



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: Prop:EPD:DHgl1607499

5 November 2018

NSW Fair Trading  
McKell Building  
2-24 Rawson Place  
SYDNEY NSW 2000

By email: [BDCBill@finance.nsw.gov.au](mailto:BDCBill@finance.nsw.gov.au)

Dear Sir/Madam,

**Improving Certifier Independence - Options Paper (“Options Paper”)**

The Law Society of NSW appreciates the opportunity to comment on the Options Paper. The Law Society’s Property Law and Environmental Planning and Development Committees have contributed to this submission.

The Law Society supports the introduction of measures to strengthen the independence of private certifiers to enhance consumer protection and public confidence in the system.

Our responses to the questions raised in the Options Paper are set out in the enclosed table.

Should you have queries about this letter, please contact Gabrielle Lea, Policy Lawyer by email to [gabrielle.lea@lawsociety.com.au](mailto:gabrielle.lea@lawsociety.com.au) or by phone on (02) 9926 0375.

Yours faithfully,

Doug Humphreys OAM  
**President**

## Improving Certifier Independence – Options Paper

### Comments from the Law Society of NSW – November 2018

No.	Question	Comments
1.	Do you agree that there is a greater risk for conflicts of interest to arise in private certification work and result in poor certification outcomes (as compared to council certifiers)?	We agree with the comments made in the Options Paper that there is a greater likelihood of conflict of interest when a private certifier is engaged to certify development.
2.	Do you think that an additional mechanism is required to support independence in private certification work?	Yes, we support the introduction of the rotation scheme, as proposed in the Options Paper.
3.	Should local councils have an additional role in appointing certifiers? If so, what kind of role should they play?	We do not support this suggestion. From the experience of some of our members, some councils are not supportive of the private certification process.
4.	Is it appropriate to only include A1 level accredited private certifiers if introducing one of the options?	<ul style="list-style-type: none"> <li>• Yes, we agree with the proposal in the Options Paper on this point.</li> <li>• We note that there may be difficulties in assembling a pool of eligible A1 level accredited private certifiers for certain types of development and in certain locations, but generally this level of accreditation should apply.</li> </ul>
5.	Do you agree with the proposed threshold requirements for when one of the options would apply? If not, why not?	We support the monetary and certifier thresholds. We suggest the requirement that the development be above three storeys could be removed to capture low rise developments, such as aged care facilities or retirement villages, to provide greater consumer protection.
6.	Do you support a monetary threshold of \$5 million, \$20 million or another amount? Why?	<ul style="list-style-type: none"> <li>• We support the proposed threshold amount of \$5 million. There are likely to be significant consequences if the certification process is not carried out correctly for projects having that value.</li> <li>• We suggest the threshold amount will need to be monitored for inflation regularly.</li> </ul>

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7.	Is the type of certification proposed to be captured by one of the options sufficient?	Yes. The mechanism should apply only to those developments which can be certified by an A1 certifier.
<b>Option 1: the rotation scheme</b>		
8.	Does the proposed selection method raise any concerns that may impact the integrity of the rotation scheme?	<ul style="list-style-type: none"> <li>• In our view, the rotation scheme appears to be the fairest scheme. However, the scheme should operate on the basis that the certifier should always have the right to reject the appointment, not only in circumstances where there is a conflict of interest, but for the other reasons outlined in the Options Paper, such as workload or other commitments and geographic constraints.</li> <li>• The process of providing quotations should be confidential.</li> </ul>
9.	How should certifiers preferences for working in certain Local Government Areas be managed?	Certifiers' preferences should be managed by allocating certifiers according to nominations by the certifiers as to the areas in which they are prepared to work.
10.	Do you support the provision of three certifiers for each development that meets the threshold requirements? If not, what other way could help eliminate competition concerns?	Yes, the provision of three certifiers who then provide quotes is likely to promote competition.
11.	Is it appropriate to allow a developer to reject all three certifiers provided under the rotation scheme? If yes, in what circumstances would this be appropriate?	We understand that the grounds upon which a developer will be able to reject a certifier will be prescribed and will be quite limited. It would be quite unusual for the developer to be in a position to validly reject all three certifiers under the proposed limited grounds.
12.	Is it appropriate to mandate the developer appoint the local council as principal certifying authority where the developer rejects the three certifiers provided?	We support the council being the 'default' certifier, subject to there being a clear methodology for the pricing of council services. It is imperative that a default mechanism is provided.
13.	Should a certifier be able to refuse selection and/or appointment under the rotation scheme? If	<ul style="list-style-type: none"> <li>• Yes. We note that geographic limitations will be taken into account in the selection process.</li> </ul>

