

DR11: The danger of unqualified certifications

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1. The responsibilities of certification

Given the risk that the issue of certification of construction quality poses to design professionals, it is surprising that more isn't written about the problem.

Many Australian architects and engineers have in recent years discovered that clients are demanding that they certify that construction is in accordance with plans and specifications. This demand increasingly comes where the client is a developer who intends to on-sell the project, and needs the certification as marketing evidence of quality (or freedom from defects). It also happens where the investors are Japanese-based; where such certifications are commonplace, and in fact are quite reasonable because the design functions and build functions are typically held by the same company.

The fragmentation of responsibility characteristic of building in Australia makes such certification extremely dangerous, unless the design professional's brief includes the authority to exercise control over construction quality. Contrasted against this danger is the legitimate need of the client for such certification. These seemingly mutually exclusive needs are resolved by way of qualification. The key is to find an expression of certification which satisfies the needs of the client without unreasonably exposing the design professional's backside.

The best discussion I've seen on balancing these potentially conflicting requirements crossed my desk some time ago, in the form of one of Schinnerer Management Services "*Guidelines for Improving Practice*". Schinnerer is the principal agent for professional indemnity insurance to members of the American Institute of Architects.

Rarely in my reading do I find something that completely encapsulates an issue and then goes on to set out cogent guidelines for dealing with it. This particular document does just that. I've taken the liberty of adapting parts of it (it is not copyrighted) to the situation confronting Australian design professionals, with all due thanks to Schinnerer.

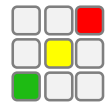
Does this sound familiar?

"One of the characteristics of the recent recessionary construction market is that design professionals are being requested or required, with increasing frequency, to issue certification forms that result in additional liability exposure and that involve possible uninsurable express warranties and guarantees of conditions beyond the design professional's knowledge or control."

We all know that the U.S. has a more litigious professional environment, and we all fear that such reliance on litigation will mark tomorrow's practice in Australia.

Certification Demands

Certificates can be generated from many sources. With the exception of the design professional's providing certificates required by their professional service agreement, the interests of other parties wanting the professional's signature on a certificate form can be substantially different from the professional's interest in serving the client. The types of forms directed at the design professional from clients, government agencies, financial institutions, other professionals, and surety companies may be valid attempts by them to protect their interests, but often have adverse consequences for the design professional.



As a result, certificate forms presented to architects, engineers, and other design professionals should be carefully evaluated to determine the propriety of the various parties' receiving the benefit of the professional's services and representations.

Qualifying Certification

Although the word "certify" confirms something as being true and carries with it the meaning that the issue or item being certified is assured or guaranteed, not all forms of certifications are such absolute statements. A "qualified" certification reduces this absolute nature and communicates that not all is guaranteed. To certify without qualification means to attest authoritatively, and this may constitute an express warranty. By signing an improper certification, a design professional may assume liability that would not be present under common law or expected of the design professional by a knowledgeable and reasonable client.

The law imposes a standard of ordinary care on design professionals as measured by the conduct of peer professionals in the community. This standard is not absolute and does not connote or imply perfection or a guarantee of performance. Accordingly, design professionals should be careful not to alter this legal standard by signing contracts or certification forms containing express terms to the contrary.

Such certifications can impose unmeasurable and unrealistic expectations on the signer and also create a major insurance problem. In the U.S., most professional liability insurance policies contain an exclusion for liability arising out of express warranties and guarantees. As a general rule, professional service firms can appropriately sign only those certification statements that contain appropriate qualifying language and relate to conditions within their knowledge or control.

2. Managing the Certification Process

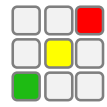
Balancing risk with the client's interests

The design professional's certification should be coordinated with the basic contract documents to provide appropriate safeguards for the design professional while enabling the design professional to fulfil contractual obligations to the client. The terms and conditions of the certificate form should not extend the duties assumed by the design professional pursuant to the agreement. Professional service firms are not required to warrant that their designs are perfect or that the construction is without flaw. Design professionals cannot ethically or legally certify information not known to them or not expressed as an opinion.

What does the public think?

While a design professional may assume that a certification is only a statement of professional opinion based on the scope of services provided on the project, society often imparts to that certification a meaning equal to an absolute assurance. This establishes a detrimental reliance that tends to shift increased risk to the design professional. In the event of a loss by a party relying on the certification, it is highly likely that the certification will be interpreted to be an authoritative verification of fact rather than an opinion based on the knowledge of the design professional and the information available at the time of the certification.

