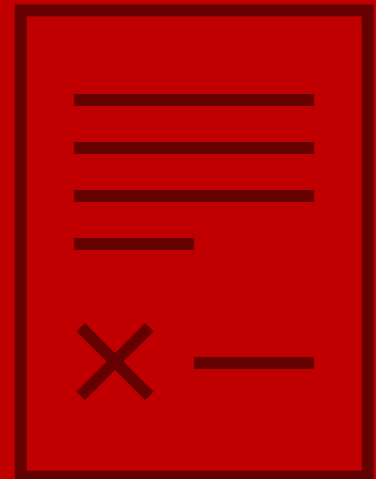


Construct NSW

Improving governance and contracts

Research report on financial, contractual and governance risks for the construction industry



CORRS
CHAMBERS
WESTGARTH

August 2022

Message from the Executive Director, Compliance and Dispute Resolution *(formerly Director, Office of the Building Commissioner)*

It is with great pleasure that I present this report relating to the impact of financial, contractual and insurance risks in the building and construction industry. It forms part of the Construct NSW transformation strategy to refocus the building and construction industry into a customer-facing building and construction industry by 2023.

For the building and construction industry to consistently produce trustworthy buildings it is necessary to be able to control many moving parts. The industry regulator places focus on the quality of the final building product and the role of the many players engaged throughout the contracting chain who perform the work. However, for the industry to produce high quality buildings it is important that it considers how it manages financial, contractual and governance risks. It is for that reason that this research was commissioned to take a closer look at the existence of these type of risks in class 2 building projects.

The research was undertaken by Corrs Chambers Westgarth, a firm which has significant expertise in this area. It is another example of Construct NSW leveraging from industry experience to produce evidence-based research supporting the improvement of financing outcomes for the sector.

I would like to thank Andrew Chew and his team for their thorough analysis of the sample projects. The trends identified and recommended areas of reform will be useful in assessing the behaviour and relationships between financiers and the relevant contracting parties across projects in NSW, and ultimately the production of quality buildings for consumers.

Matt Press



Message from Andrew Chew, Corrs Chambers Westgarth

Corrs Chambers Westgarth is proud to have partnered with the NSW Government to review the financial, contractual and governance risks arising within a sample of residential apartment development projects subjected to occupation certificate audits.

We believe there needs to be an emphasis on the deficiencies identified through this research, specifically in relation to contractual documentation and administration, to ensure these are mitigated in the future which will lead to a better quality development as a result.

As highlighted in the report, financiers need to be made aware of 'red flags' so that contractual arrangements ensure satisfactory and appropriate risk allocation. Through building awareness, many of the deficiencies mentioned in the report can be identified and remedied at an earlier stage of construction.

Thank you to the NSW Government and the Office of the Building Commissioner for starting this conversation on the crucial role of financiers in building and construction projects and shedding light on the steps required to enable the delivery of better-quality projects.

Andrew Chew, Partner



Corrs Chambers Westgarth is Australia's leading independent law firm, providing exceptional legal services on major transactions, projects and significant disputes. **With more than 175 years of history and a team of over 1000 people, Corrs advises clients on their most challenging issues and is the firm of choice for many of the world's leading organisations.**

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2. Executive Summary

The NSW Government is committed to restoring consumer confidence in the residential building and construction industry through implementation of the Construct NSW transformation strategy. A key component of this strategy is the use of data and research to inform policymakers, industry and the wider community about the pain points and drivers of poor performance across the construction sector.

The implementation of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* and *Design and Building Practitioners Act 2020* has focussed the construction industry's attention on the quality of class 2 building work and the role of the practitioners.

The Office of the Building Commissioner (OBC) engaged Corrs Chambers Westgarth (Corrs) to review a sample of development projects to analyse the financial, contractual and governance risks. With extensive experience in identifying pressure points in projects and risk mitigation, Corrs was identified as the suitable party to undertake this research.

Corrs were provided with documentation on 10 sample projects located across NSW to review common behaviours and uncover key trends and risks across the projects. The contract value of the projects was generally between \$8 million - \$15 million.

Contractual Arrangements

Identity of office bearers A key trend identified across the sample projects was corporate linkages: identifying the same directors or relationships between directors and contracting entities, and a lack of governance protocol to address and manage those relationships. For example, the same sole directors of the development and building entities often sign the head building contract, without any governance protocol. This suggests the parties may not have negotiated the contract at arms' length and are therefore less likely to have exercised an appropriate degree of competency, expertise and experience expected from a robust governance framework.

Inappropriate delivery structures Another trend was the use of inappropriate delivery structures such as those intended for smaller residential developments¹ and construct-only arrangements, for complex multi-storey developments. This leads to bigger deficiencies across contractual documentation, including:

- poor administration of contracts such as inspection of work prior to payment of claims²;
- non-compliance with requirements of key pieces of legislation; and

¹ For example, HIA building contracts intended for single dwelling and up to three storey projects

² Administration elements include access to site, inspection arrangements and payment terms.

- other deficiencies which fail to appropriately allocate risk between parties involved in the sample projects.

Instead, contracts rely on catch-all provisions to manage risk, for instance, using “must comply with legislative requirements” rather than additional provisions requiring compliance with specific pieces of legislation and governance processes.

