



strata  
community  
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NSW

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PREPARED BY: SCA (NSW)

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# SUBMISSION

## *Certification of Annual Fire Safety Statements*

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To: Department of Planning, Industry and Environment  
Building Policy  
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Strata Community Association (NSW) is the peak industry body for Strata and Community Title Management in New South Wales. Membership includes strata managers, support staff, committee members and suppliers of products and services to the industry. SCA (NSW) has in excess of 3,000 members who help oversee, advise or manage a combined property portfolio with an estimated replacement value of over \$400 Billion. In the same way that our members act as professional advisers and advocates for owners' corporations, SCA (NSW) proudly fulfils the dual roles of a professional institute and consumer advocate.

SCA (NSW) is alarmed by suggestions within the Fire Safety Expert Industry, and it appears perhaps some local councils, that long standing practices for the certification of Annual Fire Safety Statements (as required under cl.175 of the *Environmental Planning and Assessment Regulation 2000*) by fire safety practitioners, on behalf of owners have been invalidated by regulation. This invites certification of vital matters regarding public safety by persons who are not qualified in fire safety requirements and is dangerously irresponsible.

### **The Regulation and its Amendment**

The suggestions arise from a misinterpretation of the legislation, promoted by the Fire Protection Association Australia, whose members largely consist of fire safety practitioners who could otherwise be expected to reasonably bear the responsibility of certification.

Clause 175 of the *Environmental Planning and Assessment Regulation 2000* provides:

*An annual fire safety statement is a statement issued by or on behalf of the owner of a building to the effect that:*

*(a) each essential fire safety measure specified in the statement has been assessed by a competent fire safety practitioner and was found, when it was assessed, to be capable of performing:*

*(i) in the case of an essential fire safety measure applicable by virtue of a fire safety schedule, to a standard no less than that specified in the schedule, or*

*(ii) in the case of an essential fire safety measure applicable otherwise than by virtue of a fire safety schedule, to a standard no less than that to which the measure was originally designed and implemented, and*

*(b) the building has been inspected by a competent fire safety practitioner and was found, when it was inspected, to be in a condition that did not disclose any grounds for a prosecution under Division 7.*

[Emphasis added]

In substance this clause has remained the same for 19 years. Throughout that time an accepted practice by all parties, including the relevant authorities, has been to have Annual fire Safety Statements certified by a qualified fire safety practitioner, on behalf of the owner. This was highly advisable because, an ordinary owner would not be qualified to certify the matters required.

Effective from 1 October 2017, the *Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017*, clause 175 was amended as follows:

*Omit "properly qualified person" wherever occurring.*

*Insert instead "competent fire safety practitioner".*

This change was in anticipation a of stated intention of the NSW government was to create an accreditation scheme, resulting in list of competent fire safety practitioners, and thus better regulate the



quality of annual fire safety reviews.

Nothing in this change altered the capacity of owners to have fire safety practitioners certify cl.175 matters on behalf of the owners, or the advisability of doing so.

### **Misinterpretation of the Regulation**

The accreditation scheme is anticipated to come into effect in 2020, and pending that the NSW Department of Planning and Environment, in October 2017 published a booklet titled *“Selecting a competent fire safety officer – A guide for building owners who must issue fire safety statements”*. However, the test that booklet, in stressing the need for owners to engage a competent fire safety practitioner, has led to arguments that the competent fire safety officer engaged by the owner cannot certify the matters required by cl.175. At least that is the position that has been adopted by Fire Protection Association Australia (the sole proposed accreditation organisation), and other fire safety practitioners, who are advising owners and their property managers accordingly.

This position unfairly shifts potential liability for certification from fire safety practitioners, to owners and their lay agents (such as property and strata managers). It is unfair, because it would require laypersons to personally certify matters in which they have no knowledge or expertise, at the risk of censure and liability.

The reality of this risk is highlighted by comments from the Coroner's Inquest held into the death of Connie Zhang, who died in the Bankstown fire. In 2015, that Inquest held:

*“That [Annual Fire Safety] statement was provided to Mr Peter Poulos, the strata manager, who, in the same document, also certified that the information contained within it was accurate to the best of his knowledge and belief. Mr Poulos believes that Firecorp Australia Pty Ltd had been recommended to him by the builder.”*

*“The evidence given at the inquest indicates that this statement was probably inaccurate in several respects. Only a few months later, another report found a significant number of fire safety faults and deficiencies.”*

*“One of the more striking aspects of this case is that regulatory systems and processes intended to ensure that large residential buildings are constructed according to strict standards failed...in part by what appears to have been lax or incompetent management by the strata agent...”*

