

A 'shonky' war shaking the foundations

SOMETHING akin to a civil war has erupted in NSW in the building approval arena. Private building certifiers are facing off against some local councils — and the battle has become ugly.

As a lawyer who acts for a number of certifiers I can attest to the fact that the mood is ominous and deteriorating and the tension and level of disquiet is palpable.

This fight has the potential to undermine the fabric of the building approval system in NSW.

In NSW, private certifiers and councils are empowered to issue construction certificates, carry out inspections and issue occupancy certificates.

Even though both sectors compete for work in this arena, only certifiers in the private sector can be prosecuted for misconduct under the Environmental Planning and Assessment Act (EPAA).

If issue is taken with the conduct of a certifier, the matter is referred to the Department of Infrastructure Planning and Natural Resources for investigation.

The angst is the result of the proliferation in the number of investigations into certifiers over misconduct complaints in recent times; many of them lacking in substance.

There also have been some disparaging public attacks on building certifiers.

Admittedly some of the matters under investigation are serious, warrant investigation and in some instances a reprimand.

However, too many of these complaints are spurious and vexatious, such as certifiers omitting to have their phone numbers on construction site signs, or failing to inspect before a construction certificate is issued, even though the EPAA does not require it.

On a more sinister note, there have been conflict of interest allegations in circumstances where there is not the remotest evidence or hint of such activity.



Facing off: The battle between private building certifiers and some local councils has become ugly

There are also too many disparaging comments in circulation.

In a David and Goliath type scenario, one certifier, a client of our firm, was accused in a media release of being a "shonky building surveyor" by a council. The matter made

national news. We issued proceedings against the council, the mayor and the TV station and the matter went to a jury trial.

The jury found that the three defendants had defamed the certifier. He nevertheless has had to commit large sums of money to



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Spurious complaints against building certifiers threaten to undermine the NSW approval system

defend his name and salvage his reputation.

Another council, after referring a particularly matter to the Department of Infrastructure, Planning and Natural Resources (DIPNR) for investigation, published a council report on its website even though DIPNR had not concluded its deliberations.

Any professional, whether it be a lawyer, doctor or certifier, finds investigations terribly draining both emotionally and financially.

The angst is heightened for certifiers because the EPAA contains some of the toughest penalties for regulatory offences in the country.

In the worst cases certifiers can be suspended or even jailed.

So when a certifier is under investigation, regardless of the magnitude of the offence or lack of magnitude, human nature takes over and the certifier thinks of the worst-case scenario. "What if I'm suspended?", "What if I'm jailed?"

It is incumbent upon a certifier to act in the public interest.

So it should be morally incumbent upon a complainant, be it a council or member of the public, to exercise a measure of humanity and responsibility in considering whether a matter warrants public rebuke or investigation.

Is the matter serious? Does it justify the use of state resources? Can one ethically subject a fellow member of the community to the inordinate level of stress that goes with defending a misconduct allegation that involves matters of little moment?

Legislation such as the EPAA, which is designed to protect the public, must not be used to victimise members of the public who happen to be members of the certification fraternity.

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