

30 October 2018

NSW Fair Trading
McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

By email: BDCBill2018@finance.nsw.gov.au

Dear Sir/Madam

RE: IMPROVING CERTIFIER INDEPENDENCE

Introduction

The Owners Corporation Network of Australia Limited (OCN) is the peak consumer body representing residential strata and community title owners and residents. As such, OCN is uniquely positioned to understand the impact that the legislative framework has on the construction of residential buildings and community living.

This is a segment of the market often characterised by owners moving from stand-alone housing to strata living, and frequently purchasing into newly constructed properties “off the plan”. As such these owners have complete reliance on the builder, and the regulatory system to deliver a well-constructed and properly certified construction.

Certifiers are engaged by the developer not the eventual owners, who only ‘take over’ the property after an Occupancy Certificate(s) has been issued and the initial meeting of the Owners Corporation is held. Thus, the reliability of certification is of utmost importance to the eventual owners as the only assurance they have beyond the reputation of the builder/developer. IF they are sufficiently knowledgeable about property to research this.

The most significant issues for owners in the current system relate to lack of accountability along the construction chain. The government’s attempt to address this with the Building Products (Safety) Act 2017 was incredibly disappointing, following the removal within the parliamentary process of anything in the Bill to do with chain of responsibility. Then we have developers and builders who set up ‘special purpose vehicles’ which go into administration soon after completion of the project. The current system does not prevent the directors of these companies from setting up another company next day and becoming Directors of the new entity.

It is essential this illegal Phoenixing behavior is stamped out. Yet in the latest commonwealth Treasury review the one proposed option that could have assisted residential strata purchasers was not pursued in the Bill. Governments, having established strata title as a property class, consistently fail strata owners who are neither individuals nor small business (or in the case of Illegal Phoenixing, creditors).

Thus, the greatest concerns of owners relate to the part of the market that will fall outside of the criteria set out in the options paper. Larger, enduring developers have a stronger interest in ongoing reputation for future projects and generally employ their own quality control systems in addition to the certification process.

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In short, the proposals set out in the Options Paper do not address the real issues – inadequate industry training and a lack of accountability. Every building practitioner involved in a building project must be made accountable for his/her work within that project. OCN calls on the government to reinstate the 80 clauses excised from the Building Products (Safety) Bill to address this fundamental flaw in the regulatory system.

Certifiers address wider issues of public interest and compliance to provide assurance of compliance both planning approvals, standards and regulations. However, they are onsite less than 1% of the time and rely on certificates supplied by suppliers and installers of the various construction components.

Given the particular focus of the Options Paper, OCN is concerned that the threshold hurdles set out in the options paper will fail to capture a significant number of projects that drive public perception of the system and create yet another system with limited practical effect for residential strata owners. In fact, the proposals have the potential to lose some of the more valuable elements of the current system.

General Remarks

OCN agrees that the number of defects experienced by residential owners in particular points at significant deficiencies in the *overall* construction process. It remains unclear just how many of these issues are failures in the certification process, or how many relate to construction quality control measures that are not captured in the certification system.

The present proposals seem to assume that certification deficiencies contribute to all manner of defects whereas their focus of attention is to ensure regulatory compliance, and to be confident that structural and other design matters are carried out by competent accredited specialists, and implemented in accordance with that design.

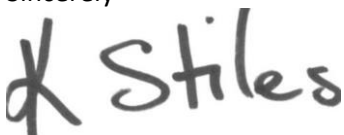
OCN lays the blame for rampant building defects on deregulation, inadequate training, inadequate supervision, and a lack of accountability for shoddy work.

Certifiers must be independent of the developer/builder, whether they be independent or local council employees and the enhanced regulatory powers provided for in the recently passed legislation, if adequately supported, and prosecuted in the case of breach should go a long way towards addressing any issues of real or perceived conflicts of interest and lack of independence.

We do not believe that any of three options set out in the paper will achieve improvement to the system and will put at risk some of the benefits that flow from a well-established independent private certification industry. Some time has lapsed since private certification was established, and whether it would be possible or sensible to revert to local council certification is questionable. Whether Government would be prepared to resource such reversion is also an open question. Much of the expertise and development of people to progress through the ranks to A1 certifier accreditation seems now to reside with the larger private firms.

The options tend to limit the ability of private certifiers to build their business and hence achieve sufficient critical mass to provide expert services and training to employees, and seem to assume that all certifiers have equal expertise. The industry is perhaps better served by allowing certifiers to specialise in particular types of buildings and hence have deeper knowledge and experience than the generalists that would seem to result from the three options set out in the discussion paper.

Sincerely



Karen Stiles
Executive Officer

Specific Comments

1. Do you agree that there is a greater risk for conflicts of interest to arise in private certification work and result in poor certification outcomes (as compared to council certifiers)?

No, apart from a few rogue operators who are known to the BPB. With proper regulatory oversight and an industry subscription to a professional code of ethics there is no reason why a properly managed private certification service should have a greater risk of conflict of interest than council certifiers.

2. Do you think that an additional mechanism is required to support independence in private certification work?

The mechanism to address issues in the industry should be a robust auditing function, enforcement and strong penalties for breach rather than assume that commercial certifiers are more open to compromise.

