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COMPLIANCE CERTIFICATION IN VICTORIA AND NEW SOUTH WALES

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Appreciating the divergent risk landscape in two States

Compliance certification in Victoria and New South Wales are similar regimes, however there is a divergent risk landscape for the professionals involved in issuing compliance certificates. We seek to examine the legislation in the respective states and to assess why there appears to be a different culture developing in each state. In Victoria there is a preparedness to issue compliance certificates. In New South Wales, however there is a distinct reluctance for building professionals to issue compliance certificates.

Liability is certainly a paramount concern for anyone who works in the building industry. As such there is the likelihood that if a person certifies work as compliant with regulations, plans, the relevant legislation or the Building Code of Australia ("BCA"), they open themselves to liability if the work is not compliant. In both states, the Building Surveyor and the Principal Certifying Authority ("PCA") can apparently rely on a compliance certificate and gain a measure of immunity from this reliance. Below we will determine the efficacy of this immunity for Victoria and New South Wales respectively.

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It is our contention that the compliance regime in New South Wales is less onerous for the PCA than his or her Victorian counterpart.

That is to say that there is less opportunity for the joining of co-defendants under proportionate liability, where there is an effective immunity for reliance on a compliance certificate.

***"the Principal Certifying Authority in New South Wales is less open to attack when relying on a compliance certificate than his Victorian Counterpart… it follows that the Risk Landscape in New South Wales is far more favourable to the New South Welsh Principal Certifying Authority in this respect"* : Kim Lovegrove, Principal, Lovegrove Solicitors**

The Compliance Regime in Victoria

A building surveyor, an engineer, a building inspector, a quantity surveyor, a builder, a draftsperson or a person who erects or supervises the erection of prescribed temporary structures, are all currently defined by the Building Act (VIC) 1993 ("the Building Act") as building practitioners and are all required to be registered and possess professional indemnity insurance.

While the Building Act in Victoria refers to immunity, prescribes the right Forms and endorses reliance on certificates issued by registered building practitioners, it does not and perhaps cannot, define the scope of potential liability of any one registered practitioner.

What we have rather is the Supreme Court of Victoria indicating that registered practitioners should be nothing short of pedantically vigilant.

The Supreme Court in *Toomey v Scolaro's Concrete Constructions Ptv Ltd (in liq) & Ors*[1]*("Toomey")* is the indication to which we refer and the leading case in Victoria on the scope of liability of the registered building practitioner.

This case involved a young athlete, who in 1996, attending a bucks party fell over a staircase balustrade in his brother's apartment block. In falling over the horizontal balustrade, he fell through a gap between the flights of stairs and landed on his head on the concrete stairs of the basement. As a result, he is confined to a wheelchair and a quadriplegic.

He sued ten defendants for negligence and breach of statutory duty. It was found that the height balustrade over which the young man fell was a cause of his injury. It was discovered that the balustrade was not compliant with the then relevant Building Code of

[1] (No. 2) [2001] VSC 279 (17 August 2001)

Australia ("BCA:) in that it was 70 millimeters shy of the prescribed requirement.

One of the defendants was the Relevant Building Surveyor. His defence was in part reliant on the apparent protection of the Building Act. As another Registered Building Practitioner (the Building Inspector) had been engaged, the Building Surveyor, in his capacity as a natural person, raised the "good faith" defence entrenched in Sections 128 and 238 of the Building Act, on the premise that a Form 14 certificate had been issued with respect with compliance to the BCA.

A building inspector, also defendant to the proceeding, had issued a Form 14 compliance certificate. This building inspector inspected the building works for compliance with the BCA.

Sections 128 and 238 of the Building Act.

Putting *Toomey* aside for a moment, let us consider a Form 14 Compliance Certificate and Sections 128 and 238 of the Building Act, which become available in this very situation:

Section 128 – Immunity for the building surveyor relying on certificate

> *A municipal building surveyor or a private building surveyor appointed under Part 6 is not liable for anything done or omitted to be done in reliance on a certificate given by a registered building practitioner under section 238.*

Section 238 — Building surveyor may rely on certificate by other registered building practitioner.

