



Regulatory Impact Statement

Building and Development Certifiers Regulation 2019 –
September 2019



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Executive summary

The *Building and Development Certifiers Regulation 2019* (**the proposed Regulation**) is proposed by the Hon Kevin Anderson, Minister for Better Regulation and Innovation. The main purpose of the proposed Regulation is to provide the legislative support for the operation of the *Building and Development Certifiers Act 2018* (**the Act**) facilitating its commencement.

On 24 October 2018, the Act was passed by Parliament. On commencement, the Act will repeal the *Building Professionals Act 2005* and the *Building Professionals Regulation 2007* and introduce a simplified and strengthened certification system in New South Wales. The new legislative framework will allow the Government to more effectively register and regulate the conduct of certifiers promoting public confidence in the certification system and the building and construction industry more generally.

Building certification involves the independent checking and approval of building work in accordance with the relevant consent, the National Construction Code, applicable Australian Standards and other legislative requirements. The certification process is an integral part of the building and construction sector in NSW, and is essential to managing risks to safety, health, amenity and sustainability of the design and performance of buildings.

The Act will establish a framework to permit continuous improvement in carrying out certification work. It will provide for the registration of people to carry out certification work, enable certain body corporates to be approved as accreditation authorities and provide for the accreditation of people to carry out regulated work.

The key reforms in the proposed Regulation are:

- detail and streamline the different classes of registration for certification work;
- prescribe the qualifications, skills and experience required to be granted and maintain registration;
- improve the independence of certifiers and provide certainty around when a conflict of interest arises;
- clarify roles and responsibilities of certifiers with a Code of Conduct setting out professional standards;
- provide greater protections for consumers by strengthening contract requirements for certification work;
- establish a new accreditation authority framework to formalise the regulation of regulated work, including the work of competent fire safety practitioners;
- strengthen compliance and enforcement through penalty notice offences to more effectively target misconduct; and

- apply the Consumer Price Index to fees consistent with standard Fair Trading practice.

This Regulatory Impact Statement (**RIS**) has been prepared as part of the making of the proposed Regulation to:

- identify and assesses direct and indirect costs and benefits, to ensure that the proposed Regulation is necessary, appropriate and proportionate to risk;
- demonstrate, when compared to alternative options, that the proposed Regulation it provides the greatest net benefit or the least net cost to the community; and
- demonstrates that any regulatory burden or impact on government, industry or the community is justified.

The RIS sets out the rationale and objectives of the proposed Regulation and the various options for achieving the objectives. It also provides a discussion on important aspects of the proposed Regulation and seeks feedback from stakeholders and the community. This RIS should be read in conjunction with the proposed Regulation.

There will be a four-week public consultation period on the proposed Regulation.

Submissions are invited on any of the matters raised in the discussion or anything else contained in the proposed Regulation. All submissions will be considered and evaluated, and any necessary changes will be made to address the issues identified before the proposed Regulation is finalised. The process for submitting comments on the proposed Regulation is explained in the following section.

Consultation process

Making a submission

Interested organisations and individuals are invited to provide a submission on any matter relevant to the proposed Regulation, whether or not it is addressed in this RIS. You may wish to comment on only one or two matters of particular interest, or all of the issues raised. Matters covered by the principal Act – *Building and Development Certifiers Act 2018* – are not the subject of the consultation process.

To assist you in making a submission an optional online submission form will be available on our website at <https://www.fairtrading.nsw.gov.au> or <https://www.nsw.gov.au/improving-nsw/have-your-say/>

However, this form is not compulsory and submissions can be in any written format.

Submissions can be made by email and the Department requests that any documents provided to us are produced in an 'accessible' format. Accessibility is about making documents more easily available to those members of the public who have some form of impairment (visual, physical, cognitive). Further information on how you can make your submission accessible is contained at <http://webaim.org/techniques/word/>.

Please forward submissions by:

Email to: BDCpolicy@customerservice.nsw.gov.au

Mail to: Building and Development Certifiers Regulation 2019
Better Regulation Division, Regulatory Policy
Locked Bag 2906
LISAROW NSW 2252

The closing date for submissions is 5pm Monday, 28 October 2019.

We invite you to read this paper and provide comments. You can download the RIS and the proposed Regulation from the NSW Fair Trading website at www.fairtrading.nsw.gov.au . Printed copies can be requested from NSW Fair Trading by phone on 13 32 20.

Important note: release of submissions

All submissions will be made publicly available. If you do not want your personal details or any part of your submission published, please indicate this clearly in your submission together with reasons. Automatically generated confidentiality statements in emails are not sufficient. You should also be aware that, even if you state that you do not wish certain information to be published, there may be circumstances in which the Government is required by law to release that information (for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*). It is also a

statutory requirement that all submissions are provided to the Legislation Review Committee of Parliament.

Identified stakeholders

This RIS has been provided directly to some stakeholder organisations. A list of these stakeholders is provided at **Appendix 3**.

Evaluation of submissions

All submissions will be considered and assessed. The proposed Regulation will be amended, if necessary, to address issues identified in the consultation process. If further information is required, targeted consultation will be held before the Regulation is finalised.

Commencement of the Regulation

After the Minister for Better Regulation and Innovation has finalised the Regulation, it will be submitted to the Governor for approval.

Once approved by the Governor, the Regulation will be published on the official NSW Government website for online publication of legislation at www.legislation.nsw.gov.au and in the NSW Government Gazette. Information on how to access the Gazette is available on the NSW Parliamentary Counsel's [website](#).

It is proposed the Act and Regulation will commence on **1 July 2020**.

Objective and rationale of the proposed Regulation

Need for Government action

The *Building and Development Certifiers Act 2018* (the Act) was passed by Parliament on 24 October 2018 and received assent from the Governor on 31 October 2018. Government action is deemed necessary at this point-in-time to give effect to overhauling certifier regulation in its response to the 'Independent Review of the Building Professionals Act 2005' (also known as the 'Lambert Review').

The Act and the proposed Regulation will strengthen and simplify the building and certification system in NSW. The proposed Regulation is a necessary and detailed component of the certifier regulation framework in NSW, and forms a critical link between the Act and monitoring compliance. The Act cannot function as intended without the supporting proposed Regulation.

Objective

The objects of the Act are to:

- provide for the registration of persons to carry out certification work and the accreditation of persons to carry out other regulated work;
- recognise that certification work is an important public function with potential impacts on public health, safety and amenity and to ensure that it is carried out impartially, ethically and in the public interest;
- provide for the approval of certain bodies corporate as accreditation authorities to exercise accreditation functions under the Act;
- ensure appropriate scrutiny and review of actions taken by persons exercising functions under the Act and the certification legislation; and
- provide a framework to permit the continuous improvement of the carrying out of certification work.

The primary objective of the proposed Regulation is to provide the legislative support and administrative detail for the operation of the Act. Regulations are integral to the effective operation of the Act.

The objectives of the proposed Regulation are to:

- detail and streamline the classes of registration available, and outline what each class is authorised to do;
- prescribe the qualifications, skills and experience required for each class and the continuing professional development requirements to ensure the maintenance of high levels of practitioner skills and qualifications;

- provide clarity on the role and responsibility of a registered certifier with a Code of Conduct which sets out required professional and ethical standards;
- establish the new accreditation authority framework, which formalises the regulatory mechanisms by which competent fire safety practitioners can be accredited by non-government organisations;
- provide greater consumer protections by strengthening the requirements for contracts for carrying out certification work;
- improve the independence of registered certifiers and provide certainty by outlining specific circumstances in which a registered certifier has, and does not have, a conflict of interest; and
- strengthen compliance and enforcement by prescribing penalty notice amounts for offence provisions in the Act and regulations.

Options for achieving objectives

The primary objective of the proposed Regulation is to provide operational and administrative detail to support the operation of the Act on commencement. Three options were assessed for achieving the objectives and are detailed below:

Option 1: Take no action

The *Building Professionals Regulation 2007* (**the current Regulation**) would be automatically repealed under the *Subordinate Legislation Act 1989* on 1 September 2020 and the proposed Regulation would not commence. Taking no action would also result in the Act not commencing and the existing *Building Professionals Act 2005* (**the current Act**) remaining in force with no supporting regulations.

Option 2: Maintain the status quo

The proposed Regulation would not be made and instead the current Regulation would be remade with the no changes made to existing provisions. Maintaining the status quo would also result in the Act not commencing, meaning that the benefits of a streamlined and strengthened certification system would not be realised.

Option 3: Make the proposed Regulation

The proposed Regulation has been developed to provide legislative support and administrative detail for the Act allowing for its commencement. Under the proposed Regulation existing provisions from the current Regulation are maintained as appropriate and other provisions are updated or inserted to reflect the new certification framework.

Criteria used to assess the regulatory options

The following criteria, which relate to the regulatory objectives, are used in the evaluation of the three options:

- the extent to which the option supports the objectives of the Act;
- the cost effectiveness of each option, in terms of costs and benefits to industry, consumers and government;
- the extent to which the option contributes to the overall efficiency of the regulatory system.

Impact assessment of options

Preferred option

After analysing the costs and benefits to consumers, industry and government of each option, the option that supports the objectives of the Act and contributes to the overall efficiency of the regulatory system is **Option 3 – Make the proposed Regulation**. The proposed Regulation will provide legislative support and administrative detail needed to facilitate the operation of the Act, which will have considerable benefits to the community, industry and the government.

Summary of costs and benefits of each option

A summary of the costs and benefits for all three options is shown in **Table 1**. This shows that **Option 3 – Make the proposed Regulation** has the highest overall benefit to the industry, consumers and government.

| Option | Likely costs | Likely benefits | Overall benefit |
|---|--------------|-----------------|-----------------|
| Option 1 Take no action | High | Low | Negative |
| Option 2 Maintain the status quo | High | Medium | Negative |
| Option 3 Make the proposed Regulation | Medium | High | Positive |

Table 1: Summary of costs and benefits for each option

Assessment of Option 1: Take no action

Costs

Industry costs would be incurred if the current Regulation is allowed to automatically lapse. Without the provisions provided in the current Regulation, the intention and detail of the current Act would not be clear, which would lead to an increase in the number of disputes. This would result in greater costs to individuals and organisations due to the time and money spent dealing with problems where disagreements arise. **The overall cost to industry has been assessed as medium.**

Consumer costs would be significant as there would be reduced community confidence in the industry without the ability for the Government to provide the protection and compliance framework placing public health and safety at risk. Enforcement under the current Act would require court action to penalise a certifier for wrongdoing without the ability to issue penalty infringement notices under the current Regulation. Consumers would suffer with a decrease in safety standards as consumer protection

contained in the current Regulation would not exist and may result in an increase in unqualified people operating in the industry. **The overall cost to consumers has been assessed as high.**

Government costs would increase as the Government's regulatory responsibilities would continue under the current Act but this role would be made virtually impossible by the lack of administrative detail. The number of complaints received by Fair Trading would likely increase, requiring additional staff resources to effectively deal with the response. There would also be an increasing number of matters in dispute, which would increase administration costs for Government. Allowing the current Regulation to lapse would also remove the ability for penalty notices to be issued by Fair Trading. All breaches of the current Act would need to be pursued through the courts, resulting in a substantial increase in compliance costs. This would make it difficult to discourage any illegal behaviour in the industry including bribery, conflicts of interest and misconduct. **The overall cost to government has been assessed as high.**

The overall costs associated with Option 1: Take no action have been assessed as high.

