



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND TOURISM
Mr Jeremy Hanson MLA (Chair), Mr Michael Pettersson MLA (Deputy Chair),
Ms Suzanne Orr MLA, Mr Mark Parton MLA

Submission Cover Sheet

Inquiry into Building Quality in the ACT

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My submission outlines significant problems I have encountered both with building quality and the regulatory process within the ACT. It focuses on the issues I've faced with hidden defects appearing in my house. After an investigation inspection took place, the findings were "all windows, and doors" are causing water penetration to enter the building. I also reveal the difficulties that have occurred in obtaining redress and rectification due to regulatory and administrative failures involving the regulator ACT Land and Planning Authority (ACTPLA).

My matter remains unresolved due to regulatory and administrative failure, and the apparent unwillingness of Ministers and regulators to accurately apply the law. Furthermore, the regulator (ACTPLA), doesn't even follow their framework¹. I have used my experience to make suggestions under the following two Terms of Reference of the inquiry.

1. *THE CERTIFICATION REGIME FOR THE BUILDING AND CONSTRUCTION INDUSTRY INCLUDING;
(B) THE APPROPRIATENESS OF CURRENT PRACTICES FOR APPOINTING CERTIFIERS, INCLUDING ADDRESSING THE POTENTIAL FOR CONFLICTS OF INTEREST*
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Conflicts of interest

All participants in the construction industry have a potential risk concerning conflict of interest. It would be impossible to define all areas that may arise, and if you did attempt to eliminate each potential conflict of interest, the result might expand significantly and becomes unworkable.

Certifiers have distinctive obligations, set under the operating Acts, in brief, they must act with integrity and be impartial. Certifiers are currently private operators. They should recognise a conflict, and where such conflict exists, discharge themselves immediately, not issuing an approval. It's fair that this responsibility applies to them entirely.

For transparency and accountability within the certification process, the committee may find it appropriate to consider a "conflict of interest" as grounds for disciplinary action. The Construction Occupations Registrar has the power to investigate and deal with minor disciplinary matters and have the power to refer more pressing matters to the ACAT. If proven that the certifier gained financial advantage from the action, they should be penalised. This certainly would reduce unwanted outcomes. The Government should consider issuing a guide on Conflict of Interests, that show examples.

As for my case, when the regulator (ACTPLA) recommended that I seek an engineer to inspect my home, with a report identifying all the building breaches/faults and possible recommendations for

¹ Building and Construction Services: Compliance Framework

rectification, I chose an engineer outside of Canberra, by booking one from Wollongong. This eliminated any conflict of interest.

5. *THE COST EFFECTIVENESS OF CURRENT BUILDING COMPLIANCE AND DEFECT RECTIFICATION PRACTICES FOR INDUSTRY, GOVERNMENT, INDIVIDUALS OR BODY CORPORATES AND THE POTENTIAL FOR THE INTRODUCTION OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS.*

Defect rectification

It is my opinion that the ACT Government is not the tough regulator I desire it to be. I have viewed the Australian Building Codes Board Intergovernmental Agreement², where the agreement states that the (ABCB) is to maintain its role as 'gatekeeper'. In my case, Mick Gentlemen MLA, absolutely upheld the agreement³, and sought to bring certainty to the individual (myself) when I needed reassurance that rectification would take place, by a licenced builder. But, the regulator (ACTPLA)⁴, who has administrative responsibility, would not commit to this course, and left the matter without clear direction. The regulatory framework⁵ appears to be a dead loss to the government and the community.

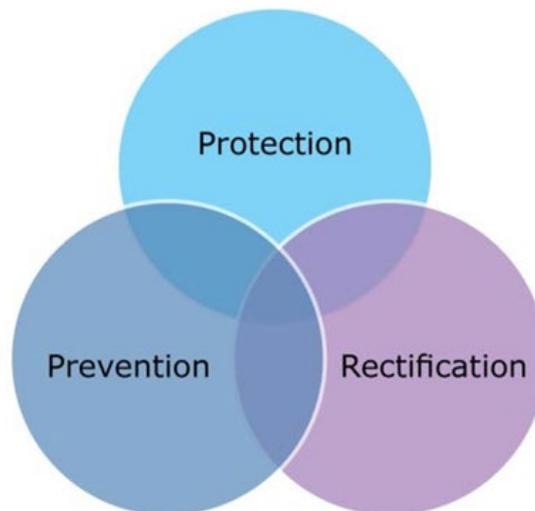


Figure 1 - The relationship between our Strategic Objectives: The central role of Access Canberra

Alternative dispute resolution mechanisms

It may be more cost effective to remind the regulators (ACTPLA), to make good on the Building and Construction Services: Compliance Framework, and refer to **Figure 1 –The relationship between our Strategic Objectives: The central role of Access Canberra**

The regulators (ACTPLA), have power to issue Rectification Orders ACTPLA “may require people who have not complied with their obligations to rectify or remedy identified issues”.