> *(1) A municipal building surveyor or a private building surveyor, in carrying out a function under this Act or the regulations, may rely on a certificate by a registered building practitioner in a prescribed category or class of practitioners-*
>
> > *(a) that proposed building work of a prescribed class complies with any provision of this Act or the regulations; or*
> >
> > *(b) that building work of a prescribed class complies with any provision of this Act or the regulations.*
>
> *(2) A registered building practitioner must not give a certificate under sub-section (1) in respect of building work unless the certificate states that the registered building practitioner has inspected that building work*

Section 238 describes what a building surveyor can rely on and Section 128 describes the effect and criteria of that reliance.

In addition to the wording of the Sections, the *Toomey* decision introduces another element to the criteria prescribed by the Building Act. Justice Barnes in fact highlights that the court will look very hard and test the robustness of a compliance certificate in two respects:

- The Form it takes and the information it includes; and

- The nature of a Building Surveyor's reliance on it.

The Devil is in the Detail.

Section 238 contemplates the not uncommon situation where a Building Surveyor obtains a certificate from another Registered Building Practitioner in order to certify that building work complies with the building regulatory scheme, ie. the Building Act and Regulations, including the BCA.

requires a description of the building work inspected and a description of that part of the Act, Regulations, or Code complied with. A precedent Form 14 is annexed to Schedule 2 of the Building Regulations (VIC).

In *Toomey* the Building Inspector issued a compliance certificate, that while set out on a form 14 "precedent", did not contain sufficient information and was thus deemed invalid by the Court for the purpose of the Building Surveyors defence.

On Kim Lovegrove's recent trip to Ethiopia, he notes the materials used for scaffolding and security on fences, and questions its compliance with Building Regulations in Australia. For a more detailed record of the Kim's trip, feel free to log into: www.lovegrovesolicitors.com

The onus on a Relevant Building Surveyor be it an Engineer or Building Inspector, taken from the wording of section 238 alone, is that a certificate in the prescribed form must not be issued unless the certificate states that s/he has inspected the building work.

Furthermore, Victorian Building Regulation 15.7(2) prescribes that a certificate under section 238 must be in accordance with Form 14 in relation to the inspection of building work and that form

In particular, upon close analysis by Justice Eames, it was considered that the certificate issued by the building inspector was deficient in the following respects:

It did not state the relevant provisions of regulations or BCA standards; and

The certificate was issued with respect of *Block 3* of an apartment building rather than specifying the actual parts of

the building work that were inspected and was therefore deficient in the particularity mandated by Section 238 and Regulation 15.7(2). On point, Justice Eames commented at paragraph 270:

> *The requirement of particularity does not seem to me to impose a major burden on the person completing the certificate.*

In *Toomey,* on the basis of the deficiency of the Form 14 certificate issued by the Building Inspector, the Building Surveyor was prevented from the protection of the immunity provisions before any good faith arguments were even considered by the Court.

It is evident that detail will be critical in the body of a Form 14 certificate and that the Court will not hesitate to scrutinize the level of detail included and undermine a Building Surveyors reliance on Form 14 that does not contain adequate detail.

The Court nonetheless, went on to consider Section 128 and whether the Building Surveyor had relied on the deficient Form 14 in good faith and whether the immunity could be therefore invoked.

What does it take to act in Good Faith?

While the notion of good faith has been the subject of many academic debates and legal arguments, considerations of the Court in *Toomey* still remain the current position on good faith with respect to Section 138 of the Building Act.

The *Toomey* decision makes it evident that a "hands off" approach by a building surveyor, or "blind disinterest" will not be considered acting in good faith and thus the statutory immunity will not apply. This was the case in *Toomey* where the Court considered that the building surveyor had misconceived his role when he conceded that he had no other obligation than to "collate" the Form 14 certificates. To reiterate Justice Eames at paragraph 283:

> *In my opinion,* [the Building Surveyor] *adopted an entirely "hands off" approach towards his own and* [his employer's] *statutory and contractual obligations to inspect the project. It cannot be acting in good faith to do nothing at all, in theses circumstances, so as to check that the inspections were being properly conducted.*

Furthermore the Court considered it relevant that the Building Surveyor knew that the building inspector in this case, was being paid a low monthly fee, and to quote Justice Eames at paragraph 282:

> "*There was every reason* [for the building surveyor] *to fear that he*
> [the building inspector] *might cut corners in those circumstances".*

Interestingly, this factor alone indicates that for the Section 128 immunity to operate, the Court will have to be satisfied with the fee charged by the relevant practitioner

in order for that practitioner to assume liability for the certificate issued by him or her. His Honour concluded at paragraph 283 that:

> [The Surveyor Company] *was being well paid for inspections under its contract and its income from its fees for inspection was not greatly reduce by virtue of its payment of the modest fees charged by the man who was doing all the work.*

The combination of these factors indicated to the Court that the Building Surveyor had not relied on the Form 14 in good faith. Unfortunately, Justice Eames also stopped short of describing what may constitute good faith in these circumstances but we can nonetheless be guided by what was not considered good faith in a scenario like the one in *Toomey*.

