

Association of Australian Certifiers – Submission to the NSW Public Accountability Committee – Further inquiry into the regulation of building standards

29 August 2021

Message from AAC President

The Association of Australian Certifiers (AAC) welcomes the opportunity to contribute to the NSW Public Accountability Committee's further inquiry into the regulation of building standards.

This inquiry raises a number of important issues, but we would respectfully suggest that it too narrowly focusses in on the certification system.

For more than 15 years, the AAC has been advocating for a NSW construction industry where all practitioners are accountable for the work they carry out.

This focus on accountability was borne out of a desire to improve outcomes for the public, but also a reflection on the limitations that exist within a registered certifier's role.

Despite common misconceptions about the certification system, the role of a registered certifier is limited and well defined in the *Environmental Planning and Assessment Act 1979* and the vast majority of registered certifiers in NSW perform their role diligently and in the best interests of the community.

For too long though, there has been a number of deficiencies in the regulatory environment which has allowed too many practitioners to operate without being properly registered, regulated and insured.

In recent years, the NSW Government has embarked on a building reform program, which has largely sought to bring more of these practitioners under the regulatory umbrella.

This has generally been a positive development, but it will take time for these changes to flow through the entire industry and ultimately improve outcomes for the general public.

The AAC also recognises that driving reform and cultural change is not just a matter for government. Industry must do its fair share and that is what our organisation has been focussed on - lifting standards, improving the culture, and ensuring consumers are put front and centre.

A central pillar of this effort has been the development of a Professional Standards Scheme (PSS), which we will soon be launching.

The AAC thanks the Committee for considering this submission and we would be happy to provide further evidence at any public hearing.

Yours sincerely,

Craig Hardy
President
Association of Australian Certifiers

Background information

The AAC was incorporated in 2003 and represents the interests of professionals participating in the certification of building and subdivision works in New South Wales. We represent registered certifiers employed in private practice and registered certifiers employed by local government.

We provide practical support to registered certifiers by providing education and representing their views in government and key industry forums.

The AAC is a strong advocate for greater accountability from all practitioners participating in the NSW construction industry.

Introduction

This inquiry raises a number of important issues relating to the construction industry, namely the use of flammable cladding and the NSW Government's regulation of building standards.

Disappointingly, the inquiry narrowly focusses on the role of the private certification system in this. It is disappointing because the certification system does not operate in a vacuum, it exists within a broader framework, which cannot be examined in isolation.

As the inquiry is focussed on private certification, it is important to set out the following to ensure an informed discussion:

What does a registered certifier do?

A registered certifier is a building professional, who, depending on their type of registration, can act as a Principal Certifying Authority (building inspection role) and/or can issue certificates under the *Environmental Planning and Assessment (EP&A) Act 1979* (issue Complying Development Certificates, Construction Certificates, Strata Certificates and Occupation Certificates for projects).

A registered certifier checks that a building design complies with the Building Code of Australia (BCA), and that a completed building is suitable for occupation.

If you are planning to carry out building work or subdivide land you may be required, under the EP&A Act, to obtain approvals and be issued with particular certificates.

To obtain approvals and receive the appropriate certificates you can choose to appoint either a registered certifier working in private practice or a registered certifier working in the local council.

The range of certificates includes:

- **Complying development certificates** - authorising building or subdivision work where a Development Consent is not required.
- **Construction certificates** - authorising building or subdivision work where a Development Consent is required.
- **Occupation certificates** - permitting the occupation or use of a building.
- **Subdivision certificates** - allowing a strata subdivision to be registered by the Department of Lands.
- **Strata certificates** - allowing a subdivision to be registered by the Department of Lands.

Not all registered certifiers can issue all of these certificates. Depending on their qualifications and level of registration, some registered certifiers can only issue certain certificates.

What a registered certifier doesn't do

What a registered certifier is permitted and required to do is legislated by government. It is important that the distinctions between the role and responsibility of the registered certifier and the builder are understood. A registered certifier does not do the following:

- Supervise the building work.
- Attend site all the time.
- Act as a clerk of works on the project.
- Carry out the quality control function for the project.
- Draw the plans or write the specifications for any part of the project.

Building construction and the quality of the work is the responsibility of the project manager or the builder and it is best managed by these people.

Who appoints a registered certifier?

According to the EP&A Act, registered certifiers are contracted and engaged only by the person with the benefit of development consent (i.e., the owner).

Furthermore:

- It is the owner's choice who they engage as a certifier.
- The builder is not allowed to appoint the registered certifier nor the Principal Certifying Authority.
- The builder cannot do this for the owner.
- The owner is not obliged to engage a certifier suggested by the builder.

