



Land Use Planning and Approvals Amendment (Private Certification) Bill

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Introduction

The Local Government Association of Tasmania (LGAT) is the representative body of Local Government in Tasmania. Established in 1911, the LGAT is incorporated under the *Local Government Act 1993* with membership comprising all 29 Tasmanian councils.

The objectives of the Association are:-

- To promote the efficient administration and operation of Local Government in the State of Tasmania;
- To watch over and protect the interests, rights and privileges of municipal councils in the State of Tasmania;
- To foster and promote relationships between Local Government in the State of Tasmania with both the Government of Tasmania and the Government of the Commonwealth of Australia;
- To represent the interests of the members of the Association generally, and in such particular matters as may be referred to the Association by its members; and
- To provide such support services to the members of the Association as the Association may by resolution in meeting determine.

In preparing this submission, LGAT has tried to focus primarily on common issues or higher order issues and encouraged member councils to respond directly to the Commission with detailed technical feedback.

We are aware that a number of councils have made direct submissions. Any omission of comments they have made should not be viewed as lack of support by the Association for that specific issue.

Feedback

Local Government acknowledges that the intent of the proposed legislation is to provide applicants with greater choice and efficiency. In principle, the sector supports formalising 'no permit required' development through a compliance certificate but not in the form currently proposed. The sector believes there are better, less complex ways to achieve the same desired outcomes and one such option is outlined in this submission.

Further, while Local Government understands the drive to stimulate the building industry, we note that in light of the relatively small proportion and value of development captured by this legislation, and the quick turnaround times for such development in Tasmania, introducing certification would seem to create additional cost for little benefit. That is, the changes are unlikely to have a significant impact on reducing application times and development costs. Indeed, there are some possibly significant unintended negative consequences in relation to time and costs which will be outlined later in this submission.

The concerns raised by Tasmanian councils can be grouped in the following broad categories:

1. Lack of suitably qualified and experienced certifiers and related capacity for errors.
2. No mechanisms for addressing known errors.
3. Lack of clarity on scope of Bill – specifically what is captured under 'low risk development'.
4. Potential liability issues for planning authorities.
5. Failure to address issues related to competitive neutrality and consequent escalation of costs.

Other matters raised by councils are provided in Appendix 1.

1. Lack of suitably qualified and experienced certifiers and related capacity for errors.

Councils have raised concerns that private certifiers may not have suitable qualifications and expertise in the field of planning and therefore LGAT suggests that matters requiring the exercise of 'planning judgment' should be excluded from their authorised functions.

The draft Bill and background paper do not provide enough information and reassurance in relation to the competency of private certifiers. For example:

- o The Bill does not include any criteria to indicate the professional competencies of those that will be accredited or indicate requirements in relation to the currency of accreditation.

- Are there suitable training providers /accreditation options for private sector practitioners? If not, how will this be resourced?
- There needs to be special accreditation for dealing with Residential Code development.

Without appropriate training, accreditation and review mechanisms in place there is significant capacity for errors to be made by a private certifier who does not understand the local conditions or issues. The consequence of this is that the applicant may face unnecessary future costs. This concern is supported by the experience of councils in relation to PD4 where a large proportion of applications have asserted compliance but not actually been compliant. The experience of councils is that private certifiers do not have a proven track record of correctly interpreting the criteria of complying development.

Determining compliance with existing scheme provisions is complex, even for minor developments. Hobart City Council provide an example - under the City of Hobart Planning Scheme 1982 a single development must comply with Schedule F, Schedule I and Schedule Q before it can be exempt from the need for a permit. In the past, planning consultants have made errors in both interpreting and applying Scheme Provisions. The Council has received building applications with a planning report prepared by a planning consultant advising the development is exempt when in fact, it is discretionary.

Consequently there is significant potential for errors with a desire for no oversight by councils (see issue four regarding liability).

This leads to the next broad issue.

2. No mechanisms for addressing known errors.

A legislative mechanism needs to be introduced to ensure that errors and complaints can be appropriately dealt with.

