

'Retrospective' approvals, consents, modifications and certificates

A briefing session presented by Dr Ian Ellis-Jones¹

OVERVIEW AND EXECUTIVE SUMMARY

1. Broadly speaking, a council's functions are of two types, namely, **service (or supply) functions**, and **regulatory functions**. A council's regulatory functions are of two main kinds:
 - firstly, various activities may only be carried out with the **prior 'approval'** or **'consent'** of the council; and
 - secondly, in certain circumstances (including, relevantly, where a person has failed to obtain that **prior** approval or consent in respect of some activity), the council is empowered to **'order'** a person to do, or to stop doing, that activity or even to demolish and remove the building or structure that has been erected or the work that has been carried out.
2. There is a further type of **regulatory function**, namely, that council can issue certain types of certificates, including what is known as a **building certificate**.
3. NSW superior courts have not embraced the concept of a retrospective approval or consent in the context of a statutory scheme for obtaining some form of *prior* [sic] approval, consent or certificate.
4. There has been a consistent line of authority in NSW courts and tribunals to the effect that a retrospective or *ex post facto* consent or approval

¹ BA, LLB (Syd), LLM, PhD (UTS), Dip Relig Stud (LCIS), Adv Mngt Cert (STC), Prac Leg Trng Cert (Col of Law). Solicitor of the Supreme Court of New South Wales and the High Court of Australia; Principal, Ian Ellis-Jones, Lawyer; Special Counsel, Turnbull Planning International Pty Limited; Local Government Consultant; Lecturer, New South Wales Institute of Psychiatry; *formerly* Senior Lecturer, Faculty of Law, University of Technology, Sydney, Partner, Henningham & Ellis-Jones, Solicitors & Mediators, Manager, Legal Branch, NSW Department of Local Government, and Commissioner of Inquiry under the Local Government Act (NSW).

cannot be obtained in respect of something that has *already* taken place. The whole idea of a retrospective or *ex post facto* approval, consent or certificate is misguided and not in the public interest. Any consent or approval is *prospective* in its operation.

5. However, various judges have approached the matter in different ways, resulting in some confusion, and the position is made more difficult by subtleties in the legislation and a few unfortunate and misguided judicial decisions with respect to, among other things, the modification of development consents.
6. A modification of a development consent under s 96 of the EPA Act may be approved in relation to development which has already been carried out. However, any such modification is *prospective* in its operation and does not render lawful any past illegality in respect of the building.
7. Even if development consent cannot be granted in respect of the *erection* of a building which has already been erected---and that is indeed the case---development consent can still be sought and granted in respect of the future (that is, *prospective*) *use* of that building.
8. Additionally, a building certificate (which has both a *retroactive* and *proactive* effect) can be sought in respect of the unauthorized building work. A building certificate *must* be granted unless Council intends to take permissible action in respect of the building, and *may* even be granted in a case where Council is entitled to take action (and even in a case where Council has already taken or started to take certain permissible action).
9. Finally, development consent can be sought and given in respect of *alterations, additions or extensions* to *existing* building work that was unauthorised in the sense that the prior approval of the council had not been *obtained* in respect of the original building work.

THE EARLY CASES---THE TRADITIONAL (AND STILL GOOD) LINE OF AUTHORITY

See *Tennyson Textile Mills Pty Ltd v Ryde Municipal Council* (1952) 18 LGR (NSW) 231; *Lowe v Mosman Municipal Council* (1953) 19 LGR (NSW) 193; *Holland v Bankstown Municipal Council* (1956) 2LGRA 143; *Waverley Municipal Council v Parker* (1960) 77 WN (NSW) 243; 5 LGRA 241; *Roeder v Marrickville Municipal Council* [1972-73] LGATR 298; *Longa v Blacktown City Council* (1985) 54 LGRA 422. See also *Steelbond (Sydney) Pty Ltd v Marrickville Municipal Council* (1994) 82 LGERA 192; *Tynan v Meharg [No 2]* (1988) 102 LGERA 119 per Handley JA at 121; *Signorelli Investments Pty Ltd v Sutherland SC* [2001] NSWLEC 78.