Financial Arrangements

The financier is a key enabler of development projects. In terms of lending, the sample did not show there to be any tripartite arrangements between lenders, developers and builders, requiring the notification for claims of variations and other key notices to be provided. This lack of tripartite arrangements necessarily leads to an insufficient level of involvement, due diligence and risk governance resulting in financiers often relying on catch-all provisions and recourse to guarantors of loan facilities to manage risk. Administration of the lending arrangement seemed to rely on tick box processes to certify payment claims rather than an accurate check of the quality of work. This misses an opportunity to scrutinise the quality of work, its compliance to standards and design, and therefore to hold the builder accountable at the progress payment stage.

Insurance Arrangements

- ***Policy terms*** The review found the certificate of currency is often provided as the only proof of insurances including professional indemnity and public liability and works. These certificates do not provide enough information about policy exclusions, meaning it is not clear what requirements a claimant needs to satisfy or what is excluded from cover. Anecdotal evidence indicates building practitioners have not reviewed their insurance policy for some time and may be unaware of changes that may have occurred when renewing the policy. This creates a risk of work not being covered by insurance.
- ***Full disclosure*** Another risk is the lack of appropriate disclosures to insurers which may void the policy or be excluded from cover. Additionally, if developers and builders wrongfully disclose claims, insurers may be reluctant to respond to these claims, creating a shortage of insurance coverage when required. The lack of clarity about policy exclusions and appropriate disclosures are increasing insurance-related risks.

Recommended areas for improvement

To account for these trends and assist in mitigating risk, areas for improvement and which may restore trust include:

1. Developers and financiers should adopt a system which certifies that contracts have been properly reviewed, are compliant and consistent with good market practice.
2. Financiers, quantity surveyors and project superintendents should be more involved in verifying that works have been completed to the required quality standard before authorising payment.

3. Financiers should request details of consultancy arrangements to ensure quality of work.
4. Financiers should regularly be notified of the progress of developments and any contractual or legal action taken against developers and builders, so they can attend meetings in connection to occupation certificate audits. This would include actions by local councils issuing orders, certifiers issuing directions or orders issued by other any other regulator

These areas for improvement will be explored in more detail in this report.

3. Key trends and risks

The review identified a number of key trends which lead to risks that can be identified as “red flags” for financiers as potential risks for a project.



NSW Building Commissioner on site

Key trends were:

- (1) Corporate linkages, shared directors or relationships between directors of contracting entities and a lack of governance protocol to manage those relationships.³
- (2) The use of inappropriate delivery structures for complex multi-storey developments.⁴
- (3) Issues with contractual documentation and administration, including:
 - contract administration arrangements lacking provision for inspections by a superintendent, and for payment claims to be assessed and certified by a superintendent or representative of the developer.
 - failure to reflect the requirements of key pieces of legislation.

³ This was the case for six out of ten sample projects.

⁴ These delivery structures were intended for smaller residential dwelling builds and construct only arrangements.

- deficiencies in the substance of contract documentation.⁵

The key trends indicate that parties may not have negotiated the contractual arrangements at arms' length and with a view to the appropriate allocation of risk that would be expected in a proper governance framework. It is concluded that, due to pricing pressures and lack of transparency or oversight over those sample projects, the engaged builders and consultants would be less likely to exercise the degree of competency, expertise and experience expected from a proper governance framework.

The review also found additional risks associated with financial and insurance arrangements. The lack of tripartite contractual arrangements for lending leads to an insufficient level of due diligence and risk governance by financiers for the sample projects. The lack of knowledge of policy terms, in particular, clarity about policy exclusions and appropriate disclosures by developers and builders are potentially increasing insurance-related risks.

3.1 Corporate linkages and relationships between contracting entities and directors

Corporate linkages, shared directors or related directors between contracting entities including developers, builders and consultants were common amongst the sample projects. In six out of ten sample projects, the developer and the builder either shared the same directors, the directors of each entity exhibited familial relationships, or the entities were related by corporate structure.

Across the board, the sample projects showed no evidence of governance protocols in place to respond to these relationships and corporate linkages, and to ensure that negotiations and contractual arrangements were made at arms' length and with appropriate risk allocation. On two occasions, contracts were executed by the same director for the developer and the builder. The use of related body corporates and the form of contract used demonstrated a lack of governance or arms' length transactions⁶. This is a concern because if risk is inappropriately allocated it is possible that there is no arrangement contemplated to be in place during the period after completion for which the consumer can rely on for meeting statutory warranties.

In general, it was observed that execution blocks in the contracts did not appropriately indicate the position of the signing individual⁷ and it was not clear where a sole director was also the sole secretary of the contracting entity. Companies with sole directors indicate a lack of governance structure and reflect a less than adequate approach to proper contracting practices or due diligence in implementing appropriate quality assurance processes in delivering the projects.

⁵ This includes no stipulation of liquidated damages, minimal or extremely broad provisions for extensions of time, lack of a limitation on the liability of the builder and failure to appropriately populate contract particulars.

⁶ This is because of several inadequacies and non-compliance with legislative requirement.

⁷ For example, on a section 127 execution block, neither "director" nor "secretary" was crossed out.

