



## Civil and Administrative Tribunal New South Wales

**Medium Neutral Citation:**

**Gearin v Commissioner for Fair Trading [2023]  
NSWCATOD 155**

**Hearing dates:**

20 October 2023

**Date of orders:**

27 October 2023

**Decision date:**

27 October 2023

**Jurisdiction:**

Occupational Division

**Before:**

T Simon, Principal Member

**Decision:**

1. The decision disqualifying Mr Gearin from being registered as a registered certifier for a period of 6 years, is stayed.

2. Paul Gearin's Certificate of Registration Number BDC0132, for all purposes is treated as on foot from 21 September 2023 (including the conditions that were already in place prior to the cancellation of the registration) until the final determination of the substantive application by the Tribunal in these proceedings on additional condition that:

(a) Paul Gearin will not enter into any new contracts for any certification work.

(b) Local Certification Services Pty Ltd (will not enter into any new contracts for any certification work for any new class 2-9 buildings which involve any National Construction Code fire safety performance/alternative solutions.

(c) Paul Gearin is permitted to continue with:

(i) critical stage inspections for class 1a 10a and 10b and class 2-9 buildings, under the supervision of Stuart Barnes (Building Surveyor unrestricted Reg No. BDC3233 currently employed by the Company) or other

registered certifier who holds certification that permits supervision of that type of critical stage inspection;

(ii) issuing occupation certificates for the existing contracted class 2-9 buildings but under supervision in the form of an internal written report prepared before any sign off of an OC confirming that all requirements have been met for the issuing of that OC (available on request to the Department) prepared by Stuart Barnes or other registered certifier who holds certification that permits supervision of that type of critical stage inspection, and

(iii) issuing occupation certificates for the existing contracted class 1a and 10a and 10b buildings but under supervision in the form of an internal written report prepared before any sign off of an OC confirming that all requirements have been met for the issuing of that OC (available on request to the Department) prepared by Stuart Barnes or other registered certifier who holds certification that permits supervision of that type of critical stage inspection.

**Catchwords:**

ADMINISTRATIVE LAW - REVIEW OF DECISION BY EXTERNAL DECISION-MAKER — decision to cancel registration as a certifiers pursuant to section 48 of the Building Professionals Certifiers Act 2018 (NSW)  
PRACTICE AND PROCEDURE — INTERLOCUTORY ORDER – interim decision — factors relevant to exercise of the power to make the interim decision under section 60 of the Administrative Decisions Review Act 1997 (NSW) — interlocutory decision to take effect retrospectively — stay.

**Legislation Cited:**

Administrative Decisions Review Act 1997 (NSW)  
Civil and Administrative Tribunal Act 2013 (NSW)  
Civil and Administrative Tribunal Rules 2014 (NSW)  
Building and Development Certifiers Act 2018  
Building Professionals Act 2005 (NSW)  
Environment Planning and Assessment Regulation 2000 (NSW)

**Cases Cited:**

QLD Protection Security Pty Ltd v Commissioner of Police, NSW Police Force [2018] NSWCATAP 113

**Texts Cited:**

None cited

<b>Category:</b>	Procedural rulings
<b>Parties:</b>	Paul Gearin (Applicant) Commissioner for Fair Trading (Respondent)
<b>Representation:</b>	Counsel J Reid (Applicant) M Fozzard (Respondent)  Solicitors: Wilshire Webb Staunton Beattie Solicitors (Applicants) Legal, Corporate Services, Department of Customer Services (Respondent)
<b>File Number(s):</b>	2023/00316840
<b>Publication restriction:</b>	Nil