- The general rule is that statutory approvals and consents (to carry out some act that requires the *prior* approval or consent of some consent authority) **must** be obtained 'beforehand'.
- The whole scheme of the legislation is directed to the necessity for obtaining approval **before** work is commenced.
- A so-called **retrospective** (sometimes referred to and known as an *ex post facto*) approval or consent *cannot* be granted, whether by the local council or by some appellate body, to **erect** a building which is **already in existence** (that is, where the building has already been completed or where the building work in question has already been carried out).
- Any approval or consent that is *capable* of being granted:
 - is strictly **prospective** in its nature and operation -- that is, it applies and takes effect according to its tenor *on and from the date of the approval or consent*, and
 - provides no protection nor relief against the consequences of past breaches of the legislation.

LATER CASES—THINGS GET MORE COMPLICATED

See *Lirimo Pty Ltd v Sydney City Council* (1981) 66 LGRA 47; *Longa v Blacktown City Council* (1985) 54 LGRA 422; *Hooper v Lucas* (1990) 71 LGRA 27; *Steelbond (Sydney) Pty Ltd v Marrickville Municipal Council* (1994) 82 LGERA 192; *Mineral Wealth Pty Limited v Gosford City Council* (2003) 127 LGERA 74.

The expression 'development' is defined in s.4(1) of the EPA Act to include, among other things, not just the *erection* of a building but also the *use* of land. This, even if development consent cannot be granted in respect of the *erection* of a building or the carrying out of work which has already been erected or carried out---and that is indeed the case---development consent can still be sought and granted in respect of the future (i.e. prospective) *use* of that building or work: see, eg, *Mineral Wealth*.

Note. A development consent that enables the *erection* of a building is sufficient to authorise the *use* of the building when erected for the purpose for which it was erected **if that purpose is specified in the development application**, subject to s 109M [need for occupation certificate] of the EPA Act: see s.81A(1) of that Act.

Lirimo Pty Ltd v Sydney City Council

- The legal position was *suggested* [sic] to be otherwise than as stated above (that is, no retrospective approvals) very early in the life of the EPA Act in the context of development consents, at least as regards the erection of buildings, and possibly also with respect to the use of land.
- Cripps J in the LEC made certain *obiter* remarks that a development consent could be granted under the EPA Act despite the fact that a building had been erected.
- However, Cripps J appeared to adopt a different view (again, admittedly *obiter dicta*) in *Longa*, supporting the proposition that there is no power in a consent authority or the Court to approve unauthorised work which has already been carried out.
- In the *Steelbond* case Talbot J stated that he could find 'no other

authority' for the proposition that where the erection of a building has already been completed, the Court had been prepared to grant development consent for the **erection** [sic] of that building.

Hooper v Lucas

Hemmings J in the LEC held that s.311(1) of the LG Act 1919 did not prevent the making of an application for, and the granting by the local council of, an approval for **alterations, additions or extensions** to *existing* building work that was unauthorised in the sense that the prior approval of the council had not been obtained in respect of the original building work.

Steebond (Sydney) Pty Ltd v Marrickville Municipal Council

- This case concerned the ability, if any, to amend a building approval following completion of the relevant building work.
- A pergola had been erected in excess of the height which had been approved under the building approval granted by the local council.
- Talbot J in the LEC held that:
 - o there is no power to grant an approval pursuant to Ch 7 [of the LG Act 1993], which would have the effect of overcoming a breach of s.68 already committed;
 - o the person to whom an approval has been granted or who is entitled to act on an approval may apply to the council to amend the approval if they are still seeking to carry out the activity for which the council's amended approval is required;
 - o where the work contemplated by the amendment is already complete it is too late to make an application under s.78 or s.106.
- However, the position may well be otherwise with respect to certain other types of approvals under the LG Act 1993, and there is no obvious reason why an approval could not be forthcoming pursuant to Ch 7 [of the LG Act 1993] in respect of the **prospective** [sic] carrying out of some of the

activities referred to in the Table [in s.68 of that Act], notwithstanding that a person has already carried out or is continuing to carry out that activity.

By way of example, there should be no impediment to consideration of an application for approval to the future operation of a public car park even though the applicant has been operating the public car park for some time. It is nevertheless difficult to perceive a situation where prior approval of the council can be obtained to erect a building which is already in existence.

