

update

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Building and Construction Update: Are the Chinese walls crumbling?

The expanding definition of conflict of interest in the Building Professionals Act 2005

When discussing the legislation affecting private certifiers in New South Wales, the hot topic is always the existence of a potential 'conflict of interest', and what one can and cannot do whilst still maintaining an independent certification role.

There is general industry concern about the level of involvement between design and certification that would constitute a conflict prohibited by the Building Professionals Act 2005. Such transgressions are punishable by misconduct charges brought under the Act against the accredited certifier.

One issue that often arises is to what extent a person can carry out certification functions in a company that employs others providing design or consultancy services for the same projects. Are information barriers or "Chinese walls" between different departments within a company enough to guard against complaints of a conflict of interest?

There are measures that can be implemented to properly separate departments within a company carrying out these different functions. That is, the certification function (which is a regulatory role for maintaining construction standards) and the design/consultancy function. Some of these measures were previously discussed in a document entitled "The Stapleton Protocol" previously released by DIPNR. However, this protocol may have been undermined – if not irreparably damaged – by the changes to conflict of interest provisions in the new Act.

A key difference between the new Act and the pre-existing Environmental Planning and Assessment Act 1979 is the expanded definition of conflict of interest. The definition now expands upon the concept of "being related to" another person who is involved in the design for an aspect of development.

Under the new Act (as with the EPA legislation), a conflict of interest arises if an accredited certifier issues a Part 4A certificate or complying development certificate in relation to any aspect of development, in situations including where:

- he or she has been involved in the design of that aspect of the development;
- he or she has been involved in the carrying out of work on that aspect of development; or
- he or she is related to a person who was involved in the design or construction of that aspect of the development.

There is a narrow exception to this, namely, where a certifier who is not acting as a principal certifying authority (PCA) issues a compliance certificate to the effect that specified building work "has been completed as specified in the certificate and complies with specified plans and specifications". In that situation, the certifier is not guilty of a conflict of interest by reason of being involved in the design or by being related to a person who was involved in the design or construction of that aspect of development.

Section 68 of the new Act sets out the widened meaning of "being related to" another person. An accredited certifier is said to be "related to" another person in situations where:

- he or she is an employer, partner or employee of the other person;
- he or she is employed by the same employer as the other person; or
- he or she has a contractual arrangement with the other person that might reasonably be seen to give rise to a conflict between the accredited certifier's duties as an accredited certifier and the accredited certifier's interests under the arrangement.

This means that "being related to" now includes an employment or business type relationship with someone involved in the design for the development. So despite the strength and stability of any information barriers or "Chinese walls" within a company, a certifier in one department will always "be related to" a designer in another department if they have the same employer. This situation will therefore fall within at least one of the three grounds for "conflict of interest" set out in the Act.

If there is doubt about whether an activity constitutes "design", one should turn to the Regulations. "Design" includes actual pen and paper drafting of plans and specifications, but may also include conceptual input into plans and specifications. If unsure, it is preferable to err on the side of caution rather than risk a misconduct complaint down the track.

On this basis, certifiers will need to be acutely aware of the importance of maintaining an independent role, as public interests are paramount when carrying out certification duties. The certifier is a public official charged with maintaining public standards.

A certifier cannot afford to have their regulatory independence tainted in any way by private interests, even though they have been engaged by a developer. The pressures that may be brought to bear on a certifier to bend may not be explicit, rather the pressure may exist subconsciously by virtue of having a common employer with the designer. Hence the difficulty of having design and certification departments under the umbrella of a common employer.

There are other issues that can give rise to a conflict of interest, for example where the certifier has a financial ("pecuniary") interest in the development for which they act as certifier. The extent of these other interests

will vary in every case. Some pecuniary interests may be too remote, whereas others will pose a problem.

Building certifiers now need to be particularly mindful of situations that may potentially generate a conflict of interest complaint – including situations where certification and design functions are being carried out by the same company for the same development. If in doubt about your responsibilities, you should seek legal advice.

This article contains general information and should not be acted upon without specific professional advice based on your own circumstances.

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