

Draft
LGNSW Submission on *Improving Certifier Independence: Options Paper*

November 2018

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1. Opening

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

LGNSW welcomes the opportunity to make a submission to the Department of Finance Services and Innovation (DFSI) on *Improving Certifier Independence: Options Paper*. This closely follows recent consultation on the *Building and Development Certifiers Bill 2018* (the Bill) which was passed by NSW Parliament on 24 October 2018. LGNSW has welcomed reforms in the new legislation which go some way to strengthening the regulatory framework for private certification.

LGNSW commends the release of the Options Paper supplementary to the Bill, in so far as it demonstrates the Government's commitment to addressing the issue of certifier independence. However, while targeting the issue of certifier independence, the options do not appear to be altogether workable or practical and may have some unintended consequences, as detailed in this submission.

Further, this submission argues that the implementation of such measures alone will not be enough to ensure the building and certification system delivers well-built, safe and compliant buildings that protect the public interest. As stated in previous submissions and reinstated here, local government has extensive and deeply-held concerns about unauthorised and defective building work resulting from inadequate building regulation.

This submission is structured as follows:

- Section 2 clarifies LGNSW's understanding of the proposal and its relationship to the new Bill;
- Section 3 reaffirms LGNSW's long-held views about the private certification system;
- Section 4 makes general comments about the proposed schemes to address certifier independence;
- Section 5 makes observations about additional and alternative actions needed;
- Section 6 contains concluding remarks; and
- Attachment A contains specific comments in response to selected questions in the Options Paper.

This is a draft submission awaiting review by the LGNSW Board. Any revisions made by the Board at that time will be forwarded to DFSI in the form of an updated submission.

2. Background

- The NSW Government is seeking feedback on whether an alternative appointment process should be introduced for certain types of developments. The focus of *Improving Certifier Independence: Options Paper* is to address widely-held concerns about real and perceived conflicts of interest associated with the lack of independence of private certifiers.
- The Government has put forward three options and seeks feedback on which process, if any, would be most effective at managing conflicts of interest and certifier independence. The three options are:
 - Option 1: Rotation scheme - three randomly-selected certifiers would be available for appointment from an eligibility list.
 - Option 2: Cab rank scheme – a certifier would be appointed to work on a development from an eligibility list on a next-in-line or cab-rank basis.

- Option 3: Time limit scheme - involves enforcing a limit on the amount of time a certifier can continually work for the same client and would require the certifier to take a three-year break from the client after a certain period.
- The paper proposes these options would apply above certain thresholds which are intended to capture developments considered to have the “greatest complexity and potential risk to consumers”¹. The proposed thresholds target class 2 to 9 buildings above three storeys, with a total floor area greater than 2,000m² and valued at more than \$5million.
- According to recent statements by the Minister for Better Regulation and Innovation², the Options Paper has been released to consider ways to take action against poorly performing and dishonest building practitioners and address issues more broadly with the private certification system.
- LGNSW contributed to the Government’s recent consultation on the Bill to strengthen governance of certifiers, through participation in stakeholder forums and its formal submission (September 2018). There has been no occasion to make comment on the merits of these current proposals until now.
- LGNSW understands that amendments to the *Environmental Planning and Assessment Act 1979* (EP&A Act) passed in NSW Parliament on 24 October³ will enable regulations to be developed which specify an alternative framework for appointing a principal certifier, such as the options proposed in the paper. LGNSW stated in its submission on the Bill⁴ that any alternative appointment process should not force councils into having carriage of problematic projects by becoming the ‘default certifier’ for projects rejected by other certifiers.
- LGNSW recommends careful consideration and further engagement with local government and industry before developing any regulations to effect such changes.

3. LGNSW position on private certification

- LGNSW has opposed the private certification system since its inception because of a deficient regulatory framework and fundamental flaws in protection of the public interest.
- LGNSW and councils continually argue for stronger regulation of private certifiers. Concerns about the inadequacy of the regulatory framework and the lack of regulatory enforcement by the regulator (previously known as the Building Professionals Board (BPB)) have been consistently highlighted.⁵
- It is acknowledged that private certification is here to stay, but local government expects this system to be properly regulated. LGNSW’s focus therefore continues to be on having a robust and reputable regulatory regime in place.
- LGNSW and councils are concerned to ensure that the building and certification system delivers well-built, safe and compliant buildings that protect the public interest. From

¹ *Improving Certifier Independence: Options Paper*, October 2018, p 11

² Media release, 14 September 2018: “Rising complaints against dodgy building operators”; Media release, 2 October 2018: “Dodgy certifiers on notice with new laws”; Interview, 2GB, 2 October 2018: “Government to crack down on ‘cowboy’ certifiers signing off on dodgy projects”.

