

4 May 2018

Our ref: DB:MGP:

The Manager  
Policy & Legislation  
NSW Planning  
BY EMAIL

Principal: **David Bannerman**  
dbannerman@bannermans.com.au

Contact: **Mark Pollinger**  
mpollinger@bannermans.com.au

Dear Sir/Madam,

## ISSUES CONCERNING EXECUTION OF ANNUAL FIRE SAFETY STATEMENTS

We are writing concerning on a NSW Planning FAQ ("FAQ") in relation to this issue.

### NSW Planning FAQ

The FAQ contains an unhelpful statement, namely that, although an authorised person, including a competent fire safety practitioner ("CFSP"), can execute an annual fire safety statement ("AFSS") on behalf of an owner, the person signing "should not be involved in the assessment of any of the measures or the inspection of the building for the purposes of the statement ..... to ensure that any potential conflicts of interest are minimised". Perhaps the author of the FAQ intended this as risk management guidance for CFSPs, but some councils are construing this as imposing an additional legal requirement, namely that the CFSP who carried out the assessment cannot sign the AFSS on behalf of the owner. This has resulted various councils refusing to accept an AFSS executed in this way, which is causing significant problems for strata owners corporations and their strata managing agents.

We act for numerous strata managing agents, which in turn act as strata managing agents for numerous strata schemes throughout NSW ("Schemes"). We are providing assistance to these clients in relation to dealings with specific councils. However, as the root problem seems to be the FAQ, various council officers having cited the FAQ as the basis for their position, we consider it appropriate to contact you to request that you correct the FAQ.

Our position is as follows:

1. The FAQ does not say that the CFSP who carried out the assessment cannot sign the AFSS on behalf of the owner. It says that the person signing "should not be involved in the assessment of any of the measures or the inspection of the building for the purposes of the statement ..... to ensure that any potential conflicts of interest are minimised". If this was intended as a suggestion only, the comment could be amended to clarify that.
2. If the intent was to suggest that the CFSP who carried out the assessment cannot sign the AFSS on behalf of the owner, that suggestion is incorrect, inventing a requirement which does not exist in the legislation, being Clauses 181 & 175 of the *Environmental Planning & Assessment Regulation 2000* ("Regulation"). Specifically:
  - a. 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) .....*

- b. Clause 175 provides that:

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

without restricting who may sign on behalf of the owner.

- c. Construing the AFSS form so as to prohibit execution by the CFSP would be construing it so as to conflict with the requirements of Clauses 181 & 175, by imposing an additional requirement not contained in those clauses.

- d. An FAQ is the opinion of its author and has no role in the law making process, i.e. requirements additional to those contained in legislation cannot be imposed by FAQ.

3. 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.
4. 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.
- III. applying to the Court for declaratory orders.
5. 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 you correct the FAQ. The issue is of course urgent.

If you have any queries please contact me.

Yours faithfully  
**BANNERMANS**



**David Bannerman**  
dbannerman@bannermans.com.au  
Acc. Spec. (Prop.)  
Principal

Contact  
**Mark Pollinger**  
mpollinger@bannermans.com.au  
Special Counsel