No.	Question	Comments
	yes, in what circumstances would this be appropriate?	<ul style="list-style-type: none"> <li>• A certifier should be able to refuse appointment on the types of grounds specified on page 16 of the Options Paper.</li> </ul>
14.	Do you support Option 1? If not, why not?	We support Option 1 provided there are appropriate limitations and systems in place to avoid the developer 'cherry-picking' between certifiers.
<b>Option 2: the cab rank scheme</b>		
15.	Do you support the cab rank scheme for the appointment of the PCA for developments that meet the threshold requirements? If not, why not?	<ul style="list-style-type: none"> <li>• In our view the cab rank scheme is inappropriate. It is uncertain and capable of being circumvented.</li> <li>• The Options Paper cites the operation of a type of cab rank system for barristers. In our members' experience this system does not always operate as expected.</li> <li>• The cab rank scheme would be difficult to manage and appears less competitive than other options.</li> </ul>
16.	Is it appropriate to allow a developer to reject the single certifier provided under the cab rank? If so, in what circumstances would this be appropriate?	We do not think it is appropriate to allow developers to reject the single certifiers under the cab rank, but we acknowledge that this leads to an obvious competitive disadvantage for the developer. If a process was to be mandated to try and ensure the certifier's price is competitive, the system would be slow, cumbersome and likely subject to delay.
17.	Is it appropriate for developers to have two rights of rejection? Would this encourage price competition?	No, especially if the refusals would not be subject to review, as specified on page 19 of the Options Paper.
18.	Is it appropriate to mandate the developer appoint the local council as PCA where the developer rejects the private certifier provided?	No. We believe the council should only be the certifier as a last resort, and even then, only when it has quoted a price for the services which it agrees to provide.
19.	Should a certifier be able to refuse selection and/or appointment under the cab rank? If yes, in	Yes. There are many reasons a certifier may want to refuse an appointment or selection. For example a certifier may:

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	what circumstances would this be appropriate?	<ul style="list-style-type: none"> <li>• lack the requisite qualifications; or</li> <li>• may be required to work outside the geographical area where the certifier practices; or</li> <li>• be in a position of conflict; or</li> <li>• be genuinely unavailable.</li> </ul>
20.	Do you think that a 'cab rank' system will result in additional costs or delays for industry? If so, what sorts of costs or delays?	A cab rank system may, without significant regulation, result in higher certification costs. If appropriately regulated, it may then not be sufficiently flexible and may result in slower appointment times. Time delays also have other knock-on effects, such as the impact delay may have in relation to the financing of the development.
21.	Do you support Option 2? If not, why not?	No, it would appear to be less competitive and more administratively cumbersome.
<b>Option 3: the time limit scheme</b>		
22.	Do you agree that a three-year break between certifier and client would sufficiently mitigate a conflict of interest from occurring? If not, what would be a more appropriate break time?	<ul style="list-style-type: none"> <li>• We are not in favour of this proposal, but consider that it is preferable to the cab rank scheme.</li> <li>• This proposal also penalises good certifiers who have built a reputation and client base over many years.</li> </ul>
23.	Do you support that a certifier can work for the same client for a period of five years before taking a break? If not, what would be a more appropriate period?	Most large developments take three or more years. We defer to the expertise of other stakeholders as to whether three years or five years is appropriate, if this option is to be implemented.
24.	Do you support an exemption that permits a certifier to work with the same client for more than the maximum number of years? If so, what kinds of situations should be exempt?	If the break time is for a period of three years, there would need to be an exemption for the certifier to continue to work on the same development as it would not be expedient or appropriate to change certifiers. This may give rise to questions as to the definition of the 'development', particularly for very large multi-staged developments.
25.	Do you support Option 3? If not, why not?	<ul style="list-style-type: none"> <li>• We do not support Option 3. In our view it has a greater propensity for conflicts of</li> </ul>

No.	Question	Comments
		<p>interest to develop than the other options.</p> <ul style="list-style-type: none"><li data-bbox="943 300 2063 432">• Option 3 may also be difficult to administer as often a developer will use a special purpose vehicle for a development. The legislation may need to define the developer in terms analogous to the use of the term 'associate' in the <i>Corporations Act 2001</i>, to capture related parties.</li></ul>