3.2 Inappropriate understanding of delivery structures

Half of the sample projects used inappropriate forms of contracts in relation to the delivery structure used for the development. In most of these cases, the parties had used a form of contract designed for smaller home builds or renovations such as the Housing Industry Association (HIA) new residential dwelling contracts, as opposed to more commonly used form of contracts⁸ for multi-storey developments.



Construction worker reading documentation while on site

Construct-only contracts cover only the construction element of the project as opposed to the design and ongoing operations associated with the project. In some of the projects studied, use of a construct-only contract was not appropriate and therefore reflected a lack of consideration or lack of understanding of the fundamentals of contracting. It may be that a design and construct form of contract was intended but a construct-only form of contract was used in those instances. Use of the wrong type of contract illustrated a lack of clarity around who is responsible for the different elements of the project (e.g., design vs construction), which means that the work is affected, and the consumer is unsure about whom they claim against for losses eventually suffered.

Further, in two of the sample projects which used construct-only delivery structures, the review revealed that the builder rather than the developer had engaged design consultants (such as architects and engineers).

⁸ Such as amended Australian Standards or bespoke form of contract.

3.3 Issues with contractual documentation and administration

3.3.1 Deficient contract administration arrangements

A number of the head contracts across the sample projects had a combination of different contract administration arrangement deficiencies including:

(1) **Lack of inspection requirement for Principal Certifying Authority (PCA).**

While most sample projects contained evidence that a PCA had been engaged for the project, none of the head contracts provided evidence of a regime under which a PCA would be able or required to undertake inspections of the site prior to an occupation certificate being issued. This is presumably because of reliance on separate legislative requirements⁹ that provide for critical stage inspections and the final inspection to be carried out prior to an occupation certificate being issued. Consideration might be given to expressly include provision for access rights to the site for the PCA in the contract.

(2) **No or limited superintendent arrangements.**

A superintendent can undertake inspections of the work during construction at key points and certify that work has been done in a compliant manner and is therefore suitable for payment. However, in the sample projects:

- On four out of ten sample projects, there was no evidence that a superintendent had been nominated under the contract, and
- On seven out of ten sample projects, there was no evidence of regular inspection arrangements for a superintendent to inspect the works.

While a number of the contracts provided access rights to superintendents, a prudent developer would seek to ensure that the superintendent is inspecting the quality of works on a regular basis.

(3) **Lacking requirements for developer or superintendent to follow best practice in assessing payment claims.**

All contracts required payments to be made to builders on an interim basis upon payment claims being made, though in at least two instances there was no evidence that the developer or superintendent was required to assess payment claims and provide a payment schedule as is the usual practice in accordance with the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOPA). This suggests that builders would have a right to be paid automatically upon lodging a payment claim. This may in part arise from the lack of arms' length in contracting arrangements. It is a poor situation for the financier to accept.

Overall, these observed deficiencies in the contract administration arrangements of multiple sample projects are concerning. The ability to inspect or review payment claims is a key aspect of a developer's oversight over the quality of work performed, and that of the developer's financier. A lack of those contractual mechanisms in place suggest that a project may be more prone to defects that continue unnoticed, leading to later harms to the developer and purchasers of properties.

⁹ *Environment Planning and Assessment Act 1979*

The occupation certificate audits conducted by the regulator of the sample projects has identified defects in some key building elements. Had a level of scrutiny been shown over the building work prior to paying a claim, it may have mitigated some of the defective work from progressing. Defective work is undesirable for financiers of developers who are paying for non-compliant building work which may delay the issue of an occupation certificate, and also undesirable for financiers of purchasers of units because the building has defects to be addressed, affecting the value.

3.3.2 Failure of contract documentation to reflect requirements of key legislation

A number of the sample projects contained contract documentation which did not adequately incorporate requirements from key pieces of legislation which impact the industry including:

- (1) *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOPA) (six out of ten sample projects);
- (2) *Home Building Act 1989* (NSW) (HBA Act) (seven out of nine sample projects partially or fully); and
- (3) *Work Health and Safety Act 2011* (NSW) or *Work Health and Safety Regulations 2011* (NSW) (WHS Laws) (four out of ten sample projects).

A failure to adequately incorporate the requirements of this legislation suggests that contracting parties have paid little attention to drafting and not turned their minds to the risks associated with failure to comply¹⁰. In most cases, the developer is not the appropriate party or may not have the necessary skills and experience to discharge the duties of a principal contractor under the WHS Laws. Inadequate provisions dealing with SOPA would mean that the developer is not receiving the appropriate notifications if the builder fails to make the appropriate or timely payments to its subcontractors. Such failures would have ramifications for the safe, quality, compliant and timely delivery of projects.

¹⁰ For example, a failure by the developer to engage the builder as the principal contractor under the WHS Laws would mean that the developer is the principal contractor for the project under the WHS Laws.



NSW Building Commissioner talking with a developer about site drawings

In addition, with the commencement of the *Design and Building Practitioners Act* on 1 July 2021, contracts should reflect an understanding of the new registration and declaration requirements and include provisions about the contracting parties' obligations under that legislation. To assist with compliance with the new reforms, the Office of the Building Commissioner developed model clauses for design consultants and construct-only contracts and made them available for use.