Ultimately the Building Surveyor was not afforded the immunity contemplated by Section 128.

The Compliance Regime in New South Wales

The Environmental Planning and Assessment Act 1979 ("EPAA") provides for a compliance regime whereby a natural person who is specified under part 4A of the EPAA may issue a compliance certificate under section 109C Of particular importance to the Accredited Certifier (the New South Wales equivalent of the Registered Building Practitioner), who may issue compliance certificates for the Principal Certifying Authority (the New South Wales equivalent to the Building Surveyor) is the nature of the system of compliance certificates under the EPAA.

Compliance Certificates

A Compliance Certificate is to state the obvious, a certificate — therefore a written document. The importance of such certificates is that it does not require that the

PCA who is retained for the project, to certify the compliance of all the building work required in the project. This certainly has real and important legal implications for the Building compliance certificate.

Section 109C (a) states what a compliance certificate may represent as to the adequacy of building works. Compliance to the effect that:

> *(i) specified building work or subdivision work has been completed as specified in the certificate and complies with specified plans and specifications, or*
>
> *(ii) a condition with respect to specified building work or subdivision work (being a condition attached to a development consent or complying development certificate) has been duly complied with, or*
>
> *(iii) a specified building or proposed building has a specified classification identified in accordance with the Building Code of Australia , or*
>
> *(iv) any specified aspect of development complies with the requirements of any other provisions prescribed by the regulations, or*
>
> *(v) any specified aspect of development (including design of development) complies with standards or requirements specified in the certificate with respect to the development,*

As any Building Practitioner or Accredited Certifier is aware there is a risk involved with approving work on a which that person is not intimately involved. There is always the danger that an examination as to the actual compliance will reveal that a compliance certificate should not have been issued for work completed. That is to say, the compliance regime under the EPAA provides that the Principal Certifying Authority may rely on the compliance certificate. The Accredited Certifier issues the compliance certificate, however, must bear liability if a court finds that the compliance certificate was issued negligently.

The aspects of compliance under section 109C, for which a compliance certificate can be issued certainly may be complex. Therefore the Building Practitioner under the Environmental Planning and Assessment Act 1979 must take the utmost care to ensure that the compliance certificate is accurate and correct.

The Question of Form – New South Wales

Form is also an important requirement in New South Wales under the EPAA. The Environmental Planning and Assessment Regulations (2000) state the requirements for compliance certificates under regulation 138. The particulars that are required of the person providing the certificate are there to ensure standards are met. This regulation is set out below:

138 - Compliance Certificates

(1)A compliance certificate must contain the following information:

(a)the identity of the certifying authority by which it is granted,

(b)if the certifying authority is an accredited certifier:

(i)his or her accreditation number,

(ii)the name of the accreditation body by which he or she is accredited,

(c)a description of the development being carried out,

(d)the registered number and date of issue of any relevant development consent or complying development certificate,

(e)the address, and formal particulars of title, of the land on which the development is being carried out,

(f)the date of the certificate,

(g)a description of any work that has been inspected, how the work has been inspected and the date and time when the work was inspected,

(h)a statement, signed by or on behalf of the certifying authority, as to the matters in respect of which the certificate is given.

(2)A compliance certificate must be accompanied by any documents referred to in the certificate, being documents concerning matters in respect of which the certificate is given.

(3)A copy of each compliance certificate relied on in issuing an occupation certificate must be forwarded to the consent authority and the council when a certifying authority notifies them of the issue of an occupation certificate.

Therefore there is a requirement of form that must be complied with by the Accredited Certifier. It is open to conjecture as to whether a PCA can rely on the immunity under the EPAA if the

requirements of form are not met due to a deficient compliance certificate issued in New South Wales. That is to say the PCA possibly may not be able to rely on the protection in 109P (discussed below). Section 109P appears to provide a certainty of immunity; however, the logic of *Toomey* may be used to argue that a document that does not comply with regulation 138 of the Environment Planning and Assessment Regulations (2000) is in fact not a compliance certificate (and there is no immunity for the PCA).