- The result in each case will depend on the nature of the activity which is the subject of consideration.
- The legal position under the LG Act 1993 in relation to *so-called* retrospective approvals would not appear to be any different from that which applied under the 1919 Act, at least in circumstances where **all** of the relevant work has been completed or the whole of the activity has already been carried out.
- However, the legal position may well be otherwise in relation to other types of approvals in circumstances where there is **still something to be done** that is capable of being made the subject of a **prospective**---note, prospective, *not* retrospective---approval or consent. The result in each case will depend on the nature of the activity which is the subject of consideration. Some activities *by their very nature* are simply incapable of so-called retrospective approval once fully carried out or completed.

MODIFICATIONS AND AMENDMENTS OF CONSENTS AND APPROVALS

See *Connell v Armidale City Council* (LEC, Pearlman J, 25 September 1996, Nos 10272/96 and 20068/96, unreported); *Herbert v Warringah Council* (1997) 98 LGERA 270; *Tynan v Meharg [No 2]* (1998) 102 LGERA 119; *Jacklion Enterprises Pty Ltd v Sutherland Shire Council* [1998] NSWLEC 152 (8 July 1998); *Ireland v Cessnock City Council* (1999) 103 LGERA 285.

Connell v Armidale City Council

- This was an *ex tempore* decision of Pearlman J of the LEC.
- The case concerned 2 applications, one brought under s.106 of the LG Act 1993 for **amendment** of a building approval and the other an application under s 102 (now s.96) of the EPA Act for **modification** of a development consent.
- Pearlman J appeared to accept the submission made on behalf of the respondent council that the provisions of s.106(1) of the LG Act 1993, at least when read in conjunction with s.78 of that Act, are prospective in wording, nature and intent.
- However, her Honour stated that the position was less clear as regards (then) s.102 of the EPA Act.
- Ultimately, her Honour accepted the submission made on behalf of the respondent council that the provisions of the EPA Act were **prospective** despite the *obiter* remarks of Cripps J in *Lirimo*.
- Her Honour proceeded to hold that, not only was there no power to entertain an application for amendment of an approval granted by a NSW local council under Pt 1 of Ch 7 of the LG Act 1993, there was also no power to entertain an application for modification of a development consent under the EPA Act 'where the work the subject of the amendment has already been carried out'.

Herbert v Warringah Council

Sheahan J in the LEC, after reviewing a number of salient judicial authorities such as *Lirimo*, *Steelbond* and *Connell*, held that (then) s.102 of the EPA Act only makes provision for the **prospective** approval of works the subject of the modification application and could not be used to modify a development consent where the works the subject of the modification application had already been carried out.

Tynan v Meharg [No 2]

Handley JA, sitting singly in the NSW Court of Appeal, appeared to affirm the **long line of judicial authorities against retrospectivity**.

Jacklion Enterprises Pty Ltd v Sutherland Shire Council

- Pearlman J in the LEC was content to assume, but only for the purpose of determination of the question of law in that case, that *Steelbond, Connell* and *Herbert* established the proposition that there is no power to grant retrospective consent for development already carried out.
- It was not necessary for Her Honour to further consider the proposition in *Jacklion* because she decided on the facts of the case that the modification application did not seek to obtain retrospective consent.

Ireland v Cessnock City Council

- In *Ireland v Cessnock City Council*, a decision of Bignold J of the NSW Land and Environment Court involving 2 merit-based appeals being, respectively:
 - o an appeal pursuant to s.97 of the EPA Act in respect of the respondent council's deemed refusal of a development application for the *use* of a certain building which had not lawfully been constructed with the consent or approval of the council and which did not otherwise comply with any building approval granted by the council, and
 - o an appeal pursuant to s.149F of the EPA Act in respect of the council's refusal to issue a building certificate in respect of the same building.
- On the vexed issue of 'retrospectivity versus prospectivity' Bignold J

stated that it was 'common ground' between the parties that the *highest* and best result for the applicants in the development appeal was the grant of consent to the **prospective** use of the building.

But wait! There has been a *change in direction* as respects modifications and amendments!

See *Windy Dropdown Pty Ltd v Warringah Council* (2000) 111 LGERA 299; *Willoughby City Council v Dasco Design and Construction Pty Ltd* (2000) 111 LGERA 422.