3.3.3 Contractual deficiencies

Several contractual deficiencies were identified across most sample projects:

- (1) Failure to stipulate liquidated damages.
- (2) Inappropriate treatment of risk allocation between the developer and the builder – often a greater allocation of risk for the builder to bear than is appropriate for what they are contracting to perform.
- (3) Potential inadequate qualifying causes of delay entitling builders to extensions of time reflecting an imbalance in bargaining position of the builder with regards to the developer.
- (4) Failure to require a written statement ¹¹ for payment claims.
- (5) Generally, a failure to appropriately populate the particulars of the contract.

Deficiencies such as those noted above go to the allocation of risk between the parties. The existence of these deficiencies suggests that:

¹¹ S.127 of *Industrial Relations Act 1996*, Sch 2 of *Payroll Tax Act 2007* and s.175B of *Workers Compensation Act*

- (1) the parties have not properly considered key risk allocation issues (or priced those risks appropriately) to properly manage the delivery of those projects in a timely manner; and
- (2) the parties are less likely to negotiate and contract at arms' length and negotiate the appropriate allocation of risk; and
- (3) the builders are likely to not fulfil their contractual obligations or meet their liabilities under the contract if they fail to deliver the projects in a proper way.

3.4 Financial arrangements

The level of due diligence performed by financiers on potential borrowers may vary depending on the lending institution (for example, a bank as opposed to a non-bank lender). For the purposes of this report, as no lending documentation was provided for the sample projects¹², the level of due diligence and risk governance was generally not adequate for the sample projects.

In addition, for the sample projects reviewed, there was no evidence of any consideration of a requirement for tripartite arrangements between the lenders, developers and builders. Ordinarily, such tripartite arrangements would require builders to notify the lenders of claims for variations, employee ownership trusts (EOTs), default and other key notices. This may be due to the size of the sample projects, which were generally between \$8 million - \$15 million.



Construction workers on site

¹² Apart from one project, which was limited.

However, it is suggested that there is a tendency among financiers to rely on:

- catch all provisions to manage risk such as “must comply with legislative requirements”, rather than also including additional in-depth provisions incorporating compliance with governance processes¹³. This shows a lack of knowledge of the provisions and of who is best placed to address the requirements; and
- having recourse to the guarantors of the loan facilities for the developments (and therefore not put in place processes to proactively manage the developers to deliver a quality project).

Current industry practices require the Financier’s quantity surveyors to certify the amounts payable based on desktop take-offs with limited site inspections. However, quantity surveyors may not necessarily be best qualified to certify compliant work.

Financiers may also treat the payment claim certification process as a mere tick box process, rather than an accurate check of the quality and quantity of work. Where developers do not establish governance arrangements themselves, it creates a significant problem as there is no real cross-check of the quality of work done. The AS4000 series general conditions of contract for design and construct include provisions that building work will comply with the relevant codes, standards and specifications that the works are required to comply with under any law. Scrutinising work at the progress payment stage will add a level of quality assurance to work and ensure defects or deficiencies in work quality are identified and remedied early in the construction phase.

3.5 Insurance arrangements

There was little evidence of the insurances of builders and consultants available in the sample documents provided for this review. However, the key risks associated with insurances are policy exclusions and appropriate disclosures to insurers.

It is a requirement of contract that certain levels of cover are taken out for common types of insurance, including Professional Indemnity, and Public Liability and Works. However, it is common practice that certificates of currency are provided as the only proof of insurance to financiers and developers. These certificates also tend to provide insufficient information about policy exclusions or whether the applicants for insurance have made proper disclosures to insurers when applying for the insurances. In some instances, applicants may not have satisfied the insurers’ underwriting requirements.

Under the *Insurance Contracts Act 1984* (Cth), insurers have various rights to refuse payment or cancel the insurance policy when provided with information that is fraudulent or falsely represented. If insurance companies do not respond to a claim because of wrongful disclosure by the developers or builders, there may not be adequate insurance coverage when an insured event is triggered. This may even result in a situation where projects are

¹³ For example, by identifying specific pieces of legislation, provision of key information required to be submitted, regular reporting and audits, co-relation between certification of payments and sign offs by the relevant consultants as to quality and contractual compliance, etc.

not completed due to lack of funds. The lack of appropriate corporate or risk governance may also be a risk.

4. Key areas for reform

From this review and drawing on industry experience, the following areas for reform are suggested, to improve the quality of oversight and governance frameworks by the financiers and enable the delivery of better quality projects.

4.1 Financier certification declaration and standardised request for information

It is important for financiers to be confident that the contractual arrangements between developers, builders and consultants are satisfactory. As has been observed in this report, there are a number of risks for financiers to identify in order to ensure that contractual arrangements evidence satisfactory risk allocation and good governance. These risks also highlight opportunities for defects or deficiencies in work quality to be identified and remedied at an early stage of construction.

On this basis, it is recommended that financiers adopt a sound certification system to certify that contracts have been properly reviewed, comply with the requirements of law and are consistent with good market practice as a condition of lending and drawdown (gradual accessing of part, or all, of a line of credit).



Documentation at site office

To support such an initiative, it would be prudent for financiers to develop a standard request for information form requesting at least the following pieces of information from developers for assessment of payment claims:

- (1) the head contract between the developer and builder, and eventually contracts for superintendent and other consultants; and
- (2) an outline of the relationships between the contracting parties, including a declaration of any corporate linkages, familial or other relationships between directors or shared directors; and
- (3) key consultancy agreements; and
- (4) as far as possible, copies of insurance policies including the policy exclusions or details of them, and any disclosures submitted to the insurance brokers when applying for the insurance policies.

