

Submission on the *Building and Development Certifiers Regulation 2019* (NSW)

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Building and Development Certifiers Regulation 2019 (NSW)

Fair Trading NSW

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The NSW Young Lawyers Environment and Planning Committee (Committee) makes the following submission in response to the *Building and Development Certifiers Regulation 2019* (NSW)

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committee comprises of a group of approximately 50 members interested in our environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

Summary of Recommendations

1. Amend clause 2 of the Code of Conduct to require certifiers to not adversely affect the safety of property.
2. Amend clause 2 of the Code of Conduct to refer to the unique public position of certifiers.
3. Amend clause 4 of the Code of Conduct to:
 - a. require certifiers to have “reasonable regard” to specialist advice; and
 - b. better specify or define the term “specialist”.
4. Amend clause 7 of the Code of Conduct to require a certifier to have an ongoing duty to notify a principal of matters affecting the certifier’s registration.
5. Amend clause 9 of the Code of Conduct such that it applies to statutory functions performed by a certifier, in addition to certification work.
6. Amend clause 10 of the Code of Conduct to require written consent before confidential information is disclosed.
7. Amend clause 11 of the Code of Conduct to require certification work carried out under supervision to be carried out in accordance with the Code of Conduct.
8. That further consideration be given to broader, systemic changes and strategies beyond the scope of the Regulation, and to ensure effective implementation of the Regulation, in order to enhance the integrity of the certification process.

Introduction

The Committee welcomes the opportunity to comment on the proposed *Building and Development Certifiers Regulation 2019* (NSW) (**the Regulation**). The Committee recognises the extensive list of questions which Fair Trading NSW sought comment in relation to the Regulation. The Committee has limited its submission to two questions, being the Code of Conduct introduced in Schedule 2 of the Regulation and the appropriateness of the prescribed conflicts of interest in clauses 24 and 25 of the Regulation.

Overall, the Committee considers the proposed amendments to these two parts of the Regulation will enhance the accountability of registered certifiers, promote the public interest and ensure safety of development in New South Wales. However, as outlined below, the Committee considers that the Regulation could be amended to further clarify duties of registered certifiers and, further, that systemic change beyond the scope of the Regulation is necessary.

Do you support the proposed duties in the code of conduct? Why or why not? What other duties should be considered?

The Committee supports the introduction of the Code of Conduct (**Code**) into the Regulation. This will give the duties within the Code statutory weight, in contrast to the current code of conduct (**Current Code**) which is contained in the Building Professionals Board Accreditation Scheme.¹

The Committee also supports the introduction of an offence for a breach of the Code in Schedule 1, Clause 2. This again contributes to enforceability of the requirements in the Code and will enhance the accountability of registered certifiers.

The Committee makes the following comments in relation to specific duties in the Code:

¹ State of New South Wales through the Building Professional Board, Building Professionals Accreditation Scheme (23 August 2019) <https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0007/461455/Building-Professionals-Board-Accreditation-Scheme.pdf>.

Duty to act in the public interest (clause 2)

The Committee supports this duty to the extent it provides greater specificity and gives greater certainty to the public, particularly in comparison to the equivalent duty (Duty 1 – Acting in the public interest) in the Current Code. Enhancing the specificity of a certifier’s duty to act in the public interest is important given that:

“[r]egistered certifiers are in a unique position as compared with many other practitioners as they are recognised as ‘public officials’ and ‘public authorities’ under the Independent Commission Against Corruption Act 1988 and the Ombudsman Act 1974 respectively.”²

The duty to act in the public interest, as draft in the consultation version of the Regulation could be improved by inserting the words “or property” after “person” in clause 2(2)(a). As currently drafted, clause 2(2)(a) impliedly contemplates safety of property by reference to the safety of “a person”. However, there may be situations in which the safety of property may not directly impact the safety of a person. These circumstances should be explicitly included in the Code for certainty.

Duty to act within level of competence, expertise and area of registration (clause 4)

The Committee supports the Code’s expansion of the duty in the Current Code to require a certifier to seek specialist advice if an aspect of certification work is beyond the registered certifier’s competence and expertise. The Committee recommends that this duty be further expanded to require certifiers to have “reasonable regard” to specialist advice sought, to prevent the situation where specialist advice is sought for the purpose of complying with the Code, but a certifier has not turned their mind to this advice. The Committee notes that it does not intend for a certifier to have to follow or agree with specialist advice, but instead submits that a requirement to give real consideration to specialist advice would assist in increasing public confidence in the certification process and personal and building safety.