The Court's decisions in *Connell*, *Herbert* and *Jacklion* proved not to be the final word on the matter.

Windy Dropdown Pty Ltd v Warringah Council

- This was a decision of Talbot J in the LEC.
- His Honour held that the provisions of s.102 [see now s.96] of the EPA Act could be used to modify a development consent where the works the subject of the modification application had **already been carried out**.

Willoughby City Council v Dasco Design and Construction Pty Ltd

- This was a decision Bignold J in the LEC.
- His Honour:
 - agreed with Talbot J's conclusion in *Windy Dropdown* that the power of modification is available even in a case where the relevant works have already been carried out; and
 - referred to the decision of Handley JA in *Tynan v Meharg [No 2]*, stating that he (Bignold J) did not think that Handley JA's reference to *Herbert* could be taken as a clear and deliberate endorsement of the actual decision in *Herbert* holding that the statutory modification power was not available in a case where the works had already been carried out.

The combined weight of *Windy Dropdown* and *Dasco Design and Construction* is such that there can no longer be any doubt about the power of a consent authority in NSW to **modify** a development consent is available even where the relevant works have already been carried out.

Other points to note with respect to modifications

However, any modification of a development consent---including, relevantly, a modification of a consent in relation to development which has already been carried out---operates prospectively and does not render lawful any past illegality in respect of the building, nor does it prevent third parties (other than the Court) from taking proceedings under s.123 of the EPA Act for an order to require demolition of the building or building work in question.

A modification application can still be made in relation to a development that has already been carried out (and even after the consent has been finalised by the issue of a final occupation certificate): see *Austcorp No 459 Pty Ltd v Baulkham Hills SC* [2002] NSWLEC 90 (7 June 2002). In that case the Court allowed the modification of an apartment building that had been completed. This is not dissimilar to the decision in *Windy Dropdown* where the Court ruled that s.96 can even be used to in respect of unlawful works already carried out, saying that s.96 is a broad and facultative provision 'that enables a consent authority to deal with unexpected contingencies as they arise during the course of construction of development or even subsequently'. The reference to 'subsequently' clearly encompasses post-construction, and there is no basis on which to conclude that the modification power does not also apply to post-occupation.

As a basic example, a home owner who may have been living in an approved dwelling-house for many years may choose to lodge a modification application to add a swimming pool for example, rather than submitting a full DA. Subject to a merit-based examination, the question is simply whether the application would 'modify the consent', where to modify means to alter without radical transformation, there being no doubt in such a case that the development to which the consent as modified relates is 'substantially the same development' (i.e. essentially or materially the same or having the same essence) as the development for which the consent was originally granted.

Subject to the '**substantially the same development**' test and an **examination of the merits**, a s.96 modification application can incorporate **other land**, that is, land or a site that was not part of the original development consent: see *Scrap Realty Pty Ltd v Botany Bay City Council* [2008] NSWLEC 333 (19 December 2008).

Sadly, too few of the cases on the question of retrospectivity have alluded to the facility afforded by a building certificate insofar as unapproved building work is concerned, for it is a building certificate, and prior to that what was known as a 'certificate of compliance' under what was then s.317A of the LG Act 1919, that was intended by the legislature to be the mechanism for dealing with the consequences of unauthorised building work.

CONSTRUCTION CERTIFICATES

See *Marvan Properties Pty Ltd v Randwick City Council* [2005] NSWLEC 9 (11/01/05).

Marvan Properties Pty Ltd v Randwick City Council

- This was a decision of Talbot J of the LEC.
- The case was an appeal against the refusal of the respondent council to issue a construction certificate to the applicant in respect of certain building works.
- His Honour held that a construction certificate may be lawfully issued pursuant to s.109F of the EPA Act notwithstanding that the work has been commenced.
- McClellan J had previously expressed a tentative view to the same effect in *Austcorp No. 459 Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 318 (28 November 2003), unreported.

Important note. Not long after the decision of Talbot J in *Marvan Properties* the NSW Parliament amended the EPA Act to render nugatory, indeed reverse the effect of, his Honour's decision. In that regard, s.109F(1A) of the EPA Act, with effect on and from 3 March 2006, now states that a construction certificate has no effect 'if it is issued after the building work or subdivision work to which it relates is physically commenced on the land to which the relevant development consent applies'.