It's important to note that the same rules apply to all registered certifiers, whether they are employed in a council or by a private company.

Registered certifier contracts and fees

Before the registered certifier does any certification work for a person, the registered certifier must have a written and signed contract with the person. The contract must specify the scope of work and the payment, which must be paid on or before the lodgement of the application for building approval. This upfront payment ensures the registered certifier cannot be pressured to issue approvals or certificates by a certain date, nor issue without the requisite information.

Members of the AAC also commit to abide by the AAC's code of conduct and demonstrate the AAC's values, providing clients with a high level of service and professional standards.

Issue – Terms of Reference

The efficacy and adequacy of the government’s regulation of building standards

The general principles guiding the NSW Government’s building reform process have been sensible, but a range of implementation and operational issues which have arisen over recent times.

Planning Portal

The concept behind the Planning Portal is sound, but the implementation of the Portal has been an abject failure.

Our members, particularly across regional NSW, are telling us that the Portal is making life harder for their regional small businesses and their clients.

Many of these people are just trying to get their house built or make minor alterations and are hitting a brick wall.

The system has been plagued by technical glitches and unnecessary red tape and duplications, and the Portal operates without any meaningful understanding of relevant legislative and regulatory obligations.

The Portal also ignores the fact that industry has developed mature systems to manage these application and appointment processes, and this new approach does not speak to these existing systems in any intuitive way.

This burden is already leading firms to have to employ additional administrative staff just to manage the Portal.

OBC Audits

Sharing insights

We welcome the OBC conducting audits and we appreciate that the government must highlight where things are going wrong, but we think there is also opportunity for the OBC and the government to highlight the vast majority doing the right thing.

This also sends a signal and gives those doing the right thing a competitive advantage.

We also think it would be helpful to industry as a whole if the findings from these audits are more widely shared with industry via industry associations.

Handling of private information

Finally, we are concerned about the management of personal information of practitioners involved in audits. We have been made aware of one example where an AAC member’s private information, collected from a background check conducted by the OBC, was shared by the OBC with third parties during an audit, without the knowledge of the AAC member. This is unacceptable and measures should be put in place to prevent this happening in the future.

The cost, effectiveness and safety concerns arising from the use of flammable cladding

It is important that proper risk assessments are done in relation to cladding rectification.

One of the issues created by more arbitrary assessments is that if the bar is set so low for replacement, it becomes prohibitively expensive to replace.

Then we end up in a position where less cladding will actually be replaced than in a situation that involved risk assessment that might set a higher bar for removal.

This issue was recently canvassed in the Law Review of Australia by barrister, Philip Bambagiotti, who stated:

“The (Cladding Product Safety Panel) adopted a ‘very low risk approach’ to the question of replacement products for defective ACP. It ultimately reached the surprising conclusion that the threshold for what it regarded as those panels that were too dangerous and required replacement as being those with greater than 8% combustible material mass. And further that, with some insignificant exceptions, all such cladding needs to be removed and replaced.

“The product ban of 10 August 2018, issued pursuant to the *Building Products (Safety) Act 2017*, dealt with the prohibition of ACP ‘with a core comprised of greater than 30% polyethylene (PE) by mass’. This is the standard to which people have been working, and remediating, since that time, almost 2 ½ years now.

...

“NSW faces the nightmare that rectification of the ACP problem, by wholesale removal, may become so expensive, that the process becomes a money pit – meaning that too many residential apartment blocks will not be able to afford to replace all the 8% ACP without sinking into a debt cycle. The result could well be that there is less ACP replacement than even there would have been with the 30% ACP threshold – making a bad situation worse for everyone.”¹

It is also important that a comprehensive cladding remediation funding package, similar to the approach taken in Victoria, is implemented.

Without this approach, it is difficult to see how the cladding issue will be resolved or when or how insurers will be drawn back into the market because of this issue.

Private certification of and engineering reports for construction projects

The private certification system has played a positive role in the construction industry in NSW and delivered overwhelmingly positive results for the general public.

The vast majority of private certifiers perform their role in a professional manner and in the best interests of the broader community, but like any industry there is going to be a small minority of people doing the wrong thing.

The AAC has always supported a rigorous and transparent compliance and auditing regime for registered certifiers, which occurs in NSW. Members of the public can access this data and make informed judgements on registered certifiers across the state, and those making a habit of doing the wrong thing will lose their registration.

