

8 POINT PLAN TO REFORM THE BUILDING INDUSTRY IN NSW

Pre-election platform – January 2019



ASSOCIATION OF ACCREDITED CERTIFIERS

The Association of Accredited Certifiers (AAC) represents the interests of professionals actively participating in the certification of building and subdivision works in New South Wales.

We exist to be a united alliance, providing practical support to Accredited Certifiers 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.

We encourage the delivery of quality service and advice to customers and promote high standards of ethical and professional behaviour among members. We encourage AAC members to build confidence through leadership.

To find out more about AAC, please visit www.accreditedcertifiers.com.au/about/about-the-aac-3

INTRODUCTION

The following document outlines eight common-sense and overdue reforms that need to be implemented by the next NSW Government in its first 100 days.

These measures will improve accountability of all people involved in the construction process and improve protections for owners and residents.

For too long, governments in NSW have failed to act to ensure robustness and accountability in the apartment construction industry in NSW.

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

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.

The recommended reforms in this document are all common-sense measures that will drive much-needed improvements in the building industry and return confidence in the construction sector.

The AAC calls on all NSW political stakeholders to endorse this pre-election platform and commit to implementing these recommendations within 100 days of the March 23, 2019 poll.

For further information, please do not hesitate to contact the AAC on 1300 735 935.

Yours sincerely,

Jill Brookfield
Chief Executive Officer

SUMMARY OF PRE-ELECTION PLATFORM

8 POINT PLAN TO REFORM THE BUILDING INDUSTRY

1. All professionals involved in the design, installation and approval of buildings must be accredited / registered and insured.
2. All key personnel contributing to the construction of a building that are not accredited / registered must be licensed and be required to prove their competency at regular intervals.
3. All documentation relating to the certification of a building should be in a standard form developed by industry and Government.
4. It must 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.'
5. A comprehensive auditing program is required that takes a holistic approach to managing the performance and behaviour of not just Accredited Certifiers but all registered or licensed persons. This program needs to be developed by industry Associations under a watchful eye of the Government and include input from experts in the fields of insurance and risk management. Participation in this Auditing/Risk Management program should be compulsory and funded by a levy with the results provided direct to Government through a predetermined reporting mechanism.
6. 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. It is critical to the longevity and structural soundness of buildings that the products and materials procured and used are 'fit for purpose' and comply with Australian building laws and standards.
7. 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. Compliance with Deemed To Satisfy (DTS) provisions of the Building Code of Australia (BCA) should be made available to Applicants within the performance-based framework of the Building Code of Australia (BCA) similar to Section J or part of that Section.
8. 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.



ACCREDITATION / REGISTRATION OF ALL PROFESSIONALS

On the 18 April 2002 Mr Craig Hardy, who is now the President of the AAC, made a submission to the then NSW Government as part of the Campbell Inquiry into the Quality of Buildings expressing a concern that works undertaken on building sites may not be structurally sound, and that they did not conform with the legislative requirements of the time (i.e. the Building Code of Australia). Furthermore, attention was drawn to the fact that works were not of a quality that met reasonable building standards and the expectations of the customer. This same submission emphasised the need for ensuring that the construction of buildings involved a coordinated effort by professionals from many disciplines and that there was a distinct need to ensure that all participants were accountable for their role in the process. As part of this submission it was recommended that:

