

Good-Faith Clause Protects Council Certifiers

COUNCIL certifiers are subject to the same obligations as private certifiers to check self-certified building work but they are protected from being prosecuted or sued if they have acted in good faith.

The Building Professionals Board has clarified confusion about sections 92 and 93 of the Local Government Act, which state that councils can rely on certificates of compliance for an aspect of work from a contractor or installer without having to inspect the work themselves.

The act was amended in 1998, removing "buildings" - but not "activity" such as manufactured homes - from the ambit of these clauses. However, four years later, the report of the parliamentary inquiry into building quality still states that councils can rely on qualified persons to give suitable documentary evidence of compliance with building approvals and standards.

Section 731 of the act, however, still exempts council certifiers from any "action, liability, claim or demand" provided they have acted in good faith. No similar protection is afforded to private certifiers.

"Under the Building Professionals Act 2005, the functions and authority of council-accredited certifiers and private accredited certifiers are identical," the president of the board, Sue Holliday, told the Herald.

"Both are subject to potential disciplinary action by the board, for example cancellation of accreditation, although fines and compensation orders cannot be imposed on council-accredited certifiers.

"Both are subject to the same disciplinary procedures if they rely upon certificates from self-certifying contractors rather than undertake these inspections [themselves].

"While section 731 of the Local Government Act provides a general protection from [civil] liability for council officers acting 'in good faith', it does not override the requirements of the Environmental Planning and Assessment Act or provide protection where actions show wilful disregard for good practice or are a result of incompetence," she said.

David Bannerman, of the law firm Bannermans, said the exemption from liability for council certifiers under section 731 should be read "narrowly".

"Whether or not the exemption applies will be debatable in every damages case [but] it puts a council acting as certifier in a better position than a private certifier," he said. "If the council makes an honest mistake, it is less likely to be liable for any compensation than a private certifier who makes an honest mistake."

A recent decision of the Administrative Decisions Tribunal upholding the board's finding of unsatisfactory professional conduct against private certifier Lyall Dix for not checking work that was self-certified by installers sent shock waves through the industry.

"The Dix decision goes too far," said the planning director of a Sydney council who is no fan of private certification.

"It [is] unreasonable to expect a private certifier or a council inspector to be a structural engineer, fire-safety expert, electrician, plumber and a waterproofer.

"If it is applied across the industry, certifiers will need to set up a site office on one job at a time and supervise every nail, bolt and rivet to ensure they are not liable. Evidence of suitability of the work from the contractor as provided for under the Building Code of Australia should be sufficient."

The Australian Institute of Building Surveyors has reminded its members that they are professionals charged with the responsibility of protecting public safety. "In instances where poor conduct is on display, people won't hesitate to tar us all with the same brush, as it were," the national president, Terry Bush, said.

A former board member of the Association of Accredited Certifiers, Scott McGufficke, said that unlike a council certifier, a private certifier cannot hide behind section 731 of the Local Government Act but must consider the possibility of having to pay fines of up to \$100,000 and compensation orders of up to \$20,000.

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