¹ ‘ACP Cladding Rectification’ Law Council of Australia Newsletter - Philip Bambagiotti – Barrister – St James Hall Chambers – 4 May 2021

One of the central issues facing the certification system throughout the period of private certification, is that when private certification was introduced, the overarching regulatory environment was not appropriately reformed until the most recent building reform program commenced.

This meant that for around two decades, registered certifiers were some of the few practitioners actually registered (or accredited) and insured across the system, while many other practitioners were less accountable for the work they performed on construction sites.

It is our expectation that the current reforms, namely the implementation of the *Design and Building Practitioner Act 2020*, will finally work to address many of these accountability issues across the sector, and ultimately improve outcomes for the public. We also support expanding this to include all other classes of building, not just Class 2 and Mixed-use buildings.

There are a range of specific issues relating to private certification which need to be addressed, including perceptions of conflicts of interest, standard forms, the professional indemnity insurance market, industry development and reform fatigue.

Conflicts of interest

The AAC is aware there is a view among some stakeholders that conflicts of interest remain in the private certification system. We would argue that the system as it is currently set up ensures real conflicts of interests do not occur.

The concept of a 'cab-rank' system, which has previously been flagged, has the potential to create a range of unintended consequences that would not be in the best interests of owners or the public.

Ultimately, we support the work the OBC is doing in this space and believe it will also work to address perceived conflicts of interests.

Standard forms

It should be a mandatory requirement for all persons involved in the certification of any engineering design or technical aspect of construction (e.g., fire walls, acoustic walls, bushfire, etc.) to issue a Certificate of a standard form and generated by a government managed 'Certificate Generator.'

This will improve accountability and performance of professionals, which will in turn improve outcomes for the community.

Professional indemnity insurance

The professional indemnity insurance market remains a significant issue facing registered certifiers throughout NSW.

The registration of additional building practitioners which mandates insurance coverage will hopefully go some way to alleviating insurance pressures by broadening the insurance pool, but this will take time.

The AAC is of the view that the insurance requirements for these practitioners should at a minimum be the same as those for registered certifiers, and that the insurance requirements should have commenced when the regulation commenced.

It is not logical that building practitioners working on the same projects as registered certifiers should have insurance requirements that are less robust than those applying to registered certifiers.

If a practitioner on a project is under-insured, this exposes the homeowner, the other design practitioners, the builder, and the registered certifier.

We've seen the dreadful impact on homeowners, and the costs imposed on the community and government due to the current inadequate insurance coverage by building and design practitioners in NSW.

While we are pleased that the original two-year transition period has been reduced to one year, we feel the insurance requirements should have started when the Regulation commenced.

Industry development

One of the biggest issues facing the certification system, both in private practice and in local government, is an ageing workforce and shortages of certifiers across regional NSW.

On the current trajectory, we believe there is likely to be a significant shortage of registered certifiers in NSW, which will have a significant impact on the ability of NSW to house its citizens and build much-needed infrastructure into the future.

Reform fatigue

Among AAC members, and across the entire industry, there is a strong sense of 'reform fatigue'.

These are highly regulated areas, as they should be, but it is important to note that over the last few years registered certifiers have had to deal with significant regulatory change that impacts many aspects of their day-to-day operations.

This could be better mitigated through improved communication from the NSW Government, specifically the Department of Customer Service and the OBC.

Other related matters

The AAC continues to urge policymakers to consider the following initiatives to improve outcomes for the general public.

Reform	How does this benefit the community
1. More rigorous auditing of licensed tradespeople operating on NSW construction sites.	Will improve accountability and performance of professionals, which will in turn improve outcomes for the community.
2. All documentation relating to the certification of a building should be in a standard form developed by industry and Government.	Will improve transparency, clarity for professionals and the community.
3. All parties involved in the building product supply chain need to be accountable for the products that they prescribe, specify, purchase and use in the construction of a building.	Will improve accountability and performance of professionals, which will in turn improve outcomes for the community.
4. Amend the BASIX Scheme to allow Applicants to design buildings based on predetermined standards such as the size of water tanks, the thermal rating of wall and roof insulation, permissible window area sizes, and the like.	Will provide certainty and clarity to both professionals and the community.
5. Strengthen the administration of building regulation by bringing building regulation and control functions currently undertaken separately within government into one portfolio reporting to one Minister.	Will provide certainty and clarity to both professionals and the community.
6. A review of the <i>Environmental Planning and Assessment Regulation 2000</i> .	Will provide certainty and clarity to both professionals and the community.

Conclusions

Thank you for your consideration of this submission. The AAC would be happy to provide further information or appear at any public hearing.

To discuss further, please contact AAC CEO, Jill Brookfield on 0431 082 259.