

Submission
No 74

**INQUIRY INTO REGULATION OF BUILDING
STANDARDS, BUILDING QUALITY AND BUILDING
DISPUTES**

Organisation: Association of Accredited Certifiers

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**Submission to the Public
Accountability Committee inquiry into
the regulation of building standards,
building quality and building disputes**

Association of Accredited Certifiers

Summary

We welcome the opportunity to provide a submission to the Public Accountability Committee inquiry into the regulation of building standards, building quality and building disputes.

For more than 15 years, the Association of Accredited Certifiers (AAC) has been arguing for greater accountability in the construction sector.

While the terms of reference for this inquiry narrowly focus in on “private certification”, this process does present an opportunity to explore broader issues in the industry that must be addressed to restore residents’ and owners’ confidence.

Central to achieving this is ensuring accountability of all building practitioners. Currently, only Accredited Certifiers are required to be accredited and hold Professional Indemnity Insurance.

This means that those who carry out specific construction work are not as accountable as they should be for that work. Additionally, it skews the liability towards Accredited Certifiers, which has contributed to the current PI insurance crisis facing the industry today.

To deliver the desired accountability across the entire sector, AAC strongly believes that more practitioners must be accredited or licensed and required to be covered by PI insurance.

This inquiry is also an opportunity to address several misconceptions about certification including what is and is not involved; and about the roles of Accredited Certifiers and local government employed Accredited Certifiers.

Introduction

The AAC represents the interests of professionals participating in the certification of building and subdivision works in New South Wales. We represent both private Accredited Certifiers and Accredited Certifiers employed by local government.

We provide practical support to Accredited Certifiers by providing education and representing their views in government and key industry forums. We promote the activities and services of Accredited Certifiers to the building and development industry and the public, as responsible, reliable and professional.

The AAC was incorporated in 2003 and was created because of the issues Accredited Certifiers working in the private sector were facing. Sadly, they’re still facing many of the same issues today. Now we have members from both the private and public sectors.

For more than 15 years, the AAC has been calling on government to mandate the wider licensing of building designers, subcontractors and engineers and to mandate their involvement in the construction process.

As a starting point, we must put accountability at the centre of any reform process. Ensuring accountability of all key personnel in the industry is crucial to restoring the public’s confidence in the entire system.

The recommendations contained within the discussion paper are a good start, but to get the ‘balance’ right, government must go further. Singling out a small number of practitioners will not and cannot relieve the problems currently experienced within the building industry.

The problems in the building industry are far broader than the scope outlined in this discussion paper.

The registration of building designers and engineers is just the beginning. **It is essential that all key personnel contributing to the construction of a building must be licensed and insured.**

Issues – Terms of Reference

(a) The role of private certification in protecting building standards

There is significant misinformation in the community about the role of Accredited Certifiers in NSW. In order to better understand the role and ensure an informed discussion, it is important to set out the following:

What does an Accredited Certifier do?

An Accredited Certifier is a building professional, who, depending on their type of accreditation, can act as a Principal Certifying Authority (building inspection role) and/or can issue Part 4 and 4A certificates under the Environmental Planning and Assessment (EP&A) Act 1979 (issue Complying Development Certificates, Construction Certificates, Strata Certificates and Occupation Certificates for projects).

If you are planning to carry out building work or subdivide land you may be required, under state legislation, to obtain approvals and be issued with particular certificates.

To obtain approvals and receive the appropriate certificates you can choose to appoint either an Accredited Certifier working in private practice or an Accredited 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 Accredited Certifiers can issue all of these certificates. Depending on their qualifications and level of accreditation, some Accredited Certifiers can only issue certain certificates.

When appointing an Accredited Certifier, it is important that you check that they can issue the type of certificate you need.

What an Accredited Certifier doesn't do

What an Accredited Certifier is permitted and required to do is legislated by government. It is important that the distinctions between the role and responsibility of the Accredited Certifier and the builder are understood. An Accredited Certifier does not do the following:

- Supervise the building work.
- Attend site all the time, (In fact an Accredited Certifier acting as a Principal Certifying Authority is generally only on site for less than 0.5% of the total building time).
- Act as a clerk of works on the project.

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- Carry out the quality control function for the project.
- Draw the plans or write the specifications for any part of the project.

It is not the Accredited Certifier's role to check that the builder or developer has complied with every aspect 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 an Accredited Certifier?

According to the legislation, Accredited 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 Accredited 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 Accredited Certifiers, whether they are employed in a Council or by a private company.

Accredited Certifier contracts and fees

Before the Accredited Certifier does any certification work for a person, the Accredited Certifier must have a written and signed contract with the person. As detailed in the *Building Professionals Regulation 2007*, 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 Accredited Certifier or Principal Certifying Authority cannot be pressured to issue approvals or certificates by a certain date, nor issue without the requisite information.

Members of the AAC 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.

(b) The adequacy of consumer protections for owners and purchasers of new apartments/dwellings, and limitations on building insurance and compensation schemes

Currently, consumer protections for owners of new apartments/dwellings are inadequate. All building practitioners, including 'building designers' and builders should owe a duty of care.

The duty of care should apply to all types of work and be commensurate with the service that they provide.

Legislation should prevent building practitioners to contract out of their duty of care.

The national market failure with respect to compliant insurance for Accredited Certifiers also exposes consumers. Any solution will therefore need to deal with the fact that:

- Historical statutory liability for cladding matters will only be insured if those projects have been notified on policies. Holistically, this risk will be at least partly uninsured in NSW;
- Future statutory liability for cladding matters will be wholly uninsured.

Uninsured statutory liability has three significant ramifications:

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1. No protection for NSW consumers;
2. No protection for Certification Companies; and
3. No protection for Certifier's personal and family assets.