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## REASONS FOR DECISION

- 1 Paul Gearin, a building certifier, is seeking administrative review of a decision made by a delegate of the respondent, Commissioner for Fair Trading on 14 September 2023 pursuant to *Building and Development Certifiers Act* 2018 (NSW).
- 2 The decision is for the following disciplinary action to be taken against Mr Gearin:
  - (1) Cancel Mr Gearin's certificate of registration as a registered certifier
  - (2) Disqualify Mr Gearin from being a registered certifier for a period of 6 years.
- 3 The decision took effect on 21 September 2023. The reasons for the disciplinary action is that Mr Gearin was found to have engaged in unsatisfactory professional conduct under the *Building Professionals Act* 2005 (NSW), contravened the certification legislation, engaged in conduct in connection with the carrying out of certification work (*Building and Development Certifiers Act*, s 45(b)) and had fallen short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent registered certifier (s45(a), *Building and Development Certifiers Act* ).
- 4 Mr Gearin seeks an interim order for reinstatement of his registration, subject to conditions, until the final determination of the substantive application by the Tribunal in these proceedings, pursuant to s 60(2) of the *Administrative Decisions Review Act* 1997 (NSW).
- 5 The Commissioner opposes the reinstatement of the building certifier registration, even with the proposed conditions.

### Interim Order

- 6 Mr Gearin lodged the application for administrative review of the decision and an

application for a stay of the decision on 6 October 2023.

7 An application for administrative review of a decision does not prevent the decision from taking effect (*Administrative Decisions Review Act*, s60(1)). The Tribunal has power to make an order “staying or otherwise affecting the operation of the decision under review” (*Administrative Decisions Review Act*, s 60(2)).

8 Mr Gearin seeks a stay on the decision in circumstances where the cancellation has already taken effect.

9 In *AVS Group of Companies Pty Ltd v Commissioner of Police* [2010] NSWCA 81, Campbell JA (with whom Handley AJA agreed) dealt with the difference in effect between a stay and the power reinstate a licence and held at [96] – [97]:

96. In the present case (unlike *McBride v Walton*), the Tribunal has a wider power than merely to grant a stay. It has power, under section 60(2) ADT Act, to “make such orders staying or otherwise affecting the operation of the decision under review as it considers appropriate to secure the effectiveness of the determination of the application.” That power is one that is wide enough to enable the Tribunal to temporarily reinstate a licence that has been revoked pending the hearing of an application for review of a decision to revoke the licence.

97. If a notice of revocation of a licence under the SI Act was served, which said that the revocation would take effect in 21 days after service, there may still be a problem in the Tribunal granting a stay, properly so called, before the 21 day period had expired. It might be argued that it is only when there is an application for review of a “decision” that a stay can be granted under section 60, and the relevant “decision” is the revocation itself. However, even if that argument is right it would be possible for a licensee to put itself into a situation where it was in a position to lodge an application for review, and an application for temporary reinstatement of the licence, to commence as soon as the Tribunal could make an order after the revocation became effective. Alternatively, it might be argued that the relevant “decision” is to revoke the licence in 21 days, and that that decision could be stayed by an order made before expiry of the 21 days. It is not necessary to decide which of those arguments is right. As well, I leave for further argument whether section 60(2) is wide enough to enable the Tribunal to restore a revoked licence with retrospective effect.

10 His Honour also stated the following at [105]:

105 It should at once be recognised that for the parties to apply for, and the Tribunal ultimately to grant, a “stay” of the decision of the Commissioner to revoke the licence was an inapt use of language. If ever in the future the Tribunal wished to achieve the effect that a revocation of a licence that had already taken place, was to be treated as though it had not taken place, pending the hearing of an appeal against the decision to revoke, it would be highly desirable for the Tribunal, to achieve that effect by language that made clear what the Tribunal was doing, such as that “*the licence for all purposes be treated as on foot pending the hearing of the appeal*”. As well as clarity, use of such language has the effect of helping to make clear the seriousness of such an order.

11 The Commissioner did not dispute that the Tribunal has the power to reinstate the registration.

12 Consistent with the decision in *AVS*, it is within the scope of s 60(2) of the *Administrative Decisions Review Act*, for the Tribunal to reinstate the registration retrospectively from 21 September 2023 and stay the decision disqualifying Mr Gearin from being registered for a period of 6 years. I have proceeded to consider the interim application on that basis.