BUILDING CERTIFICATES

See Taipan Holdings Pty Ltd v Sutherland SC [1999] NSWLEC 276; *Ireland v Cessnock City Council* (1999) 103 LGERA 285, 110 LGERA 311; *Mineral Wealth Pty Limited v Gosford City Council* (2003) 127 LGERA 74; *Griffis v Tweed SC* [2011] NSWLEC 1126.

Introduction

The *Local Government (Building Certificates) Amendment Act 1986*, which commenced on 1 January 1988, omitted the old s.317A from the LG Act 1919 and inserted a new division (Div 4D) in Pt 11 of that Act, containing ss.317AA to 317AJ. A building certificate was issued, on and from 1 January 1988 (and until 30 June 1993), under s.317AE of the LG Act 1919. (Certificates of compliance issued under s.317A of the LG Act 1919 before 1 January 1988 continued in force.)

The LG Act 1993 began on 1 July 1993, repealing the 'bulk' of the LG Act 1919. The building certificate provisions formerly contained in Pt 11 of the LG Act 1919 were reproduced in Pt 4 of Ch 7 of the LG Act 1993. What was formerly known as a 'section 317AE certificate' under the LG Act 1919 became a 'section 172 certificate' under the LG Act 1993. (Building certificates issued under the LG Act 1919, and in force immediately before 1 July 1993, were 'continued in force' and were taken to have been issued under the LG Act 1993.)

On 1 July 1998 the building certificate provisions formerly contained in Pt 4 of Ch 7 of the LG Act 1993 (and, before that, in Div 4D of Pt 11 of the LG Act 1919)

were transferred, with effect on and from 1 July 1998, into Pt 8 of the EPA Act. Building certificates are now issued under s.149D of the EPA Act. (Building certificates issued before 1 July 1998 under s.172 of the LG Act 1993 are taken to have been issued under s.149D of the EPA Act.)

Issue of building certificates

A building certificate is essentially a 'certificate of non-action'. It is *not* a certificate of compliance. The building certificate legislation has been carefully drafted with the intention that a building certificate *must* issue in the vast majority of cases.

There are three possible fact situations in the context of an application made for a building certificate:

1. There is **no entitlement** on the part of the council to take action.
2. There is **an entitlement** on the part of the council to take action but the council does **not** propose to take any such action.
3. There is **an entitlement** on the part of the council to take action and the council **proposes** to take action.

As respects the third fact situation, the council may even have already taken certain action, such as applying to the Court for an injunction requiring the demolition of the building.

In either of the first two circumstances, the council has an *express duty* issue the building certificate: see s.149D(1) of the EPA Act.

However, in the third circumstance, the council *may* refuse to issue the certificate, but it has been held that the council is **not** under an *express duty* to refuse the certificate. Indeed, the council, so it has been held, still has a *discretion* to issue a certificate in such a circumstance.²

²As the originator of the building certificates legislation at the (then) NSW Department of Local Government way back in the 1980s I can say this---hopefully without any disrespect to the Court---it was *never* the intention

Ireland v Cessnock City Council

This LEC decision held that a local council, or the Court on appeal, has a discretion to issue a building certificate even in circumstances where the council is not duty-bound to issue the certificate.

- Bignold J of the LEC was called upon to consider whether a council (or the Court, on appeal) had the discretion to issue a building certificate in circumstances where the council was not obliged to issue the certificate.
- In earlier proceedings instituted by the council, Sheahan J of the Court had issued a mandatory injunction requiring the demolition of an unlawfully erected building. However, his Honour suspended the injunction to provide the opportunity for the parties to seek to 'regularise' the planning law position in relation to the building. Subsequently, an application for a building certificate and a development application in respect of the subject land for the *use* of the building, were lodged with the council. The council refused the building certificate but failed to determine the development application.
- Those two matters then came before the Court on appeal and were heard by Bignold J, who ultimately directed the council to issue a building certificate and granted development consent to the proposed use of the building.
- His Honour was at pains to point out that:
 - o a council is certainly not under a duty to issue a building certificate in circumstances where the council has, as in this case, already

that where the third fact situation existed, that is, where there is an entitlement to act and the council actually proposes to take action, that the council might not take that action but might instead issue a building certificate. The intention was that the applicant would either get the certificate or get an order---a 'put up or shut up' situation insofar as the council was concerned.