- A transparent yet affordable auditing process was required to ensure that professionals working within the building industry were operating within agreed boundaries outlined in industry Codes of Practice;
- Auditing should be administered by the NSW Government with technical input from relevant Associations such as the AAC, Australian Institute of Building Surveyors (AIBS) the Housing Industry Association (HIA) and the like;
- Funding for this initiative should be sourced from a modest and regulated levy placed on all Development Applications and/or Construction Certificates issued by both Local Councils and Accredited Certifiers. This levy should replace fees for the registration of Part 4A Certificates;
- Building Surveyors employed in both Local Government and the private sector should have their activities and practices audited. To be effective any auditing program should not be restricted to the private sector based on the fallacy that it is only private practitioners that may participate in corrupt activities;
- Industry 'Practice Notes' should be prepared that clearly outlines the methodologies and procedures required to carry out certain functions. For example, any Building Surveyor undertaking an inspection should follow an agreed procedure and prepare a 'Site Report' that is an industry standard;
- All 'Site Reports' should be completed and kept as part of a record that is recognised as a public document (both within Local Councils and privately). They should be made available to the public on request in accordance with an agreed procedure;
- All participants in the industry should carry a suitable level of accountability commensurate with the service that they provide. They should have the appropriate level of training, qualification, insurance, association membership and be required to prepare their documentation (such as Compliance Certificates) in a format that is consistent, accountable and binding on the trade or professional concerned. This requirement should relate to all aspects of construction, including but not limited to fire safety, waterproofing, pest control and the like; and
- All Building Surveyors participating in the accreditation, inspection and approval of buildings should be required to participate in a program of preparing their documentation in accordance with an agreed procedure.

At the time private certification was introduced in NSW it was anticipated that Engineers would participate in the Scheme and become accredited. Whilst the facility exists to do just that the Engineers have never engaged in the process either individually or as a Corporation in numbers that are meaningful. Similarly, it has never been mandated that Engineers be required to issue Compliance Certificates for the designs they create or the inspections that they undertake under the provisions of Part 4A of the *Environmental Planning and Assessment Act 1979* or its replacement legislation.

An understanding of the complexity involved in the construction of a building appears to have been lost on successive State Governments since the introduction of certification in NSW. The recent events surrounding the construction of the Opal Tower Building at Sydney Olympic Park have highlighted this fact. An investigation by eminent structural engineers in their field (i.e. Professors Carter, Hoffman and Foster), at the behest of the NSW Planning Minister, has concluded that the cause of damage to the Tower is not the result of environmental factors, the materials used in construction or the adequacy of the foundation material but rather it is likely due to issues relating to the design and construction of the structure. In conclusion, the authors:

“identified a number of design and construction issues, a combination of which probably caused the observed damage to some structural members in the Opal Tower Building.”

Therefore, what we have is a building that:

- Is a complex structure more than 36 stories above ground level;
- Will house hundreds of people that rely totally on an approval framework developed and owned by the NSW Government;
- Did not need to be constructed by a licensed Builder;
- Did not require a Builder to provide any evidence that they have the skills necessary to undertake the work;
- Did not mandate the need for the Engineer that designed the structure to inspect it, or any engineer for that fact;
- Is not insured for building defects and offers no protection to the consumer other than through a complex legal process involving civil action; and
- Probably has defects “caused by a combination of design or construction issues” but that’s only probable because even Government appointed experts can’t say for certain.

This is the result of an endemic problem in a system that successive NSW Governments have owned and yet neglected for far too long. A solution needs to be found using a holistic, multidisciplinary approach that involves experts that are actively involved in the planning, building and certification of buildings as well as politicians with the will to promote change.

As such, the industry, along with Accredited Certifiers, are subjected to a process whereby the responsibility and accountability of an Engineer for the services that they provide are subjected to the framework of the *Civil Liability Act 2002* and more specifically when these services are not delivered appropriately the impacts of their failings are distributed to others by the Courts through proportional liability.

The legislation needs to be amended to ensure that all Engineers that provide design and/or inspection services or who issue any certificate are required to be accredited/registered, as eluded to in the Shergold-Weir Report 2018 (S-WR), so that their liability is not shared with another party. Similarly, it needs to mandate the requirement for Engineers to be insured in accordance with the provisions of the *Building Professionals Act 2005* or any replacement legislation.

COMPULSORY LICENSING OF KEY PERSONS

If we accept the premise that Engineers should be accountable for the designs that they create and the inspections that they undertake it is reasonable to expect the same of all those involved in the design, inspection or undertaking of works on a building site.

The S-WR makes the clear statement that:

“Those responsible for making decisions under the NCC need to be identified so that they can be held accountable for their decisions.”

This reinforces the need for Architects, Building Designers, Builders and Tradesman to be either accredited/registered or licensed to provide services relating to the construction of a building. The level of accreditation/registration or license should be commensurate with the service that they provide.