## Internal Review

- 13 Section 30 of the *Civil and Administrative Tribunal Act* 2013 (NSW) provides that the *Administrative Decisions Review Act* provides for the circumstances in which the Tribunal has administrative review jurisdiction over a decision of an administrator. Pursuant to s 9(1) of the *Administrative Decisions Review Act*, the Tribunal has administrative review jurisdiction over a decision of an administrator if enabling legislation provides that applications may be made to the Tribunal for an administrative review under the *Administrative Decisions Review Act*.
- 14 Section 24(b) of the *Building and Development Certifiers Act* provides that a person aggrieved may apply for administrative review of a decision to cancel or suspend the person's certificate of accreditation
- 15 Applications made to the Tribunal under the *Administrative Decisions Review Act* may not be made unless the applicant has applied for an internal review and the review is taken to have been finalised (*Administrative Decisions Review Act*, s 55(3)). The applicant did not apply for internal review of the decision to cancel his registration and disqualify him from being registered. However, the applicant seeks that the Tribunal deal with the application on the basis that it is necessary to do so to protect the applicant's interests and the application was made within a reasonable time (*Administrative Decisions Review Act*, s 55(4))
- 16 The respondent did not object to the application proceeding in the absence of a finalised internal review, however indicated at the hearing that if the application for interim order was refused then they would proceed to consider an internal review.
- 17 The respondent's decision was made on 14 September 2023 and the applicant notes in the application form that he was notified of the decision on the date the decision was made. The applicant applied to the Tribunal for review of the decisions on 6 October 2023 and made the application for interim orders on the same day. In circumstances where the respondent has not objected to the application proceeding, I am satisfied that the application to the Tribunal was made within a reasonable time, being about three weeks after the applicant was notified of the decision.
- 18 The decision to cancel the applicant's registration and to disqualify him from being registered from holding authorities took effect on 21 September 2023. In those circumstances I find it is necessary for the Tribunal to deal with the application to protect the applicants' interests (*Administrative Decisions Review Act*, s 55(4)(b)).
- 19 I accept that the applicants' interests are immediately and directly affected by the decision to cancel his registration. I accept that the cancellation of the registration and disqualification will result in the applicant not being able to undertake any certification work. The situation has a degree of urgency and for those reasons, I have decided to deal with the application, notwithstanding that the applicants did not apply for an internal review.

## Consideration

20 Pursuant to s 60 (2) of the *Administrative Decisions Review Act*, the Tribunal has power to make an order

... staying or otherwise affecting the operation of the decision under review as it considers appropriate to secure the effectiveness of the determination of the application.

21 Section 60(3) of the *Administrative Decisions Review Act* empowers the Tribunal to make orders, if it considers that it is desirable to do so after considering:

(a) the interests of any persons who may be affected by the determination of the application, and

(b) any submission made by or on behalf of the administrator who made the decision to which the application relates, and

(c) the public interest.

22 In *QLD Protection Security Pty Ltd v Commissioner of Police, NSW Police Force* [2018] NSWCATAP 113, the Appeal Panel of this Tribunal summarised the considerations which should be applied when considering a stay in matters such as this as including (at [31] - [33]);

31 The Tribunal recently considered the power under s 60 of the *Administrative Decisions Review Act* in *Loveday v Commissioner for Fair Trading* [2018] NSWCATAD 80 (Loveday). In that decision it was held at [8]:

“... Section 60(2) and (3) give the Tribunal a single discretionary power to make a stay order or to refuse to make such an order taking into account all relevant considerations. Secondly, the words “to secure the effectiveness of the hearing” include a situation where the applicant will suffer irreparable loss in the sense that no recompense for it can be obtained if the application is ultimately successful: *Re Pelling and Secretary, Department of Aviation* [1984] AATA 179; (1984) 5 ALD 638 at 639. It is not confined to the situation where a hearing would be pointless because the applicant will go out of business if a stay is refused. ...”