² Clause 1.2 of the Intergovernmental Agreement (IGA) for the Australian Building Codes Board (ABCB).

³ Clause 1.3 (f.) of the IGA for the ABCB

⁴ Clause 1.3 (h.) of the IGA for the ABCB

⁵ 1.5 Compliance model - **Enforce** means taking action when non-compliance occurs proportional to the harm caused by the conduct (eg issue a warning, a rectification order, or an infringement notice).

Notwithstanding that compliance is encouraged through an education framework, Access Canberra can escalate matters: “*escalating enforcement actions will be applied to those whose conduct will, or is likely to, cause harm, or those who demonstrate a disregard for the law*”.

Alternatively, establish a dispute resolution process for conflicts between individuals with differing opinions, as to how defects should be rectified, with a provision that reports from experts are obtained independently, for example, outside of Canberra's jurisdiction.

However, this system must have legal effect, because if one party is willing to commence legal proceedings, they might find themselves out of time to start legal actions. They may find themselves trying to convince a judge to extend time, and there is no guarantee they will succeed.

In light of this

I do hope that the Standing Committee on Economic Development and Tourism, will find my information useful for their report in cases of latent defects to property (which this is).

Background

By way of background, my house was constructed and certified and passed as compliant despite the people responsible knowing that they weren't in a legal position to certify that property as at the time their licenses were suspended or expired. Records obtained show builder's license expired in May 2003⁶ and certifier's license was suspended⁷. Therefore, under the current legislation (*Building Act 1972*), my home could not have been certified accordingly to legal requirements. The regulators have ignored the invalid certification of my property.

My home has severe defects that need to be rectified, including rotting timbers, mould and cracking caused by construction defects. The defects have been identified by an engineer, and the work needs to be carried out by a licensed builder. This precludes the original builder. The original builder should nonetheless be required to pay for the rectification works and associated costs. They should be served with a rectification order which requires this.

I have repeatedly sought redress from the Chief Minister, the Attorney General, Ministers, Government Inspectors and the builders since 2014, without success. I would also argue that the **Attorney General acted improperly** in my matter and was effectively allowing builders, certifiers and the regulator to operate outside the law.

I have three related matters to present—I provide background on the failure of the builder to construct a compliant property, the failure of the regulator to rectify the problem, and the failure of the ACT Attorney-General to uphold the law. I begin by providing a simple history.

Background on the purchase of property

I purchased a new residential property through an ACT agent [REDACTED] in (Canberra). The property had been advertised on Allhomes.com, on 9 September 2004. [REDACTED] Solicitors, acted for me in the conveyancing transaction. [REDACTED] acted for the seller. Settlement occurred on 7 December 2004. Drawdown on 8 December 2004.

- Contract of sale dated 29 October 2004⁸;
- Stamp duty paid in full (Market value lease) on 23 November 2004;
- Certificate of Occupancy dated 26 November 2004; and
- Master Builders Fidelity Fund⁹ Certificate (*construction period 9 May 2002 to April 2003*) – issued on 18 October 2004
- Certificate of Compliance¹⁰ dated 14 December 2004
- **Missing Certificate** - Certificate of Completion¹¹

⁶ [REDACTED] Pty Ltd, licence number [REDACTED] Class A Builder expired in May 2003. The nominee was [REDACTED] licence number [REDACTED] Class A Builder, who was the nominee of [REDACTED] and ceased in the position.

⁷ Certifier [REDACTED] Registration suspended - [REDACTED] and Chief Executive of ACT Department of Urban Services [2003] ACTAAT 6 (30 January 2003) [REDACTED]

⁸ contract 29 October 2004 - marked out to read 14 days later, or earlier? In question?

⁹ Construction period- 9 May 2002 – April 2003, SL 2002 No-9 also the owner of the land when work begins to provide proof of insurance not before work begins (but instead before the building certifier issues a certificate of completion for the building work).

¹⁰ 13.5 BUILDING COVENANTS/COMPLIANCE CERTIFICATES

¹¹ Building Act 1972 s 31 and s 40 Completion of building work within 7 days; [Construction Practitioners Registration Act 1998](#) s 9 Term of registration

Failure of the builder to construct a compliant property

On 11 April 2014, I submitted a complaint to the ACT Planning and Land Authority regarding defective building works completed on my house. The building works had been completed by [REDACTED] (Builder), [REDACTED] Director and [REDACTED] Nominee of the Company.