It is also possible that the certification will be interpreted as an assumption by contract of a liability, which, like a guarantee or a warranty, is excluded from coverage under professional liability insurance. When design professionals agree to provide design services, under English common law they are obliged only to provide such services to the best of their ability and in conformance with the professional standards applicable to those services.



Certificate Form Problems

Most certificate forms present one or more of four general problems for design professionals:

- The terms of the certification may impose duties and responsibilities on the design professional that extend and expand those assumed pursuant to the agreement with the client.
- The terms of the certification may involve a legally questionable assignment or delegation of governmental responsibility to a private individual, as in the case of building department certification forms.
- There normally is no provision for, nor interest in, compensating the design professional for whatever services may be required to enable the design professional to sign the certification in a professionally responsible manner.
- Provisions in the certification form may create an unrealistic exposure to liability for the design professional by making the design professional responsible as a guarantor for the builder's performance.

Certifications Required by Clients

Many clients are contractually requiring design professionals to provide more certifications than those required by the standard contracts. Some clients, and some project managers, attempt to shift their risks on a project to the design professional or attempt to increase the exposure of the design professional by requiring certifications that are tantamount to express warranties, for example certifying that the contract documents are in complete compliance with codes and standards.

If an architect or engineer signs any statement regarding the status or conditions of the project, the statement should be accurate and reasonable and reflect professional judgment. It will be no excuse to say subsequently that certain conditions apply to a certification when the provisions in the certification are absolute and unqualified.

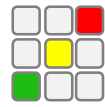
Financial Institutions

Commonly in the U.S., and increasingly in Australia, financial institutions attempt to protect their investments in construction projects by requiring architects and engineers to sign certifications running to the benefit of the lender before any funds are released. Quite often this requirement arises at a critical time, either at the commencement of construction for the construction financing or upon completion of construction for the permanent financing. Significant pressure to sign the certificate is then brought to bear on the design professional by the client, who cannot afford to have financing delayed by a reluctant architect or engineer.

The lender typically wants the professional to state that the drawings and specifications are in compliance with codes and regulations or that the builder has completely complied with the requirements of the contract documents. Such a certification usually is part of a contract that grants many privileges and few obligations to the financial institution while putting the design professional at risk for uncompensated services and unintended liability.

Obviously, an architect who agrees to broad financial institution provisions to enable the client to get financing for the project would be exposed to significant potential liability, much of it beyond the coverage of professional liability insurance.

An architect or engineer should anticipate or investigate the possibility of a lending institution requiring certain representations about the project as a condition of the financing.



Rather than wait until a critical time to negotiate over the terms of the design professional's representations, it would be preferable to develop a form at the time the client-design professional agreement is being negotiated to serve as the professional's certification to any lending institution. This form should become an addendum to the agreement. In this way, the certification language can be coordinated with the services set forth in the design professional's contract, and qualifying language can be included to keep the certification within appropriate professional bounds and the scope of insurance coverage.

As with public officials, a lending institution interested in having the benefit of a design professional's signature on a certification form is not interested in having insurance coverage voided by the language of the certification.

Appropriate Reactions to Requested Certifications

Particular liability problems exist for a design professional when provisions in certification forms expand or extend the professional's obligations and duties as set forth in his or her agreement. Normally, the only certificates that a professional is obligated by agreement to sign are the builder's certificates for payment and ones indicating the practical and final completion of a project. If the architect or engineer is to sign certification forms for the benefit of another party, the design professional should be sure that the terms of the certification:

- are consistent with contractual obligations,
- do not require an assumption of responsibility for a public duty,
- do not create guarantees or express warranties,
- do not create an unacceptable or uninsured exposure to liability, and
- are acceptable to the professional indemnity insurer.

The rule to remember is that no certificate can or should be signed if it contains any statement that is beyond the professional's personal knowledge.

3. Ethics & Actions

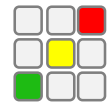
The Ethics of Certifications

It would be unethical and improper to certify that certain conditions exist when the design professional cannot know that they exist. Accordingly, a client should not require the design firm to sign any certification that would result in that firm's certifying the existence of conditions whose existence cannot be known to them.