32 The relevant considerations in deciding whether to make an order under s 60(2) include:

(1) whether the order is appropriate to secure the effectiveness of the determination of the application for review: s 60(2), *ADR Act*.

(2) whether the order is desirable taking into account:

(a) the interests of any persons who may be affected by the determination of the application for review: s 60(3)(a), *Administrative Decisions Review Act*, *Loveday v Commissioner for Fair Trading* [2018] NSWCATAD 80 (Loveday) at [10], *Re Scott and Australian Securities and Investments Commission* [2009] AATA 798 (*Re Scott*) at [4];

(b) any submission made by or on behalf of the administrator who made the decision to which the application relates: s 60(3)(b), *Administrative Decisions Review Act*, *Loveday* at [10], *Re Scott* at [4];

(c) the public interest: s 60(3)(c), *Administrative Decisions Review Act*, *Loveday* at [10], *Re Scott* at [4];

33 The circumstances that are relevant in any particular case to the considerations identified above may well overlap or be interrelated.

23 In his affidavit dated 6 October 2023, Mr Gearin states that he has been practising continually as a registered certifier since 1999 (24 years). Prior to that he was a Health and Building Surveyor (since 1985).

24 In summary, the matters raised by the respondent against Mr Gearin relate to a series of actions for a single development in Caringbah comprising of 5 townhouses. The actions can be summarised as follows:

- (1) On 1 July 2014 Mr Gearin issued a construction certificate for the development when he should not have because:
  - (i) Only one rainwater tank had been installed to service the 5 proposed townhouses instead of 5 individual tanks to service each townhouse.
  - (ii) Two additional lifts had been installed to service townhouses 1 and 2 which included access to the basement carpark
  - (iii) Laundries had been removed from townhouses 1 and 2 with no alternative laundry specifically provided.
- (2) Mr Gearin issued interim occupation certificates on 16 June 2016 for townhouse 3, on 2 August 2016 for townhouse 5, on 9 September 2016 for townhouse 4 and on 12 February 2018 for townhouses 2-5. The respondent found that the interim occupation certificates should not have been issued because:
  - (i) The individual water tanks specified in the BASIX certificate had not been installed.
  - (ii) Townhouse 2 incorporated an additional floor comprising laundry facilities, toilet, storeroom and rumpus room, internal lift access to the basement and that was inconsistent with the development consent
  - (iii) Critical stage inspections prior to covering the stormwater drainage connections had not been carried out
  - (iv) In relation to the interim occupation certificates issued in 2016, inspections had not been completed and the inspections for not take place until 12 February 2018.
- (3) On 21 April 2021 Mr Gearin issued the final occupation certificate for the townhouses in circumstances where he should not have because:
  - (i) The individual water tanks specified in BASIX certificate had not been installed.
  - (ii) Townhouses 1 and 2 were inconsistent with the development consent in that they each incorporated an additional floor comprising laundry facilities, toilet, storeroom and rumpus room, and with internal lift access to the basement.
  - (iii) The critical stage inspection prior to covering the stormwater drainage connections had not been carried out.

25 According to his affidavit dated 6 October 2023, Mr Gearin is a director and shareholder of Local Certification Services Pty Ltd (LCS) a company providing certification services. There are two other director/shareholders who are registered certifiers. LCS is a

registered body corporate under the *Building and Development Certifiers Act* and has 8 offices. Mr Gearin is the only director of LCS that can do certification involving class 2-9 buildings that involve any fire performance solutions.

26 Section 40 of the *Building and Development Certifiers Act* requires that a registered body corporate must ensure that any certification work that is carried out on behalf of the body corporate is carried out only by a registered individual whose registration authorises the individual to carry out that work.

27 Section 41 of the *Building and Development Certifiers Act* provides that a registered body corporate must not carry out any certification work during any period during which it does not have at least one suitably qualified director. Section 41(3) defines 'suitably qualified director' as"

... in relation to certification work, means a director who is a registered individual whose registration authorises the individual to carry out that work.

