

Draft Submission on the Building and Development Certifiers Draft Regulation 2019

October 2019

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Opening

Local Government NSW (LGNSW) is grateful for the opportunity to make a submission in response to the consultation on the Building and Development Certifiers Regulation 2019 (the draft regulation) under the *Building and Development Certifiers Act 2018* (the Act).

LGNSW is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

This is a draft submission awaiting review by the LGNSW Board. Any revisions made by the Board will be forwarded.

Purpose

This draft submission outlines LGNSW's comments on the Building and Development Certifiers Regulation 2019. The draft regulation provides legislative support for the operation of the *Building and Development Certifiers Act 2018* which was passed by NSW Parliament in 2018. LGNSW's submission¹ on the draft Bill in September 2018 acknowledged the Government's intention to strengthen the regulation of building and development certification through this new legislation. That submission emphasised the important role of the certifier (whether they are a council or private certifier) as a public officer and the need to establish and maintain a practice guide to create a benchmark for the process that should be followed by a certifier to act "impartially, ethically and in the public interest".

The draft regulation and the *Building and Development Certifiers Act 2018* form part of a wider context of reforms needed to strengthen the building and construction sector. These include the Design and Building Practitioners Bill 2019 (introduced to Parliament on 23 October 2019) measures to address the independence of private certifiers and perceived conflicts of interest, and a four-point plan announced by the Government in December 2018 which included an ambitious commitment to annual audits. We note that concurrent with this consultation on the draft Regulation, the Design and Building Practitioners Bill 2019 was introduced to NSW Parliament on 23 October 2019 following a short period of public consultation. Also underway is the Public Accountability Committee's inquiry into the regulation of building standards, building quality and building disputes.

This submission responds to the content of the draft regulation and the accompanying Regulatory Impact Statement. It also provides an update on LGNSW's policy in relation to private certification, makes additional comments about the role of the building commissioner and reiterates a call for a practice guide for certifiers.

¹ https://www.lgnsw.org.au/files/imce-uploads/581/LGNSW_submission_on_Building_and_Development_Certifiers_Bill_2018_%28Sept_2018%29.pdf

General comments

LGNSW policy on private certification

LGNSW and councils have argued for stronger regulation of private certifiers for more than 20 years. For this reason, in 2018 we supported the introduction of the new *Building and Development Certifiers Act 2018* as heralding a critical step towards achieving better building safety and quality outcomes in the future.

However, several high-profile incidents with defective buildings since late 2018 have renewed councils' focus on the inadequacies of the building regulation and private certification system. The Local Government Annual Conference in October 2019 adopted two new policy positions in relation to private certification as follows:

That:

- 1. Local Government NSW encourages the NSW Government to conduct a review of its policy that allows private accredited certifiers to issue development certificates.*
- 2. This review strongly consider a gradual return of development certificates, construction certificates and complying development certificates to councils, and that the principal certifying authority for developments are gradually returned to council in the relevant local government area.*

And:

That Local Government NSW calls on the NSW Government to identify how it intends to address unresolved conflict-of-interest concerns highlighted in the 2018 Options Paper; and to undertake a review, in consultation with local government, of alternative solutions to address conflicts of interest with private certification. The review should include consideration of:

- 1. Introducing a system whereby certifiers are allocated from a register rather directly engaged by the applicant or builder;*
- 2. Random appointment of certifiers from a panel or by some other method that significantly reduces the conflict of interest issues inherent in the current system; and*
- 3. Councils having a pool of Certifiers that residents can use, with council retaining overarching control of the process.*

Technical feedback and expertise from councils

Councils have the requisite knowledge and expertise in relation to the certification process day-to-day and are therefore best placed to provide comment on specific technical details such as the proposed work that each class of registration is proposed to do and the necessary qualifications and experience for registrations.

Recommendation 1: *That feedback from councils be deferred to on the specific details of the content in the schedules to the draft Regulation.*

Commencement of regulation (Part 1)

The proposed commencement date appears reasonable, provided the new Regulation is actually finalised and published in December 2019 as anticipated in the RIS. Councils will need time to review and augment their administrative procedures and documentation to ensure compliance.

All affected parties will need appropriate and adequate education and awareness training and this should be factored into the 6 month timeline between finalising the Regulation (December 2019) and proposed commencement of the Act and Regulation.