There is also no mechanism to refuse to issue a building permit where Council is aware that a mistake in certification has been made. Rather, provided the application for a building permit is accompanied by the relevant certificate, building approval must be issued. In this situation, where an error has been made, and having regard to Council's statutory obligation, under section 63A of the *Land Use Planning and Approvals Act 1993 (LUPAA)* to take all reasonable steps to ensure its planning scheme is complied with, Council will be obliged to issue the building permit but must then take action to ensure the development complies with the planning scheme by commencing proceedings pursuant to section 64 of the *Land Use Planning and Approvals Act 1993*. A mechanism needs to be introduced to ensure that errors can be appropriately dealt with without

Council being forced to take action. Further, even if liability issues (detailed later) are addressed, the public perception will be that Council is responsible.

One suggestion is that section 71 of the *Building Act* be revised to provide an alternative process to resolve errors, along with suitable provisions for revisions to compliance certificates under LUPAA.

There need to be reasonable options for resolving inaccuracies or identified errors or deliberate abuse.

Glenorchy City Council provide an example in their submission of how in New South Wales, the certification system was misused, with applicants obtaining a certificate based on one design and then submitting a differing design for approval. This led to the introduction of powers of review (of certificate validity) for councils.

3. Lack of clarity on scope of Bill – specifically what is captured under ‘low risk development’.

Councils were not clear on what is meant by ‘low-risk development’. The background document suggests only those developments with ‘no permit required’ status and not those relying on performance criteria but this is not clear in the legislation.

Local Government seeks clarification on the intended scope of permit approval. Scope is particularly relevant in relation to the complexity of decision making and the skills set required (see issue 1).

The proposed amendments to the *Building Act* sections 71A (b) and (c) indicate that private consultants will be able to certify that a Building Approval complies with a Planning Permit, including any conditions placed upon it - which seems to go beyond the scope of the discussion paper

It is argued that the legislation should be limited to single dwelling proposals under ‘no permit required’ status following assessment against the full planning scheme.

There have also been strong concerns raised that the functions of a certifier may be extended in the future ‘at the stroke of a pen’ to include full merit assessments as has been the experience in other states. That would not be supported on the basis of capability, competency and liability as outlined in this document. It also calls up the inherent philosophical conflict between the involvements of private stakeholders making decisions in a process “for the public good”.

4. Potential liability issues for planning authorities.

A number of councils raised concerns about potential liability for Planning Authorities.

Legal advice obtained by Meander Valley council suggests that assertions that councils can accept the compliance advice of a building surveyor or planning consultant under current arrangements, without need to refer to a council planning officer, are incorrect. They have been advised that the legal obligations of a planning authority are that it must take reasonable steps to satisfy itself that planning scheme requirements are complied with and that it cannot simply accept at face value, the assertions of a third party individual, particularly if that third party is engaged by the applicant (with their obvious conflict of interest).

The draft Bill indemnifies the building permit authority but does not address the obligations and liabilities of a planning authority that are inherent in Sections 63 and 63A of *Land Use Planning and Approvals Act*. If liability is not addressed, the planning authority must still satisfy itself that compliance is achieved. This will possibly necessitate intervention by the planning authority despite the private purchase of a planning compliance certificate.

In South Australia, where similar legislation has been recently introduced, the Act articulates that councils will not have an oversight function, must accept the certificate and will incur no liability (see below).

89(6) If a [relevant authority](#) receives a certificate given by a [private certifier](#) for the purposes of this Act—

(a) the [relevant authority](#) incurs no liability if it relies on the certificate; and

(b) the [relevant authority](#) cannot be held liable for a subsequent act or omission of the [relevant authority](#) in relation to a matter within the ambit of the certificate. (*Development Act 1993*, South Australia).

In Tasmania, section 69A of the *Land use Planning and Approvals Act 1993*, provides similar protection from liability in relation to accredited bushfire hazard management (or other prescribed) plans. It is suggested that this provision could be amended to incorporate liability related to private certification.

