carried out if:

- a complying development certificate (CDC) has been issued; and

- the development is carried out in accordance with the certificate and any provision of the relevant environmental planning instrument.

31. Other miscellaneous provisions relating to CDCs include:

- no CC is required for complying development;

- the carrying out of complying development without first obtaining a CDC is a criminal offence (s 76A(1) EP&A Act);

- an application for a CDC cannot be refused if the applicable development standards are met (s 85A(7) EP&A Act);

- an application for a CDC must be determined within 10 days of lodgement (cl 130AA EP&A Reg);

- no right of appeal exists against the refusal of a CDC (section 85A(10) EP&A Act).

32. There is only one decision of the Land and Environment Court, of which I am aware, in which the validity of a CDC was questioned (Gosford City Council v Beville [2003] NSWLEC 79). However, nothing of any particular
significance comes from that decision. There are no other decisions of any other Court of which I am aware dealing with the validity of a CDC.

**Codes SEPP**

33. *State Environmental Planning Policy (Exempt in Complying Development Codes) 2008* (Codes SEPP) commenced on 27 February 2009. The Codes SEPP identifies particular types of development as exempt and complying development under the EP&A Act. The underlying purpose of the Codes SEPP is to “speed up and simplify the process.”

34. The Codes SEPP demonstrates a concerted attempt by the State Government to centralise control over exempt and complying development. Prior to 27 February 2009 the State Government had a very limited role in the areas of exempt and complying development. Prior to 27 February 2009 exempt and complying development was defined primarily by local environmental plans and development control plans developed by local Councils.

35. The Codes SEPP is the vehicle by which the Government will achieve its goal of ensuring that 50% of all development is dealt with as complying development within the next 4 years. The complying development portion of the Codes SEPP (as it currently stands) specifies siting and design controls for: detached housing on lots greater than 450 sqm, alteration and additions to residential development and ancillary residential development.

36. The Department of Planning has advised that over the next 12 months the Codes SEPP will be amended to incorporate controls for other development types including housing on lots less than 450 sqm, attached dwellings, dwellings on rural lots and commercial development.

37. There is a transitional period lasting for 12 months after commencement of the Codes SEPP within which local policies (LEPs and DCPs) will continue to apply in most circumstances. The circumstances in which the local policies will continue to apply are set out in clause 1.9 of the Codes SEPP, which is summarised in the table below:
<table>
<thead>
<tr>
<th>Local Policy</th>
<th>SEPP</th>
<th>Transitional period</th>
</tr>
</thead>
<tbody>
<tr>
<td>exempt</td>
<td>exempt</td>
<td>SEPP prevails</td>
</tr>
<tr>
<td>complying</td>
<td>complying</td>
<td>Both apply</td>
</tr>
<tr>
<td>complying</td>
<td>exempt</td>
<td>Both apply</td>
</tr>
<tr>
<td>exempt</td>
<td>complying</td>
<td>SEPP prevails</td>
</tr>
<tr>
<td>exempt or complying</td>
<td>silent</td>
<td>Local policy applies</td>
</tr>
</tbody>
</table>

38. There is nothing unusual in these provisions, except that the SEPP imposes greater controls for that is currently exempt under the local (ie that development now becomes complying development under the SEPP). That approach is contrary to the underlying purpose of the SEPP to “speed up and simplify the approval process.”

39. Other legal aspects of the Codes SEPP to bear in mind include the following:

   a) A development standard contained in the Codes SEPP cannot be varied under *State Environmental Planning Policy No. 1* (cl 4A of SEPP 1).

   b) If a development does not meet any criteria in the Codes SEPP it cannot be approved as complying development and must be the subject of a development application.

   c) The Codes SEPP does not contain a clause under section 28 of the EP&A Act setting aside private covenants. Therefore a land owner acting on a CDC issued under the Codes SEPP must also comply with any covenants on title or otherwise seek approval to vary those requirements from the person or body named in the covenant.

40. This last mention point raises an interesting dilemma for certifying authorities. Does a certifier owe a duty of care to the person acting on a CDC issued by the certifier to warn that person that they cannot carryout the
development unless they also comply with any private covenant? What liability is incurred if a certifier says to an applicant once a CDC is issued that they can now carry out the development if the development is contrary to a private covenant?

