



Regulation Overhaul for Certifiers

As part of the overhaul of the building and construction industry, the NSW Government have released the draft *Building and Development Certifiers Regulation 2019*¹ (**draft Regulation**). The draft Regulation is needed in order to bring the *Building and Development Certifiers Act 2018* (**the Act**) into force.

The Act and draft Regulation are intended to simplify and strengthen the certification system in NSW. The intention of these reforms is to allow the Government to more effectively register and regulate the conduct of certifiers.

NEW BUILDING AND DEVELOPMENT CERTIFIERS ACT 2018 (THE ACT)

On 24 October 2018, the Act was passed by NSW Parliament, but has not yet commenced. The Act will establish a framework to permit continuous improvement in carrying out certification work.

The Act will repeal the *Building Professionals Act 2005* and the *Building Professionals Regulation 2007*. This reform is in response to the 'Independent Review of the Building Professionals Act 2005' released in 2015 (also known as the 'Lambert Review').

Overview of Reform

Key reforms under the Act will:

- provide for the registration of people to carry out certification work;
- enable certain body corporates to be approved as accreditation authorities;
- provide for the accreditation of people to carry out other regulated work;
- clarify the roles of certifiers in NSW and their responsibilities;
- improve the independence of certifiers; and
- tighten registration requirements and the complaint handling and disciplinary measures.

REGULATORY IMPACT STATEMENT (RIS)

Together with the draft Regulation the NSW Government has released a Regulatory Impact Statement² (**RIS**).

The RIS sets out the rationale and objectives of the proposed Regulation. It also sets out a detailed cost benefit analysis of the changes to the Regulation.

KEY REFORMS OF DRAFT REGULATION

The key reforms of the draft Regulation are set out below.

Registration of certifiers

Section 120(2)(a) of the Act enables the draft Regulation to provide for the qualifications and experience required to hold registration to carry out certification work.

Building certification is accepted as a profession rather than a trade in the industry and requires a higher level of qualification and continuing professional development (CPD).

Under the new Act, the Regulations will prescribe the qualifications, skills and experience that are required in order for a certifier to be approved for registration.

Schedule 3 of the draft Regulation prescribes the qualifications, experience and CPD requirements to be met by any person seeking a certificate as a registered certifier. The existing requirements have been simplified but not changed in context.

As part of the accreditation process (with the exception of a swimming pool inspector), a certifier is required to successfully complete an accreditation exam.

The draft Regulation sets out the training requirements for registration of certifiers

Schedule 4 of the draft Regulation details the knowledge and skills requirements when assessing the competence of a person to carry out the functions of a registered certifier.

These requirements are in addition to the qualifications and experience detailed in Schedule 3 of the proposed Regulation.

Insurance required to indemnify registered certifiers

The draft Regulation requires registered certifiers to hold professional indemnity insurance.

The government did allow Amendments to the current Regulation in 28 June 2019 to temporarily allow the Building Professionals Board to accept Public Indemnity Insurance policies with conditions or exclusions in response to the difficulty in obtaining insurance following the Grenfell Tower Fire in London in 2017.

It is envisaged that this issue will have resolved itself by the time the draft Regulations and Act commence as proposed in July 2020.

Conflicts of interest relating to registered certifiers

Clause 24 stipulates the following specific scenarios which would be considered to create a conflict of interest where a registered certifier:

- a) provides advice on how to amend plans and specifications to comply with legislation on an aspect of a development for which they are also undertaking certification work;
- b) proposes design options (including alternative solutions) to comply with legislation on an aspect of a development for which they are also performing certification work; or
- c) certifier issues a strata certificate in respect of a strata plan, strata plan of subdivision or notice of conversion prepared by the registered certifier or by a person they have a relationship with.

Clause 25 exempts a number of specific scenarios so that a registered certifier is taken to not have a conflict of interest as follows:

- a) working on behalf of a council issues a certificate to a council or an employee of the council where the development has a capital investment value of less than \$2 million (reduced from current \$5 million) and is not located in the metropolitan area;
- b) carries out certification work on behalf of a council under contract where the development is not located in the metropolitan area. This exemption arises due to the low availability of certifiers in regional and rural areas.

Contracts required for certification work

The Act requires a registered certifier to only carry out certification work under a written contract.

- a) **Clause 28** sets out the particulars that must be included in a contract for certification work. These particulars are identical to the current Regulation.

- b) **Clause 29** details when the fees and charges are payable in certain circumstances (and remains identical to current Regulation).
- c) **Clause 30** requires the contract to be signed by the parties to the contract. This is consistent with existing Regulations but adds, however, that the contract include a declaration by the person having the benefit of the development confirming they have freely chosen the certifier themselves and are engaging the certifier and they have read any document accompanying the contract and understand their roles and responsibilities and those of the certifier.
- d) **Clause 31**, as previously, requires the contract to be accompanied by an information sheet which outlines the role and responsibilities of certifiers, but additionally required the information sheet (prepared by Fair Trading) to cover the role of the person for whom the certification work is carried out and highlight the types of information that can be found on the register.

Accreditation authorities

The Lambert Review identified that improvements were needed to the administration and effectiveness of accreditation schemes.

The new Act addresses this concern and includes provisions to approve non-government organisations, to administer accreditation schemes, and in particular schemes for competent fire safety practitioners.