Following an inspection undertaken by the Environment and Sustainable Development Directorate (ESDD) on 29 April 2014¹², I was advised (by letter dated 30 April 2014) that the ESDD had determined that: It was appropriate for action to be taken under s 345 (k) of the Planning and Development Act 2007 (P&D Act). On the same date, the ESDD wrote to [REDACTED]. ESDD had formed the view that the building works were not compliant with Building Act 2004 s 49, [REDACTED] (who I've never had consultation with) was required to rectify the issues with the building works; and if this did not occur, a rectification order would be issued against [REDACTED].

Under the direction of the regulator (ACTPLA), I was requested, before a rectification order is issued, to make contact with the builder, [REDACTED], and obtain an engineer's report, to ensure that nothing had been overlooked during the inspections on my property.

To avoid a conflict of interest, I hired [REDACTED], located in Wollongong, NSW. The opportunity remained for the builder to obtain his engineer's report, but he chose not to.

I had subsequently arranged for experts to hold discussions directly with [REDACTED]. On one occasion, [REDACTED] met with [REDACTED] to discuss the engineer's report, which set out the works required to be undertaken to address the defective building works. In addition, a total of four inspections were conducted by the regulator, (ACTPLA).

On 3 November 2014, at the fifth site inspection undertaken by [REDACTED], and [REDACTED]'s second, [REDACTED] advised that, he wouldn't complete the full scope of works set out in the report. Instead, he indicated he would personally undertake a lesser scope of works to address the building defects. I was advised by [REDACTED], that the full scope of works were required and that they should be undertaken by a licensed builder, not [REDACTED]. A statement to this effect was provided to the regulator (ACTPLA), including the Minister, and Directorate. But the statement was ignored¹³.

¹² P&D Act 2007 s 392) an inspector must not exercise a power under subsection (1) unless the inspector believes on reasonable grounds that the exercise relates to 1 or more of the following: (a) a controlled activity or possible controlled activity;

¹³ I met Mr [REDACTED] at your property on 3/11/2014 to discuss my report and his method of rectification.

Mr [REDACTED] advised me he will not remove any windows for further inspection and only provide sealant to the windows. He advised he will do the work himself, I asked him if he was licensed, he advised he had no licence and he would use his son's license. I've received no statement or any correspondence from Mr [REDACTED] since our meeting on the 3/11/2014. All work should be carried out by a licensed builder and carried out in accordance with our report dated 5 September 2014.

During this time, I maintained contact with the regulator (ACTPLA), and at all times, maintained cooperation, regardless of certain attitudes and outcomes.

This should have been a straightforward matter, not requiring legal intervention. The defects with the property and the need for rectification is not in dispute. The regulators (ACTPLA) should have applied the powers given to them by the executive (the ACT Government) and issued the builder with a notice that he had breached the s 49 Building Act 2004, and the Building Code of Australia, and that a penalty or imprisonment will follow if the breach isn't rectified.

These issues are covered by strict liability—there is no need to prove there was a deliberate intention to do this act, the act happened. The regulator issued the notice. The executive supports this. In addition, the builder gave his confirmation (prior to the limitation period). The breach happened, the expert report confirms this, and the builder shouldn't be entitled to negotiate how he will rectify the damage, simply because he failed to do the work properly the beginning.

Furthermore, Minister Gentlemen wrote to me on 25th February 2015, stating "There has been an offer by the builder to rectify the defects voluntarily". Despite Minister Gentleman's unequivocal commitment to this, the works remain outstanding. In July 2016, I obtained advice from the office of the ACT Director of Public Prosecutions (DPP), who noted, the Minister wrote to me and advised that a fully qualified tradesperson would undertake rectification work. And asked has this happened yet. I responded by saying no.

The failure of the regulator to rectify the problem

At this time, it was open to ESDD to issue an order that rectification work is carried out according to s 366 of the P&D Act. To date, the building defects remained un-remedied. Moreover, there are licensing issues which could compromise the quality and adequacy of any rectification works completed at the site. Despite its awareness of these circumstances, no further action was taken by the ESDD under the P&D Act.

Given that substantial time had passed, I had contacted Minister Gentlemen's office. I explained the situation to the staffer, including that ACTPLA ought to be held responsible for allowing significant time to pass without issuing the rectification order and that it appeared that a particular inspector was managing the situation in favour of the builder. Under the direction of the Minister's office, a meeting was held on 8 November 2016.