- exercised its entitlement to take action in respect of an unlawful building;
 - o s.149A of the EPA Act confers a discretion on a council to issue a building certificate even in circumstances where the council was not bound to issue it;
 - o the discretion is wider than the duty, and the duty to issue the certificate, unless certain conditions apply, does not create an implied duty *not* to issue the certificate where those conditions apply
- In the case at hand, this meant that although the council was *not obliged* to issue a building certificate where it was not satisfied of the matters specified in s.149D(1) of the EPA Act, the council nevertheless had a discretion to issue such a certificate, and was even entitled to issue such a certificate where the Court had declared that the building was unlawful and had even ordered that it should be demolished.

Since the discretion to issue a building certificate is wider than the statutory duty, a council's refusal to issue a building certificate is not the end-of-the-matter in every case. An aggrieved applicant has a range of options legally available to effect the issue of a building certificate to 'regularize' (as opposed to render lawful) the unlawful erection of a building.

Of course, any council that has actually issued a demolition order, or has instituted Class 4 proceedings in the Land and Environment Court for an order requiring a building to be demolished, and has obtained such an order, is most unlikely to issue a building certificate, but the fact remains that the power is there, and the refusal by a council to issue a building certificate is an appealable decision.

Relevant matters for consideration with respect to building certificates

In deciding whether or not a building certificate should issue in a particular case (note: the EPA Act does not contain any matters for consideration), regard should be had to a number of factors, including:

- the **structural adequacy** of the building, and
- where no prior consent or approval had been obtained---**whether development consent would probably have been granted** in respect of the building had such consent been sought (the 'notional [*or hypothetical*] development application' concept: see *Taipan*):
 - o before the building was erected, or
 - o at the time the Court deals with the matter (assuming that the building had not already been erected but was proposed to be erected at that time).

In considering the notional development application, regard should be had to the **relevant matters for consideration under s.79C(1)** of the EPA Act.

However, where there is an **actual development application** (even one for the prospective *use* of an already unlawfully erected building), there is **no need for the invocation of the notional DA concept**: see *Mineral Wealth*. In that regard, Pain J held in *Mineral Wealth* that the cases do not establish a general principle concerning the approach to be taken to the issue of a building certificate (including the invocation of the notional DA concept). However, the notional DA concept has been applied widely by the LEC.

If the consent authority/Court's findings are favourable in the above mentioned respects, the fact that the building was erected unlawfully will not be decisive in most cases: see, eg, *Ireland*; *Mineral Wealth*.

It would appear that the issue of a building certificate is an essential prerequisite to the **grant of development consent** in respect of the **use** [sic] of an

unlawful building: see *Ireland; Mineral Wealth*. **However**, the two issues are **separate**, and even if a building certificate is issued in respect of an unlawfully *erected* building does not necessarily mean that development consent (if sought) for the *use* of the building must be granted: see *Griffis v Tweed SC*.

The better view is that the **past illegality** is *not* a relevant factor in determining whether development consent should be granted: see *Kouflidis v City of Salisbury* (1982) 49 LGRA 17.

Other points to note with respect to building certificates

Where a building certificate *is* issued in respect of the unlawful building, that fact alone, together with the statutorily defined legal immunity applicable to the building (see s.149E of the EPA Act) become relevant factors in the determination of a development application for the prospective *use* of the building: see *Ireland*.

If Council refuses to issue a building certificate, it must inform the applicant, by notice, of its decision and of the **reasons** for it: s.149D(2).

The **reasons** must be sufficiently detailed to inform the applicant of the work that needs to be done to enable Council to issue a building certificate: s.149D(3). The only type of work which can be specified as 'work that needs to be done' is work that **actually needs to be done** so that Council is legally able (and under a duty) to issue the certificate---that is, work which would obviate the need for action of the type specified in s.149D(1) of the EPA Act: see *Kruf v Warringah SC* (LEC, Holland J, Nos 20027/87 & 10344/88, 15 December 1988, unreported).

Council **must not** refuse to issue or delay the issue of a building certificate by virtue of the existence of a matter that would not entitle Council to make any order or take any proceedings of the kind referred to in s.149D(1)(a).

