

What is a PCA?

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WHAT IS A PRINCIPAL CERTIFYING AUTHORITY IN NEW SOUTH WALES?

The legislation tells us that a PCA is the Accredited Certifier that is appointed to issue Part 4A Certificates within the confines of the Environmental Planning and Assessment Act 1979 (NSW) (the Act) and Environmental Planning and Assessment Act Regulation 2000 (the Regulation).

However, if the Act and Regulation are considered the only sources of the PCA's job description, then a PCA is the accredited certifier (natural person) or the Consent Authority (Council) that issues compliance certificates, construction certificates, occupation certificates and subdivision certificates for approved developments, so long as they are satisfied of the certain matters mandated by the relevant provisions of the legislation.

Aside from the specific restrictions stipulated by sections 109F, 109G, 109H and 109J of the Act, the main obligations of the PCA are centered around Clauses 145 and 146 of the Regulation, not only for the direction they give to the role of the PCA, but since most case law is centred around a PCA's compliance with the requirements laid out in them.

For clarification, Clause 145 provides that:

145 COMPLIANCE WITH DEVELOPMENT CONSENT AND BUILDING CODE OF AUSTRALIA

A certifying authority must not issue a construction certificate for building work unless it is satisfied of the following matters: (a1) that the plans and specifications for the building include such matters as each relevant BASIX certificate requires, that the design and construction of the building (as depicted in the plans and specifications and as described in any other information furnished to the certifying authority under Clause 140) are not inconsistent with the development consent.

Clause 146 of the Regulation further provides: **146 COMPLIANCE WITH CONDITIONS OF DEVELOPMENT CONSENT**

A certifying authority must not issue a construction certificate for building work or subdivision work under a development consent unless it is satisfied that each of the following has been complied with: each condition or agreement requiring the provision of security before work is carried out in accordance with the consent (as referred to in section 80A(6) of the Act), each condition requiring the payment of a monetary contribution before the work is carried out in accordance with the consent (as referred to in section 94 or 94A of the Act), each other condition of the development consent that must be complied with before a construction certificate may be issued in relation to the building work or subdivision work.

In a nutshell, a PCA is required to comply with the relevant development consent, its conditions and the Building Code of Australia, but notably only with regard to the issue of construction certificates. What is nonetheless evident is the fact that the opinion of the PCA in being satisfied of certain matters is the main feature of the role.

Case law has tended to support the opinion of the PCA and the level of discretion one can exercise in being satisfied of the matters set out in the legislation. Most judicial consideration on this point has been with regard to the requirement that the PCA be satisfied that the design and construction of the building are not inconsistent with the development consent. The discretion of the PCA is reflected in the comments of Pain J in the Land and Environment Court in *Lesnewski v. Mosman Municipal Council & Anor* [2004] NSWLEC 99 whereby His Honour considered at paragraph 32 that:

It is clear that "inconsistent" does not mean that a construction certificate must be identical to the development consent plans. Accordingly, the possibility of some variation between the terms of a development consent and the design and construction of the building is contemplated by the legislation.

I consider that provided the development consent and construction certificate plans are largely similar so that they depict substantially the same development they are not inconsistent.

Judicial interpretation of Clause 146 of the Regulation also reflects the nature of the work which the PCAs are dealing with and the considerations they must apply when fulfilling their role in being satisfied of compliance with development consent conditions. The comments of Talbot J in *Baulkham Hills Shire Council v. Dix* and Another [2004] NSWLEC 404 are germane in this sense, in stating that:

It is not appropriate to construe a development consent in a way that one would construe a statute or other statutory provision. It is not a document drawn by lawyers. One has to look at the objective of the consent and its conditions. The overall construction needs to be rationalised in a practical and effective way where there are conflicting provisions.

In both the above cases it was held that the Accredited Certifier had not breached his statutory obligations, although in both cases there was some degree of difference between the requirements of the development consent and the plans and specifications certified by the PCA. At most, what the case law offers is the suggestion that the job description of the PCA is expanding on a case by case basis and that judges will afford a PCA a certain degree of leniency with regard to their professional opinion in the fulfilment of their regulatory function.