Recommendation 2: *The Government should deliver a stakeholder awareness program during the 6 month transition period, with supporting material (eg FAQs) made available to assist stakeholders.*

Registration of certifiers (Part 2)

Part 2 of the draft Regulation discusses registration of certifiers and outlines what each proposed class of registration is authorised to do. NSW Parliament is now considering a new bill which proposes provisions to register designers and builders (Design and Building Practitioners Bill 2019).

Recommendation 3: *The requirements in the Regulation and the Act in relation to registration of certifiers should be reviewed to consider any potential impacts from the recently released Design and Building Practitioners Bill 2019.*

Recognised training

LGNSW and councils have long called for measures to apply greater scrutiny when determining the competence of building practitioners for registration or accreditation. Training should be delivered by skilled and experienced individuals and must be a requirement of continuing professional development for accredited/registered practitioners.

The key requirement is to establish clear and detailed assessment criteria to allow for the full and proper processing of applications seeking recognition. In addition to requiring trainers to demonstrate competency with interpretation and application of the relevant Acts, Regulations, and Standards, when assessing 'recognised training' (for the purposes of clause 4(2) of the Regulation), the Secretary must also ensure the training program includes a robust evaluation system so that attendees' are required to demonstrate their understanding of the information/skills taught and the training does not become simply a 'tick' of attendance.

Recommendation 4: *The Regulation should include provisions that require 'recognised training' programs to include a robust evaluation system, so that attendees' must demonstrate their understanding of the information/skills taught.*

Insurance (Part 3)

LGNSW notes that the proposed Regulation replicates existing requirements for professional indemnity insurance which were introduced in June 2019 via amendments the current

Regulation in response to concerns with the application of exclusions to professional indemnity insurance policies.

We acknowledge this as a short-term response to some practical difficulties around professional indemnity insurance (in large part due to issues with combustible cladding). However, to support the expanded accountability of all building practitioners (as proposed under the Design and Building Practitioners Bill 2019) it is our view that the insurance framework as a whole needs to be looked at, to protect consumers in the long term. Two key aspects that need further consideration are Home Owners Warranty insurance for all apartment buildings and a requirement for run-off cover. (The original requirement for certifiers to have run-off cover was removed in 2002 due to insurance industry concerns.)

Recommendation 5: *That the professional indemnity insurance framework be reviewed to protect consumers in the long term, with particular consideration of expanding Home Owners Warranty insurance for all apartment buildings and a requirement for run-off cover.*

Conflicts of interest (Part 4)

The certifier (whether they are a council or private certifier) is a public officer and needs to act in a manner that reflects community standards. Clarification of potential areas of conflict of interest is therefore fundamental.

While the proposed provisions go some way towards clarifying areas of conflict of interest, they do not address the inherent conflict of interest in the private certification system where the owner directly pays for regulating their construction work and developers/builders form business relationships with private certifiers. The financial and/or future business interests of a certifier who is providing certification work for a client (such as a large developer or builder) appears to be another potential conflict of interest that is not recognised in the proposed legislation.

The NSW Premier has recently acknowledged that allowing the industry to self-regulate “hasn’t worked”², particularly for multi-unit residential buildings, where there the end-purchaser, compared with the developer, has no say in the development. The local government sector believes strongly that substantial reforms are needed to address this inherent conflict.

Recommendation 6: *LGNSW recommends a review of alternative solutions to address conflicts of interest with private certification, in consultation with local government.*

Clause 25 Exemptions

LGNSW acknowledges that in recognition of the low availability of certifiers in regional and rural areas, changes have been made to the exemptions that apply to conflicts of interest for council certifiers (cl 25(2)). It is noted that the exempt criteria have been reduced such that no council employee can obtain certification services from their local council, except in rural areas where the capital investment value is less than \$2M.

Some councils have hundreds of employees and the suggestion that a council certifier may have a private interest with every staff member of a common employer may be excessive.

² <https://www.smh.com.au/national/nsw/it-hasn-t-worked-premier-admits-sydney-s-building-industry-is-failing-20190710-p52601.html>

There are also practical issues with the introduction of registration of certifiers for subdivision certification. If these exemptions are adopted, it appears that subdivision certificates which involve council-owned land or a council employee could not be issued by a council certifier. However, there is no alternative option to engage a private registered certifier because under the majority of planning instruments only council can be the PCA for the subdivision certificate.