All buildings require certification. A series of significant contractual and OHS issues can arise if this is not undertaken. This is particularly the case in high rise and residential buildings, which are already under settlement duress due to falling valuations. Councils have no capacity to step in and execute these functions in the event of an industry failure.

The private insurance system has repeatedly failed building practitioners and consumers over the last two decades, significantly:

- The withdrawal of run off-cover for certifiers in 2002
- The degradation of available Home Owner's Warranty Insurance cover in repeated stages from 2002 – 2015
- The gradual withdrawal of insurers from the certification market culminating in the total unavailability of full insurance cover in July 2019.

To ensure consumer and practitioner confidence in the construction industry, NSW needs a government-backed insurance scheme with at least the following characteristics

- Government sponsorship, co-partnering, underwriting or oversight such as afforded medical and CTP (green slip) and other insurances considered key to the operation of our society.
- Run off cover as originally required by the various state's regulations, with a retirement arrangement that will cover practitioners and continue to protect consumers once practitioners retire and/or surrender their accreditation.
- Meaningful liability caps covering all types of claims.
- Meaningful Home Owners Warranty insurance for all apartment buildings.
- Potentially further extending the personal liability and insurance requirements to:
 - o Builders and Developers (as is in part the case in Victoria) as well as consultants as suggested in your word document.
 - o Trades such as roofers, water proofers and gyprockers (and others) who are responsible for construction of the waterproof, fire and acoustic rated construction elements which have also been problematic over the years.
- A requirement that any such system includes Accredited Certifiers and their existing potential liabilities.

(c) The role of strata committees in responding to building defects discovered in common property, including the protections offered for all strata owners in disputes that impact on only a minority of strata owners

No comment.

(d) Case studies related to flammable cladding on NSW buildings and the defects discovered in Mascot Towers and the Opal Tower

Regarding cladding risks, our view is that, in order to ensure a consistent and balanced assessment to this issue, the NSW Government must convene an independent panel of industry experts to assess large or contentious cladding risks and provide decisions for cladding.

These experts would be acting as Government Employees in this capacity and not consultants and as such indemnified by the Government. Hence, they would be free to make positive decisions that

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consider and balance concerns relating to both fire-safety and cost to owners and the community, unfettered by concerns about future legal action and their PI insurance.

The model for this panel should be the Victorian Building Appeals Board which undertakes a similar role in that state.

In the absence of a single state assessment system, it is likely that outcomes will be inconsistent across different local Government jurisdictions, leading to inefficiencies at considerable and unnecessary costs to owners, residents and the community.

To conclude, if private consultants are left to undertake assessments unsupported by such a system, the implications of the insurance crisis faced by the industry are such that private consultants will be forced into an overtly and unnecessary conservative position to protect themselves.

This will potentially result in the community bearing tens or even hundreds of millions of dollars in unnecessary remediation costs, it is likely that some owners will seek to recover part of these costs from insurers via legal action.

A vicious cycle will then develop where insurance will become harder or impossible to obtain, leading to even more conservatism from industry with respect to cladding assessments, and potentially resulting in private consultants leaving the industry because they cannot obtain complying PI insurance.

The NSW state government must very carefully consider the dangers of relying on private and local government sectors to determine suitable outcomes for combustible cladding on buildings. Our view is that a public sector panel, utilising the best of the skills and experience from both the public and private sectors, is best placed to arbitrate on cladding risk. Such a panel could balance all the relevant factors in making decisions, free of concerns about insurance, and hence achieve the best outcomes for the state based on risk and cost concerns.

(e) The current status and degree of implementation of recommendations of reports into the building industry including the Lambert report 2016, the Shergold/Weir report 2018 and the Opal Tower investigation final report 2019

The AAC is actively engaging with the NSW Government on their building reforms which seek to translate the Shergold/Weir report, and to a lesser extent the Lambert report, into policy outcomes.

The NSW Government is moving this forward through its *Building Stronger Foundations Discussion Paper*, which the AAC has responded to.

The AAC has been on the record endorsing both the Lambert report and Shergold/Weir report recommendations.

While action on reforming the construction industry is long overdue, we welcome the Government's reform process.

(f) Any other related matters

It is vitally important that we improve the accountability of all professionals in the construction industry.

This will restore confidence in the construction and housing industry and better protect owners, residents and other consumers.

To achieve this, the AAC advocates eight key policy reforms.

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Central to this plan is that all professionals involved in the design, installation and approval of buildings must be accredited and insured.

Under current regulations there is no requirement for structural or services engineers to undertake inspections of structural or services elements in buildings.

Currently, the construction sector lacks accountability and fundamental checks and balances. This must change to restore owners' and residents' confidence.

The AAC's eight-point plan includes:

- All professionals involved in the design, installation and approvals process must be accredited and insured.
- All key personnel in the process who are not accredited must be licensed and be required to prove their competency at regular intervals.
- All documents related to the certification of a building should be in a standard form developed by industry and Government.
- All persons involved in the certification of any engineering design or technical aspect of construction must issue a certificate on a standard form.
- Comprehensive auditing of all accredited or licensed persons.
- All parties involved in the building product supply chain need to be accountable for the products they prescribe, specify, purchase and use.
- Amend the BASIX scheme to allow applicants to design buildings based on predetermined standards.
- Strengthen the administration of building regulation in NSW by bringing building regulations and control functions into one portfolio, reporting to one Minister.

These reforms are long overdue and must be implemented as a matter of urgency to better protect consumers, restore confidence in the construction industry and improve accountability.

As well as this, AAC believes there would be significant merit in the NSW Government investing in a public education campaign to better inform the community on the roles and responsibilities of building professionals throughout the construction chain.