As currently drafted, the legislation would not ensure protection from liability for planning authorities and also require them to undertake

statutory enforcement. It could also be argued that private certifiers should also have statutory enforcement obligations.

5. Failure to address issues related to competitive neutrality and consequent escalation of costs.

Currently councils are undertaking the work that would be done by a private certifier at little, or more often, no cost. That is, councils are offering a preliminary planning assessment or internal certification process which provides similar assurance to developers when lodging a building application.

The experience of Local Government in relation to caravan parks suggests that the Economic Regulator would take a view that councils would have to apply a full cost attribution model in order to meet competitive neutrality principles (CNPs). This means that councils must charge a price for the service that reflects the actual costs incurred, as well as those costs that the council would have incurred if it were a private operator.

This is not straight forward. Competitive neutrality costs must be factored into the cost of providing the service by the council, even though they are not actually incurred. For example, a competitive neutrality cost would be public liability insurance; councils usually have a policy that covers all their operations and services. In order to meet the requirements of the CNPs, a council should determine how much it would cost to take out insurance for the certification service if it were seeking separate insurance as a private operator. This cost would then be added to other costs of providing the service and factored into the price that is charged to the end user.

So another risk in opening the process out to private operators is that it may escalate costs quite substantially, even if councils were also able to offer a certification service.

Other options:

It is not clear from the background documentation whether any other options have been canvassed for improving consistency of process between councils which would also see continued quick turnaround and minimal cost.

Mandated processes for councils.

The LGAT asks why standardized, formal, mandated processes with statutory timeframes have not been considered as an alternative to private certifiers?

There do not appear to be any significant resourcing/capability issues in councils that would prohibit such an approach. Instead, there would likely be the added benefit of removing issues around liability, planning compliance and accuracy, competitive neutrality and paper trails. Such an approach is also more likely to ensure consistency than private practitioners, acting independently of each other and from the information available at the local government level. Private certifiers will have different standards of information requirements and expertise; there will in effect be less uniformity than is currently the case. They also will not be able to easily obtain the same intimate knowledge of the relevant planning schemes that local government planning professionals have and therefore assessments by private certifiers may actually take longer.

Using a mandated process in councils may provide adequate confidence in applying the compliance certificate process to any use of development for which a planning scheme does not require a permit with reduced opportunity for error in interpreting when this is the case.

The table below provides examples of assessment processes in place in councils to illustrate the relatively ease and low cost of those processes and how easily they could be made more consistent. Most councils have very similar processes— in that all building applications without a prior planning permit are referred to the planning officer for checking.

Council	Process
Glenorchy	Relatively simple internal referral arrangements which allow council officers to sign off the 'no permit required' applications within minutes in most cases and at no cost to applicant. All new building permit applications are reviewed by a Planning Officer, Development Engineer and Environmental Health Officer at a daily meeting, often "signed-off" on the spot.
Kingborough	Quickly let designers know if planning approval is required, either formally through an FI request within 7 days if a BA is lodged, or informally through pre-application discussions. No cost.
Hobart City Council	Hobart City Council charges \$100 for review of planning applications lodged as exempt under Planning Directive 4 and does not charge a fee if any other proposal is exempt from the need for a planning permit.
West Tamar	Can complete assessment in 10 minutes at the counter but also present compliance assessments to an assessment meeting of regulatory service staff and send written confirmation of the status and any relevant issues afterwards. We have a single page check sheet (called a yellow sheet) which is completed and lodged with us and building.
Tasman	A desktop assessment is undertaken. If the application