Where a building worker plays only a minor role in the construction of a building (e.g. labourers and unskilled subcontractors) the legislation should be clear that the principal builder is vicariously responsible for the actions of those persons.

We currently have the absurd situation whereby a Builder is required to be licensed to contract to undertake any building works to the value of more than \$20,000. However, we do not require a builder to be licensed to build a multi-story residential building worth millions of dollars.

Successive NSW Governments have been prepared to stand back and allow high rise buildings to be constructed by unlicensed and uninsured phoenix companies. They have preferred to

turn a blind eye to what is happening and allow these phoenix companies to flourish in an unregulated market without any real form of control. It has taken an event such as the damage to the ‘Opal Tower Building’ to sharpen the focus of the Government on what is happening. However, the response has been to play a ‘blame game’ on others and deflect responsibility rather than to address a chronic issue in the system that has been there for many years. A small group of Certifiers who are clearly not responsible for what has been identified as an engineering failure appears to be the NSW Government’s solution for a problem that it clearly does not have the desire to rectify.

Mandating a requirement for the occasional inspection of some aspects of construction by an Accredited Certifier who does not share the same skill set as Engineers fails to address a defective system that ignores a requirement for Engineers to:

- Certify the designs that they create;
- Inspect the works that they have designed; and
- Certify works that they have designed and inspected on completion.

This is supported by the findings of the S-WR that found that:

“Changes to approved designs occur frequently at the discretion of the builder, project manager and/or contractors without independent certification.”

Whilst designers and builders have the capacity to find creative solutions to meet the performance requirements of the NCC it is critical that a robust system of third-party certification is policed. Similarly, inspections during construction and third-party certification can only ever provide part of the solution. The competency of builders will always be a critical factor in the effective implementation of any building and or certification system. S-WR recognised that:

“Whilst there is some crossover, the skills required for the design and construction of Commercial buildings differ significantly from the skills required for the design of Domestic buildings.”

In light of the most recent situation with the Opal Tower Building, it has become apparent that the licensing of persons involved in the construction of commercial buildings is an expectation of the community and that the licensing of all trades involved in the construction of buildings has a great deal of merit. The first recommendation of the S-WR supports that view and recommends that:

“the builder remains the primary person accountable for the proper construction of building work.”

This would appear to be appropriate given the time and level of involvement that builders have in the design and construction process.

STANDARD FORMS

To facilitate the smooth, efficient and consistent introduction of building certification members of the AAC has advocated the use of standard documentation since 2002.

All professionals, and selected tradespersons, involved in the construction of a building must be required to certify all aspects of design and installation relating to their activities. This certificate should take the appearance of a prescribed form that has been designed and/or approved by the Government. The generation of

such a certificate through a government managed 'certificate generator' would provide for a consistent, standard approach to documentation that is clearly understood and recognised by the industry whilst it could attract a fee in a similar manner to that currently generated by BASIX Certificates.

'Certificate generators' can issue certificates with a unique number that can be referenced on every Occupation Certificate issued by a Certifying Authority and traced to the responsible person thereby reinforcing

the importance of a process that is transparent and that makes participants accountable for their actions.

The fact is that building regulation throughout Australia is driven by the National Construction Code and this Code is a performance-based document. As such, the use of third-party certification from accredited persons and the importance of having participants being accountable for their actions has never been more important.

AUDITING AND RISK MANAGEMENT

A common perception within the building industry prior to the introduction of certification was that Building Inspectors/Building Surveyors were open to be influenced in an inappropriate manner. Professionals in Local Government were exposed to, and expected to, attend courses in or related to Customer Service. These courses were designed to reinforce the importance of providing a service that is courteous, reliable, responsive to the needs of the customer, punctual, flexible enough to allow for continued improvement and empower suitably qualified persons to make small changes to meet the needs of a circumstance. Those who followed these principles were recognised as valued employees with good personal skills who were focused on the needs of their customers.

However, when acting as an Accredited Certifier in the private sector these same qualities are seen as being corrupt and ones which breed an inappropriate relationship with the client and hence act as a precursor to a conflict of interest.