Benefits

Industry benefits would be minimal, but there would be some savings achieved as a result of the removal of the regulatory requirements imposed on certifiers. This includes the financial benefit of not having to pay licence fees as stipulated in the current Regulation. This would be offset by complaints and disputes needing to be managed by the courts. **The overall benefit to industry has been assessed as medium.**

Consumer benefits would be minimal as community confidence in the industry would likely to be eroded and public health and safety may be put at risk. The loss of the consumer protection provisions of the current Regulation would mean there is no benefit to consumers in allowing the current Regulation to lapse. **The overall benefit to consumers has been assessed as low.**

Government benefits would also be very minor and primarily relate to the savings achieved in time and resources in not having to remake the current Regulation. However, these would be far outweighed by the costs associated with handling more complaints as detailed above and the reputational cost of not adequately protecting the public and not implementing the recommendations from independent reviews. **The overall benefit to government has been assessed as low.**

The overall benefits associated with Option 1: Take no action have been assessed as low.

Conclusion

The current Act cannot function as intended without the supporting current Regulation. Taking no action would result in the current Regulation lapsing on 1 September 2020, with no replacement Regulation being made. This option would significantly reduce consumer protection. Without the Regulation, many important aspects of the Act would not function effectively and there are few, if any real benefits associated with allowing the Regulation to lapse.

Further action by the Government would be required to enact these functions, such as amending the current Act to enshrine the requirements of the current Regulation. This would reduce the capacity to amend the requirements quickly to respond to problems that may arise for consumers or to address changes in industry practices. For these reasons, **Option 1: Take no action is not the preferred option.**

Assessment of Option 2: Maintain the status quo

Costs

Industry costs would be moderate as the indirect costs likely to affect the industry would be related to the missed opportunity to reduce red tape and administrative burden that the new framework will provide. The modernisation of the proposed Regulation would not be recognised and any inefficiencies and ambiguities would not be resolved. **The overall cost to industry has been assessed as medium.**

Consumer costs would likely be moderate. Despite consumer protection measures existing in the current Regulation, the proposed Regulation provides an opportunity to increase consumer protection by introducing consistent compliance and enforcement provisions and providing greater awareness of consumer rights in selecting a certifier. **The overall cost to consumers has been assessed as high.**

Government costs would likely be substantial as there is an opportunity cost for government to improve the regulatory framework that would provide greater clarity to stakeholders and reduce disputes. For example, measures in the proposed Regulation including modernisation, improved efficiency, increased compliance and consumer protection would not be implemented. There would also be reputational risk to the Government by not updating the regulatory framework for certifiers to be consistent with

recommendations made by Michael Lambert¹ in 2015 (the Lambert report) and Peter Shergold and Bronwyn Weir² in 2018 (Shergold Weir report). Actual administrative and financial costs of the administration of the current Regulation would be similar if the current Regulation was remade without amendment. **The overall cost to government has been assessed as high.**

The overall costs associated with Option 2: Maintain the status quo have been assessed as high.

Benefits

Industry benefits are likely to be moderate as certifiers would still be required to comply with the requirements of the current Regulation. The primary benefit of this option for industry is the savings achieved because of the absence of any costs associated with transitioning to the new requirements of the proposed Regulation. This includes costs associated with ensuring compliance. Members of the industry can continue operations under usual practices. As the proposed Regulation introduces new and enhanced provisions designed to improve consumer protection in the industry, proceeding with this option would avoid any new regulatory impact. **The overall benefit to industry has been assessed as medium.**

Consumer benefits relate primarily to the time and effort saved in not having to adapt to any new legislation or requirements. Consumers would continue to benefit from the consumer protection mechanisms of the current Regulation. This option would still provide the necessary administrative mechanisms to support the current Act. However, this option would see a continuation of an out-dated regulatory framework which has not kept pace with current standards or approaches. **The overall benefit to consumer has been assessed as medium.**

Government benefits would be focused on the administrative savings that could be achieved. Proceeding with this option would mean guidance and advice material provided by Fair Trading would not need to be updated. There would be no requirement to publicise any legislative changes. Fair Trading staff would not need to be re-trained on the new legislation. However, this option would not improve the current issues and complaints and disputes would still need to be managed. **The overall benefit to government has been assessed as medium.**

¹ Independent review of the Building Professionals Act 2005 conducted by Michael Lambert in October 2015

² Building Confidence – Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia by Peter Shergold and Bronwyn Weir in February 2018

The overall benefits associated with Option 2: Maintain the status quo have been assessed as medium.

Conclusion

Remaking the current Regulation in its present form would not impose any new costs on industry or consumers, but it would not respond to the recommendations by any independent reports or result in any significant benefits or improvements in the sector. Enhancements provided in the proposed Regulation and Act would not be realised. This would have an overall negative impact on industry, consumers and the government. For these reasons, **Option 2: Maintain the status quo is not the preferred option.**

Assessment of Option 3: Make the proposed Regulation

Costs

Industry costs are likely to be varied as the proposed Regulation seeks to reduce red tape but it also increases fees and includes more compliance obligations. The following have been identified as potential cost impacts for industry under this option:

- costs associated with understanding the new requirements and reflecting these in their business practices,
- the introduction of new penalty notice offences that may impact non-compliant certifiers,
- introduction of a new process and associated fee for the variation of a registration such as adding or changing a class of registration after completing further qualifications, and
- increase to fees to incorporate Consumer Price Index (CPI) inflation.

The overall cost to industry has been assessed as high.

Consumer costs may arise for those consumers using the services of a certifier as a flow on effect from the increase to certifier fees proposed in the proposed Regulation. However, the benefit consumers receive from increased consumer protection from the measures in the proposed Regulation may off-set these costs. This will be achieved by:

- the auditing program that will identify non-compliances in the building industry,
- greater awareness of consumer rights in selecting a certifier; and
- the introduction of more penalty notices to target non-compliant certifiers.

The overall cost to consumers has been assessed as medium.

Government costs would initially relate to one-off implementation costs associated with updating the various forms, guidance material and systems required to reflect change in the proposed Regulation. Initial administrative costs would be required to educate the industry of the changes under the proposed Regulation and Act. However, these costs would be kept to a minimum by aligning the commencement dates of the proposed Regulation and Act. Prescribing penalty notice amounts for new provisions in the Act would also ease costs and the time associated with enforcing non-compliance through court proceedings, mitigating the cost impact on government. The efficiency gained by implementing the legislation will outweigh the initial costs associated with the implementation of the new reforms. **The overall cost to government has been assessed as medium.**

The overall costs associated with Option 3: Make the proposed Regulation have been assessed as medium.

Benefits

Industry benefits would largely be derived from the manner in which the proposed Regulation seeks to improve the performance of the profession. The following are the potential benefits for the industry under this option:

- modernisation of the regulatory requirements and simplified clauses to improve understanding,
- conflict of interest provisions and exemptions further explained to assist certifiers in understanding situations where this may occur,
- reduced red tape and administrative burden by extending the duration of a licence from one year to up to five years, and
- including the Code of Conduct in the proposed Regulation to place greater emphasis on its importance and the expected behaviour of certifiers.

The overall benefit to industry has been assessed as high.

Consumer benefits under this option are likely to arise through the proposed Regulation aiming to promote consumer understanding and public confidence in the profession by assisting consumers to understand the role a certifier plays in the building industry. The following have been identified as potential benefits for consumers under this option:

- assisting consumers in understanding their rights on selecting a certifier with an offence for a builder not providing the right to a consumer
- increasing consumer protection by strengthening and developing a consistent approach to target certifiers who provide false or misleading information.

- enhance the accountability of certifiers by broadening the range of penalties that have been imposed in the proposed Regulation

Benefits from the current Regulation have been retained to ensure that consumers have all the current protections including a licensing and certification scheme for certifiers and the monitoring of compliance to ensure minimum standards of professionalism and behaviour in the industry. **The overall benefit to consumers has been assessed as high.**

Government benefits arising from it being in the best interests of the government to serve the public by reviewing the current Regulation to ensure the industry is functioning effectively and efficiently. This involves taking action as a result of the recommendations made by various reviews of the sector. The proposed Regulation will also provide consistent and comprehensive enforcement provisions that will enable the regulator to more effectively carry out compliance and enforcement actions. Although there may be additional up-front one-off implementation costs, the government will benefit from a modern and consistent regulatory approach that improves compliance and protects the consumer. It also balances the needs of industry by removing unnecessary red tape. **The overall benefit to government has been assessed as high.**

The overall benefits associated with Option 3: Make the proposed Regulation have been assessed as high.

Conclusion

This option enables the Act to commence with the proposed Regulation meeting the regulatory objectives of the Act and provides a more streamlined and consistent approach to regulating the certifier industry. This option addresses several weaknesses in the current Regulation and provides the greatest benefit to the industry, community and government outweighing any new costs. The cost impact of the proposed Regulation would be partly offset by the red tape reduction measures in reducing compliance burdens on industry. For these reasons, **Option 3: Make the proposed Regulation is the preferred option.**

Discussion of the proposed Regulation

Submissions are welcome on any aspect of the proposed Regulation or any other relevant issue, whether or not raised in this RIS. This section will outline discussion points to provide greater context for the key provisions contained in the proposed Regulation. A summary of the proposed Regulation is provided in **Appendix 2**.

A list of questions posed in this section with a reference to the page number is provided in **Appendix 5**, to allow people to navigate to specific issues of interest.

On commencement of the Act, the Secretary of the Department of Customer Service will replace the Building Professional Board as the regulator in this legislation. This reflects the formal integration of the functions of the Board into the Department that will occur on proclamation of the Act. For this reason, the proposed Regulation refers to the Secretary instead of the Board.

