



## CERTIFIERS AND BUILDING PROFESSIONALS NSW—FURTHER DEVELOPMENTS IN THE REGULATION AND CONDUCT OF CERTIFIERS

On 1 July 2020 the *Building and Development Certifiers Act 2018* (the **Act**) and the *Building and Development Certifiers Regulation 2020* (the **Regulation**) became law in New South Wales.

This follows on from the increased regulation and compliance measures introduced in the **Design and Building Practitioners Act 2020 NSW (DBPA)** which came into operation on 11 June 2020.

### EXECUTIVE SUMMARY

We set out below a summary of the key requirements in the *Building and Development Certifiers Act 2018* and the Regulation for certifiers carrying out certification work in NSW:

- a) Registration: Certifiers to be registered to carry out certification work;
- b) Insurance: Certifiers to be adequately insured; and
- c) Conflicts of interest.
- d) Contracts for certification work to be in writing. The Act and Regulation introduce new measures requiring contracts for certification work to be in writing and the elements to be included in those contracts.
- e) Revised categories of accreditation of registered certifiers.

The Act and Regulation include a number of very similar provisions found in the *Design and Building Practitioners Act NSW 2020* requiring building and design practitioners to be registered, suspension or cancellation of their registration, having adequate and current insurance and disciplinary action.

### DISCUSSION/BACKGROUND

The Act and the Regulations have been introduced to replace the *Building Professionals Act 2005* and the *Building Professionals Regulation 2007*.

The Building Professionals Board is abolished and New South Wales Fair Trading is to assume its functions carried out by the former Building Professionals Board.

The Act seeks to:

- a) strengthen regulatory requirements for the registration of certifiers;
- b) improve complaints handling and disciplinary processes for certifiers; and
- c) introduce more rigorous conflict of interest provisions and stronger penalties for breaches including disciplinary action against certifiers.

### REGISTRATION

Certifiers are required to be [registered](#) to carry out the [certification work](#).

### INSURANCE

Certifiers must have professional indemnity insurance so they are “adequately indemnified” against any liability to which the registered certifier may become subject as a result of carrying out the certification work.

The Certifier is also required to provide evidence of insurance to NSW Fair Trading.

The Act makes an exception in relation to employees of Councils who are registered Certifier and who satisfy the Secretary that they have adequate insurance.

The Act and Regulation make provision for professional indemnity policies of insurance required for registered certifiers who carry out business on their own, i.e. as individuals, Certifiers carrying out work in a corporate entity, and partnerships carrying out work as Certifiers.

**Cladding exclusions:** Exclusions may be made in professional indemnity policies so that indemnity under the policy may not apply to a claim made against the insured person in relation to cladding (defined to include panels, linings, attachments to a building's external wall or another area of a building, that does not comply with the requirements of the BCA, Australian Standard, Act, or other law of the Commonwealth, or that does not comply with the manufacturer's conditions of use of the cladding.

Clause 19 applies only in relation to a professional indemnity policy providing indemnity for a period not exceeding 12 months, commencing on or before 30 June 2021.

A transition period of 12 months applies following the commencement of the Regulation.

Existing policies of insurance taken out before the commencement of the Regulation that complied with the requirements of the Building Professionals Act are deemed to satisfy the requirements of insurance.

### **CONFLICTS OF INTEREST**

No certification work is to be carried out if the Certifier has a conflict of interest involving his private interests and his role to act in the public interest s28, for example involving a pecuniary interest.

"Pecuniary interest" is defined in section 30. A registered certifier has a pecuniary interest in the development or building if there is a reasonable likelihood or expectation of appreciable financial gain or loss to the registered certifier, or to a person with whom the registered certifier has a relationship (whether family, personal, employment, or business. Clause 24 of the Regulation sets out specific circumstances in which a conflict will arise.

The Act and Regulation seek to draw a distinction between the private interests of the Certifier and his role as a public officer and where those interests intertwine, the Certifier has a conflict of interest in carrying out relevant certification work. The Certifier is required to abide by a specific Code of Conduct and act in the public interest.

### **CERTIFICATION CONTRACTS TO BE IN WRITING**

While these continue the requirements found in the now repealed Building Professionals Act 2005, the Act introduces new requirements in relation to requiring contracts for certification work to be in writing (appropriately signed/executed by the parties and to contain a declaration.

The contract must be accompanied by an information sheet) available on the Fair Trading website. This sets out the obligations of certifiers.

### **REVISED CATEGORIES OF ACCREDITATION OF REGISTERED CERTIFIERS**

Schedule 1 contains a revised series of classes of registration and corresponding categories of accreditation and the knowledge and skills required.

### **CONTACT US**

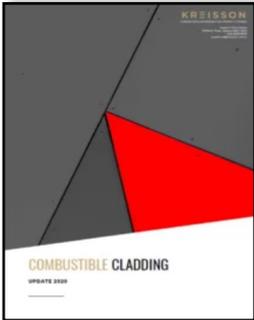
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### **Combustible Cladding**

*Across Australia various state governments have introduced a series of measures to address community concerns about public safety and to identify the extent of the issues posed by combustible cladding.*



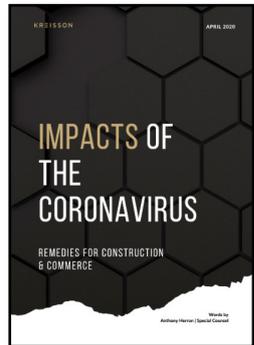
### **SOPA Amendments**

*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.*



### **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.*



### **Impacts of the Coronavirus**

*For those clients with existing supply lines and current financial responsibilities, in most cases they have agreed a series of commercial contracts. The comfort of these contracts is that they help establish and develop the business.*

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