



CERTIFIERS AND COMPLYING DEVELOPMENT

Schedule 2.1

Background

Exempt Development

The definition of development is long, complex and inclusive. However, not everything that falls within the definition needs to be regulated. The Act therefore allows certain categories of development to be *exempted* from the definition.

Complying Development

There are two types of development control:

- The first is an objective or *quantitative* control based on a definition and measurement. A development either fits the definition and measurement, or it doesn't.
- The second, a *qualitative* control, requires a judgement to be made – a discretion to be exercised. There is no clear right or wrong answer. Given that most development applications involve something that may impact on a neighbouring property, a judgement may need to be made on the appropriate balance between the rights of the applicant and those of the neighbour.

If only quantitative controls apply, most property owners are likely to have official recognition that a proposed development does in fact fit within the measurable standards. Accordingly, the Act provides for plans to be *certified as complying*. A system has been provided which allows owners to employ their own private certifiers to provide a certificate that the proposed development complies.

Problems have arisen at the margin between *quantitative* and *qualitative* decisions. For example, when a private certifier certifies that a building is in conformity with the plans approved by council, some leeway is permitted. However, how much leeway should be permitted is difficult to define, so there are disputes as to the level of variation allowed.

Scope of Certification

The Associations have argued that where discretion has to be exercised only government should make the decision. For example, it is not appropriate for a private certifier paid by the applicant to exercise a judgement on what is a proper balance between an applicant and their neighbour. Inevitably, there must, at the least, *seem* to be a conflict of interest.

In addition, there is considerable scope for poor behaviour by certifiers. Taking action on errors is difficult and costly for councils - although the public looks to councils for action.

Disciplining certifiers has been poorly done to date. The most effective disciplining would come from taking away a certifier's livelihood. This is a highly punitive sanction considering the nature of the 'crime' and regulatory authorities are unwilling to impose such a sanction. This gives advantages to those who are prepared to cut corners.

Associations' Alternative Solution

The Associations have argued that in order to overcome this problem and the failure to adequately discipline private certifiers, certificates of compliance should be made to government (usually

councils). Government would then issue the consents relying on those certificates as well as making any discretionary judgements required. This would solve a number of problems.

Overly detailed development applications

One of the complexities of the DA system is that, since the current private certifier system has come in, government only has one opportunity to review an application. This means that all the detail of concern to government has to be in both the development application and the consent. Details cannot be left for later approval in case the detailed drawings are approved by a private certifier and have not come before government again for review. It is no longer possible to accept sketch plans followed by working drawings, a sequence that is more efficient for all parties.

Lodging the certificate with government would enable the detail to be checked and government would be more prepared to accept sketch plans as DAs, thereby saving considerable costs and time for everyone.

Making discretionary decisions

Where a discretionary decision has to be made, such as whether the construction plan is in conformity with the consent, the lodgement of a complying certificate with council would enable council to make the discretionary decisions without having to do all the quantitative measurements. Efficiency and probity would be enhanced.

Clarifying responsibilities

The current system divides responsibilities between councils and private certifiers. The public expects council to fix problems with construction projects but the private consultant is primarily responsible for compliance. When councils do take action it costs them money, which is not recoverable and the enforcement tools are clumsy.

Market failure fixed

Importantly if council was to rely on the private certifier's certificate, the market would tend to select certifiers with the best reputations. A certifier with a good reputation is less likely to require auditing by council. As it is, under the present system, there can be a market advantage for certifiers who are prepared to cut corners and do cheap work. A change to the process would reduce the need for increased regulation and supervision by the Building Professionals Board.

Proposals

The Minister has rejected the Associations' alternative solution of having certificates issued to government and has instead sought to address the symptoms of a fundamentally flawed private certification system. i.e. a certifier exercising discretionary judgements on the respective rights of citizens when being paid by one of those citizens.

The problem of having to put all the detail in the DA has not been solved, despite the obvious disadvantages of the current system for all concerned.

