

29 October 2020

Mr Matthew Press
Director, Office of the Building Commissioner
Department of Customer Service
McKell Building
Rawson Place
Sydney NSW 2000
Via email: matthew.press@customerservice.nsw.gov.au

Dear Matt

Further to my recent correspondence on the Registered Certifier fact sheets, the Association has been advised about another piece of communication sent directly to Registered Certifiers, namely the *Notice to provide information and records under S17 of the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (the Act)* (the Notice).

I write specifically regarding Item 6(b) and the requirement in the Notice for Registered Certifiers to provide “*For each occupation certificate you have issued, a copy of the evidence that you have satisfied yourself that the developer had provided the notification required under S7 of the Act to the Secretary*”.

This specific requirement is not in any relevant legislation, regulation, or the Practice Standard.

When queried by one of our members, Mr Sean O’Hara of your Department replied and referred to a clause in the Practice Standard. We have reviewed this clause and our view is that it cannot be reasonably inferred to impose an obligation on Registered Certifiers as referred to in Item 6(b) of the Notice.

That clause clearly relates to construction defects and other construction phase issues. It would be disingenuous to infer that it relates to the operation of the *RAB Act*, particularly where that Act clearly does not impose a pre-condition to the issue of the occupation certificate.

Previous advice from the Department of Fair Trading (attached) supports this view. That advice indicates that the Registered Certifier is not responsible for satisfying themselves that the developer has fulfilled their own obligations to the Secretary.


It was also made clear to us during the consultation phase of the legislative and regulatory development process that this requirement was not part of the Registered Certifier’s responsibilities and was squarely on the developer as their obligation and responsibility.

We think it inappropriate for Fair Trading to issue directives without reference to relevant legislative or regulatory requirements. We further request that the Department refrain from imposing its own subjective and inconsistent views on how the legislation is to be interpreted without industry consultation or reliance on appropriate legal advice.

We have worked tirelessly with the Department to seek clarification around the obligations of Registered Certifiers under the legislation, and to ensure that communications in this regard are well considered and founded on facts. Ad-hoc and contradictory communications from the Department simply create confusion and uncertainty for industry and ultimately, the public.

Again, I would appreciate an urgent clarification of this matter, and ultimately a retraction of this Notice if an explanation cannot be provided.

Yours sincerely

A handwritten signature in cursive script that reads "J Brookfield".

Jill Brookfield
Chief Executive Officer

From: [Certifier Strategy](#)
To: [Tim O'Reilly](#)
Subject: RE: Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 - Certifier Obligations
Date: Wednesday, 2 September 2020 7:06:17 AM
Attachments: [image005.jpg](#)
[image006.png](#)
[image002.jpg](#)

Hi Tim,

The new legislation only explicitly prohibits the certifier from issuing an OC if there is a prohibition order on the building. The certifier is required to be notified whenever a prohibition order is issued.

Of course, it's sensible for the certifier to ask if the notification has been made, just like it's sensible for the certifier to ask if the strata bond has been lodged even though the certifier isn't responsible for that either.

Regards,
Donna

Donna Quinn
Senior Project Officer

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From: Tim O'Reilly <tim@bcaustralia.net.au>
Sent: Tuesday, 1 September 2020 3:11 PM
To: Certifier Strategy <certifierstrategy@customerservice.nsw.gov.au>
Cc: Robin Howard <robin@bcaustralia.net.au>
Subject: Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 - Certifier Obligations

Hi Donna, trust you are staying well.

Hoping you may be able to assist with this query.

In relation to the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 that came into force today: <https://www.fairtrading.nsw.gov.au/about-fair-trading/legislation-and-publications/changes-to-legislation/building-industry-reforms>

Is the certifier liable if they issue an Occupation Certificate without the developer fulfilling their obligations under this new Act?

Reason for question - there is nothing in the EP&A Act or Regulations (that I have been able to find) which restricts the issue of an Occupation Certificate without this application requirement being fulfilled. From my reading of the new Act it would appear that the onus is fully on the Developer or person having the benefit of the Consent to meet this statutory obligation or they are guilty of an offence – refer section 7.

Having said that, we now have it as a requirement on our Class 2 OC checklist, but I just wanted to be sure we are not otherwise liable in a legislative sense.

If you require any further information or wish to discuss the above, please don't hesitate to contact me.

Kindly CC our Admin Assistant, Meg, in all project related correspondence at meghan@bcaustralia.net.au

Kind regards,

Tim O'Reilly
Associate
Building Certificates Australia Pty Ltd

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