41. At least one NSW council (Wingecarribee) deals with this issue by including a statement in its development consents to the effect that the development consent does not negate nor vary any private covenant. Certifying authorities should consider including a similar statement in CDCs issued under the Codes SEPP.

42. The absence of a “section 28 clause” in the Codes SEPP seems to be contrary to the underlying purpose of speeding up and simplifying the approval process for minor development. The absence of such a clause is even more surprising when, in my experience, most local environmental plans contain clauses made under section 28. This situation could well encourage applicants to choose the longer and more complex development application process rather than apply for a complying development certificate just to avoid a private covenant.

Some upcoming legislative amendments to certification

43. The “planning reform” package of amendments to the EP&A Act passed by the NSW Parliament in June 2008 includes a number of amendments relating to certification. Most have already commenced. Two amendments that are yet to commence and which will be of particular interest to certifying authorities are:

- section 109EB (directions by certifying authorities); and
- section 109PA (certifying authorities may apply for advice).

New section 109EB notices

44. Section 109EB of the EP&A Act deals with the powers and obligations in respect of a breach of a condition of development consent. Under the current Act (section 109L) a certifying authority “may” issue a person with a notice of intention to issue and order under section 121B of the EP&A Act if the certifier becomes aware of a breach of a development consent. The
decision to issue or not issue such a notice is entirely at the discretion of the certifying authority.

Section 109EB creates a new type of notice and removes all discretion. The new notice is a written direction that identifies “the matter that has resulted or would result in [a] non-compliance” and that directs the person to take specified action, within a specified period, to remedy the matter. The certifier must issue the notice if he or she becomes aware of a non-compliance. The notice is to be issued to “the person responsible for that aspect of the development.” If the notice is not complied with the certifier is to notify the consent authority of the non-compliance.

“Non-compliance” is defined for the purpose of section 109EB of the EP&A Act as:

(a) a failure to comply with a condition of a development consent relating to the manner in which construction of that aspect of development is carried out on the relevant site (including, for example, a condition relating to the hours during which construction may be carried out or the measures to be taken to reduce impacts on adjoining land), and

(b) any matter arising during the course of carrying out that aspect of development that would prevent the issuing of a final occupation certificate or a subdivision certificate in respect of that aspect of development.

The qualifying phrase “manner in which construction of that aspect of development is carried out” and the examples given in paragraph (a) suggesting that the focus is on the conduct of the person carrying out the development rather than the design or construction of a development. Paragraph (b) type non-compliances include a failure to comply with any conditions specified in the applicable development consent that are required, by the terms of the condition, to be met prior to issue of an occupation certificate. That includes compliance with the terms and conditions of the applicable development consent (s154D(2)).

Section 109EB also applies to Council officers acting as certifying authorities.
New section 109PA immunity

48. This section enables certifying authorities to immune themselves from litigation by a council in which the validity of a CC or final occupation certificate is challenged. This section is also designed to partly address the difficulties discussed above in relation to the meaning of “not inconsistent” clause 145(1)(a) of the Regulation.

49. Section 109PA(1) of the Act allows a certifying authority to apply to a council for “advice” as to whether or not a CC proposed to be issued by the authority is consistent with the applicable development consent. A similar application can be made in respect of a final OC.

50. The council is deemed to have said “yes” if it has not given an actual advice with 21 days of the application. If the Council actually says, or is deemed to have said, “yes” a CC or an OC is consistent with the applicable development consent, then the CC or final OC issued in reliance on that advice cannot be “challenged, reviewed, quashed or called into question before any court of law or administrative review body” commenced by the council. However, people other than the council can mount such a challenge.

51. In our view this is a sensible amendment. Not all development consents are as clear and unambiguous as they could be and it is the Council that is the person that best know what is, or was, intended by a particular condition. The certifying authority should not bear liability in proceedings commenced by a council on the basis of an ambiguous development consent issued by the Council in the first place.

52. Neither section 109EB nor section 109PA has commenced.