28 In his affidavit dated 6 October 2023, Mr Gearin states that he is the only director of the body corporate that is a suitably qualified director for certification work involving class 2-9 buildings (and primarily residential flat buildings) that involve any fire safety performance solutions under the National Construction Code.

29 Mr Gearin states that there are approximately 107 jobs (580 residential units which would be affected) that could not proceed if the stay was not granted due to requirement to comply with s41 of the *Building and Development Certifiers Act*.

30 In addition, the class 2-9 building matters (of which there are approximately 132) would need to be transferred to the responsibility of the only other employee of LCS who could do that work, Stuart Barnes. Mr Barnes does not want the responsibility of acting as principal certifier and signing off on occupation certificates of any Class 2-9 buildings.

31 Mr Gearin also states that there are very few qualified certifiers in the marketplace that can carry out class 2-9 certification work and it is unlikely that LCS would be able to urgently employ a suitably qualified certifier.

32 Mr Gearin's advice from his business manager is that his contribution to LCS is approximately 25% of the business in the last 5 years and that will have a detrimental effect on income.

33 Mr Gearin submits that if he not able to carry out his duties, there will be a financial impact on the business which employs 20 certifiers and 35 administration and support staff across 8 offices in NSW. Business expenses will continue to accrue until the proceedings are finally heard. Mr Gearin submits that there is no power in the *Administrative Decisions Review Act* or the *Building and Development Certifiers Act* to award compensation if Mr Gearin is successful in his application.

34 Mr Gearin also submits that the decision has reputational damage to him and LCS and that Mr Gearin was given 6 business days' notice of the decision and has already had to advise approximately 850 existing clients of the cancellation of his registration which



has had an impact on his reputation and the reputation of LCS. He submits that if the cancellation continues the reputational damage will continue.

35 Mr Gearin also states that the decision is having a personal effect on him at this "late stage of his career".

36 Mr Gearin states that if his registration is not reinstated then there will be a delay in issue of occupation certificates which would affect, as a minimum, 580 residential units which would have a cascading impact on property settlements and future residents being able to move into their homes.

37 Having considered the affidavit of Mr Gearin, I am satisfied that the cancellation of his registration has significant effect on the applicant, his business and the parties who require certification.

38 The Commissioner submits that the decisions should be maintained in the public interest for the protection of the public because that is one of the paramount objects of the legislation and because there is potential for harm as the allegations are serious. Counsel for the Commissioner conceded at the hearing that none of the actions found in relation to the decision the subject of this review relate to safety issues.

39 I note that Mr Gearin was not provided with an opportunity to show cause in relation to the allegations, on the basis that it is in the public interest to take immediate disciplinary action.

40 Mr Gearin submits that he only seeks review of the severity of the penalty imposed by the respondent and not the individual findings. In that regard Mr Gearin submits that there is overlap in the disciplinary grounds in that the same "actions" are the subject of multiple disciplinary grounds. He submits that the findings do not support the conclusion reached by the delegate in relation to the disciplinary outcome. In that regard Mr Gearin refers to the 'Guidelines for Determining a Disciplinary Action Outcome' and submits that the actions are minor in relation to assessing harm, culpability and severity.

41 In determining the appropriate disciplinary action, the delegate also considered that Mr Gearin had been subject of 9 previous disciplinary actions taken between 25 July 2005 and 30 April 2015 and a penalty infringement notice issued on 5 March 2020 for the offence that the Occupation Certificate did not comply with prescribed form.

42 Mr Gearin submits that the delegate did not consider the context and circumstances of the previous disciplinary action in the determination of the matter. He submits that if weight was to be placed on the previous findings it was necessary to understand the nature of the breaches alleged at that time and the circumstances surrounding them.