Part 1 Preliminary

Date of commencement (clause 2)

The Act commences on a day or days to be appointed by proclamation. It is proposed to commence the Act and the proposed Regulation on 1 July 2020. Having the same commencement date for the Act and Regulation is intended to make the transition to the new certification legislative framework simple and efficient for all stakeholders.

It is anticipated that the proposed Regulation will be finalised and published by December 2019. The commencement date of 1 July 2020 has been proposed to provide the industry with six months to become familiar with the requirements of the new legislative framework and adapt to any new processes that may be required.

- 1. Is the commencement date of 1 July 2020 for the proposed Regulation and the Act appropriate? Why or why not?**
- 2. Is the proposed 6 month transitional period appropriate? Why or why not?**

Part 2 Registration of certifiers

Qualifications, skills, knowledge and experience

Section 120(2)(a) of the Act enables the proposed Regulation to make provision for the qualifications, skills and experience required to hold registration to carry out certification work. It also enables the

proposed Regulation to make provision for the approval of training and the approval of people to conduct the training or to assess people undergoing the training.

Requirement to complete training

The proposed Regulation provides that the Secretary can require an applicant for registration to have successfully completed recognised training to be granted registration. This recognised training would be in addition to the minimum qualifications and experience required to be granted registration set out in Schedule 3 of the proposed Regulation. It is intended that the requirement and details for the recognised training will be outlined on the Fair Trading website.

Approval of recognised training and person to conduct/assess the training

To complement the requirement for an applicant to complete recognised training, the proposed Regulation provides the process that will apply for a person or an organisation to apply to the Secretary for training to be recognised by the Secretary. This will allow the Secretary to approve courses of training and approve people (including an organisation) to conduct the training or to assess people undergoing the training. The person or organisation will be required to have the necessary qualifications, resources and infrastructure to perform the function. While it is envisaged that the conduct and operation of recognised training will be outsourced to private people or organisations, Fair Trading will continue to be able to influence the quality of the training by being involved in the development of the training materials and approving the training providers. This is to ensure that the training adequately achieves the desired learning outcomes required for certifiers.

Precedence for a similar training scheme currently operates for health and safety representatives regulated by SafeWork NSW.

- 3. Do you support the Secretary having discretion to require an applicant to complete additional training? Why or why not?**
- 4. Do you support a person (including an organisation) being able to apply to the Secretary for training to be recognised by the Secretary? Why or why not?**

Grounds for finding that a person is not a suitable person to carry out certification work (clause 5)

Section 7 of the Act provides grounds for finding that a person is not a suitable person to carry out certification work. The proposed Regulation prescribes additional grounds which focus on a person's conduct in another field of the building and construction industry. Specifically, it enables the Secretary to consider whether a person has had their accreditation to carry out regulated work or their licence or

registration under the Architects Act 2003 or the Home Building Act 1989 cancelled or suspended, and whether they have been disqualified or whether legal or disciplinary proceedings have been commenced against them. The Secretary is also able to consider the conduct of someone who may have held similar licences or registrations in other Australian jurisdictions.

- 5. Do you support the grounds for finding that a person is not a suitable person to carry out certification work? Why or why not?**
- 6. Do you support the grounds focusing on accreditation to carry out regulated work and licences/registration under the *Architects Act 2003* and the *Home Building Act 1989* and similar schemes in other jurisdictions? Why or why not?**

Variation of registration (clause 7)

Section 12 of the Act introduces the ability of the Secretary to vary a registration to afford registered certifiers with the same procedural rights that exist in other occupational licensing schemes managed by Fair Trading.

The proposed Regulation outlines the process for a certifier to apply for a variation of registration which is similar to process set out in the Act for a new registration. The application fee for a variation is prescribed in Schedule 6 and is the same as the application fee for a new registration. In some circumstances, particularly variations to recognise additional classes, the assessment would take the same amount of time and resources as a new registration. The Regulation enables the Secretary to waive, refund or reduce fees in circumstances where the assessment isn't as extensive.

- 7. Do you support the process for a certifier to apply for a variation of registration? Why or why not?**
- 8. Do you support the fee being the same as the fee for a new registration, subject to the Secretary being able to waive, refund or reduce the fee? Why or why not?**

Part 3 Insurance

Section 26 of the Act provides that a registered certifier must be adequately insured. The Act contemplates that a registered certifier will be adequately insured if they are indemnified by insurance

that complies with the regulations against any liability resulting from certification work, or if they are part of some other arrangement approved by the regulations that provides indemnity against the liability.

Current insurance market challenges

The NSW Government acknowledges that the professional indemnity insurance (PII) market for the construction industry has tightened since the Grenfell Tower fire in London in 2017. The Government has been closely monitoring the availability of PII for building practitioners and is aware that certifiers have been facing increased difficulty in purchasing cover that is reasonably priced cover and compliant with the existing requirements in the current Regulation.

The Government recently took decisive action to help alleviate concerns with the application of exclusions to PII policies. Amendments were made to the current Regulation on 28 June 2019 to temporarily allow the Building Professionals Board to accept PII policies with conditions or exclusions. The amendment is a short-term, urgent action to avoid a situation in which the unavailability of PII prevents certifiers from operating. It will be removed mid 2020 with the expectation that other reforms and changes in the market dynamics will have improved the operation of the PII market by then. NSW Fair Trading is closely monitoring the market to ensure that there are no adverse outcomes for consumers or certifiers.

Aside from this immediate response, the NSW Government is working with all other Australian governments to find suitable solutions. States and Territories agreed at the Building Ministers' Forum on 18 July 2019 to work towards a coordinated approach to PII with an options paper setting out a pathway for professional standards schemes and alternative insurance options to facilitate targeted consultation with insurers and the building industry. Outcomes of consultation are expected to be reported back to the Building Ministers' Forum (BMF) by September 2019.

Maintaining status quo

The proposed Regulation replicates the existing requirements for professional indemnity insurance in the current Regulation with no changes. It is acknowledged that pending the results of the national consultation and outcomes from the BMF, there may be changes required to the proposed Regulation before it is finalised later this year or before it commences on 1 July 2020.

9. Are the requirements for professional indemnity insurance contracts and exclusions in the proposed Regulation appropriate? Why or why not?

Part 4 Conflicts of interest

The Act introduces measures to improve the independence of registered certifiers by ensuring that conflict of interest provisions are clearly drafted, and broadened to cover all types of certification work to more accurately reflect the type of work performed by certifiers. In addition, the conflict of interest provisions have been redesigned to more effectively target and prohibit situations where it is likely that a registered certifier's impartiality may be influenced.

The *Independent Review of the Building Professionals Act 2005* (the Lambert report) identified a lack of clarity around the functions of certifiers as a major deficiency in the certification system. It also raised issues around the confusion that some certifiers face in terms of their expectations and duties.

The Act introduces a two-part test for establishing conflicts of interest. Firstly, the certifier must have a 'private interest' in respect of the certification work. Secondly, that private interest must come into conflict with, and affect the duties of the certifier to act in the public interest when undertaking certification work.

Without limiting what can constitute a private interest, the Act prescribes a number of private interests to assist certifiers in their understanding of the types of things they need to look out for while performing certification work.

The Act additionally provides that the regulations can prescribe or exempt particular circumstances from being captured under the conflict of interest provisions. This is important to ensure that certifiers are aware of the types of circumstances which would be considered a conflict of interest, and will help carve out examples of where a conflict would not occur to clearly identify scenarios where a conflict exists.

Prescribed conflicts of interest

Clause 24 of the proposed Regulation prescribes the following specific scenarios in which a registered certifier would be considered to have a conflict of interest:

- where a registered certifier provides advice on how to amend plans and specifications to comply with legislation on an aspect of a development for which they are also carrying out certification work for;
- where a registered certifier proposes design options (including alternative solutions) to comply with legislation on an aspect of a development for which they are also carrying out certification work for; or
- where a registered 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.

Exempt conflicts of interest

Clause 25 of the proposed Regulation exempts a number of specific scenarios so that a registered certifier is taken to not have a conflict of interest. The majority of the exemptions in clause 25 have been

replicated from the current Regulation without change. The following exemptions have either been replicated with changes from the current Regulation or are new:

- a) where a registered certifier 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 \$2,000,000 and is not located in the metropolitan area;
- b) where a private registered certifier carries out certification work on behalf of a council under contract where the develop is not located in the metropolitan area.

Exemption (a) has been replicated from the current Regulation but the threshold relating to the value of the capital investment has been reduced from \$5 million to \$2 million. The value has been lowered to appropriately limit the application of the exemption to mostly residential building work and avoid it extending to the majority of commercial developments. The exemption is also limited to operating in regional and rural areas to assist in addressing the low availability of certifiers in these areas.

Exemption (b) has been introduced into the proposed Regulation to also assist in addressing the low availability of certifiers in regional and rural areas. In these areas, councils will sometimes employ private certifiers under contract because they do not have in-house council certifiers available (e.g. for reasons such as there are none employed, the council is going through a busy period, the sole council certifier is on leave, etc.). The private certifier who is hired under contract by the council typically continues to undertake private certification work in addition to council work as the volume of work under contract may not be sustainable for the certifier in terms of income. The contract typically prohibits the private certifier from subsequently working on matters they have certified for the council while under contract.

10. Do you support the proposed prescribed conflicts of interest in clause 24? Why or why not?

11. Are there any additional scenarios in which a registered certifier should be considered to have a conflict of interest? If so, please explain.

12. Do you support the proposed exempt conflicts of interest in clause 25? Why or why not?

13. Are there any additional scenarios that should be prescribed so that a registered certifier is taken to not have a conflict of interest? If so, please explain.

Part 5 Contracts for certification work

Section 31 of the Act prohibits a registered certifier from carrying out certification work unless it is under a written contract. This requirement reinforces the fact that certifiers are a party to the contract and have

enforceable duties to ensure that the certification work is accurate and independent. Section 31(2) of the Act provides that the contract must comply with any requirements prescribed by the regulations.

Clause 28 of the proposed Regulation sets out the particulars that must be included in a contract for certification work. These particulars have been replicated from the current Regulation with no changes. Clause 29 has also been replicated from the current Regulation with no changes and details when the fees and charges are payable in certain circumstances.

Similar to the existing obligation under the current Regulation, clause 30 of the proposed Regulation requires the contract to be signed, or otherwise appropriately executed, by the parties to the contract. However, clause 30 additionally requires the contract to 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. The declaration must also confirm that the person has read any document accompanying the contract and understands their roles and responsibilities and those of the certifier.

The requirements captured in clause 30 have been included to support the Act and enforce that an owner has the right to appoint a certifier of their choice.