³ Refer to Schedule 3, paragraphs 9 and 10 of the Building and Development Certifiers Bill.

⁴ See LGNSW Submission on the *Building and Development Certifiers Bill 2018*, September 2018, p 25

⁵ See LGNSW Submission on the *Building and Development Certifiers Bill 2018*, September 2018, pp 4, 6, 10, 22 & 24

councils' perspective, the public interest includes not only the property owner/buyer, but occupants such as residents/tenants, neighbours, and the wider community.

- The issue of private certification continues to be a source of frustration for many of our members and was again the focus of numerous conference motions at this year's LGNSW Annual Conference (October 2018).
- For these reasons, LGNSW welcomes provisions in the new Bill that strengthen regulation of private certifiers, including a greater range and size of penalties; emphasis on the responsibility of the certifier to act in the public interest; clarification of certifier roles and responsibilities; stronger conflict-of-interest provisions; and new powers for the Secretary to issue standards or methodologies, such as a practice guide, as a condition of the certifier's registration.⁶
- A major deficiency in the private certification system has been insufficient enforcement of regulations and discipline. As LGNSW has highlighted in previous submissions⁷, building defects and illegal work are a major and ongoing concern for councils. These impose significant remediation costs on individual property and regulatory costs on councils.
- Building defects will continue to arise so long as there is an overall lack of regulatory oversight and discipline in the industry. In February 2018 the Shergold & Weir national report recommended the importance of having tighter government oversight:

“There should be a tightening of government oversight of the building approvals process in order to effectively minimise the conflict of interest that is inherent in a privatised building surveying model... There is a significant danger that without increased auditing and enforcement, the privatised building approvals process will lead to an ongoing decline in compliance standards. That is why we propose enhanced regulatory oversight. Improved governance of private building surveyors is necessary in order to win over vocal industry critics and, crucially, to restore public confidence that safety is paramount.”⁸

4. General comments on Options Paper

- The inherent conflict of interest between a private certifier's responsibility as a public officer (i.e. to act in the public interest) and their commercial interests has been a major flaw in the private certification system since its introduction 20 years ago.
- LGNSW therefore welcomes the Government's attempt to address the potential lack of independence between the certifier and the builder/developer. However, LGNSW is concerned that the options proposed - although well-intended – are not practical or workable and may have some unintended consequences.
- Option 1 (Rotation) has some merit, however LGNSW objects to the idea of councils being the default service provider in this scheme. Another issue with the rotation scheme is that it may limit competition. It could also present difficulties for private certifiers in business planning and growth and therefore negatively affect the supply of certifiers in the longer term.

⁶ Refer to LGNSW Submission to Building and Development Certifiers Bill, September 2018, pp 10-11

⁷ Refer to LGNSW Submissions to the Lambert Review of the Building Professionals Act 2005 (October 2015) and to the BPB Report on “*Building Certification and Regulation – Serving a New Planning System for NSW*” (March 2014)

⁸ Shergold, P. and Weir, B., *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, February 2018, p 12

- Option 2 (Cab-rank) is inferior to the other options because it is anti-competitive, provides no consumer choice and like option 1 it relies on the idea of councils being the default service provider. LGNSW does not support this option.
- Option 3 (Time limit) has some potential advantages compared with the rotation and cab-rank schemes, but as with these first two options, it again has practical limitations. These include the challenge of dealing with companies changing their name or closing down and/or reopening as a new business and the complexity and long timeframes often characteristic of large development projects.
- To varying degrees, all three schemes risk constraining supply of private certifiers and increasing costs, timeframes and workload for councils, particularly in regional areas where the availability of certifiers is already an issue.
- The potential disadvantages of options 1 and 2 appear to outweigh the advantages, as presented in the paper⁹. By comparison, the time-limit option appears to have fewer disadvantages.
- A potentially more effective alternative (or variation) to the time limit option is to have a system where a long period of continuous work with a developer triggers an audit of the certifier. Audits that are triggered in prescribed circumstances such as this would help target poor performance without compromising competent practitioners who are found to be achieving the desirable building outcomes.
- Based on the thresholds proposed in the paper, the options will not tackle problems experienced with private certification in the lower end of the market, where councils often cite cases of illegal or unauthorised work and have to deal with neighbour complaints in relation to work that is being overseen by a private certifier.
- Responses to selected questions are contained in **Attachment A**.

