



Australia's property industry

Creating for Generations

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Mr John Tansey
Executive Director
Regulatory Policy
Department of Finance, Services and Innovation
Level 5, McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

Dear Mr Tansey,

The Property Council welcomes the opportunity to provide feedback on the Consultation Draft of the *Building and Development Certifiers Bill 2018* and also appreciates the invitation for the Property Council to be involved in the stakeholder roundtable on this Bill.

The Property Council's comments on the draft Bill are below:

Section 4 (1) – Definitions

Building certification is an industry of professionals and a profession of some status related to the important role certifiers play. Certifiers have asked me to raise the concern that the term 'licensed certifier' diminishes the role and function they perform and puts them at the same level as the licensed tradespeople whose work they are tasked with certifying. Their preferred terminology would be 'building certifier' or 'registered building certifier'.

Section 29 Meaning of "conflict of interest"

The Property Council would appreciate greater clarity in the drafting of this section as some terms used have a broad interpretation particularly in relation to sections 29 (c), (d) and (f).

In s29 (c) and (d) the definition of "worked on" needs further clarity. As drafted, the provisions will potentially add time and expense to the construction process for potentially little or no benefit. Whilst we understand the inherent risks that might accrue should potential and/or actual conflicts of interest occur the provision as drafted goes beyond this and might create a situation where a certifier with a very minor or insignificant advisory role at the beginning of a process might be prevented from certifying an end product. We would urge caution in this regard, especially given the shortage of qualified certifiers in the marketplace. We would suggest the language of the current Act is adequate.

Similarly, in relation to s29 (f) the definition of 'relationship' is too broad, particularly with regard to what is a personal and business relationship. This could particularly impact certifiers in regional areas as, given the smaller regional economies, personal or business relationships are more likely to be in issue. Section 30 of the Bill, relating to pecuniary interests, is a more than adequate protection against unethical practices.

Section 44 knowingly issuing a false certificate

Considering the high penalties of 10,000 penalty units, that is, \$110,000, and/or up to 2 years imprisonment, the test for this offence, namely, “ought reasonably to have known” is too subjective. “Knowingly” should require evidence to show that a falsification has occurred.

Section 103(4) – Warning notices

Under this section the Secretary, before authorising publication of a warning notice, must give the person a period of not less than 48 hours to make representations. Given such a notice could be issued on a Friday, this should be changed to a minimum of two *business* days. Our preference would be that a person has seven days to respond.

Regulation Making Powers under Section 6.6 and 6.12 of Environmental Planning and Assessment Act PA Act 1979

Amendments to allow a certifier to be appointed by a Licensing Secretary will have the potential for a “cab rank” system to occur for the proscribed classes of development. The risks associated with this is that a certifier who is not skilled in that proscribed type of development could be appointed. It is also unclear whether a certifier would have a right of refusal if they were to be appointed.

At the recent meeting with Fair Trading, it was stated it was highly unlikely that these powers would ever be used. Given this, and the silence of the Lambert Report on this issue, we do not think such a change is needed.

Liability and Insurance issues

The Property Council suggests that there should be a level playing field between private certifiers and their local government counterparts. It is in the public interest that private certifiers be afforded the same protection from civil litigation as Council employed certifiers.

There should also be harmonisation with the other state jurisdictions in relation to amount of insurance coverage required. All other states only require that a certifier be covered by an insurance policy for \$1million, plus costs, and there is the ability for all certifiers in a firm to be covered by this policy. However, in NSW the regulations require an aggregation of the amount of cover depending on the number of certifiers, up to a total of \$20 million. This significantly adds to the insurance cover required and therefore to the cost of that insurance.

This issue should be examined in the context of this current suite of reforms for the industry.

Should you have any questions on this submission please contact Emma Ashton, Senior Policy Advisor, on 0402 277 247 or eamshon@propertycouncil.com.au.

Yours sincerely,


Jane Fitzgerald
Executive Director – NSW
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