Clause 31 also replicates the existing requirement in the current Regulation for the contract to be accompanied by an information sheet which outlines the role and responsibilities of certifiers, but additionally required the information sheet 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. This will address the recommendations made in the Lambert report to provide clarity around a certifiers role and responsibilities. The information sheet will be prepared by the Department and will be subject to consultation prior to being endorsed and published on the Fair Trading website.

14. Do you support the list of particulars in clause 28 that must be included in a contract for certification work? Why or why not? Are there any additional particulars that should be included?

15. Do you support the details of when fees and charges are payable in certain circumstances in clause 29? Why or why not?

16. Do you support the requirement for a declaration by the person having the benefit of the development to be included in the contract and the content of the declaration?

17. Do you support the requirement for the contract to be accompanied by an information sheet and the contents of the information sheet?

Part 6 Accreditation authorities

Parts 5 and 6 of the Act deliver on the Government's commitment to approve non-government organisations to administer accreditation schemes, and in particular to administer accreditation schemes for competent fire safety practitioners.

The Lambert report identified that more could be done to improve the administration and effectiveness of accreditation schemes. The Act introduces the regulatory mechanism for competent fire safety practitioners to be accredited by private organisations who operate industry accreditation schemes.

The Act will allow a body corporate to operate as an accreditation authority to accredit individuals to become accredited practitioners. The same regulatory requirements that apply to individual registered certifiers would also apply to a body corporate who wants to accredit competent individuals undertaking 'regulated work'. Regulated work refers to the functions performed by existing competent fire safety practitioners which are required to be accredited to carry out this specific type of work. While 'regulated work' is not work that requires a registered certifier, it is work that requires the person carrying out the work to have certain skills, competencies and experience.

A body corporate wishing to operate as an accreditation authority will need to be approved by the Secretary.

Applying to be an accreditation authority

Clause 32 of the proposed Regulation clarifies the criteria that the Secretary may use to determine the suitability of a person (director if the person is a body corporate) that is applying to carry out the function of an accreditation authority. For consistency, this criteria is based on a similar process in the Act - the considerations that apply to the Secretary to determine the suitability of a person to be a registered certifier.

Clause 33 of the proposed Regulation 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. This timeframe can be extended with the agreement of the applicant, and does not account for any period of time that an applicant has been given to provide further information as requested by the Secretary.

Clause 34 of the proposed Regulation provides that an approval is subject to a condition that the accreditation authority 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.

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.

Accreditation scheme requirements

Clauses 38 to 45 collectively outline the matters that an accreditation scheme must provide for. The aim of the accreditation scheme is to ensure that the accreditation authority is to act in an open and honest way in carrying out its functions and provide the public with information about the Scheme and accreditation holders. The matters include:

- 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.

Publication of suspension or cancellation

Under section 63(7) of the Act the Secretary is to publish in the Gazette any approval granted for an accreditation authority. To ensure that the public is also notified when an accreditation authority has had their approval suspended or cancelled, clause 46 requires the Secretary to publish a notice in the Gazette in the same manner.

18. Is the criteria for the Secretary to determine the suitability of a person or director to be an accreditation authority appropriate? Why or why not? What other criteria should be considered?

19. Is the 60 business day timeframe for a deemed refusal an appropriate timeframe?

20. Do you support the matters that an accreditation scheme must provide for in clauses 38 to 45? Why or why not? What other matters should be considered?

Part 7 Record keeping

Section 120(2)(c) of the Act enables the regulations to make provision with respect to the keeping of records by registered certifiers and local councils. Section 120(d) provides a similar power for the keeping of records by accreditation authorities.

Division 1 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 requirements³. The record keeping requirements have been replicated from the current Regulation, but restructured so that the types of records relevant to each Act that they apply to have been grouped together. Records must be kept for at least 10 years.

Division 2 sets out the records a local council must keep. These requirements have also been replicated from the current Regulation and restructured like the requirements for registered certifiers.

Accreditation authorities

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. The types of records that are to be kept generally relate to the function of the accreditation authority granting an accreditation to an applicant, as well as in relation to any investigations, complaints or conditions relevant to accredited people. 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.

- 21. Are the record keeping requirements appropriate for registered certifiers, local councils and accreditation authorities? Why or why not?**
- 22. Do you support the penalty that applies for a breach of the record keeping requirements?**
- 23. Should a penalty apply for the failure to keep records? Why or why not?**
- 24. Is 10 years an appropriate minimum timeframe that records should be kept by registered certifiers, local councils and accreditation authorities? Why or why not?**

Part 8 Councils

Section 112(1) of the Act enables the regulations to prescribe a class of certification work which would require a local council to ensure that anyone who performs that work on their behalf is registered with appropriate authority to carry out the work. Clause 59 of the proposed Regulation prescribes all certification work other than certification work under the *Strata Schemes Development Act 2015* and the *Swimming Pools Act 1992* for this purpose.

Section 120(2)(c) of the Act enables the regulations to make provision for local councils to provide information to the Secretary. Clause 60 of the proposed Regulation provides that a council must give

³The value of one penalty unit is currently equal to \$110 (provided in section 17 of the *Crimes (Sentencing Procedure) Act 1999*).

notice to the Secretary of the dates on which a registered certifier commences and ceases employment with the council that involves carrying out certification work on behalf of the council.

Section 48(1)(c) of the Act enables the Secretary to make a determination requiring a registered certifier to pay the Secretary a penalty as a type of disciplinary action. Clause 61 of the proposed Regulation exempts registered certifiers employed by a council from this action. This exemption has been replicated from the current Regulation.

- 25. Do you support the class of certification work prescribed which requires the council to ensure that anyone who performs the work on their behalf is appropriately registered? Why or why not?**
- 26. Do you support councils being required to notify the Secretary of the dates that registered certifiers commence and cease being employed by them for certification work on their behalf? Why or why not?**
- 27. Do you support the exemption for registered certifiers employed by councils applying in relation to the payment of a penalty as a form of disciplinary action? Why or why not?**

Part 9 Miscellaneous

Certification work

The Act defines certification work for the purposes of the new legislative framework. The Act enables the regulations to expand the definition of certification work further. Clause 62 expands the definition to include the supervision of certification work that is carried out by a registered certifier. Some classes of registered certifier are allowed to perform certain types of certification work when they are appropriately supervised by another registered certifier authorised to do that type of work.

Regulated work

Section 55 of the Act enables the regulations to authorise a registered certifier to carry out regulated work. Clause 63 of the proposed Regulation allows the following registered certifiers to carry out regulated work in relation to fire safety systems:

- a registered certifier in the class of engineer – electrical (previously C8); and
- 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.

Register of registrations and approvals

Section 102 of the Act requires the Secretary to maintain a register of the particulars of registrations related to registrations and approvals as are required to be kept by the regulations. Clause 64 of the proposed Regulation outlines the following particulars:

- name, address and contact details of registered certifiers and accreditation authorities;
- classes of registration or approval;
- dates of registration/approval and renewals;
- insurance details;
- details of any conditions imposed;
- dates of any suspensions or cancellations;
- details of any disciplinary action or relevant offences;
- details of any failure to comply with Tribunal orders;
- details of any warning notices published or undertakings made under the Act;
- employment details; and
- details of registered directors and employees for registered body corporates.

Waiver, refund or reduction of fees

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

28. Do you support the expanded definition of certification work? Why or why not?

29. Do you support the authorisation of registered certifiers in the class of engineer – electrical and engineer – hydraulic (building) to carry out regulated work? Why or why not?

30. Do you support the particulars in clause 64 that must be included in the register of registrations and approvals? Why or why not? What other particulars should be considered?

31. Do you support the Secretary having the ability to waive, refund or reduce the payment of fees? Why or why not?

Schedule 1 Classes of registration

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.

The classes of registration have been streamlined and renamed following a review of the current Regulation.

The current Regulation was reviewed with the possibility of streamlining the number of classes. This would reduce the burden of administering the licenses and for certifiers applying for multiple classes. The review found that a number of classes carried out similar functions and had similar qualification and experience requirements. These classes were merged for example C1, C2 and C6. The naming of the classes was changed based on the recommendations in the Shergold Weir report.

The classes of registration in the proposed Regulation are:

| Class of registration | Current category of accreditation |
|--|--|
| building surveyor—unrestricted | A1 or A5 |
| building surveyor—restricted (all classes of building) | A2 |
| building surveyor—restricted (class 1 or 10 building) | A3 |
| subdivision engineer | B1 |
| building inspector | A4 |
| surveyor—land | C5 |
| surveyor—strata | D1 |
| engineer—civil (road and drainage) | C1, C2 or C6 |
| engineer—civil (stormwater management facilities) | C3 or C4 |
| engineer—structural | C7 |
| engineer—hydraulic (building) | C14 |
| engineer—hydraulic (stormwater) | C15 |
| engineer—hydraulic (speciality) | C16 |
| engineer—mechanical | C9 |
| engineer—geotechnical | C12 |
| engineer—electrical | C8 |
| engineer—energy management | C11 |
| engineer—acoustic | C13 |

| | |
|-------------------------|-----|
| engineer—fire safety | C10 |
| swimming pool inspector | E1 |

The existing category of accreditation of A5 as a certifier for Port Botany, Port Kembla and Port of Newcastle has been absorbed into the building surveyor—unrestricted class although additional requirements will need to be met by this class in order to be approved to issue complying development certificates for developments under clause 25 of State Environmental Planning Policy (Three Ports) 2013.

The existing categories of accreditation of C1, C2 and C6 have been merged to cover private and subdivision roads and drainage for design and construction compliance.

The existing categories of accreditation of C3 and C4 for stormwater management facilities have been merged to cover both design and construction compliance.

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

32. Do you support the proposed classes of registration certifiers, including the way they have been streamlined? Why or why not?

33. Do you support what each proposed class of registration is authorised to do? Why or why not?

Schedule 2 Code of conduct

The current code of conduct (the Code) was prescribed as part of the Building Professionals Board Accreditation Scheme. Under section 32 of the Act the Regulation may prescribe a code of conduct for certifiers. This places greater emphasis on the importance of a code of conduct for certifiers by prescribing it in the regulations, rather than by a Ministerial Order.

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

Registered 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.

One of key areas of focus of the Code is for certifiers to exhibit, and be seen to exhibit, the highest ethical standards in carrying out their duties so as to maintain public confidence in the integrity of the

certification system. The Shergold Weir report identified that public confidence in the building and construction industry has diminished and that private certification is tainted with conflicts of interest and poor practices.