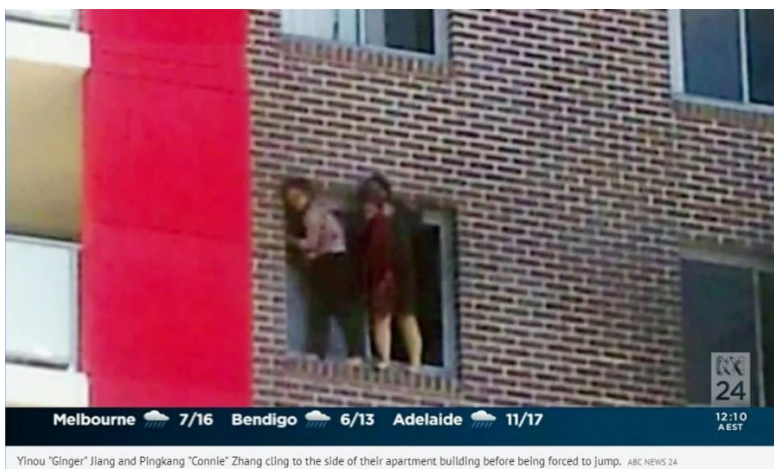


IMAGE SOURCE:  
ABC NEWS 24

It may be pertinent to note that the Inquest into the Bankstown Fire, was an event central to the instigation of the 2017 regulatory amendments. And yet now it is being suggested that Annual fire Safety Certification can be performed by some unqualified person.

The NSW Department of Planning and Environment issued an FAQ titled *"New requirements for fire safety statements – for building owners and practitioners"* which advised:

*"The Regulation allows an agent to issue the annual fire safety statement on behalf of the building owner. The agent who issues the statement may be a competent fire safety practitioner ..."*

This much usefully encapsulates the position of SCA (NSW), however the statement unfortunately goes on:

*"... however that person should not be involved in the assessment of any of the measures or the inspection of the building for the purposes of the statement. This is to ensure that any potential conflicts of interest are minimised."*

The regulations contain no such prohibition. The opinion invents a requirement which does not exist in the legislation, being Clauses 181 & 175 of the Environmental Planning & Assessment Regulation 2000 ("Regulation"). Specifically, clause 181 provides that:

*(1) A fire safety statement for a building or part of a building must be made in the form approved by the Secretary and must contain the following information:*

*(g) a statement to the effect referred to in clause 175 (for an annual statement) .....*

And clause 175 does not restrict who may sign on behalf of the owner.

The Regulation makes no mention of a person being precluded from executing an AFSS on the basis of conflict of interest. In any event, there is no conflict of interest between an owner certifying the engagement of a CFSP and the results of the assessment and the CFSP certifying the same thing, which he or she will already have certified to the owner and which would be the basis of any certification by the owner. The suggestion that there is a conflict of interest in turn suggests a failure to appreciate the difference between certifying the engagement of a CFSP and certifying the results of the CFSP's assessment.

## **Strata Schemes**

Councils adopting the position that the CFSP who carried out the assessment cannot sign the AFSS are causing significant problems for strata schemes and their strata managing agents. In particular:

- a) This is effectively requiring a strata managing agent or strata committee member to certify the competence of the CFSP and the results of the CFSP's assessment. This would expose them to liability, as they lack direct knowledge of the matters being certified and would be reliant on certification by the CFSP.
- b) This could involve civil liability, in relation to which neither is insured.
- c) This could also involve criminal liability concerning provision of false information, e.g. under Section 10.6 of the Environmental Planning & Assessment Act 1979 ("Act") or Part 5A of the Crimes Act 1900.

- d) In these circumstances, signing of the AFSS by the strata managing agent or a strata committee member is not appropriate and the appropriate person to sign the AFSS is the CFSP, who has the necessary competency and direct knowledge.
- e) In these circumstances, strata managing agents will likely decline to execute the AFSS. If so, the strata committee will be left with a difficult choice between:
  - i. having one of its members (if one is willing to do so, as they are not paid or even insured for this), take the risk of signing the AFSS,
  - ii. not submitting an AFSS or submitting an AFSS executed by the CFSP and having the scheme defend any prosecution on the basis that Council has prevented it from complying with its obligations, or
  - iii. applying to the Court for declaratory orders.
- f) Councils adopting the position that the CFSP who carried out the assessment cannot sign the AFSS appear not to be taking legal advice and to be relying on the FAQ and layout of the AFSS form. Given the significant adverse impact this is having for strata owners corporations and their strata managing agents, it is appropriate that NSW Department of Planning and Environment correct the FAQ.

## **Conclusion**

Compliance with fire safety requirements is not only an important, but also an urgent matter for regulatory attention. In 2012 a University of New South Wales' report dated May 2012 '*Governing the Compact City*' by Hazel Easthope, Bill Randolph and Sarah Judd, noted that 15% of strata buildings surveyed had a lack of or defective fire safety measures. More recently, a 2018 pilot study by Nicole Johnston of Deakin University and Sacha Read of Griffith University, found that 15% of all building defects surveyed related to fire safety. Annual Fire Safety Statements should be an important tool in addressing this problem, and the requirements for such statements should not be muddled by misinterpretations and unsupported opinions. Clarification is urgently required.

An unambiguous statement needs to be published by the NSW Department of Planning and Environment, confirming that under the existing regulation there is no restriction on a competent fire safety practitioner signing the certification required for an Annual Fire Safety Statement of behalf of an owner under clause 175. And correcting any previous statements that this is somehow restricted by any conflict of interest considerations.

For the reasons given here, such clarification and correction is in the interest of all owners and the community at large.