It is entirely appropriate to have a comprehensive and transparent auditing process to oversee the activities and conduct of Accredited Certifiers. This has been a requirement of all accreditation schemes since the introduction of certification and whilst it was generally agreed that early industry

based programs failed to meet the expectations and standards of the both the community and the Government with the transfer of these responsibilities to the NSW Government the quality of the auditing has not improved. In fact it could be argued that things have worsened.

The community needs to have confidence in a process that not only manages the industry but it must also be comfortable that the persons delivering these services are fulfilling their roles in a professional manner without any hint of impropriety.

As it currently stands, the space administering this governance role is occupied by the Insurance Industry by default and recent events have confirmed that it is a role that cannot be the sole responsibility of one party.

Auditing programs in today's climate need to take a holistic approach to managing the performance and behaviour of all accredited/registered and licensed persons. They need to be developed by industry Associations that are now better placed to make a meaningful contribution to the process under a watchful eye of the Government and include input from experts in the fields of insurance and risk management.

Participation in this Auditing/Risk Management program should be compulsory and industry funded with the results provided direct to Government through a predetermined reporting mechanism. The necessary tools include a Professional Standards Scheme, clearly defined procedures and policies that clarify the role of participants and a Code of Conduct. All of which effectively integrate the latest and best technologies relevant to the size of scale of the organisation being audited.

NON-CONFORMING BUILDING PRODUCTS

The building industry is plagued by the use of products and building elements that:

- Claim to be something that they are not;
- Do not meet the standards required for their intended use; or
- Are marketed or supplied with the intent to deceive those that are intending to use them.

Everyone involved in the building product supply chain needs to be accountable for the products that they prescribe, specify, purchase and use in the construction of buildings. It is critical to the longevity and structural soundness of buildings that the products and materials procured and used in buildings are 'fit for purpose' and conform with Australian building laws and standards.

All of the individuals listed in Table 1 have a role to play in ensuring that building products meet the expectations of the relevant Building Codes and their Owners and Occupants.

It should be mandatory for the Applicant or the relevant person to supply Accredited Certifiers and those that approve buildings for construction with the appropriate documentation that satisfies the requirements of Part A2 of Volumes One and Three of the National Construction Code (NCC) and Part 1.2 of Volume Two of the NCC.

Table 1

<ul style="list-style-type: none"> • Manufacturers • Importers • Wholesalers • Distributors 	<ul style="list-style-type: none"> • Architects • Designers • Engineers • Procurement officers 	<ul style="list-style-type: none"> • Developers • Retailers (online and store front) • Builders and other specialist tradespersons • And other specialists
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These pieces of legislation require *"evidence to support that the use of a material, form of construction or design meets a Performance Requirement or a Deemed to Satisfy Provision..."* using one or a combination of means.

Providing evidence of suitability for the use of a product is part of a supply chain process to ensure that materials, design and construction are fit for their intended purpose under the NCC and meets all of the relevant Performance Requirements of the product.

The effective control over the use of **Non-conforming Building Products (NCBP)** is invaluable for ensuring that products and materials are not used in situations where their use does not comply with the requirements of the NCC or a relevant Australian Standard. Amongst other things, they are not to be used as a **Non-compliant Product (NCP)**.

Product conformance and compliance schemes provide a system for proving that building products and materials satisfy the performance requirements of the NCC. It should be mandatory to provide evidence that verifies that a product conforms and/or complies with the NCC throughout the entire supply chain from raw materials,

fabrication through to installation. This can occur either prior to the issue of a Construction Certificate (CC) or a Complying Development Certificate (CDC) or on completion of the project and prior to the issue of an Occupation Certificate (OC). Typically, they include:

- CodeMark or WaterMark Certificate of Conformity;
- Certificate of Accreditation from a State and Territory Accreditation authority;
- Certificate from a professional engineer or another appropriately qualified person;
- Certificate from a product certification body accredited by JAS-ANZ;
- Report issued by a registered testing authority; or
- Other documentary evidence.