Design professionals have an ethical obligation to certify only those facts that they know to be true and to express their professional opinion based on the application of their judgment to a known set of conditions. Therefore professional service firms should certify only those facts of which they are certain or should clearly indicate that they are expressing a professional opinion in a certification or declaration.

Preserving Insurance Coverage

Improper certification language can result in potentially serious and often uninsurable exposures to claims of professional liability. In this regard you should talk to your insurer.



In general, however, it is important to have every certification not stating a fact known by the design professional include language indicating that "certify" is understood to be an expression of professional opinion by the design firm based on their best knowledge, information, and belief, and that it thus constitutes neither a guarantee nor a warranty.

This is all that should reasonably be expected from a design professional, and it helps to preserve the coverage afforded under a firm's professional liability insurance policy.

Most clients understand that design professionals are insured against their own professional negligence and not for any breach of contract beyond that caused by negligence. Thus, by accepting the "professional opinion" qualifier, a client is making it more likely that the certifications will not be considered to be express warranties, which would be excluded by the professional liability insurance policy.

Detrimental Reliance and Express Warranties

When a design professional undertakes to certify that something has been done, not done, or done in a certain way, the client has the right to rely on the professional knowledge and skill of the individual and the firm making that certification. A design professional should therefore be certain that what is being certified is consistent with the services rendered. It is the design professional's duty to avoid providing a certification that goes beyond the scope of services for which the professional service firm was retained and to avoid making the certification an unqualified statement of fact.

By making such an unqualified certification, there is a real possibility that, by implication, the design professional may be considered to have given broader assurances as part of that certification than were intended or justified. Any notice or statement should be carefully worded to avoid such misunderstandings.

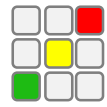
Certifications and Contractual Obligations

Certifications should not be thought of as after-the fact recordations. The contract that a design professional negotiates with the client and the certifications that the design professional provides the client should be in accord. The contracts signed include descriptions of the services to be provided. In the certification, a firm should list the standards by which the services were performed, the factors that may have limited the scope of those services, and the parties for whose benefit the services were performed.

Basic Questions

Design professionals should examine every certification with the following issues in mind:

- Does the language of the certification change the standard of care required of the design professional? Does the certification attest to more than the skill and care ordinarily used by members of the profession practicing under similar conditions at the same time and in the same locality?
- If the certification contains facts that are not within the knowledge of, or includes statements of activities not within the direct control of, the design professional, is the certification phrased in such a way that it is an expression of the professional opinion of the design professional based on the judgment of the design professional? Is it an application of the knowledge of the design professional to specific information available to the design professional at the time of the certification, and does it clearly indicate that the certification is no more than the belief of the design professional?



- Is the certification based entirely on, and expressly limited by, the scope of services that the design professional has been commissioned by the owner to perform? If the certification involves the work of the builder, is the certification based on the services furnished during construction by the design professional based on the contract with the client, and does the certification apply only to facts that are within the design professional's knowledge or that could reasonably have been ascertained by the design professional as a result of carrying out the responsibilities specifically assigned to the design professional under the agreement?
- Is it clear that the certification does not constitute a guarantee or warranty of activities outside of the design professional's control, such as the approval of permits, the financial performance of the client, or the builder's performance under the contract for construction? Is it clear that the certification is not an assumption of responsibility for any failure of the builder to furnish and perform the work in accordance with the contract documents?

Design professionals can provide a valuable service to clients and to the public through certifications. But the final effect of a certification is not simply that it puts the design professional into the solicitor's line of fire should a problem occur, but rather that the certification identifies--to all who need to rely on it--the true scope of services provided by the design professional, the facts known to the design professional, and the opinion of the design professional for those issues of concern beyond the design professional's direct knowledge or control.

Risk Management Options

Careful attention to the language of certifications and an ability to state to a client the realistic limitations of a professional service firm's certification constitute a prudent, assertive program of risk management that allows the firm to better predict the costs and consequences of practice.

Using qualified certifications enables a design professional to provide services to clients while protecting the design professional's investment in the professional practice.

To see other **DesignRisk** "more info" docs, go to http://iprojects.net.au/index.php/user_guides and scroll down to the bottom: 8.0 DESIGN RISK, and click on the document you'd like to review.

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