The Code is a key mechanism to assist certifiers to act honestly, ethically, responsibly and with accountability. Clarification has been provided in the Code by defining 'improper benefit' that could reasonably be expected to be perceived or would be a conflict of interest. Even though the Code captures many of the same provisions that currently exist, the requirements in the proposed Regulation are clearly defined. To further enhance the importance of the code and behaviours, any breach of the Code will be an offence and subject to disciplinary action under the Act.

The Code in Schedule 2 covers the following duties:

1. General duties
2. Duty to act in public interest
3. Duty to abide by standards expected by the community
4. Duty to comply with the law
5. Duty to act within their level of competence, expertise and area of registration
6. Duty to maintain a satisfactory level of competence
7. Duty to avoid conflicts of interest
8. Duty not to misinform or mislead
9. Duty to obtain and consider all facts
10. Duty to document reasons for decisions
11. Duty to maintain confidentiality
12. Duty to supervise.

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

Schedule 3 Qualifications and experience

Section 120(2)(a) of the Act enables the proposed Regulation to make provision 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, experience and continuing professional development (CPD). Under the existing

Building Professionals Act 2005 the requirements for qualifications and experience was provided in the accreditation scheme maintained by the Building Professionals Board. This was changed in the new Act to allow the Regulation to prescribe the qualifications, skills and experience that are required in order for a certifier to be approved for registration.

Schedule 3 of the proposed Regulation prescribes the qualifications, experience and CPD requirements to be met by any person seeking a certificate of individual accreditation 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 (previously E1), a certifier is required to successfully complete an accreditation exam to demonstrate that the applicant meets the core performance criteria of being a certifier. As noted above, the proposed Regulation will provide that the Secretary can require an applicant for registration to have successfully completed recognised training to be granted registration.

35. Are the proposed qualifications and experience appropriate? Why or why not?

Schedule 4 Knowledge and skills

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

Schedule 4 of the proposed 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.

The current knowledge and skills criteria was captured from the Building Professionals Board Accreditation Scheme which were developed after a lengthy consultation process with the relevant industry representatives.

By capturing the skills and knowledge requirements in the proposed Regulation it will ensure an objective and transparent assessment process that ensures applicants have the competency to perform the functions of a registered certifier relevant to the class or classes of registration they have applied for.

A competency based assessment process needs to specify the knowledge and skills (competencies) a person needs to have in order to perform a task, function or role. A qualification may be considered as one form of evidence of demonstrating that the applicant has the knowledge and skills to perform the relevant task, function or role.

36. Do you support the skills and knowledge requirements in the proposed Regulation? Why or why not?

Schedule 5 Continuing professional development (CPD)

Section 120(2)(a) of the Act enables the proposed Regulation to make provision for the qualifications, skills and experience required to hold registration to carry out certification work.

All accredited certifiers are currently required to complete continuing professional development (CPD) to stay up to date with industry developments, skills, tools and knowledge, and statutory responsibilities.

These requirements are currently outlined in the Building Professional Board's Accreditation Scheme.

Schedule 5 of the proposed Regulation replicates the existing CPD requirements without change.

37. Do you support the continuing professional development requirements in the proposed Regulation? Why or why not?

Schedule 6 Fees

Section 120(2)(e) of the Act enables the proposed Regulation to make provision for the fees payable under the Act or the regulations.

The following fees are included in Schedule 6 of the proposed Regulation:

- Application fee for registration of persons, local councils, body corporates and accreditation authorities;
- Application for the variation of a registration;
- Application fee for a replacement certificate of registration under clause 10 of the Regulation;
- Application fee for a certificate of evidence admissible in criminal or civil proceedings under section 117 of the Act;
- Application fee for exemption for certification work or registration provisions under 120(4) of the Act; and
- Fee for provision of an examination or test under clause 4(3) of the Regulation.

Increase to fees

The current fees for certifiers have not been changed since the current Regulation commenced in 2007.

In the proposed Regulation, application fees for the registration of a certifier, body corporate and

accreditation authority have all increased slightly due to Consumer Price Index (CPI) adjustments for the 2018/19 financial year. It is proposed that in future year fees will be automatically adjusted to account for changes in CPI.

The following fees have been carried over from the current Regulation to the proposed Regulation and increased to take into account inflation over the last 12 years since they were implemented, namely:

- The application fee for a certificate of evidence admissible in criminal or civil proceedings has increased from \$20 to \$40;
- The application fee for exemption for certification work or registration provisions of the Act has increased from \$100 to \$200; and
- The application fee for a replacement certificate of registration has increased from \$35 to \$100.

There is no change proposed for examination or test fee which is currently \$300.

A new fee has been introduced for the proposed training scheme when it is implemented. The training scheme will allow training providers to apply to the Secretary to be able to deliver training courses to certifiers. The fee will cover the cost of evaluating the application and ongoing monitoring of the services over a 3 year period.

Change to fees for 1, 3, and 5 year licence terms

The Act introduces the duration of registration renewals from a yearly renewal to a period of one, three or five years. As a result, fee schedules have been introduced in the proposed Regulation for registrations of three and five-year periods. This was a recommendation made in the Lambert report to improve the administration of registrations to reduce the administrative burden for registration holders.

Change to how fees are expressed

The NSW Government has introduced a new approach that will enable fees prescribed in regulations to be automatically adjusted each year in line with the Consumer Price Index (CPI).

The fees in Schedule 6 of the proposed Regulation are expressed as a number of 'fee units' instead of dollar amounts, as they are in the current Regulation. This approach is a similar concept to the penalty unit system used in NSW to describe the amount payable for a fine. For example, as the fee unit for the 2019-20 financial year is worth \$100, a fee amount expressed as 7.60 units would be \$760 (7.60 x \$100). This is explained in Part 2 of Schedule 6 of the proposed Regulation.

The fees will be automatically adjusted from 1 July 2020 onwards. The fee unit will change on an annual basis as it is indexed annually for inflation. The introduction of a fee unit scheme will reduce the administrative burden and cost to Government as it will not have to amend the proposed Regulation each year to adjust fees for inflation.

38. Do you support the proposed fees? Why or why not?

Schedule 7 Penalty notice offences

Section 118 of the Act empowers penalty notice officers to issue a penalty notice if it appears a penalty notice offence has been committed. For the purposes of section 118, Schedule 7 of the proposed Regulation specifies a range of offences against which a penalty notice may be issued.

Penalty notices are an important feature of the suite of compliance and enforcement options available to NSW Fair Trading and are relied on as an effective deterrent against non-compliance. In general terms, penalty notices are used to enforce compliance in situations where it is not considered appropriate to take prosecution action against a corporation or individual.

Penalty notice offences in the current Regulation have been reviewed and some have been changed to ensure that they provide an effective deterrent to the commission of the offence and reflect the seriousness of the offence within the certification framework. Consideration has also been given to ensuring that the penalties are consistent with existing offences of a similar nature or seriousness in other Fair Trading regulatory schemes. Additional offences under the Act and the proposed Regulation have been prescribed as penalty notice offences.

A table listing all of the penalty notice offences in the proposed Regulation which identifies changes from the current Regulation is in **Appendix 4**.

39. Are the proposed penalty notice offences and amounts fair and reasonable?

40. Are there any additional penalty notice offences that should be prescribed?

Appendix 1 – Regulation making powers

| Regulation making power in the Act | Clause in proposed Regulation |
|--|---|
| <p>Section 4(1)(e)</p> <p>Definition of <i>certification work</i></p> <p>Prescribe any other work (additional to work in the Act).</p> | <p>Clause 62</p> <p>Prescribes that a kind of certification work is to include supervision of certifiers whose class of accreditation requires supervision by a registered certifier.</p> |
| <p>Section 4(1)(e)</p> <p>Definition of <i>certification work</i></p> <p>Exclude work.</p> | <p>Nil – no exclusions proposed.</p> |
| <p>Section 4(1)(e)</p> <p>Definition of <i>relevant offence</i></p> <p>Prescribe an offence or class of offences (additional to offences in the Act).</p> | <p>Nil – no additional offences proposed.</p> |
| <p>Section 6(4)</p> <p>Prescribe different classes of registration that authorise the carrying out of different classes of certification work.</p> | <p>Schedule 1</p> <p>Prescribes the following classes of registration of certification work:</p> <ul style="list-style-type: none"> a) Building surveyor – unrestricted; b) Building surveyor – restricted (all classes of building); c) Building surveyor – restricted (class 1 and 10 buildings); d) Subdivision engineer; e) Building inspector; f) Surveyor – land; g) Surveyor – strata; h) Engineer – civil (road and drainage); i) Engineer – civil (stormwater management facilities); j) Engineer – structural; |

| Regulation making power in the Act | Clause in proposed Regulation |
|---|---|
| | k) Engineer – hydraulic (building); l) Engineer – hydraulic (stormwater); m) Engineer – hydraulic (specialty); n) Engineer – mechanical; o) Engineer – geotechnical; p) Engineer – electrical; q) Engineer – energy management; r) Engineer – acoustic; s) Engineer – fire safety; t) Swimming pool inspector. |
| <p>Section 7(2)(h)</p> <p>Prescribe the circumstances in which the Secretary may form an opinion that a person is not a suitable person to carry out certification work (additional to circumstances in the Act).</p> | <p>Clause 5</p> <p>Prescribes the following circumstances in relation to a relevant authorisation (defined):</p> <ul style="list-style-type: none"> • disqualification; • cancellation or suspension; and • legal/disciplinary proceedings commenced. |
| <p>Section 8(3)</p> <p>Provide for a fee to be paid for an application for the grant of registration.</p> | <p>Schedule 6</p> <p>Prescribes relevant fees for an application.</p> |
| <p>Section 10(3)(c)</p> <p>Prescribe grounds allowing the Secretary to refuse registration (additional to grounds in the Act).</p> | <p>Nil – no additional grounds proposed.</p> |
| <p>Section 10(5)</p> <p>Prescribe the period by which the Secretary must give an applicant for registration notice of a decision to grant or refuse registration before the Secretary is taken to have refused registration.</p> | <p>Clause 6</p> <p>Prescribes a period of 28 business days after the application is made (not including time taken to provide further information as requested).</p> |