Reliance on an Accredited Certifier's Certificate of compliance

Section 109P of the EPAA affords the Certifier who exercises functions under this Act in reliance on a Part 4A compliance certificate the entitlement to assume certain matters in relation to that compliance certificate. Section 109P is set out below:

109P - Satisfaction as to compliance with conditions precedent to the issue of certificates

(1) A person who exercises functions under this Act in reliance on a Part 4A certificate or a complying development certificate is entitled to assume:

(a) that the certificate has been duly issued, and

(b) that all conditions precedent to the issuing of the certificate have been duly complied with, and

(c) that all things that are stated in the certificate as existing or having been done do exist or have been done,

and is not liable for any loss or damage arising from any matter in respect of which the certificate has been issued.

(2) This section does not apply to an accredited certifier in relation to any Part 4A certificate or complying development certificate that he or she has issued.

In addition to this entitlement the Principal Certifying Authority is not liable for any loss or damage arising from any matter in respect of which the compliance certificate has been issued. It is a certainty that if the question of negligence is raised, the Accredited Certifier who issued the compliance certificate will arduously defend him or herself. This, however, will be against the presumption that the Principal Certifying Authority is free from liability for the building works of which the compliance certificate is the subject.

What is Good for the Goose is not Good for the Gander.

It would appear that there is an inherent disincentive for any Accredited Certifier issuing a compliance certificate under the EPAA. Conversely there is a tremendous incentive for the PCA to obtain compliance certificates.

In Conclusion

The compliance certification regimes in Victoria and New South Wales have given rise to a divergent risk landscape for the

professionals associated with the issue of compliance certificates in each State.

What we have is a situation where a PCA in New South Wales is better able to rely on the compliance certification scheme than the Building Surveyor in Victoria.

In Victoria, absent a compliant Form 14 certificates and absent good faith, the immunity promised by the Building Act in circumstances like the *Toomey* scenario, is not operable. For it to be operable, *Toomey* indicates the level of pedantic vigilance that may be required by all relevant building practitioners involved in issuing compliance certificates.

From the point of those who issue compliance certificates, *Toomey* reflects the approach of the Court to the level of detail and particularity that a Form 14 certificate must contain.

From the point of those who rely on compliance certificates in Victoria, *Toomey* prescribes a 'good faith' menu, by no means definitive and crouched in discussion of what will not constitute good faith. We thus extrapolate what conduct or practices might be adequately vigilant to constitute good faith reliance on a compliance certificate and be afforded the immunity offered to the Building Surveyor.

The Good Faith Menu

- A "hands on" approach to the project;

- Satisfaction with an Inspector or other registered building practitioner's robust reputation, including the good standing of the employer company, the character of the practitioner, his or her qualifications and experience; and

- Remuneration which is commensurate with the Inspector or other practitioner's level of expertise, ie. Token remuneration will not suffice.

Surprisingly, despite the onus alluded to by *Toomey*, the culture has developed whereby a Building Surveyor in Victoria is more willing to rely on Form 14 Certificates notwithstanding the scrutiny of the Court displayed in *Toomey* and more so than the PCA is willing in New South Wales.

The PCA is better able to rely on the immunity afforded by the EPAA compliance certificate regime because there is no "good faith" requirement. While we advise that a PCA should always be vigilant to ensure that compliance certificates, on which s/he intends to rely, are completed as per the requirements set out in the EPAA and its regulations. It is perhaps, due to the robustness of the immunity afforded under the EPAA, that one of the few considerations that may be imported from the *Toomey* case is the matter of form. It would appear the PCA has a robust immunity whereas the Building Surveyor does not.

It is perhaps ironic that there is a culture in Victoria where practitioners readily issue compliance certificates notwithstanding the backdrop of the legislative regime and the decision in *Toomey*. Whereas in New South Wales, Accredited Certifiers are somewhat averse to the issuing of compliance certificates. As such this appears to be an acknowledgment on the part of Accredited Certifiers of the divergent risk landscape in which certification of compliance is set.

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Kristy and Jonathan provide advice and representation to Registered Building Practitioners in Vic and Accredited Certifiers in NSW and the ACT and other construction industry professionals in all three jurisdictions.

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