It is also worth noting the case of *Director General, Department of Infrastructure, Planning and Natural Resources v. Stapleton (No.2)* [2004] NSWADT 70 for a more practical consideration of the PCA's role. Not only does the case highlight the situation that has arisen from a legislative scheme which introduces private remuneration for a regulatory service and consequently the conflict of interest which arises, but it makes direct reference to the perceived duties of the Accredited Certifier. O'Connor K stated that:

The Accredited Certifier carries out an important public function – the certifier's certificates provide a guarantee to the community that certain critical requirements in the building and development process have been satisfied.

The certifier is expected to ensure that the specific conditions to which the consent is subject have been addressed by the developer. For example it may

have been necessary to have the plans or designs varied, or other certificates obtained. The certifier must be scrupulous and detached in his or her approach to those responsibilities. Similarly when giving the final occupation certificate the Accredited Certifier performing the responsibility of the PCA must bring similar detachment and scrupulousness to bear. These are the duties, in summary, as we see them, of the accredited certifier.

Framed in terms of the PCA's duty to the community, the role of the PCA becomes somewhat more significant than that discerned from the words of the legislation alone, especially with regard to the level of satisfaction required of a PCA.

This leads to the critical consideration of the standard of conduct which is demanded of a PCA. On this point, the legislation is clear. Section 109R of the Act, which deals with complaints against the conduct of accredited certifiers, and in particular in its definition of unsatisfactory professional conduct refers to:

The standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent Accredited Certifier.

What a member of the public is entitled to expect provides the benchmark for the conduct of a PCA. Since the role of the PCA combines the making of a professional judgment that involves the exercise of a statutory responsibility, it is considered in the Stapleton case that the public would expect a high standard of objectivity to be observed in the issuing of Part 4A Certificates. With particular reference, O'Connor K considered the filling out of applications for development consent as not a part of the functions and responsibilities of the PCA. Rather, He considered that:

The role of the Accredited Certifier is to make the statutory determinations required after the application for the development consent has been successful, and to do so in a detached way free of any (reasonable) perception of conflict of interest.

In O'Connor K's reasons for decision in the Stapleton case, He affirmed the protocol proposed by the Department which made

practical reference to the functions of the PCA. Although the focus of the protocol is the avoidance of conflict of interest, it is nonetheless a useful summation of the duties of a PCA which are not so specifically referenced by the legislation. The standards are that a PCA for a particular development must, in relation to that development, only:

- (a) determine applications for Part 4A Certificates
- (b) determine applications for complying development certificates
- (c) accept appointment as the CA
- (d) carry out inspections, including mandatory critical stage inspections
- (e) issue notices requiring work to be carried out, and
- (f) liaise with the consent authority, the local council and the public on matter pertaining to the development

Accredited Certifiers must not perform any other function in relation to a development for which they are involved as the Accredited Certifier or PCA, unless such a function is carried out in fulfilment of a statutory obligation imposed on the Accredited Certifier. Specifically an Accredited Certifier cannot provide additional advice including administrative assistance (i.e. preparing development applications for lodgment) or a design solution for a particular non-compliance issue.

The role, functions, duties and responsibilities of the PCA are not defined by any one section of legislation or any one extract of judicial deliberation, but rather by a combination of all the sources that are available and a consideration of the issues that necessarily arise from a job mandated by legislation.

However, this present discussion of the role of PCA would be incomplete without reference to the landmark case *Toomey v. Scolaro's Concrete Constructions Pty Ltd (in liq) & Ors* (No.2) [2001] VSC 279. Although it is a Victorian decision and refers to the Victorian equivalent to a PCA, that is, the relevant building surveyor, it is a critical case on the point of the ultimate liability of the authority charged with certifying compliance and issuing the relevant development certificates. The consideration of Eames J is perhaps the most accurate summation of the role of the PCA:

It is beyond doubt that a surveyor charged with statutory and contractual responsibility

for examining plans for compliance, and being well paid to do so, is being called on to apply an expertise which condescends to examine the minutiae of plans, so as to detect error, and ambiguity which might reasonably produce error by those who will subsequently rely on those plans.

This position is accurate, and a useful conclusion, in that it reflects the role of the PCA in the wider sense, it recognises the dual role of the PCA and it refers to the practical standard of expertise demanded by the role.

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