| Regulation making power in the Act | Clause in proposed Regulation |
|--|---|
| <p>Section 12(3)</p> <p>Make further provision for or with respect to the variation of registration.</p> | <p>Clause 7</p> <p>Provides the requirements for an application for variation of registration and when the variation takes effect.</p> <p>Schedule 6</p> <p>Prescribes relevant fee for the application.</p> |
| <p>Section 13(1)(a)</p> <p>Prescribe conditions a registration is subject to.</p> | <p>Clause 9</p> <p>Prescribes conditions for:</p> <ul style="list-style-type: none"> • surrendering certificates of registration; and • courses for registered directors of registered body corporates. |
| <p>Section 16(g)</p> <p>Prescribes grounds for suspension or cancellation of registration (additional to grounds in the Act).</p> | <p>Nil – no additional grounds proposed.</p> |
| <p>Section 23(3)</p> <p>Provide for a fee to be paid for an application for the cancellation or suspension of registration.</p> | <p>Nil – no fee proposed.</p> |
| <p>Section 26(2)(a)</p> <p>Compliance requirements for insurance that provides indemnity against liability.</p> | <p>Clause 13</p> <p>Prescribes indemnification under a professional indemnity contract that complies with Part 3.</p> |
| <p>Section 26(2)(b)</p> <p>Approve other arrangement that provides indemnity against liability.</p> | <p>Nil – no arrangement proposed.</p> |
| <p>Section 27</p> <p>Make provision for or with respect to:</p> <ul style="list-style-type: none"> • the persons or bodies who may provide indemnity, • the period for which a registered certifier is to be indemnified, | <p>Clauses 11 – 21</p> <p>Prescribes the requirements for insurance contracts with former accredited certifiers, individuals, body corporates and partnerships.</p> <p>Sets out the limits, exceptions and exclusions for insurance contracts.</p> |

| Regulation making power in the Act | Clause in proposed Regulation |
|---|---|
| <ul style="list-style-type: none"> • the amount for which a registered certifier is to be indemnified, • the risks for which a registered certifier is to be indemnified, • the nature and terms of any insurance or arrangement, • the obligations on a person or body who provides indemnity, • the issue of indemnity for liability incurred by a person who was formerly a registered certifier. | |
| <p>Section 28(1)(c)</p> <p>Prescribe certification work which a registered certifier must not carry out if they have a conflict of interest in that work (additional to work in the Act).</p> | <p>Nil – no additional work proposed.</p> |
| <p>Section 28(2)</p> <p>Create exemptions to conflict of interest.</p> | <p>Clause 25</p> <p>Prescribes the following exemptions:</p> <ul style="list-style-type: none"> • issuing relevant certificate on behalf of council to a council or council employee in certain circumstances; • inspecting, carrying out work and issuing certificate of compliance for swimming pools in certain circumstances; • carrying out certification work on behalf of council under a contract in certain circumstances; • issuing a relevant certificate and: <ul style="list-style-type: none"> ○ identifying matters to be satisfied before the certificate can be issued; |

| Regulation making power in the Act | Clause in proposed Regulation |
|--|--|
| | <ul style="list-style-type: none"> ○ indicating that an alternative solution is required ○ identifying the relevant requirements of the Building Code of Australia; ○ being involved in the assessment of development; ● issuing a strata certificate and: <ul style="list-style-type: none"> ○ providing advice on whether plans and specifications comply; ○ providing advice on how the relevant strata plan is not in accordance with plans and specifications; ○ identifying the matters to be satisfied before the certificate can be issued; and ● issuing a relevant certificate on behalf of a council to a person who has a relationship with the certifier in certain circumstances. |
| <p>Section 29(1)(b)</p> <p>Prescribe circumstances in which a registered certifier has a conflict of interest (additional to the circumstances in the Act).</p> | <p>Clause 24</p> <p>Prescribes the following circumstances:</p> <ul style="list-style-type: none"> ● provides advice on how to amend plans and specification on development certifier is carrying out certification work for; ● proposes design options on development certifier is carrying out certification work for; and |

| Regulation making power in the Act | Clause in proposed Regulation |
|---|--|
| | <ul style="list-style-type: none"> • issues strata certificate for strata development prepared by certifier, or person certifier has a relationship with. |
| <p>Section 29(2)(g)</p> <p>Prescribe circumstances when a registered certifier has a private interest with respect to certification work (additional to the circumstances in the Act).</p> | <p>Nil – no additional circumstances proposed.</p> |
| <p>Section 31(2)</p> <p>Prescribe requirements a contract for certification work must comply with.</p> | <p>Clauses 27 – 31</p> <p>Prescribes the following requirements:</p> <ul style="list-style-type: none"> • particulars to be included in contract; • details of fees and charges; • must be signed, executed and contain declaration; and • must be accompanied by information sheet. |
| <p>Section 32(1)</p> <p>Prescribe a code of conduct for registered certifiers.</p> | <p>Schedule 2</p> <p>Prescribes the code of conduct which covers the following duties:</p> <ol style="list-style-type: none"> 1. General duties 2. Duty to act in public interest 3. Duty to abide by standards expected by the community 4. Duty to comply with the law 5. Duty to act within their level of competence, expertise and area of registration 6. Duty to maintain a satisfactory level of competence 7. Duty to avoid conflicts of interest |

| Regulation making power in the Act | Clause in proposed Regulation |
|---|---|
| | 8. Duty not to misinform or mislead 9. Duty to obtain and consider all facts 10. Duty to document reasons for decisions 11. Duty to maintain confidentiality 12. Duty to supervise. |
| <p>Section 35(1)(i)</p> <p>Prescribe events where a registered certifier must notify the Secretary in writing within 7 days after becoming aware of the event.</p> | <p>Clause 8</p> <p>Prescribes the following events:</p> <ul style="list-style-type: none"> • equivalent authorisation being varied; • disciplinary action being taken; and • specific events relevant to a registered body corporate. |
| <p>Section 45(m)</p> <p>Prescribe any other ground that the Secretary may take disciplinary action (additional to grounds in the Act).</p> | <p>Nil – no additional grounds proposed.</p> |
| <p>Section 54(5)</p> <p>Prescribe different classes of accreditation that authorise the carrying out of different classes of regulated work.</p> | <p>Nil – none proposed.</p> |
| <p>Section 55</p> <p>Authorise a registered certifier in a particular class to carry out regulated work.</p> | <p>Clause 63</p> <p>Prescribes the following classes:</p> <ul style="list-style-type: none"> • an engineer – electrical class • an engineer – hydraulic (building) class. |
| <p>Section 57(1)(c)</p> <p>Prescribe any other function of an accreditation authority (additional to functions in the Act).</p> | <p>Nil – no additional functions proposed.</p> |
| <p>Section 61(2)(d)</p> | <p>Nil – no additional matters proposed.</p> |

| Regulation making power in the Act | Clause in proposed Regulation |
|---|---|
| Prescribe any other matters that the accreditation authority approval guidelines may provision for (additional to matters in the Act). | |
| <p>Section 62(2)(c)</p> <p>Prescribe a kind of information or evidence to be included or accompany an application for approval.</p> | Nil – none proposed. |
| <p>Section 62(3)</p> <p>Provide for a fee to be paid for an application for the grant of approval.</p> | <p>Schedule 6</p> <p>Prescribes relevant fee for an application.</p> |
| <p>Section 63(3)(f)</p> <p>Prescribe any other ground for the Secretary to refuse an approval to exercise the functions of an accreditation authority (additional to grounds in the Act).</p> | Nil – no additional grounds proposed. |
| <p>Section 63(4)(a)</p> <p>Prescribe any matter the Secretary may have regard to when considering the suitability of a person for approval.</p> | <p>Clause 32</p> <p>Prescribes the following matters:</p> <ul style="list-style-type: none"> • convicted of a relevant offence; • ICAC finding/opinion of corrupt conduct; • undischarged bankrupt; • disqualified from holding equivalent authorisation in other jurisdictions; and • close associate who is not fit and proper and exercises influence. |
| <p>Section 63(6)</p> <p>Prescribe the period by which the Secretary must give an applicant for approval notice of a decision to grant or refuse approval before the Secretary is taken to have refused approval.</p> | <p>Clause 33</p> <p>Prescribes a period of 60 business days after the application is made (not including time taken to provide further information as requested).</p> |

| Regulation making power in the Act | Clause in proposed Regulation |
|--|---|
| <p>Section 65(3)</p> <p>Make further provision for the variation of approval.</p> | <p>Clause 35</p> <p>Provides the requirements for an application for variation of registration and when the variation takes effect.</p> <p>Schedule 6</p> <p>Prescribes relevant fee for the application.</p> |
| <p>Section 66(1)(a)</p> <p>Prescribe any conditions that an approval to exercise the function of an accreditation authority is subject to in relation to insurance.</p> | <p>Clause 34</p> <p>Prescribes that an accreditation authority must provide the Secretary with evidence of insurance.</p> |
| <p>Section 70(3)</p> <p>Make further provision with respect to the provision of information (additional to the Act).</p> | <p>Clause 36</p> <p>Provides for the Secretary to request information be provided periodically or within a specified time after specified occurrences.</p> |
| <p>Section 71(3)</p> <p>Make further provision with respect to audits (additional to the Act).</p> | <p>Nil – none proposed.</p> |
| <p>Section 73(3)</p> <p>Make further provision with respect to making information available (additional to the Act).</p> | <p>Clause 37</p> <p>Provides for the Secretary to request information be made publicly available periodically or within a specified time after specified occurrences.</p> |
| <p>Section 74(1)</p> <p>Prescribe the records that the accreditation authority must keep.</p> | <p>Clauses 57 – 58</p> <p>Prescribes the record keeping requirements for accreditation authorities.</p> |
| <p>Section 75(1)(e)</p> <p>Prescribe grounds for suspension or cancellation of approval (additional to the grounds in the Act).</p> | <p>Nil – no additional grounds proposed.</p> |
| <p>Section 75(2)(b)</p> | <p>Clause 32</p> <p>Prescribes the following matters:</p> |

| Regulation making power in the Act | Clause in proposed Regulation |
|---|--|
| <p>Prescribe any matter the Secretary may have regard to when considering the suitability of a person for approval.</p> | <ul style="list-style-type: none"> • convicted of a relevant offence; • ICAC finding/opinion of corrupt conduct; • undischarged bankrupt; • disqualified from holding equivalent authorisation in other jurisdictions; • close associate who is not fit and proper and exercises influence; and • accreditation scheme doesn't comply. |
| <p>Sections 79(1)(f)</p> <p>Prescribe any matter to be set out in the accreditation scheme (additional to matters in the Act).</p> | <p>Nil – no additional matters proposed.</p> |
| <p>Section 79(2)(c)</p> <p>Prescribe any matter that an accreditation scheme must provide for.</p> | <p>Clauses 38 – 45</p> <p>Prescribes the following matters:</p> <ul style="list-style-type: none"> • process for avoiding conflicts of interest; • accreditation process; • record keeping; • code of conduct; • duties of accreditation authority; • public website; and • transition strategy if accreditation authority no longer grants accreditation. |
| <p>Section 82(3)</p> <p>Provide for a fee to be paid for an application for the cancellation of an approval.</p> | <p>Nil – no fee proposed.</p> |
| <p>Section 87(c)</p> <p>Prescribe a class of persons to be authorised officers (additional to persons in the Act).</p> | <p>Nil – no additional persons proposed.</p> |