4.2 Financier and quantity surveyor verification of quality and quantity of works

It is recommended that financiers (including using quantity surveyors) take a greater role in verifying that works have been completed to a satisfactory quality standard and meet the specifications of the contract documentation before approving drawdowns under the lending facility. This may be undertaken by financiers by reserving a right to conduct and conducting random audits of the site and works on a regular basis¹⁴ and not just relying on certification from the developer.

As an example, in a progress claim related to a sample project with a green occupation certificate audit risk rating and low contract risk rating, the quantity surveyor reported in addition to assessing the claim, they had taken steps to identify with the builder any environment, health, statutory or market issues that could present a risk to the successful delivery of the project. In addition, the quantity surveyor provided recommendations to the builder about compliance with new statutory requirements to notify the NSW Building Commissioner of the expected completion date of the project (as required under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW)). These practices suggest that the quantity surveyor on that project had taken a greater role in overall risk management of the project and in verifying the quality of works.

4.3 Financier supervision of consulting arrangements

Consultancy arrangements are an important component of ensuring the quality of work. To ensure that consultancy arrangements are satisfactory, it is recommended that financiers request details of key consultancy arrangements, such as the principal certifying authority, the principal's representative or the Superintendent (to administer the contract), the design team¹⁵, and the quantity surveyor.

Financiers should have oversight of the compensation payable to consultants under their contractual arrangements (in relation to market benchmarks) as it is common for consultants to be pressured into low pricing and then be unable to deliver the required services (especially including a suitable number of inspections at the appropriate time) appropriate for a quality project. Design consultants should be empowered to appropriately price their

¹⁴ Not just relying on certification by the developer's representatives or quantity surveyors.

¹⁵ For example, the architect, structural engineer, fire services engineer, and services engineer.

consultancy work to deliver quality services for their client and financiers have an interest in this as it is likely to ensure fewer defects in the eventual building.

4.4 Require notification of occupation certificate audits and allow attendance in finance documentation



Inspectors conducting an occupation certificate audit


It is important that financiers are regularly informed of the progress of the development and any contractual, legal or compliance action (including any building audits, orders, or other sanctions such as prosecutions, disciplinary action or fines) taken against developers and builders. Financiers should ensure that financing documentation requires timely notification of those scenarios¹⁶ or situations. They should require notification to the financier of meetings and outcome of meetings and, possibly in some scenarios, allow for the presence of a representative of the financier at meetings with authorities in connection a failure to comply with legislation, if this is relevant to them and they choose to go. If notified the financier can choose to attend but if not aware, cannot do so.




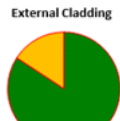
¹⁶ This includes copies of occupation certificate audits, orders issued following audits and responses to information sought by regulator

Annexure A – Sample Project Profiles

This Annexure contains de-identified profiles for each of the 10 samples projects.

No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
1	Project A Contract value: \$7,012,000	RED	Elements not individually rated.	Audit conducted in early construction phase – audited as a case study following a wall collapse of adjacent building. Serious defects identified at the time of early works stage. Now well on track to be a ‘green’ project.	MODERATE	Governance profile does not raise concern: (1) The Developer and Builder entities are not related, nor do they share directors. (2) The D&C Contract was properly executed by different individuals on each of the execution blocks. (3) An appropriate delivery structure was	(1) No evidence of a regime which would allow the PCA under the <i>Environmental Planning & Assessment Act 1979</i> (EP&A Act) to inspect the site prior to the issue of an occupation certificate. (2) With respect to one of the structural engineers engaged on the project, it was apparent that there was no provision for inspections of the site, despite requests for a structural adequacy certificate to be provided. When this	(1) In general, the terms of engagement of consultants were not clear as only one consultancy agreement was provided.




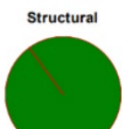
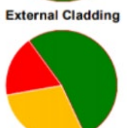
No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
						used (an amended AS4902-2000 contract).		report proceeded to be done on the papers, discrepancies between the geotechnical report and pile log as well as structural inadequacies were found. (3) Financing documentation has not been provided which would allow an assessment of any loan conditions imposed on the parties.
2	Project B Value: \$13,920,000	GREEN	 <p>Fire Safety</p>	Completed project – visited as an Anywhere/ Anytime visit.	HIGH	Governance profile raised significant concerns: (1) Directors of one entity in the Developer, the Builder and the Certifier all share a	(1) No evidence of a regime which would allow the PCA to inspect the site prior to the issue of an occupation certificate.	(1) No evidence that warnings or statutory warranties required by the <i>Home Building Act 1989 (NSW) (HBA Act)</i> were included in the contract documentation.