### *Conclusion*

43 Having considered the matters referred to in s 60(3) of the *Administrative Decisions Review Act*, I consider it desirable to make the orders reinstating Mr Gearin's registration and staying his disqualification as a registered certifier, because it is

appropriate to secure the effectiveness of the determination of the application for administrative review of the decision.

- 44 I find that the decision will affect the interest of the applicant, specifically in relation to his ongoing business and the ongoing business of LCS, of which he is a director. It will have a detrimental financial effect on LCS. The decision will at least cause inconvenience to current clients who are utilising the applicant for certification work, in particular class 2-9 buildings.
- 45 The evidence in relation to the decision has not yet been provided, challenged or conclusively examined by the Tribunal. There will need to be in this case, an evaluation of the seriousness of the breaches and the evidence overall. At this stage of the proceedings, it is not possible to conclusively determine whether there is a proper basis for the disciplinary action taken and until that is evaluated, I accept that the decision has a significant impact on the business of the applicant and the company of which he is a director. I also note that the actions alleged against the applicant are overlapping in relation to the disciplinary grounds. In effect the disciplinary grounds arise from the overlapping actions related to the rainwater tanks, lifts and laundries.
- 46 In relation to the public interest, I am mindful of the protective natures of the relevant legislation and that it is in the public interests for certifier to comply with their obligations. However, none of the actions referred to raise immediate safety concerns and balanced against the impact that the decision will have on the applicant, his business and client's, together with the applicant's right to have the decision reviewed, I am satisfied to grant the orders sought.
- 47 To limit any potential damage to the wider public interest, I have imposed the conditions proposed by the applicant. Mr Gearin is prevented from taking on any new certification work so that if the outcome of the administrative review is that the registration should be cancelled, there will be no new clients who will be inconvenienced by the cancellation. The certificate of registration as it was immediately before it was cancelled already included significant conditions and reinstatement of that certificate will mean that those conditions remain in place. The proposed further conditions include significant conditions including supervision. At the hearing, the respondent submitted that the evidence of Mr Gearin had previously indicated that Mr Barnes was not willing to do the class 2-9 building work. However, the conditions allow for any other registered certifier who hold the relevant certification to act as a supervisor.

## Orders

48 Accordingly, I make the following orders:

- (1) The decision disqualifying Mr Gearin from being registered as a registered certifier for a period of 6 years, is stayed.
- (2) Paul Gearin's Certificate of Registration Number BDC0132, for all purposes is treated as on foot from 21 September 2023 (including the conditions that were already in place prior to the cancellation of the registration) until the final determination of the substantive application by the Tribunal in these proceedings on additional condition that:
  - (a) Paul Gearin will not enter into any new contracts for any certification work.
  - (b) Local Certification Services Pty Ltd (will not enter into any new contracts for any certification work for any new class 2-9 buildings which involve any National Construction Code fire safety performance/alternative solutions.
  - (c) Paul Gearin is permitted to continue with:
    - (i) critical stage inspections for class 1a 10a and 10b and class 2-9 buildings, under the supervision of Stuart Barnes (Building Surveyor unrestricted Reg No. BDC3233 currently employed by the Company) or other registered certifier who holds certification that permits supervision of that type of critical stage inspection;
    - (ii) issuing occupation certificates for the existing contracted class 2-9 buildings but under supervision in the form of an internal written report prepared before any sign off of an OC confirming that all requirements have been met for the issuing of that OC (available on request to the Department) prepared by Stuart Barnes or other registered certifier who holds certification that permits supervision of that type of critical stage inspection, and
    - (iii) issuing occupation certificates for the existing contracted class 1a and 10a and 10b buildings but under supervision in the form of an internal written report prepared before any sign off of an OC confirming that all requirements have been met for the issuing of that OC (available on request to the Department) prepared by Stuart Barnes or other registered certifier who holds certification that permits supervision of that type of critical stage inspection.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

## Amendments

27 October 2023 - Coversheet - Category type changed.

27 October 2023 - Coversheet - Date of Decision and Date of Orders changed to reflect correct date published.

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