| Regulation making power in the Act | Clause in proposed Regulation |
|---|--|
| <p>Section 102(3)</p> <p>Prescribe the particulars of registrations and approvals which are to be kept in the register maintained by the Secretary.</p> | <p>Clause 64</p> <p>Prescribes the following information:</p> <ul style="list-style-type: none"> • name, address and contact details of registered certifiers and accreditation authorities; • classes of registration or approval; • dates of registration/approval and renewals; • insurance details; • details of any conditions imposed; • dates of any suspensions or cancellations; • details of any disciplinary action or relevant offences; • details of any failure to comply with Tribunal orders; • details of any warning notices published or undertakings made under the Act; • employment details; and • details of registered directors and employees for registered body corporates. |
| <p>Section 108(6)(d)</p> <p>Definition of <i>relevant agency</i></p> <p>Prescribe any other person or body (additional to people and bodies in the Act).</p> | <p>Nil – no additional people and bodies proposed.</p> |
| <p>Section 108(6)(d)</p> <p>Definition of <i>relevant function</i></p> | <p>Nil – no additional functions proposed.</p> |

| Regulation making power in the Act | Clause in proposed Regulation |
|---|---|
| Prescribe any other function (additional to the functions in the Act). | |
| <p>Section 109(1)(f)</p> <p>Prescribe other information about certifier policies or particular classes of certifier policies issued by a person for certification work that a Secretary may direct the person to provide (additional to information in the Act).</p> | <p>Clause 22</p> <p>Prescribes the following information:</p> <ul style="list-style-type: none"> • information about the policy schedule and any endorsements, • details of applications made and any disclosures, • details of claims made, potential claims or circumstances (including a mistake made or a complaint received) that may indicate a claim may be made, • details of legal proceedings that relate to a claim, • details of any amounts paid out in relation to a claim. |
| <p>Section 112(1)</p> <p>Prescribe the classes of certification work that a council is responsible for ensuring is performed on their behalf by a registered individual authorised to carry out the work.</p> | <p>Clause 59</p> <p>Prescribes certification work other than certification work under the Strata Act or Swimming Pools Act.</p> |
| <p>Section 113(b)</p> <p>Authorise any person, or any class of persons, for the Secretary to delegate functions to (additional to people in the Act).</p> | <p>Nil – no additional people proposed.</p> |
| <p>Section 116(1)(f)</p> <p>Prescribe any other method for the service of documents (additional to methods in the Act).</p> | <p>Nil – no additional methods proposed.</p> |
| <p>Section 117(1)</p> | <p>Nil – no additional officers proposed.</p> |

| Regulation making power in the Act | Clause in proposed Regulation |
|--|--|
| Prescribe officer that can certify matters and be evidence of the matters in proceedings (additional to the Secretary in the Act). | |
| <p>Section 117(2)(g)</p> <p>Prescribe any other matters that a Secretary can certify and be evidence of the matters in proceedings (additional to matters in the Act).</p> | Nil – no additional matters proposed. |
| <p>Section 118(2)</p> <p>Prescribe an offence against the Act or the regulations as a penalty notice offence.</p> | <p>Schedule 7</p> <p>Prescribes a number of offences for which a penalty notice may be issued and the amount payable for the penalty notice.</p> |
| <p>Sections 118(7)(c)</p> <p>Prescribe a person to be a penalty notice officer (additional to people in the Act).</p> | Nil – no additional people proposed. |
| <p>Section 120(2)(a)</p> <p>Make provision for the qualifications, skills and experience required to hold registration or approval, including the approval of courses of training and the approval of persons to conduct the training or to assess persons undergoing the training.</p> | <p>Clause 4</p> <p>Provides for the Secretary to require an applicant for registration to have successfully completed a recognised course or training.</p> <p>Provides for the Secretary to recognise training for these purposes, and for a person to apply for training to be recognised.</p> |
| <p>Section 120(2)(b)</p> <p>Make provision for the insurance required to be held in order to exercise functions under this Act.</p> | Nil – insurance provisions provided under regulation making powers in sections 26(2)(a) and 109(1)(f) of the Act. |
| <p>Section 120(2)(c)</p> <p>Make provision for the keeping of records and the provision of information to the Secretary by registered certifiers and local councils.</p> | <p>Clauses 47 – 58</p> <p>Prescribes record keeping requirements for registered certifiers and local councils.</p> |

| Regulation making power in the Act | Clause in proposed Regulation |
|---|--|
| <p>Section 120(2)(d)</p> <p>Make provision for the keeping of records and the provision of information to the Secretary by accreditation authorities.</p> | <p>Nil – record keeping provisions provided under regulation making power in section 74(1) of the Act.</p> |
| <p>Section 120(2)(e)</p> <p>Make provision for the fees payable under this Act or the regulations and the refund, reduction or waiver of any fees.</p> | <p>Schedule 6</p> <p>Prescribes relevant fees for the Act and Regulation.</p> <p>Clause 65</p> <p>Provides that the Secretary may waive, refund, or reduce the payment of a fee under the Act or the regulations if the Secretary considers it appropriate to do so.</p> |
| <p>Section 120(4)</p> <p>Exempt specific persons for bodies or classes of person or bodies, or specified construction work or classes of certification work, or specified registrations or approvals or classes of registration or approval, from any specific provision of the Act.</p> | <p>Nil – no exemptions proposed.</p> |
| <p>Clause 1(1) of Schedule 1</p> <p>Contain provisions of a savings or transitional nature.</p> | <p>Clauses 66 & 67</p> <p>Prescribes savings and transitional provisions for existing:</p> <ul style="list-style-type: none"> • arrangements for exchange of information; and • exemptions. |
| <p>Clause 3(1)(a) of Schedule 1</p> <p>Prescribe corresponding classes for accreditation under the current Regulation and registration under the proposed Regulation.</p> | <p>Schedule 1, clause 4</p> <p>Prescribes the corresponding classes – see table on page 30 of this RIS.</p> |

Appendix 2 – Summary of the proposed Regulation

Part 1 Preliminary

Clauses 1 and 2 provide the name and date of commencement of the Regulation.

Clause 3 provides definitions to terms used in the Regulation.

Part 2 Registration of certifiers

Clause 4 prescribes that the Secretary may require an applicant to successfully complete recognised training and allows for applications for training to be recognised.

Clause 5 prescribes circumstances where the Secretary may form an opinion that a person is not a suitable person to carry out certification work.

Clause 6 prescribes the period by which the Secretary must give an applicant for registration notice of a decision to grant or refuse registration before the Secretary is taken to have refused registration.

Clause 7 provides for applications for variation of registration.

Clause 8 prescribes events where a registered certifier must notify the Secretary in writing within 7 days after becoming aware of the event.

Clause 9 prescribes conditions of registration for registered certifiers and registered body corporates.

Clause 10 provides for replacement certificates of registration to be issued by the Secretary on application.

Part 3 Insurance

Clause 11 provides the definitions of terms relevant to Part 3 – Insurance.

Clause 12 provides transitional arrangements to acknowledge the change in terminology from ‘accredited certifiers’ under the current Regulation to ‘registered certifiers’ under the proposed Regulation.

Clause 13 provides that a registered certifier must be indemnified under a professional indemnity contract that complies with the requirements of Part 3 of the Regulation.

Clause 14 provides the requirements for a professional indemnity contract issued to a registered individual.

Clause 15 provides the requirements for a professional indemnity contract issued to a body corporate.

Clause 16 provides the requirements for a professional indemnity contract issued to a partnership.

Clauses 17 – 20 provide for the limits, exceptions and exclusions that may apply to a professional indemnity contract.

Clause 21 clarifies that a professional indemnity contract is not prevent from containing other exceptions and exclusions that are not inconsistent with the requirements of Part 3 of the Regulation.

Clause 22 prescribes other information about certifier policies or particular classes of certifier policies issued by a person for certification work that a Secretary may direct the person to provide.

Clause 23 provides transitional arrangements for existing insurance policies under the current Regulation.

Part 4 Conflicts of interest

Clause 24 prescribes circumstances in which a registered certifier has a conflict of interest in certification work.

Clause 25 prescribes conflicts of interest which are exempt from section 28(1) of the Act (i.e. a registered certifier may carry out certification work if the registered certifier has a conflict of interest in the certification work).

Part 5 Contracts for certification work

Clause 26 provides the definitions of terms relevant to Part 5 – contracts for certification work.

Clause 27 prescribes that a contract for the carrying out of certification work must comply with the requirements in clauses 28, 29, 30 and 31.

Clause 28 prescribes the particulars to be included in the contract.

Clause 29 prescribes requirements for the payment of fees and charges.

Clause 30 prescribes requirements for signing, or otherwise executing a contract, including a declaration to be made by the person for whom the certification work is to be carried out.

Clause 31 prescribes requirements for the contract to be accompanied by any applicable document that the Secretary makes available on the Department's website (i.e. information sheet).

Part 6 Accreditation authorities

Clause 32 prescribes matters the Secretary may have regard to when considering the suitability of a person for approval.

Clause 33 prescribes the period by which the Secretary must give an applicant for approval notice of a decision to grant or refuse approval before the Secretary is taken to have refused approval.

Clause 34 prescribes a condition that an approval to exercise the function of an accreditation authority is subject to in relation to insurance.

Clause 35 provides for applications for variation of approval of accreditation authority.

Clause 36 makes further provision for information the Secretary may request of an accreditation authority.

Clause 37 makes further provision with respect to the Secretary requesting an accreditation authority making information available.

Clauses 38 – 45 prescribe matters that an accreditation scheme must provide for.

Clause 46 provides that the Secretary must publish a notice in the Gazette if a body corporate is no longer able to exercise the functions of an accreditation authority.

Part 7 Record keeping

Clauses 47 – 50 set out the record keeping requirements for registered certifiers.

Clause 51 provides transitional arrangements recognising the existing record keeping obligations of accredited certifiers under the current Regulation.

Clause 52 sets out the record keeping requirements for registered body corporates.

Clause 53 – 56 set out the record keeping requirements for local councils.

Clause 57 – 58 set out the record keeping requirements for accreditation authorities.

Part 8 Councils

Clause 59 prescribes the classes of certification work that a council is responsible for ensuring is performed on their behalf by a registered individual authorised to carry out the work.