Unless a matter is taken to the courts, there is currently no penalty against a person mentioned in Table 1 that prescribes, specifies, purchases or uses a non-conforming building product in the construction of a building. The relevant legislation needs to clearly prescribe a penalty for offenders.

BASIX

The Building Sustainability Index or what is more commonly known as BASIX is touted by NSW Governments past and present as being “one of the strongest sustainable planning measures to be undertaken in Australia” aimed at “delivering equitable, effective water and greenhouse reductions across the state” of NSW.

In effect, what the residents of NSW have received is a poorly operated, inefficient system that is costing the building industry and Mums and Dads millions of dollars without the rewards in energy and water savings promised by those that administer the process.

BASIX has become a poorly understood and implemented process that whilst promising the highly desirable outcomes of reducing water and energy consumption in our homes along with delivering long term financial savings to homeowners the true value of the contribution it makes to the sustainable future of our communities is not well recognised, poorly understood and inefficient.

Currently we have a small percentage of homes required to comply with BASIX and they are restricted to homes under construction. Existing dwellings are not required to achieve the same sustainable goals which leaves the new home owner with the burden of carrying the sustainable future for the majority.

Stakeholder reviews have shown that “BASIX” does not fully reflect market practice and stakeholder values.” *There also exists a level of “dissatisfaction with the usefulness and effectiveness of the resources that support the program.”*

The process is so heavily influenced by professionals who make important decisions relating to the construction of a new dwelling that often they collectively leave the homeowner bewildered regarding the link between how BASIX should be implemented against the cost of construction and the lack of motivation for better design.

The existing model is largely considered to be a “black hole” whereby data relating to various aspects of a building is entered into a computer model with the outputs determined by the post code of the area. These outcomes are often vague, surprising and poorly understood. For example, how can a four (4) bedroom dwelling use less energy than a three (3) bedroom dwelling? Similarly, requirements for water use are presenting problems for Owners in that the size of required roof catchments are inconsistent, tank sizes on small sites are undesirable, the hydraulic systems and water management practices on sites are poorly executed and managed creating a nuisance to neighbours and the over use of “charged stormwater lines.”

The general perception is that the complexities involved in achieving a desirable outcome are outweighing the benefits. The solution is found in expanding the use of the BCA and allowing Applicants to design buildings based on predetermined standards in relation to the sizes of water tanks, the thermal ratings of wall and roof insulation, permissible window area sizes and the like. Not to be confused with the current “Do it Yourself” (DIY) options that are available. Compliance with Deemed To Satisfy provisions of the BCA should be made available to Applicants within the performance-based framework of the BCA.

If energy sustainability is acknowledged as an important issue to the community, the design and installation of energy efficient strategies should be certified by suitably qualified and accredited persons. The Government currently recognises persons with the skills to do this work. As such, they should be accredited under the provisions of the *Building Professionals Act 2005* or any replacement legislation.

STRENGTHEN THE ADMINISTRATION OF BUILDING REGULATION

As recommended in the *Independent Review of the Building Professionals Act 2005* (Lambert Report), the administration of building regulation should be brought into one portfolio under one Minister.

As per the Lambert Report:

“2.2 Consolidate in an Office of Building Regulation the building regulation and control functions currently undertaken separately within DPE (namely BPU, BASIX and the implementation of complying development policy); the building regulation functions, excluding consumer protection, in Home Building Service; and any policy functions currently within BPB.

2.3 DPE to maintain responsibility for complying development policy but with a close working relationship

between DPE and the proposed Office of Building Regulation in regard to the requirements that complying development should adhere to, with the Complying Development Expert Panel to be jointly convened by DPE and the Office of Building Regulation and operate in full consultation with the Building Regulation Advisory Committee.

2.4 Location of the Office of Building Regulation and BPB in one portfolio reporting to a Minister responsible for building regulation, with suitable mechanisms established for a close working relation with local government, Fair Trading and DPE.”

AAC strongly believes that bringing these functions into one portfolio would promote greater coordination and reduce complexity in the industry.

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; and
- 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 distinction 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;
- 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; and
- Certify structural engineering elements of construction.

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.



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