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Submission: Draft BUILDING AND DEVELOPMENT CERTIFIERS REGULATION 2019

I have had the opportunity to review and consider the proposed Building and Development Certifiers Regulation, and wish to offer the following submission.

My law firm has acted in over 300 defects matters for owners corporations and have made previous submissions on reforms introduced in the *Home Building Act 1989* since 2012 and the *Strata Schemes Management Act 2015* since the date of its commencement. I welcome the government's reforms to improve adherence to construction standards in NSW. The *Building and Development Certifiers Act 2018* ("the Act") and proposed regulation are a key component in improving adherence to standards, particularly in the area of accreditation, discipline and enforcement. However, there are two important areas I would like to draw attention to.

Commercial Conflict Inherent

My perception is that many of the problems in the certification area have their origin in the introduction of private certifiers, this was echoed in the Shergold and Wier Report[1], which also noted:

"However, the private certification model will always have a significant potential for conflict of interest given the commercial relationship that must necessarily exist between the designer/builder and building surveyor. Even if the building surveyor is appointed by the owner, this appointment will be influenced by the builder and/or designer."[2]

There is a natural 'market-force' tendency, for builders and developers to select building surveyors (certifiers) who they perceive will cause them fewer problems. There is also an incentive for building surveyors to live up to that expectation where there is the possibility of remunerative repeat business from major contractors and developers.

The Act and proposed regulations attempt at some length to address areas of conflict of interest and accountability, but fail to address this central issue of conflict, namely commercial interest. If private

[1] *"Some of those consulted have told us that the move to private certification over the past 25 years has compounded many of the problems that we have been asked to examine. We tend to agree."* P.Shergold & B.Wier. "Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia", February 2018. p.12.

[2] Ibid. p.11.

certification is continue then one way to address this would be to remove the right for contractors and developers to select their own certifiers. This was touched upon in the Shergold and Weir Report:

"Some jurisdictions are considering options such as a 'cab-rank' or 'chocolate-wheel' model in which government makes the decision on the allocation of private surveyors to projects."[3]

In my view it is regrettable that ultimately this consideration was not developed into a recommendation within the Shergold and Weir Report. A nominating body, such as is used for the selection of adjudications under Security of Payment legislation, would do much to restore public confidence in the certification process.

Contrast to Rigour Contained in Design and Building Practitioner Bill

The recently circulated *Design and Building Practitioner Bill*, if adopted in its current form, sets a bench mark for accountability and liability within the industry. The duty of care for builders and designers is extended to meet the economic loss of each owner of the land in relation to which the construction work was carried out. Reading the Act and the proposed Regulations, one is left to ponder why certifiers and building surveyors are to be held to a lesser standard of care.

Furthermore, whilst the there is an express provision forbidding builders and designers from contracting out of the statutory duty of care, certifiers are only governed by the common law position, with the potential for exclusion and limited liability clauses.

The indemnity requirements for certifiers appear to be the same as that provided for builders and designers, that is to say certifiers need to be 'adequately insured' (subsection 26(2) of the Act). However, regulation 18, limits the amount of indemnity cover required. It remains to be seen whether any Regulation under the *Design and Building Practitioner Bill* will similarly limit the indemnity builders and designers are required to provide.

Regulation 19, permits professional indemnity contracts with certifiers to exclude non-compliant cladding work for a period of 12 months from 30 June 2020. It remains to be seen whether any Regulation under the *Design and Building Practitioner Bill* will similarly limit the indemnity builders and designers are required to provide. At any event this provision has the potential to cause a great deal of hardship to property owners unfortunate enough to have to rectify non-compliant cladding.

There is no principled reason for the legislation to create this disparity in the liability of builders and designers and the liability of certifiers. It reduces the potential for property owners to recover adequate damages.

The most recent high profile building defect case to be litigated is illustrative. The fire at *The Lacrosse Building* lead to an investigation that found fault with the cladding materials used. In a subsequent case before the Victorian Civil and Administrative Tribunal, Vice President Woodward J, found the Fire Engineer, Architect and Certifier were concurrent wrongdoers. The Certifier's proportion of the liability was 33%. Were such a case to be heard in NSW under the proposed legislation, it is possible that that 33% would not be recoverable against the certifier. His Honour's decision is illustrative more generally of the vital role played by certifiers, and the problems that arise, particularly in the case of private certifiers.[4]

[3] Ibid. p.12

[4] Victorian Civil and Administrative Tribunal, *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property) [2019] VCAT 286* (28 February 2019): Online: https://www.vcat.vic.gov.au/resources/owners-corporation-no1-of-ps613436t-owners-corporation-no-2-of-ps613436t-owners (Accessed 25 October 2019).

The application of proportionate liability under the *Civil Liability Act 2002,* exposes property owners to an invidious legal conundrum, as to whether certifiers should be joined as concurrent wrong doers in circumstances where they are held to a different standard of accountability.

Conclusion

I recognize and appreciate the broad sweep of legislative measures to improve compliance with the National Construction Code. The regulation of Building and Development Certifiers is a key component of that effort, and has much to commend it so far as accreditation and monitoring are concerned, but it falls short in 2 important areas:

1. Although it recognises the commercial interest inherent in contractors and developers selecting their own private certifiers, it fails to address the issue at source by introducing an independent selection regime.
2. It misses the opportunity of extending the duty of care owed by certifiers, in the way that it proposes to do with building and design practitioners. Such an extention could only foster a much needed improvement in certification practices. The disparity caused is unjust, and could lead to legal complication in cases such as those where there are concurrent wrongdoers.

I hope the above is constructive and of assistance. I am happy to meet and discuss this further at your convenience.

Kind regards,

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