At the meeting, 8 November 2016, [REDACTED], I and other key parties were in attendance, to discuss the engineers report completed by Mr [REDACTED] of [REDACTED], who was present (via teleconference). The following matters arising were discussed and agreed.

- The engineers report found that the building works were not compliant with the s 49 Building Act 2004¹⁴, and the Building Code of Australia.
- ESDD was aware that the rectification works required by its letter to [REDACTED] of 30 April 11, 2014, had not been completed, and are still expected to be rectified.
- [REDACTED] (*the sixth time around*) is given the opportunity to discuss and examine the report, and once again, [REDACTED] did not disagree, since he makes it very clear that he will "give me anything I want". (It is my opinion that this was only another tactic to appear compliant without rectification orders).

The meeting concluded, with [REDACTED] accepting the recommendations of the report. He was then directed by Ms Cassandra Keppel, Manager, Enforcement Unit, ACTPLA, to prepare a scope of works in accordance with the engineer's report.

Did the regulator fail to understand the law?

In discussion with a journalist who was investigating my situation, Ben Green, Executive Branch Manager, ACT Construction Occupations Registrar - ACT, gave details that the building inspectors duties are limited under the Construction Occupations (Licensing) Act 2004, and do not apply under the Building Act 2004 and P&D Act¹⁵.

¹⁴ 49 Complying with building code (1) A person commits an offence—

¹⁵ P&D Act s 387

I informed the journalist that they are able to perform duties under the Building Act, s 128, Appointment of building inspectors:

(1) The construction occupations registrar may appoint a person to be a building inspector for this Act, and,

(5) A building inspector has the functions of a building inspector under this Act and any other function given to the inspector by the construction occupations registrar.

Also, the Magistrates Court (Planning and Development Infringement Notices) Regulation 2008¹⁶ enables infringement notices to be issued for prescribed offences under the Planning and Development Act 2007, and for prescribed offences under the Planning and Development Regulation 2008.

The offence prescribed by Part 1.2, being section 49 of the Building (General) Regulation 2008, supports inspectors being given the option to pursue alleged breaches of the section by way of infringement notice instead of a court-based prosecution. The regulators should have been able to act in my case. The section 49 offence grounds mirror those parameters but only in respect of non-compliance with the rules of that code prescribed in section 49¹⁷.

1. The failure of the ACT Attorney-General to uphold the law

Eventually, when I received the "scope of works" it appeared to represent a potential void contract, since the person who signed the scope of works doesn't hold a current licence,

I attempted to seek clarification from the ACT Attorney General. I asked: 'Where would I legally stand, if and when an agreement has reached, since the builder is not licensed?'. It is my understanding that a void contract cannot be enforced by law. Moreover, if I did agree, the builder would be carrying out an illegal act, as he holds no licence. All parties had been aware that a licensing issue will compromise all works.

The Attorney General addressed my concerns and wrote back to me, telling me that the Government has done all it could and had closed my case, despite there being no resolution of the matter.

¹⁶ The purpose of this regulation is to create a system of infringement notices under the Magistrates Court Act 1930, part 3.8 for certain offences against the Planning and Development Act 2007

¹⁷ BUILDING (GENERAL) REGULATION 2008 SUBORDINATE LAW No SL2008-3

RECAP:

- i. The defect arose prior to expiration of the ten-year period and was acted on during that period;
- ii. The regulator (ACTPLA), should have issued the written **notice of the intention to make a rectification order** against the builder under section 38 of the Construction Occupation Licensing Act 2004; (*legal advice obtained*)
- iii. Failure to comply with this request may result in a notice to issue a rectification order;
- iv. The Builder is avoiding the notice issued on 30 April 2014.
It would be a bizarre circumstance if the builder is avoiding their obligations simply by stringing out the whole process, and, then assuming he can escape the responsibilities. Nevertheless, the outcome to date is unsatisfactory.
- v. The regulator has provided the builder with an opportunity to rectify and that is a very normal way to proceed;
- vi. There has been an offer to voluntarily rectify the defects, ensuring that the works mirror the engineers report as agreed to;
- vii. The noticed issued is a failure to build under s 49 Building act 2004,

Conclusion

My case is quite simple, [REDACTED] built the house these defects should be rectified at the Company's expense. A qualified builder should be engaged to do the work, as promised by the minister, as per the engineer's report. The builder appears to be is avoiding their obligations by merely stringing out the whole process, and then assuming he can escape the responsibilities, and the regulator is allowing him to do this, even though, by law, neither the builder or the regulator has discretion, other than issuing out that "rectification order", that is long overdue.

Regards

Natasha Petrovic