A building certificate operates **prospectively** BUT has a **retroactive** (**note**: not truly retrospective) effect **as well as a proactive** [sic] effect.

Retroactively, a building certificate operates to prevent the council:

- (a) from making an order (or taking proceedings for the making of an order or injunction) under the EPA Act or the LG Act requiring the building to be repaired, demolished, altered, added to or rebuilt, and
- (b) from taking proceedings in relation to any encroachment by the building onto land vested in or under the control of the council,

in relation to matters existing or occurring before the date of issue of the certificate: s.149E(1) of the EPA Act.

Proactively, a building certificate operates to prevent the council, for a period of 7 years from the date of issue of the certificate:

- (a) from making an order (or taking proceedings for the making of an order or injunction) under the EPA Act or the LG Act requiring the building to be repaired, demolished, altered, added to or rebuilt, and
- (b) from taking proceedings in relation to any encroachment by the building onto land vested in or under the control of the council,

in relation to matters arising only from the deterioration of the building as a result solely of fair wear and tear: s.149E(2) of the EPA Act.

However, a building certificate does not operate to prevent a council:

- * from making order No 6 in the Table to s.121B of the EPA Act, or
- * from taking proceedings against any person under s.125 of that Act, with respect to that person's failure to obtain a development consent with respect to the erection or use of the building, or to comply with the conditions of a development consent: s.149E(3) of the EPA Act.

A council's order-making and other regulatory powers over buildings and land are not restricted to those specified in s.149D(1)(a)(i) of the EPA Act and a building certificate does not cover these extraneous (but potentially important) issues. Thus, a council may not be entitled to refuse to issue a building certificate but might still order rectification or other work beyond that covered by s.149D(1)(a)(i) of the EPA Act.

For example, the issue of a building certificate will not prevent a council or the responsible Minister taking action under the *Public Health Act 2010* (NSW), nor prevent any action being taken under s.125 of the LG Act 1993 (abatement of public nuisances). Please note, however, that these matters are only relevant to the question of whether or not a building certificate should be issued to the extent that they confer on the council an entitlement to do any of the things referred to in s.149D(1)(a)(i), (ii) or (iii) of the EPA Act.

In addition, the issue of a building certificate will prevent the council, but not a third party, from instituting proceedings for an order to remedy or restrain a breach of the LG Act or the EPA Act by reason of unauthorised building work or unauthorised development in the nature of building work: see *Cramer v Leichhardt MC* (LEC, Stein J, No 40138/91, 5 March 1992, unreported).

GENERAL CONCLUSIONS AND FINAL COMMENTS

- The whole notion of granting retrospective approvals or consents, or retrospective modifications to approvals or consents, is **contrary to the basic rationale** behind the existence and need for an approvals or consent system.
- Any approvals system, in order to be fully effective and have sufficient deterrent value, needs to be **truly prospective**.
- Although **a retrospective approval or consent as such cannot be**

granted under any circumstances:

- o development consent can be sought and given:
 - for **alterations, additions or extensions to existing building work** that is unauthorised in the sense that the prior approval or consent of the council had not been obtained in respect of the original building work;
 - in respect of the **use of a building** that is unauthorised in the above mentioned sense;

- o a **development consent can be modified** (with **prospective** effect):
 - where the works the subject of the modification application have **already been carried out**, and
 - *even* after the consent has been finalised by the issue of a final occupation certificate;

- o a **building certificate**---which has both a *retroactive* and *proactive* effect---can be sought in respect of *any* building (including, most relevantly, an unapproved one) and:
 - *must* be granted unless Council intends to take permissible action in respect of the building, and
 - *may* be granted in a case where Council *is* entitled to take action (and *even* in a case where Council has already taken or started to take certain permissible action).

- *If there be a need from time to time to 'provide an opportunity to deal with anomalies in design unforeseen at the date of grant of development consent' (Windy Dropdown Pty Ltd v Warringah Council (2000) 111 LGERA 299 per Talbot J at [27]) or the like---and there may well be---then bold, forward-looking mechanisms such as the building certificates regime contained in Pt 8 of the EPA Act, or the introduction of some similar statutory mechanism, is the appropriate way to go.*