No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
			 <p>Waterproofing</p>  <p>Structural</p>  <p>External Cladding</p>  <p>Essential Services</p>			<p>surname. This indicates that there are family relationships between the directors of these entities, reducing the likelihood that the entities negotiated and administered the contract at arms' length.</p> <p>(2) One entity in the Developer and the Builder are related entities. As above, this reduces the likelihood that the entities negotiated and administered the contract at arms' length.</p>	<p>(2) No evidence that a superintendent has been nominated or that there is a regime allowing a superintendent to inspect the site.</p> <p>(3) Payment may also be an issue. While the contract indicates that payments can be claimed as per the monthly QS Report and stages of completion outlined in the QS Report, this Report has not been provided and therefore the terms of</p>	<p>(2) No evidence that the various requirements of the <i>Building and Construction Industry Security of Payment Act 1999 (NSW) (SOPA)</i> were included in the contract documentation, including no evidence of a requirement for the contractor to notify the principal upon receipt of a suspension notice from a subcontractor.</p> <p>(3) No evidence of any requirements relating to the <i>Work Health and Safety Act 2011 (NSW)</i> or <i>Work Health and Safety Regulations</i></p>


No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
						(3) An inappropriate delivery structure was used for the project. A Residential Building (Bc4) eContract was used, which is a construct-only delivery structure most often used for new homes and renovations, rather than for multi-storey developments. This creates risk that the terms of the contract were not adequate for the size and complexity of	payment are not clear. In addition, there is no provision for a payment schedule to be provided following the making of a payment claim.	2011 (NSW) (WHS Laws). (4) The terms of engagement of consultants were not clear as no consultancy agreements were provided.

No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
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this development.





3	Project C Value: \$15,620,132	RED	 <p>Fire Safety</p>  <p>Waterproofing</p>  <p>Structural</p>  <p>External Cladding</p>  <p>Essential Services</p>	<ul style="list-style-type: none"> • Serious defects were identified. • These will need to be rectified. No order required at this stage. 	MODERATE	Governance profile raised significant concerns: (1) The Developer and Builder have the same director. The Contract was also executed by this same director, with no other signatory. The Developer entity is an SPV with the same business address as the Builder. This greatly reduces the likelihood that the entities negotiated and administered	(1) While the Builder is not required to obtain any certificate of occupancy or final inspection certificate, there is no evidence in the contract a regime which would allow the PCA to inspect the site prior to the issue of an occupation certificate or that a superintendent has been nominated or that there is a regime allowing	(1) A warning preamble required by the HBA Act was not included in the contract documentation. (2) No evidence that the various requirements of the SOPA were included in the contract documentation, including no evidence of a requirement for the contractor to notify the principal upon receipt of a suspension notice from a subcontractor. (3) No evidence of any requirements
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No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
						<p>the contract at arms' length.</p> <p>(2) An inappropriate delivery structure was used for the project. A NSW Residential Building Contract for New Dwellings contract was used, which is a construct-only delivery structure. This creates risk that the terms of the contract were not adequate for the size and complexity of this development. In addition, despite that a</p>	<p>a superintendent to inspect the site.</p> <p>(2) Payment may be an issue as there is no allowance for certification of payment by a superintendent or other representative of the Developer.</p>	<p>relating to the WHS Laws (apart from a catch-all clause dealing with compliance with all "relevant codes, standards and specifications that the builder works are required to comply with under any law".</p> <p>(4) The contract documents did not specify a liquidated damages rate, any limitation on the liability of the builder, details of any lending arrangements, or require a written statement required by s 127 of the <i>Industrial Relations Act 1996</i> (NSW), Schedule 2 of Part 5 of the <i>Payroll Tax</i></p>





No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
						construct-only delivery structure was used, the Builder engaged each of the consultants rather than the Developer.		<i>Act 2007 (NSW) and section 175B of the Workers Compensation Act 1989 (NSW) with payment. The deficiency of these terms do not reflect the standard of terms which would be expected of parties properly allocating risk and operating at arms' length.</i>
4	Project D Value: \$10,725,000	AMBER		Draft orders being prepared: <ul style="list-style-type: none"> • Building Work Rectification Order • Prohibition Order 	MODERATE	Governance profile raised significant concerns: <ol style="list-style-type: none"> (1) The directors of the Developer and Builder are cousins, and the contracting entities share the same registered office and are 	<ol style="list-style-type: none"> (1) The only provision for inspections is a clause which requires the Builder to comply with the Developer's direction to allow inspection of the works. 	<ol style="list-style-type: none"> (1) A warning preamble required by the HBA Act was not included in the contract documentation. (2) No evidence that the various requirements of the SOPA were included in the contract

No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
			 <p>Structural</p> <p>Building Envelope</p> <p>Essential Services</p>				<p>linked through shareholdings. This reduces the likelihood that the entities negotiated and administered the contract at arms' length.</p> <p>(2) An inappropriate delivery structure was used for the project. A bespoke construct-only contract was used which is not necessarily appropriate for a multi-storey development. This creates risk that the terms of the contract were not adequate</p>	<p>documentation, including no evidence of a requirement for the contractor to notify the principal upon receipt of a suspension notice from a subcontractor.</p> <p>(3) The contract documents did not specify a liquidated damages rate, a limitation of liability on the Builder, or require a written statement required by s 127 of the <i>Industrial Relations Act 1996</i> (NSW), Schedule 2 of Part 5 of the <i>Payroll Tax Act 2007</i> (NSW) and section 175B of the <i>Workers Compensation Act 1989</i> (NSW) for</p>