Recommendation 7: LGNSW recommends further consultation with councils to consider how the exemptions could be revised/expanded to address potential practical difficulties with their application to councils in regional locations.

Contracts for certification work (Part 5)

We note that the provisions under clauses 28 and 29 essentially remain unchanged from the current Regulation, but additional requirements have been included (in clause 30) to support that an owner has the right to appoint a certifier of their choice. LGNSW supports the proposal for information sheets (which currently outline the role and responsibilities of certifiers) to include additional new information about the role of the 'client' who is receiving the certification work. This will hopefully help to address the general misunderstanding among consumers about the role and extent of the certifier's obligations.

The certifier is performing a statutory function as a public officer and is required to act in the public interest. As such, the concept of a contract (which by definition is of a commercial nature) between the certifier and the client is somewhat unique. As a public officer, the certifier may act contrary to the interest of the person for whom the certification work is carried out.

Some councils have expressed concerns with the practicalities of written contracts for certification work.

Recommendation 8: LGNSW recommends consideration be given to removing the requirement for formal contracts and replacing them with a less formal process such as a letter of agreement or engagement.

Clause 29, requiring pre-payment of all fees to the certifier, may leave the customer at some disadvantage, should a private certifier cease to trade before the completion of the project.

Recommendation 9: Consideration needs to be given to measures that could be used (such as holding pre-paid fees in a trust fund) to offer some financial protection to customers, in the event of the certifier being unable to fulfil the terms of the certification contract.

Recommendation 10: To ensure consistency of contract content and structure by all certifiers it would be beneficial to have guidance on a standardised format or template for these contracts for use by certifiers.

Accreditation authorities (Part 6)

LGNSW notes that Parts 5 and 6 of the Act are new sections intended to create a framework for enabling co-regulation for certain building professionals.

Recommendation 11: There may be merit to include a provision requiring accreditation authorities to have a scheme in place for effective continuing professional development.

Record keeping (Part 7)

Councils are also best placed to make comment on the specific requirements for record-keeping that apply to councils (Part 7).

Council subdivision engineers (Part 8)

The draft regulation Clause 59 proposes that all certification work by councils (with limited exemptions) are undertaken by registered certifiers, which captures subdivision certification functions. This introduces a new requirement for council development engineers undertaking subdivision certification work. It raises a number of concerns for councils, particularly around the required qualifications and experience for subdivision engineers, which could have significant impact on councils. For example, cost implications (councils will need to budget for increased costs associated with registration and CPD), transitional arrangements (a 6-month transition may not be adequate for councils and State Government to get all local government subdivision engineers accredited). The RIS has not addressed these matters.

For the above reasons, LGNSW does not support the proposal that council officers involved with approving subdivision works be registered. The current provisions (under the *Building Professionals Act 2005* and supporting Regulation) do not require council officers undertaking such activities to be accredited (registered). We request that Fair Trading NSW defer to the feedback from councils for further details on this important issue.

Recommendation 12: LGNSW does not support the proposed changes to require council subdivision engineers to be accredited and recommends that the existing provisions prevail. Further consultation with councils is recommended.

Other comments

Protecting the interests of building owners

Councils have a keen interest to see a robust and reputable regulatory framework that delivers well-built, safe and compliant buildings that protect the public interest. Councils are particularly concerned to see that in multi-unit buildings, the interests of end users/consumers (ie the building owners and occupants) are adequately protected. More regular inspections during construction, re-introducing a clerk of works and extending home warranty insurance to cover buildings over three storeys are some of the measures our members have recommended to protect the interest of owners and occupants. This draft Regulation and *Building and Development Certifiers Act 2018*, is intended to combine with other legislation governing building and construction³ to ensure that the process for assessment, approval, inspection and certification of buildings in NSW promotes and achieves the structural safety, fire safety, health and amenity of buildings. However, the latest legislative reforms fail to address concerns about the need for more critical stage inspections, nor are there any changes to home warranty

³ In particular, the *Environmental Planning and Assessment Act 1979*, *Environmental Planning and Assessment Regulation 2000*, *Home Building Act 1989*, and the *Design and Building Practitioners Bill 2019*.

insurance under the *Home Building Act 1989* which would offer the owners of residential apartment buildings greater than three storeys high similar insurance protections provided to low rise residential buildings.