3. Should local councils have an additional role in appointing certifiers? If so, what kind of role should they play?

Perhaps as the ultimate guardians of public interest at local level Councils should have a role in ensuring the integrity of the certification process, whether by audit or other process. Under the suggested options, the council becomes the default authority, but it remains uncertain how councils might be in a position to respond to a significant transfer of work. As the local authority, their role in oversight *might* be stronger than that of a central regulator remote from the community. But we would refer you to the **Lambert Review** recommendations, all 150 inextricably linked, as the answer to the market failure we are witnessing.

4. Is it appropriate to only include A1 level accredited private certifiers if introducing one of the options?

No. Has it been established that the largest bulk of complaint is from A1 certified work? The proposed threshold would appear to exclude the areas of highest risk from a consumer perspective. Risk associated with the larger developments are certainly high but from a different perspective than that of an individual lot owner (until a fire or other event highlights hidden defects).

5. Do you agree with the proposed threshold requirements for when one of the options would apply? If not, why not?

See 4 above.

6. Do you support a monetary threshold of \$5 million, \$20 million or another amount? Why?

The thresholds only have relevance to the proposed options. A proper oversight model with adequate resourcing to carry out effective investigation, audit, and penalties would mean none of the options would be needed, making thresholds irrelevant.

7. Is the type of certification proposed to be captured by one of the options sufficient?

No. The scheme runs counter to specialisation and development of specialist expertise, which is very much needed with today's complex constructions containing many alternative solutions, in favour of a generalist approach.

8. Does the proposed selection method raise any concerns that may impact the integrity of the rotation scheme?

It assumes good and bad certifiers are equal and discourages growth of companies which are more likely to assist in industry advancement and good outcomes for the community.

9. How should certifiers' preferences for working in certain Local Government Areas be managed?

This is only an issue for the limited options cited. Market forces would normally assume certifiers would have geographical preference. Local Council certification certainly does.

10. Do you support the provision of three certifiers for each development that meets the threshold requirements? If not, what other way could help eliminate competition concerns?

No. This might be the least bad option but is unlikely to assist development of a strong independent industry and it is difficult to see how it improves current arrangements. It removes any potential for certifiers to build their capability, as rotation allows little or no scope for market development, creates uncertainty as to workloads and so reduces the capacity of firms to take on junior staff and develop their expertise.

11. Is it appropriate to allow a developer to reject all three certifiers provided under the rotation scheme? If yes, in what circumstances would this be appropriate?

OCN does not support the provision of three certifiers.

12. Is it appropriate to mandate the developer appoint the local council as principal certifying authority where the developer rejects the three certifiers provided?

No. As the model seems to disadvantage councils in favour of private certification, how will councils be able to manage this uncertain and unscheduled workload?

13. Should a certifier be able to refuse selection and/or appointment under the rotation scheme? If yes, in what circumstances would this be appropriate?

Reputable certifiers who feel they do not have the experience or specialisation (or who do not wish to work for a particular developer) should be able to refuse appointment, as do other professionals such as engineers who are bound by their code of ethics not to undertake work outside of their capability or experience.

14. Do you support Option 1? If not, why not?

No. Addressed by above comments.

15. Do you support the cab rank scheme for the appointment of the PCA for developments that meet the threshold requirements? If not, why not?

No. The cab rank system has potential for even more deleterious impacts on industry capability than option 1 and does nothing to ensure quality improvement.

16. Is it appropriate to allow a developer to reject the single certifier provided under the cab rank? If so, in what circumstances would this be appropriate?

Addressed earlier. Certainly, reputable developers should not be forced to accept a certifier on face value without any consideration of experience or specialisation.

18. Is it appropriate for developers to have two rights of rejection? Would this encourage price competition? Is it appropriate to mandate the developer appoint the local council as PCA where the developer rejects the private certifier provided?

Price should not be the only criteria in selection of a Certifier. Reputable developers look to engage the most competent certifier rather than the lowest priced one. Given the options give no choice to the developer, the only thing left is price and it assumes that the certifiers are equal in all other aspects.

19. Should a certifier be able to refuse selection and/or appointment under the cab rank? If yes, in what circumstances would this be appropriate?

For the same reasons set out in 13.

20. Do you think that a 'cab rank' system will result in additional costs or delays for industry? If so, what sorts of costs or delays?

No comment.

21. Do you support Option 2? If not, why not?

No, it discourages development of a solid system that will serve the industry into the future.

22. Do you agree that a three-year break between certifier and client would sufficiently mitigate a conflict of interest from occurring? If not, what would be a more appropriate break time?

No. Managing to track the same client when the worst developers create many companies that are specific to projects (special purpose vehicles) could prove an administrative nightmare. It assumes that there is going to be conflict of interest if there is any ongoing relationship. It is not clear where the evidence is in support of this contention. Hence the arrangement seems to assume that time separation will solve the problem that perhaps needs to be addressed specifically in respect of those who deviate from the independence requirement.

23. Do you support that a certifier can work for the same client for a period of five years before taking a break? If not, what would be a more appropriate period?

Yes. Five years might be a minimum period for a big project that could, in stages, go on for much longer. There should be continuity available for the certifier to see the job through.

24. Do you support an exemption that permits a certifier to work with the same client for more than the maximum number of years (e.g. to see a project through to completion)? If so, what kinds of situations should be exempt?

See 23.

25. Do you support Option 3? If not, why not?

No. It seems to do little to address the underlying concern and would have numerous ways for intentional or even unintentional avoidance/breach and require much diligence by the parties to avoid inadvertent non-compliance.