5. Additional considerations

Along with the stronger provisions in the new Bill, the Options Paper is a step in the right direction, however local government is not confident these alone are enough to deliver well-built, safe and compliant buildings that protect the public interest. The public has a right to expect these outcomes from the building sector but they will not be realised in the absence of other necessary actions to solve broader deficiencies with building regulation.

LGNSW and councils have called on successive state governments over the past two decades to take actions to address deficiencies with building and certifier regulation. As stated earlier in this submission, LGNSW supports the intention of seeking to improve certifier independence and clamping down on poor or unethical activities. However, the schemes proposed do not appear to be practical in their current form. By implementing a package of initiatives which include the following, LGNSW is confident this would be a positive step towards restoring public confidence:

- Prioritise sufficient resourcing of authorised officers in the former BPB (now the DFSI) to enforce the stronger powers and penalties provided for in the new Bill.
- Better education and training of certifiers and all building practitioners.

⁹ *Improving Certifier Independence: Options Paper*, October 2018, pp 17 and 21

- Establish a program of proactive investigations and audits of certifiers and certification.
- Provide for adequate compensation for landowners who suffer measurable financial hardship resulting from negligent private certifiers. Include legislative provisions that force certifiers and other building professionals who do the wrong thing to take responsibility for their actions or inaction, by being required to compensate the victims for any loss or damage suffered as a result.
- Apply greater scrutiny when determining the competence of applicants seeking various categories of accreditation or re-accreditation under the accreditation.
- Establish and maintain a practice guide for certifiers. This should clarify expected standards of competence, diligence and integrity and educate, by way of examples, the behaviour that constitutes acting impartially, ethically and in the public interest expected of a registered certifier.
- Amend the EP&A Regulation 2000¹⁰ to include provisions that require a certifier to state that a development complies with a development consent, when issuing an occupation certificate. There are several examples where private accredited certifiers have issued construction certificates without conditions of consent being satisfied. This is an issue that councils have raised previously with the Department of Planning and Environment.
- Address problems with unauthorised work: introduce suitable sanctions in the form of fines of a size that would effectively discourage unauthorised work; make builders more accountable; and introduce requirements so that owners who knowingly do the wrong thing are forced to have to rectify non-conforming work.

6. Conclusion

LGNSW is hopeful that the stronger penalties and other provisions in the new Bill will bring some welcome improvements to the enforcement of certifiers. Supplementing these provisions with workable solutions to ensure certifier independence would also be welcomed by local government. The Options Paper is well-intentioned in attempting to address this issue, but as discussed in this submission, each option has its limitations and all schemes appear to be somewhat impractical and unworkable.

LGNSW has concerns that under two of the proposed schemes councils are being expected to step in if a private certifier is not available or willing to accept a project allocated to them, or the developer is not willing to accept the assigned certifiers. Councils should not have to prop up the private certification system or become de-facto overseers of private certification work – this should be the role of the NSW government regulator, not local government.

There is also a risk with all three schemes that the availability of certifiers could be reduced and the competitive provision of certification services by both council and private certifiers is compromised.

LGNSW understands DFSI would be responsible for administering one of these schemes if adopted. LGNSW believes these resources would be much better targeted at auditing, investigating complaints and disciplining incompetent certifiers, to ultimately improve overall outcomes for consumers.

In conclusion, any scheme proposed to increase certifier independence will be of little value if the fundamental issues and concerns are not addressed to improve the capabilities and

¹⁰ Clause 155 Form of occupation certificate, sub-clause (e)

competence of certifiers, audit their activities and introduce measures to make all building practitioners accountable for their work.

For further information in relation to this submission, please contact Jane Partridge, Senior Policy Officer Planning, on 02 9242 4093 or jane.partridge@lgnsw.org.au.