The symptoms have been dealt with by changes such as:

- Enabling certifiers to obtain, for a fee, the opinion of council as whether the construction drawings are *consistent with* the consent (S109PA).
- Enabling the consent authority to require payment of a security to be used if enforcement action has to be taken.
- Providing for the certifying authority to issue a notice of any breach to the builder. In the event that it is not remedied then the consent authority is to be advised so that action can be taken.
- Enabling certain stop work orders to be given without the need to first give notice of the intention to do so.
- Increasing the power of the Building Professionals Board to suspend certifiers without the need to go to the Tribunal.

These are certainly improvements but the fundamental flaws in the system are not resolved.

Increasing the range of complying developments

Having proposed changes to deal with the symptoms of a fundamentally flawed system and anticipating the proposed standard codes for particular categories of development, the Minister proposes a significant increase in what is defined as 'complying development' and the role of private certifiers.

One of two things must happen for this to be achieved. Either the codes should have only quantifiable standards and require no discretionary judgements or, private certifiers would need to be given the right to exercise discretionary judgements.

The following are the main proposals in the Bill:

- Provides for complying development categories to be contained in an EPI rather than the Act or Regulations. It is likely that the Minister will make a SEPP to implement the complying codes.
- Moves requirements regarding public notification from councils' DCPs to the Act and Regulations, which are in the hands of the Minister.
- Enables a certifier to certify a development that does not comply with quantitative standards as complying if the non-compliance is *minor* and *not likely to cause any substantial net adverse impact on the owners of adjoining or adjacent land*.
- Removes restrictions on where complying development can be approved, including all previously established exclusions such as designated development, heritage land, critical habitat, wilderness land, heritage items and environmentally sensitive land.

Assessment

It is clear that the intention of the legislation is to substantially increase the powers of the Minister to determine what is complying development. Possibly without having to give notice to neighbours (until the SEPP is published this is not known), private certifiers will be able to issue certificates based on design codes even though there may be an adverse impact on neighbours.

Efficiency and effectiveness

The proposed expansion of the role of private certifiers will be efficient as it should be quick and there will be no disputes to resolve, at least up to the issuing of the certificate.

Confusion as to who should take action on enforcement should be clearer and enforcement should be more efficient and effective. Councils can have a security fund from which to pay for enforcement.

The design codes will assist efficiency but they may not be effective in terms of achieving the best design solution for the particular site. The advantages will be with the standard products that meet standard controls, rather than with buildings specifically designed for a particular site to maximise land use, ensure sustainable design and limit impacts on neighbours. Because of this, the codes will be standards rather than objective based.

It may be that, by not involving neighbours in applications, there will be more post decision disputes – both legal and personal. Social capital may be diminished.

Probity

While the enforcement and disciplining changes are welcome, they will not fix the fundamental problem, which is that of a certifier exercising discretionary judgements on the respective rights of citizens, when being paid by one of those citizens.

The role of private certifiers to certify to a wider range of developments, including making judgements on the potential impact of non-complying development, raises fundamental probity issues. This is particularly the case if neighbours are unable to make submissions and be heard.

No increase in the penalties for bad behaviour will overcome these fundamental problems. Indeed, the ability of the Board to suspend certifiers from practice, given the status of the Board as a tribunal, raises some concerns.

Recommendations

Proposals in the Bill to improve enforcement and disciplinary provisions in relation to accredited certifiers are generally supported.

The Associations oppose:

- The provision to allow minor variations to complying development (s85A) as this will result in arguments over the degree of non compliance and require an assessment by council of the impact on neighbours, which is effectively a DA.
- Moving the provisions for development that has to be publicly notified from being in a Development Control Plan (DCP) to a regulation (s85A(2)).
- Wholesale removal of existing exclusions for complying development [proposed s76A(6)] without any details of the intended scope of future exemptions and their impact at the local level. Local councils are better placed to determine the scope of exemptions for complying development in their area.

The Associations will provide more detailed comments in relation to the draft exposure *Building Professionals Amendment Bill 2008* in a further submission.