Recommendation 13: *We must not lose sight of the aim of protecting the long-term interests of building owners and occupants, but with each separate piece of legislative reform, there is a risk that these are adding further to the complex procedural and administrative layers in the building development process.*

Role and functions of Building Commissioner

The Government has assured the public that the recently appointed Building Commissioner, will play a central role in the building approval system.⁴ However, the Commissioner is not mentioned in the draft Regulation or in any other existing or proposed legislation. The role, function and statutory powers of the Building Commissioner remain unclear, as do the details of funding and administrative support for this function.

Recommendation 14: *That the NSW Government clarifies the statutory provisions proposed for the Building Commissioner in relation to the Act and draft Regulations.*

Interface with Draft Design and Building Practitioners Bill 2019

The *Building and Development Certifiers Act 2018* introduced a new legislative framework to register and regulate the conduct of certifiers. It was passed by NSW Parliament in October last year. The Parliament is now considering a new bill which proposes provisions to register designers and builders (Design and Building Practitioners Bill 2019).

With two separate pieces of legislation dealing with registration of people involved in the building industry (accredited certifiers, designers and building practitioners) there is potential for confusion about registration and licensing requirements. The Secretary/Fair Trading NSW will need to provide clear and detailed supporting information such as fact sheets and FAQs, to enable those involved in the building and construction sector as well as consumers (building owners etc) who may be dealing with these contractors, to understand what are the relevant registration requirements, who they apply to, what type of building and construction work they apply to, and where these provisions sit in legislation).

Recommendation 15: *In addition to Recommendation 2, the Government will need to make available detailed supporting material (eg FAQs) to assist stakeholders understand the requirements of this legislation and to clarify its relationship with new proposed registration for design and building practitioners currently being considered by NSW Parliament.*

⁴ "The Commissioner will administer all building laws that are or will be in the Minister for Innovation and Better Regulation's portfolio." *NSW Government Response to the Shergold Weir Building Confidence Report*, February 2019, p 5

Practice Guide

The NSW Government has undertaken to create a Practice Guide which will be a recommended reference document for certifiers, created and maintained administratively, rather than a statutory instrument.⁵ LGNSW recommends wider consultation with industry and local government on the form and content of the Practice Guide before it is finalised.

The establishment and maintenance of a Practice Guide for certifiers is vital and should be in place when the Act and Regulation commences. LGNSW and councils have been calling for this for many years. The accountability of certifiers to act in the public interest and clarification of how building certifiers should approach their functions, for example, would be enhanced with the establishment of a practice guide.

Provision for this is made in the Act under section 14 Compliance with standards or methodologies, which gives powers to the Secretary to issue requirements on certifiers as a condition of the licence to carry out work in accordance with certain standards or methodologies prepared by the Secretary. Such methodologies should ideally include the practice guide.

Recommendation 16: LGNSW recommends that the Department of Customer Service (Fair Trading NSW) consults local government to develop a practice guide to be in place when the Act and Regulations commence, and that sufficient time be allowed for councils' input.

Summary of recommendations

Recommendation 1: That feedback from councils be deferred to on the specific details of the content in the schedules to the draft Regulation.

Recommendation 2: The Government should deliver a stakeholder awareness program during the 6 month transition period, with supporting material (eg FAQs) made available to assist stakeholders.

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Recommendation 5: That the professional indemnity insurance framework be reviewed to protect consumers in the long term, with particular consideration of expanding Home Owners Warranty insurance for all apartment buildings and a requirement for run-off cover.

⁵ NSW Government Response to the Statutory Review of the Building Professionals Act 2005, September 2016, p 5

Recommendation 6: LGNSW recommends a review of alternative solutions to address conflicts of interest with private certification, in consultation with local government.

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LGNSW would welcome the opportunity to assist with further information during the development of the draft Regulation to ensure the views of local government are considered. To discuss this submission further, please contact LGNSW Strategy Manager, Planning and Transport, Jane Partridge on 02 9242 4093 or at jane.partridge@lgnsw.org.au.