Clause 60 provides the information that a local council must give to the Secretary.

Clause 61 exempts a registered certifier employed by a council from being subject to a determination to pay a penalty to the Secretary (i.e. a specific type of disciplinary action in section 48(1)(c)).

Part 9 Miscellaneous

Clause 62 prescribes that supervision is certification work in certain circumstances.

Clause 63 prescribes that certain registered certifiers may carry out certain regulated work.

Clause 64 provides the particulars of registrations and approvals required to be kept in the register of registrations and approvals maintained by the Secretary.

Clause 65 provides that the Secretary may waive, refund or reduce the payment of a fee.

Clause 66 provides transitional arrangements for existing exchange of information agreements.

Clause 67 provides transitional arrangement for existing exemptions.

Schedules

Schedule 1 sets out the classes of registration for registered certifiers.

Schedule 2 prescribes the code of conduct for registered certifiers.

Schedule 3 sets out the qualifications and experience required for the classes of registration.

Schedule 4 sets out the knowledge and skills required for the classes of registration.

Schedule 5 sets out the continuing professional development requirements.

Schedule 6 sets out the fees payable under the Regulation.

Schedule 7 sets out the penalty notice offences and their penalties for individuals and corporations.

Appendix 3 – List of stakeholders

The following key stakeholders have been provided with a copy of the proposed Regulation and this RIS:

- AED Group
- Association of Accredited Certifiers
- Australian Industry Group
- Australian Institute of Architects
- Australian Institute of Building Surveyors
- Development and Environmental Professionals' Association
- Engineers Australia
- Fire Protection Association Australia
- Housing Industry Association (NSW)
- Institute of Public Works Engineering Australasia
- Law Society of NSW
- Local Government (NSW)
- Master Builders Association (NSW)
- Meriton
- Mirvac
- Office of Local Government
- Owners Corporation Network
- Planning Institute Australia
- Property Council of Australia (NSW)
- Southern Sydney Regional Organisation of Councils
- Strata Community Association (NSW)
- The Warren Centre
- Urban Development Institute of Australia (NSW)
- Urban Taskforce

Appendix 4 – Penalty notice offences

| Offence | | | Current penalty (if applicable) | Proposed penalty |
|---|---|---|---|---|
| Section/ Clause | Title | Penalty unit | | |
| Offences relevant to registered certifiers | | | | |
| S 5 | Certification work requires registration | 1,000 (corporation) 300 (individual) | \$3,000 (corporation) \$1,500 (individual) | \$5,000 (corporation) \$1,500 (individual) |
| S 20 | Offence of contravening condition | 300 | \$3,000 (corporation) \$1,500 (individual) | \$5,000 (corporation) \$1,500 (individual) |
| S 26(1) | Registered certifiers to be indemnified | 100 | \$3,000 (corporation) \$1,500 (individual) | \$5,000 (corporation) \$1,500 (individual) |
| S 28(1) | Conflicts of interest | 300 | \$3,000 (corporation) \$1,500 (individual) | \$5,000 (corporation) \$1,500 (individual) |
| S 33(1) | Principal certifier to notify client of certain changes | 50 | \$1,500 (corporation) \$750 (individual) | \$3,000 (corporation) \$1,500 (individual) |
| S 34(1) | Registered certifier to notify employer of certain changes | 50 | No current penalty | \$1,500 (individual) |
| S 35(1) | Registered certifier to notify Secretary of certain changes | 50 | \$3,000 (corporation) \$1,500 (individual) | \$3,000 (corporation) \$1,500 (individual) |
| S 35(2) | Registered certifier to notify Secretary of certain changes | 10 | \$500 (corporation) \$250 (individual) | \$500 (corporation) \$250 (individual) |
| S 36 | Return of certificate of registration | 40 (corporation) 20 (individual) | No current penalty | \$1,500 (corporation) \$750 (individual) |
| S 38 | Registered directors must | 300 | No current penalty | \$3,000 (individual) |

| | | | | |
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| | ensure certification work carried out lawfully | | | |
| S 39 | Registered directors must report certain conduct | 300 | No current penalty | \$3,000 (individual) |
| S 40(1) | Registered body corporate must ensure certification work carried out by individual | 1,000 | No current penalty | \$5,000 (corporation) |
| S 41(1) | Registered body corporate with insufficient registered directors | 1,000 | No current penalty | \$5,000 (corporation) |
| S 41(2) | Registered body corporate with insufficient registered directors | 1,000 | No current penalty | \$5,000 (corporation) |
| S 43 | Representing work is work requiring a registered certifier | 300 | No current penalty | \$3,000 (corporation) \$1,500 (individual) |
| CI 47(5) | Records generally | 100 (corporation) 40 (individual) | \$1,500 (corporation) \$750 (individual) | \$3,000 (corporation) \$1,500 (individual) |
| Offences relevant to accreditation of persons carrying out regulated work | | | | |
| S 53 | Regulated work requires accreditation | 1,000 (corporation) 300 (individual) | No current penalty | \$5,000 (corporation) \$1,500 (individual) |
| S 58 | Person must be approved to exercise functions of accreditation authority | 1,000 (corporation) 300 (individual) | No current penalty | \$5,000 (corporation) \$1,500 (individual) |

| | | | | |
|------|---|-------|--------------------|-----------------------|
| S 70 | Condition requiring provision of information to the Secretary | 50 | No current penalty | \$3,000 (corporation) |
| S 73 | Condition requiring publication of information | 100 | No current penalty | \$3,000 (corporation) |
| S 74 | Condition requiring the keeping of records | 100 | No current penalty | \$3,000 (corporation) |
| S 80 | Offence of contravening condition | 2,000 | No current penalty | \$5,000 (corporation) |
| S 81 | Offence of carrying out accreditation authority functions during suspension | 1,000 | No current penalty | \$5,000 (corporation) |

Appendix 5 – List of questions from the RIS

| Questions | Page |
|--|------|
| 1. Is the commencement date of 1 July 2020 for the proposed Regulation and the Act appropriate? Why or why not? | 18 |
| 2. Is the proposed 6 month transitional period appropriate? Why or why not? | 18 |
| 3. Do you support the Secretary having discretion to require an applicant to complete additional training? Why or why not? | 19 |
| 4. Do you support a person (including an organisation) being able to apply to the Secretary for training to be recognised by the Secretary? Why or why not? | 19 |
| 5. Do you support the grounds for finding that a person is not a suitable person to carry out certification work? Why or why not? | 20 |
| 6. Do you support the grounds focusing on accreditation to carry out regulated work and licences/registration under the <i>Architects Act 2003</i> and the <i>Home Building Act 1989</i> and similar schemes in other jurisdictions? Why or why not? | 20 |
| 7. Do you support the process for a certifier to apply for a variation of registration? Why or why not? | 20 |
| 8. Do you support the fee being the same as the fee for a new registration, subject to the Secretary being able to waive, refund or reduce the fee? Why or why not? | 20 |
| 9. Are the requirements for professional indemnity insurance contracts and exclusions in the proposed Regulation appropriate? Why or why not? | 21 |
| 10. Do you support the proposed prescribed conflicts of interest in clause 24? Why or why not? | 23 |
| 11. Are there any additional scenarios in which a registered certifier should be considered to have a conflict of interest? If so, please explain. | 23 |
| 12. Do you support the proposed exempt conflicts of interest in clause 25? Why or why not? | 23 |
| 13. Are there any additional scenarios that should be prescribed so that a registered certifier is taken to not have a conflict of interest? If so, please explain. | 23 |
| 14. Do you support the list of particulars in clause 28 that must be included in a contract for certification work? Why or why not? Are there any additional particulars that should be included? | 24 |

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| 15. Do you support the details of when fees and charges are payable in certain circumstances in clause 29? Why or why not? | 24 |
| 16. Do you support the requirement for a declaration by the person having the benefit of the development to be included in the contract and the content of the declaration? | 24 |
| 17. Do you support the requirement for the contract to be accompanied by an information sheet and the contents of the information sheet? | 24 |
| 18. Is the criteria for the Secretary to determine the suitability of a person or director to be an accreditation authority appropriate? Why or why not? What other criteria should be considered? | 26 |
| 19. Is the 60 business day timeframe for a deemed refusal an appropriate timeframe? | 26 |
| 20. Do you support the matters that an accreditation scheme must provide for in clauses 38 to 45? Why or why not? What other matters should be considered? | 26 |
| 21. Are the record keeping requirements appropriate for registered certifiers, local councils and accreditation authorities? Why or why not? | 27 |
| 22. Do you support the penalty that applies for a breach of the record keeping requirements? | 27 |
| 23. Should a penalty apply for the failure to keep records? Why or why not? | 27 |
| 24. Is 10 years an appropriate minimum timeframes that records should be kept by registered certifiers, local councils and accreditation authorities? Why or why not? | 27 |
| 25. Do you support the class of certification work prescribed which requires the council to ensure that anyone who performs the work on their behalf is appropriately registered? Why or why not? | 28 |
| 26. Do you support councils being required to notify the Secretary of the dates that registered certifiers commence and cease being employed by them for certification work on their behalf? Why or why not? | 28 |
| 27. Do you support the exemption for registered certifiers employed by councils applying in relation to the payment of a penalty as a form of disciplinary action? Why or why not? | 28 |
| 28. Do you support the expanded definition of certification work? Why or why not? | 29 |
| 29. Do you support the authorisation of registered certifiers in the class of engineer – electrical and engineer – hydraulic (building) to carry out regulated work? Why or why not? | 29 |

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| 30. Do you support the particulars in clause 64 that must be included in the register of registrations and approvals? Why or why not? What other particulars should be considered? | 29 |
| 31. Do you support the Secretary having the ability to waive, refund or reduce the payment of fees? Why or why not? | 29 |
| 32. Do you support the proposed classes of registration certifiers, including the way they have been streamlined? Why or why not? | 31 |
| 33. Do you support what each proposed class of registration is authorised to do? Why or why not? | 31 |
| 34. Do you support the proposed duties in the code of conduct? Why or why not? What other duties should be considered? | 32 |
| 35. Are the proposed qualifications and experience appropriate? Why or why not? | 33 |
| 36. Do you support the skills and knowledge requirements in the proposed Regulation? Why or why not? | 34 |
| 37. Do you support the continuing professional development requirements in the proposed Regulation? Why or why not? | 34 |
| 38. Do you support the proposed fees? Why or why not? | 35 |
| 39. Are the proposed penalty notice offences and amounts fair and reasonable? | 36 |
| 40. Are there any additional penalty notice offences that should be prescribed? | 36 |