- a) **Clause 32** clarifies the criteria may be used to determine the suitability of a person to carry out the function of an accreditation authority. For consistency, this criteria is based on the considerations to determine the suitability of a person to be a registered certifier.
- b) **Clause 33** provides that an application is deemed to have been refused approval if the Secretary has not given notice of a decision on the application within 60 business days after the application is made, although extensions can be made.
- c) **Clause 34** provides that an approval is subject to the requirement to provide a copy of the certificate of currency of any insurance policies held, including when a new policy is obtained or and an existing policy is renewed.
- d) **Clauses 36 and 37** enable the Secretary to make a request for information from the accreditation authority at any time and that the accreditation authority make information publicly available at any time.
- e) **Clauses 38 to 45** collectively outline the matters that an accreditation scheme must provide for, including:
 - a process for recognising and managing conflicts of interest;

- a fair, impartial, transparent and timely accreditation process;
 - recordkeeping for at least 10 years;
 - a code of conduct consistent with the prescribed code of conduct for registered certifiers;
 - the duties of the accreditation authority;
 - a public website which includes key information and is up to date and freely available; and
 - a transition strategy if they no longer operate as an accreditation authority.
- f) **Clause 46** requires any approval, suspension or cancellation of an accreditation authority be published in a notice in the Gazette (consistent with section 63(7) of the Act).

Record keeping

The Act enables the regulations to make provision with respect to the keeping of records by registered certifiers, local councils and accreditation authorities.

- a) **Division 1** of the draft Regulation sets out the records that a registered certifier must keep and imposes a maximum penalty of \$4,400 (40 penalty units) for an individual and \$11,000 (100 penalty units) for a body corporate for a breach of these requirements. Records must be kept for at least 10 years.
- b) **Division 2** sets out the records a local council must keep identical to **Division 1**.
- c) **Division 3** sets out the records an accreditation authority must keep. The requirements in the proposed Regulation have been replicated from the current Competent Fire Safety Practitioner Co-Regulatory Accreditation Framework guidelines developed and published by the Building Professionals Board in April 2019.
- d) Records must be kept for at least 10 years and the proposed Regulation notes that section 74(4) of the Act imposes a maximum penalty of \$11,000 (100 penalty units) for a failure to keep the records as required.

Carrying out of certification work by or on behalf of a council

- a) **Clause 59** prescribes all certification work (other than certification work under the Strata Schemes Development Act 2015 and the Swimming Pools Act 1992) which would require a local council to ensure that the certifier is registered with appropriate authority to carry out the work.
- b) **Clause 60** provides that a council must give notice to the Secretary of the dates on which a registered certifier commences and ceases employment with the council carrying out certification work on behalf of the council.

- c) **Clause 61** exempts registered certifiers employed by a council from paying a penalty in disciplinary action. This exemption has been replicated from the current Regulation.

Permitting certain registered certifiers to carry out certain regulated work

Clause 63 allows the following registered certifiers to carry out regulated work in relation to fire safety systems:

- a) a registered certifier in the class of engineer – electrical (previously C8); and
- b) a registered certifier in the class of engineer – hydraulic (building) (previously C14) to be able to carry out regulated work in relation to fire safety systems.

Matters to be included on the register of registrations and approvals

Clause 64 outlines the information to be included in the particulars of registrations.

Providing that supervision is certification work

Clause 62 expands the definition of certification work to include the supervision of certification work that is carried out by a registered certifier.

Classes of registration for certifiers and the qualifications, experience, skills and knowledge required for registration in a class

Section 6 of the Act provides for the Regulation to prescribe different classes of registration to authorise the carrying out of different classes of certification work.

Part 2 of the proposed Regulation outlines what each proposed class of registration is authorised to do.

The naming of the classes was changed and streamlines based on the recommendations in the Shergold Weir report and the review of the current Regulation.

Code of Conduct for registered certifiers

Under **section 32** of the Act the Regulation may prescribe a code of conduct for certifiers. By placing the code in the regulations, rather than by a Ministerial Order, it gives it greater importance.

The Code is included in the draft Regulation as Schedule 2. It sets the standards of conduct and professionalism expected from registered certifiers when performing their certification functions.

Registered certifiers are recognised as 'public officials' and 'public authorities' under the Independent Commission Against Corruption Act 1988 and the Ombudsman Act 1974. The Code is a key mechanism to assist certifiers to act honestly, ethically, responsibly and with accountability.

Any breach of the Code will be an offence and subject to disciplinary action under the Act.

Continuing professional development requirements for registered certifiers

Schedule 5 replicates the existing CPD requirements without change.

The Fees payable

Clause 65 entitles the Secretary to waive, refund, or reduce the payment of a fee under the Act or the regulations where appropriate.

Offences under the Act and Regulation for which penalty notices may be issued

Section 118 of the Act empowers the issue a penalty notice for an offence.

Schedule 7 specifies a range of offences against which a penalty notice may be issued.

A Table listing all of the penalty notice offences in the draft Regulation which identifies changes from the current Regulation is in Appendix 4 of the RIS.

CONCLUSION

The draft Regulation support the framework required for the Act to commence.

Consultation on the draft Regulation closed on **28 October 2019** and the responses will be available on the Fair Trading web site for review.

These draft Regulations are part of a larger set of reform packages in the building and construction industry to increase confidence.

For further information, please contact us.

CONTACT US

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1. https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0005/559247/Draft-Building-and-Development-Certifiers-Regulations-2019.pdf

2. https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0005/559256/Regulatory-Impact-Statement.pdf

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Developer Building Bonds

Developers are now required to lodge a building bond with NSW Fair Trading to the value of 2 percent of the contract value for works to secure funding for the rectification of defective building work.

[Click here to find out what you need to know](#)



SOPA Amendments

The amendments to the Building and Construction Industry Security of Payment Act 1999 (NSW) commenced on 21 October, 2019; posing significant changes upon the building and construction industry.

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