No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
						for the size and complexity of this development.		payment. In addition, the grounds for an EOT were extremely limited. Finally, the scope of works and schedule of technical specifications are not annexed to the contract. Thus the Contract did not reflect the standard of terms which would be expected of parties properly allocating risk and operating at arms' length.
5	Project E Value: \$12,756,000	RED	 Fire Safety	<ul style="list-style-type: none"> • Stop Work Order • Prohibition Order 	MODERATE	Governance profile raised some concerns: (1) Despite an appropriate delivery structure being used for the	(1) The New Contract contains no evidence of a regime which would allow a PCA to inspect the site prior to	The New Contract contains: (1) No evidence that warnings or statutory warranties required by HBA Act were included in the

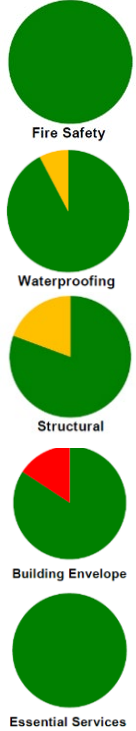
No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
			 <p>Waterproofing</p>  <p>Structural</p>  <p>External Cladding</p>  <p>Essential Services</p>			<p>original building contract (since terminated due to the insolvency of the Builder, the new building contract with Attena Group Pty Ltd as the Builder (the New Contract) used an inappropriate delivery structure, adopting a HIA Cost Plus Medium Works Commercial Contract (for use without an Architect or Superintendent) which is not appropriate for multi-storey residential</p>	<p>the issue of an occupation certificate. In addition there is no evidence that a certifier was engaged.</p> <p>(2) The New Contract contains no evidence that a superintendent has been nominated or that there is a regime allowing a superintendent to inspect the site.</p>	<p>contract documentation.</p> <p>(2) No evidence that the various requirements of the SOPA were included in the contract documentation, including no evidence of a requirement for the contractor to notify the principal upon receipt of a suspension notice from a subcontractor.</p> <p>(3) No evidence of any requirements relating to the WHS Laws.</p> <p>(4) The contract documentation did not specify a liquidated damages rate, the extension of time provision is</p>


No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
						<p>construction building work.</p> <p>(2) The New Contract was not executed correctly. The execution block for the Developer contained only the signature of an individual (it is not clear whom) and neither execution block was witnessed as was required by the execution blocks.</p>		<p>extremely broad, delay damages are as reasonably assessed by the Builder and not subject to any review by the Developer.</p>
6	<p>Project F</p> <p>Value: \$11,340,000</p>	RED		<ul style="list-style-type: none"> Building Work Rectification Order 	HIGH	<p>Governance profile raised some concerns:</p> <p>(1) The Developer and Builder share directors.</p>	<p>(1) No evidence of a regime which would allow a PCA to inspect the site prior to the issue of an</p>	<p>(1) A warning preamble and warranties required by the HBA Act was not included in the</p>

No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation	
			 <p>Waterproofing</p>  <p>Structural</p>  <p>Building Enclosure</p>  <p>Essential Services</p>	<ul style="list-style-type: none"> Prohibition Order 			<p>This reduces the likelihood that the entities negotiated and administered the contract at arms' length.</p> <p>(2) The shared director signed the D&C Contract on behalf of both the Builder and the Developer.</p> <p>(3) An SPV was used as the Developer entity. Nevertheless, the following do not raise an issue:</p> <p>(4) An appropriate delivery structure was used (an amended AS4902-2000).</p>	<p>occupation certificate. In addition, there is no evidence that a certifier was engaged.</p> <p>(2) No evidence of a regime requiring the superintendent to inspect the site at regular intervals (though access to the site is provided for).</p>	<p>contract documentation.</p> <p>(2) No evidence that the various requirements of the SOPA were included in the contract documentation, including no evidence of a requirement for the contractor to notify the principal upon receipt of a suspension notice from a subcontractor.</p> <p>(3) The contract documents did not specify a liquidated damages rate, a limitation of liability on the Builder, or require a written statement required by s 127 of the <i>Industrial Relations</i></p>


No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
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Act 1996 (NSW), Schedule 2 of Part 5 of the Payroll Tax Act 2007 (NSW) and section 175B of the Workers Compensation Act 1989 (NSW) for payment. In addition, the grounds for an EOT were extremely limited. Finally, the scope of works and schedule of technical specifications are not annexed to the contract. Thus the Contract did not reflect the standard of terms which would be expected of parties properly allocating risk and operating at arms' length.

No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
7	Project G Value: \$10,400,000	RED	 <p>Fire Safety</p> <p>Waterproofing</p> <p>Structural</p> <p>Building Envelope</p> <p>Essential Services</p>	<ul style="list-style-type: none"> • Draft Orders sent to developer • Following discussions, agreed that Certifier would issue an undertaking requiring rectification of the defects. 	LOW	Governance profile did not raise concern: <ol style="list-style-type: none"> (1) The Developer and Builder entities are not related, nor do they share directors. (2) The D&C Contract was properly executed by different individuals on each of the execution blocks. (3) An appropriate delivery structure was used (an amended AS4902-2000 contract). 	<ol style="list-style-type: none"> (1) No evidence of a regime which would allow a PCA to inspect the site prior to the issue of an occupation certificate. In addition, there is no evidence that a certifier was engaged. 	<ol style="list-style-type: none"> (1) Several errors in the contract documentation, including the principal's project requirements for the incorrect project have been included; discrepancy between Schedule stating design drawings were created by one architect, whereas the drawings in the file state they were created by another; Preliminary Design Documents do not match; Other Contract Documents referred to in Schedule 3 are not provided. (2) The contract documents did not specify a limitation of liability on the