	complies with the setback & height requirements of PD4 we write to the applicant and advise them accordingly. Generally our turn-around time is 1-2 days.
Huon Valley Council	<p>Building permit applications that have a permitted as of right status have been charged a permitted as of right assessment fee. This is a nominal amount (\$20 - \$50 depending of cost of work) in recognition that Council planning staff must still assess the building permit application to ensure compliance.</p> <p>Planners sign off on an internal document that provides the ok for the building permit to be issued from the planning perspective. This is after an initial assessment undertaken at lodgement by Council's Customer Service Officers. This is a 1 – 2 day turnaround which happens simultaneously with other referrals and initial assessment of building and plumbing permit application as well as registering the application in Council records management system. It doesn't cause delay.</p>
Meander Valley	Conducts a certification process internally for no permit required use and development so that it appropriately addresses its obligations and liabilities as a planning authority under LUPAA and enables the building permit authority to discharge its obligations with confidence. This results in a certification 'turn around' to the building permit authority of no more than 48 hours and at no cost to the applicant.

Local Government supports a formal compliance process for permitted developments¹ but feels that the current proposals and draft legislation are premature. Certainly we would encourage a cost benefit analysis to be undertaken to compare private certification with mandated process for councils. Currently the proposal would seem to time and cost, rather than reduce them.

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“The introduction of such a new certificate only results in a new fee to be charged by consultants, more paperwork to be processed by the Permit Authority, and more time delays for development (in commissioning and waiting on the consultant's report). All of the new processes which are being introduced (legislative change, new

¹It is also agreed by some councils, that private certification for minor development applications is likely to enable councils resources to be better prioritised to address strategic planning outcomes rather than assessing applications such as decks, fences and outbuildings.

certificate/forms, liability issues, accreditation of consultants and the ongoing oversight/registration of this accreditation) do appear to be a major overkill and will create an unwieldy and bureaucratic system for a very minor part issue . They seem to just be a recipe for more red tape and not less." (Council)

Lack of consistency can be addressed in other ways with less potentially negative outcomes. Regardless of approach (council vs private certifier) the procedural requirements for a planning compliance certificate application and for assessment and issue by the authorised person or planning authority must be prescribed in order to ensure both consistency and comprehensiveness².

² Prescribed matters could include the nature of information to be provided, the fee payable, the matters to be taken into consideration, the nature and content of the certificate, documentation of assessment and decision, and the timeframe within which a decision on whether or not to issue a certificate must be made and communicated.

Appendix 1: Other Matters Raised by Councils

- Will private certification extend to or allow self certification whereby a building designer or architect could be authorised to provide a planning compliance certificate for their own or their firm's projects?
- The terminology used ("single dwelling development" and "low risk development") is imprecise and possibly misleading to the community. As the Bill relates to any proposed development with a Permitted as of Right / No Permit Required status in a planning scheme it may be appropriate to provide one, more direct term such as "compliant development", "compliant without a permit development". This may avoid the need to defined terms such as "ancillary dwelling", "single dwelling" and "dwelling" in legislation.
- If "single dwelling" is to be defined it should not be defined other than as provided by Planning Directive No. 1.
- A planning compliance certificate must describe or include all plans on which that certificate is based.
- The scope of clauses 80B(4)(b) & (c) to LUPAA should be clarified. Will it be necessary for a building permit application to be accompanied by a planning compliance certificate for a development that is exempt rather than no permit required?
- Proposed Section 80B(5) of the Land Use Planning and Approvals Act 1993 needs to be expanded to impose a requirement to provide Council with copies of the plans, drawings, specifications and other documents and information lodged by the applicant, stamped or otherwise endorsed with the private certifier's approval (Similar to regulation 92 of the *South Australian Development Regulations 2008*).
- In Section 80B (5) – A person issuing a PCC must provide a copy of the certificate to planning authority within 14 days. Is this intended to merely be the certificate? It is suggested it should also include the approved plans and a statement of what information was relied upon in making the decision. What is the penalty for not complying with this section, and how will the Planning Authority ever know if a copy is provided?
- The validity of a planning compliance certificate must be clarified, including the period of currency and arrangements for appeal and correction.
- If a private certification model is pursued, there needs to be detailed consideration of the administrative and regulatory processes for councils (supported by advisory notes) as well as the role of Local Government in consistency checks.