Furthermore, clause 4 would benefit from a clearer definition or meaning of “specialist”.

Duty not to misinform or mislead (clause 7)

The equivalent duty in the Current Code (Duty 2 – Regard for interests of principals and others) requires certifiers to keep informed the person who engages the certifier of any change in circumstances relating to their rights or authority to carry out certification work. The Committee submits that this requirement should be carried across to the Code, to clarify that certifiers have an ongoing duty to inform principals of changes in circumstances which may affect their rights of authority to carry out certification work.

² Better Regulation Division – Department of Customer Service of the NSW Government, *Regulatory Impact Statement: Building and Development Certifiers Regulation 2019 – September 2019*.

Duty to documents reasons for decisions (clause 9)

The Committee notes that the equivalent duty in the Current Code (Duty 6 – Making decisions and taking actions) requires certifiers to take all reasonable steps to obtain all relevant facts when “carrying out certification *and other statutory functions*” (emphasis added). The Committee recommends that similarly broad drafting be inserted into clause 8(1) of the Code, to ensure this requirement applies to all facets of a certifier’s role.

Duty to maintain confidentiality (clause 10)

The Committee recommends that the word “written” be inserted before the word “consent” in clause 10(1)(a) of the Code. Requiring written consent before confidential information can be disclosed will provide greater certainty to both registered certifiers and persons to whom a duty of confidentiality is owed.

Supervision (clause 11)

The Committee recommends that the word “competently” in clause 11(b) be deleted and the words “in accordance with this code” are inserted. Persons undertaking certification work under supervision should be held to the same standards of conduct as registered certifiers. This will ensure uniformity in community expectations are upheld within the profession and ensure that certifiers who are in training understand their duties and responsibilities from the outset. This proposed change will require certification work carried out under supervision to be carried out competently in any event, given the requirements in clauses 4 and 5 of the Code.

Do you support the proposed prescribed conflicts of interest in clause 24 and exemptions in clause 25? Why or why not?

The prescribed conflicts provided in clause 24 are supported and build upon the circumstances in section 9 of the *Building and Development Certifiers Act 2018* (NSW) (**the Act**). Having a prescribed list of conflicts of interest increases the integrity of the overall system and will increase public confidence in the certification process.

It is important to consider real, apparent and potential conflicts of interest. While section 29 of the Act, supported by clause 24 of the Regulation addresses conflicts of interest, conflicts are inherent in the private certification of development. Certifiers rely on builders and developers for work, while builders and developers require certification of their developments. If certifiers are unable or unwilling to provide the required certification, builders and developers will seek different certifiers.

While the Committee does not have any specific comments on clause 24 as presently drafted, the Committee recommends that broader reforms, beyond the scope of the Regulation, ought to be considered to strengthen integrity in the certification process, including to:

- have certifiers appointed to specific developments by local or State governments. This would distance the relationship between certifiers and builders and seek to reduce the inherent conflict described above; and/or
- require builders and developers to provide annual reports on the number and range of certifiers used on their developments. A minimum or maximum percentage could be required to increase independence and integrity of certifiers.

In relation to the exemptions in clause 25, the Committee notes that this largely replicates the form of the current exemptions in the *Building Professionals Act 2005* (NSW).

The Committee supports the decrease in capital investment value in clause 25(2)(b) from \$5 million to \$2 million. The Committee also supports the exemptions for non-metropolitan areas, where there is often a lack of registered certifiers. However, in light of the increased scrutiny and requirements regarding training of registered certifiers dealt with elsewhere in the Regulation, and to support the efficacy of the Regulation, the Committee recommends that the New South Wales Government:

- facilitates greater access to training for certifiers;
- provides incentives for registered certifiers to work in non-metropolitan areas; and
- develops further mandatory training for certifiers in relation to conflicts of interest (which can be made mandatory by the Secretary under clause 2 of Schedule 5 of the Regulation), as this would assist in increasing the overall integrity of the certification process.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

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