No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
8	Project H Value: \$8,100,000	AMBER	 <p>Fire Safety</p> <p>Waterproofing</p> <p>Structural</p> <p>Building Envelope</p> <p>Essential Services</p>	<ul style="list-style-type: none"> • Serious defects identified • Defects could have warranted a Building Work Rectification Order and/or Prohibition Order. • Auditors to inspect site at a later date to inspect rectification work 	MODERATE	Governance profile raised significant concerns: <ol style="list-style-type: none"> (1) The directors of the Developer and Builder appear to be related as they share a last name, reducing the likelihood that the entities negotiated and administered the contract at arms' length. (2) An inappropriate delivery structure was used for the project. A construct-only 	<ol style="list-style-type: none"> (1) No evidence of a regime which would allow a PCA to inspect the site prior to the issue of an occupation certificate. (2) No evidence of the appointment of a superintendent or a regime requiring a superintendent to inspect the site at regular intervals. (3) Payment may also be an issue. While the contract 	Builder, which would have been requested by a prudent Builder. <ol style="list-style-type: none"> (1) The Particulars of Contract generally deficient as they do not stipulate any mortgages held over the property, the source of any funding or load documentation, nor the responsible party for making and paying development consent applications. (2) A number of Schedules are blank. (3) A warning preamble required by the HBA Act was not included in the contract documentation.

No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
						<p>HIA contract was used (form of HIA contract is not evidence on the face of the document). This creates risk that the terms of the contract were not adequate for the size and complexity of this development. In addition, despite that a construct-only delivery structure was used, the Builder engaged each of the consultants rather than the Developer.</p>	<p>indicates that payments can be claimed as per the QS approved by bank, this approval has not been provided and therefore the terms of payment are not clear. In addition, there is no provision for the Developer to provide a payment schedule following the making of a payment claim.</p>	<p>(4) No evidence that the various requirements of the SOPA were included in the contract documentation, including no evidence of a requirement for the contractor to notify the principal upon receipt of a suspension notice from a subcontractor.</p> <p>(5) No evidence of any requirements relating to the WHS Laws.</p> <p>(6) The contract documents did not specify a liquidated damages rate, a limitation of liability on the Builder, or require a written statement required</p>

No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
9	Project I Value: \$9,500,198	AMBER	 Fire Safety	Serious defects were identified. These will need to be rectified. No order required at this stage.	MODERATE	Governance profile raised some concerns: (1) The Developer and Builder share directors, reducing the likelihood that	(1) No evidence of a regime which would allow a PCA to inspect the site prior to the issue of an occupation certificate.	by s 127 of the <i>Industrial Relations Act 1996</i> (NSW), Schedule 2 of Part 5 of the <i>Payroll Tax Act 2007</i> (NSW) and section 175B of the <i>Workers Compensation Act 1989</i> (NSW) for payment. Thus the Contract did not reflect the standard of terms which would be expected of parties properly allocating risk and operating at arms' length. (1) The Contract documentation does not contain a Formal Instrument of Agreement, but only the General Conditions of Contract.

No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
			 <p>Waterproofing</p>  <p>Structural</p>  <p>Building Envelope</p>  <p>Essential Services</p>			<p>the entities negotiated and administered the contract at arms' length. Nevertheless, the following do not raise an issue:</p> <p>(2) An appropriate delivery structure was used (an amended AS4000-1997).</p>	<p>(2) No evidence of the appointment of a superintendent or a regime requiring a superintendent to inspect the site at regular intervals (though allowance for site access is made).</p>	<p>(2) The warning preamble, Home Building Checklist, and cooling off provisions required by the HBA Act were not included in the contract documentation.</p> <p>(3) The contract documents did not provide a limitation of liability on the Builder, or require a written statement required by s 127 of the <i>Industrial Relations Act 1996</i> (NSW), Schedule 2 of Part 5 of the <i>Payroll Tax Act 2007</i> (NSW) and section 175B of the <i>Workers Compensation Act 1989</i> (NSW) for payment. In addition, the</p>

No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
10	Project J Value: \$14,539,174	GREEN		There were areas for improvement identified with this project. Considered generally 'good' project.	LOW	Governance profile did not raise any material concern: (1) The Developer and Builder entities are not related, nor do they share directors.	No material items of concern.	<p>grounds for an EOT were extremely limited. Annexure A is missing a large number of details including provisions relating to the Superintendent. Overall, the Contract did not reflect the standard of terms which would be expected of parties properly allocating risk and operating at arms' length.</p> <p>No material deficiencies.</p>

No.	Project & Contract value	OC Audit risk rating	OC Audit Elements ratings	OC Audit outcome	Contract risk level	Governance profile	Key concerns raised by contract administration arrangements	Key deficiencies in contract documentation
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Structural



Building Envelope



Essential Services

- (2) The D&C Contract was properly executed by different individuals on each of the execution blocks.
- (3) An appropriate delivery structure was used (an amended AS4902-2000 contract).



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