Compulsory Contracts of Engagement for Council Certifiers: What are the Ramifications?

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A vexed question has arisen in New South Wales, now that government has chosen to pass laws requiring Councils to enter into contracts of engagement for their accredited certifiers.

That is, contracts between the Councils and the applicants for Construction Certificates and Complying Development Certificates.

At the outset it must be stated that there is a precedent for this and in fact the laws in Queensland make it compulsory for building certifiers to enter into contracts of engagement with their fee paying clients, consistent with the certifier's duties under the building laws.

Having said this, does that make it such a good idea for local government certifiers in NSW? There has been plenty of resistance to the notion of compulsory contracts of engagement for Council certifiers, some of which will be canvassed here.

The fact remains that much of the content of such contracts would merely recite the functions and duties that Council certifiers already fulfil as required under law, primarily the *Environmental Planning and Assessment Act 1979 ("the EPAA Act")*.

There is a clear division between commercial contracts and regulatory functions, and the AIBS in NSW has raised a valid concern: does the forced entry of Councils into these contracts "muddy the waters" so that Council is then seen as providing a commercial service rather than carrying out a public regulatory function?

Another concern is that the contracts themselves may somehow derogate from the requirements set out in the legislation. But this does not need to be the case, the contracts can be drafted in such a way as they are consistent with the duties under the EPAA Act and other legislation (including the

regulations).

It would be imperative to ensure that all terms and conditions in such a contract are totally consistent with the Act and regulations (and other laws). If there is inconsistency, the contract could be held invalid to the extent of any such inconsistencies, with potential losses occasioned as a result.

While it is correct to say that commercial contracts are at odds conceptually with the notion of public functions (given that for the accredited certifier the true client is in fact the public and their community expectation of safe and sound building work), this is just as true for private accredited certifiers as it is with Council accredited certifiers.

In both cases, the primary client is the public and the community, even though the private developer is paying the fee for the service. Therefore, even the idea of a private accredited certifier regime, where these professionals effectively compete for business against each other, can be seen as a contrary imperative to the public function.

There has not been such a resistance from private accredited certifiers to the idea of compulsory contracts of engagement, because many of them will have been voluntarily entering such agreements already. The contracts provide valuable protection for private accredited certifiers in not only setting out the responsibilities of <u>both parties</u> to the contract, but specifying the terms for such matters as:

- The services that will be provided
- The mandatory inspections that will be conducted
- The fees for payment including rates
- The times or periods for fee payments
- Duties of the client including provision of documents, access to land and timely payment of fees
- Rights of the parties to terminate the agreement, the circumstances where this can occur and the process to follow
- Variations to the agreement including any rights to charge extra fees for extra services

One criticism has been that Councils are denied choice if they are compelled by the EPAA Act to enter into contracts with clients. As has been indicated,

they have no choice but to accept the engagement, which is at odds with commercial contracting, and have no choice in who they accept as clients. This is doubtless a valid point, but can be remedied by having a solid and dependable contract that is consistent with the Council's functions and responsibilities and that specifies the client's duties. And if the client is unreliable they may well choose to use a private certifier if they do not like the terms of the contract.

There may be other aspects of compulsory contracts that are unwieldy or impractical, and these will be the subject of a later article. For example, mandated or prescribed conditions that may not properly reflect the reality of busy building sites.

One example being the requirement to notify the client if another person is going to undertake an inspection rather than the relevant certifier nominated for the project in the agreement. Perhaps this is an onerous impost on Council certifiers in circumstances where traditionally the PCA can delegate all inspections save for the final inspection at issue of the Occupation Certificate. For instance, it could be problematic if the nominated certifier is suddenly unavailable due to a health emergency.

There may be ways around these problems in the way the contract is drafted, and these specific requirements will be the subject of a later article. However, it is argued that compulsory contracts of engagement for Councils, in and of themselves need not be an insurmountable hurdle.

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