Attachment A - Specific comments on selected questions

Question	LGNSW comment
The importance of maintaining certifier independence	
1. Do you agree that there is a greater risk for conflicts of interest to arise in private certification work and result in poor certification outcomes (as compared to council certifiers)?	Yes. Whenever the certifier is paid by the owner/developer and is running a commercial business (reliant on clients giving them work) there will always be the potential for and/or perception of a conflict of interest.
2. Do you think an additional mechanism is required to support independence in private certification work?	<p>Agree that a mechanism is desirable, although the options identified do not appear to provide practical and effective solutions.</p> <p>Rather than implementing any of these options, the issue of defective building work and poor outcomes for consumers would be better addressed if:</p> <ul style="list-style-type: none"> • a proactive auditing program is implemented; • the policing role of the regulator (currently the BPB) is sufficiently resourced; • complaints against certifiers are effectively investigated and disciplinary action taken; and • all building practitioners are made accountable for their work.
Role of local council in appointing certifier	
3. Should councils have an additional role in appointing certifiers? If so, what kind of role should they play?	<p>No. Any proposal to expand the role of councils in the private certification process would raise the following issues for councils:</p> <ul style="list-style-type: none"> • May be considered as anti-competitive in the current system, where councils are direct competitors of private certifiers. • Councils should not become de-facto inspectors of private certification work – this should be the role of the NSW government regulator. • Councils should not have to step in to fix problems with individual projects or take on projects that no competent certifier wants to accept. • Allocating or appointing private certifiers is not councils' core business and many councils are not equipped with the resources to undertake such a function. • Additional resourcing needs could add to development costs.
Certifier threshold	
5. Do you agree with the proposed threshold requirements for when one of the options would apply? If not, why not?	<ul style="list-style-type: none"> • The proposed thresholds would capture not only residential development, but all other industry sectors (commercial, health, industrial, government buildings) as well. Although not strictly stated in the paper, the focus of the Government's concern appears to be with multi-storey developments in the residential sector, where the future owner/purchaser or occupant may be impacted by poor or defective building or certification work. Strategies to improve outcomes for consumers need to be targeted to address that sector. • In addition, at lower scales of the residential market, councils frequently report problems with certifiers

	<p>approving smaller residential developments (single detached, secondary dwellings etc) – although less complex and hence less ‘risky’, these projects nevertheless generate complaints from neighbours (which councils have to deal with) and contribute to the overall negative perception of private certifiers. These types of issues would not be captured by the proposed threshold.</p>
<p>Option 1: The rotation scheme</p>	
<p>8. Does the proposed selection method raise any concerns that may impact the integrity of the rotation scheme?</p>	<ul style="list-style-type: none"> • The rotation scheme has some merit when compared with the cab-rank scheme as it would maintain a degree of competition and would offer some level of consumer choice. • LGNSW does not support councils being the default certifier under this model. • May be difficult to implement in regional areas, where availability of certifiers is already limited. • Would make it difficult for certifier businesses to plan and prepare for work, and hence affect business viability. This in turn could lead to a shortage of private certifiers in the long term, placing additional pressure on the limited resources of councils to deliver these services. • Administration and ongoing management of this scheme would create additional costs and potential time delays in the process. It is anticipated that the government-funded administrative role would involve generating up-to-date lists of available certifiers, tracking service requests from owners and developers and handling enquiries. • Presumably the DFSI would be administering the scheme - these resources would be much better targeted at auditing, investigating complaints and disciplining incompetent certifiers, to ultimately improve overall outcomes for consumers.
<p>11. Is it appropriate to allow a developer to reject all three certifiers provided under the rotation scheme? If yes, in what circumstances would this be appropriate?</p>	<p>No. As currently presented, this would result in council being required to undertake the role. Discussed in more detail below in response to Q 12.</p>
<p>12. Is it appropriate to mandate the developer appoint the local council as principal certifying authority where the developer rejects the three certifiers provided?</p>	<p>No.</p> <ul style="list-style-type: none"> • Councils should have the right to choose whether or not they take on particular certification work. Under current arrangements, private certifiers have discretion to accept or not accept appointment as the principal certifying authority whereas councils ultimately have to provide the service. • Councils cite examples where they have been directed to take over projects which are problematic and have poor records/documentation. This issue, combined with the current insurance concerns, may place an undue burden on local government having to remedy problematic certification projects. • Councils should not be forced into a position of having to appoint or engage additional certification officers in response to mandated appointments from developers. • As experienced council building surveyors have progressively moved to the private sector with the

	<p>expansion of private certification, councils may no longer have in-house expertise to take on an increased level of certification work.</p> <ul style="list-style-type: none"> • Refer also to response at Q 3.
14. Do you support Option 1? If not, why not?	No. Refer to response at Q 8.
Option 2: Cab rank scheme	
15. Do you support the cab rank scheme for the appointment of the PCA for developments that meet the threshold requirements? If not, why not?	<p>No.</p> <ul style="list-style-type: none"> • This scheme would remove competition and provides no choice for consumers, which could lead to inflated certification prices. • LGNSW does not support councils being the default certifier under the cab-rank model. • Unlikely to be practical in regional areas, where availability of certifiers is already limited. • As with Option 1, the cab-rank scheme would make it difficult for certifier businesses to plan and prepare for work, and hence affect business viability. This in turn could lead to a shortage of private certifiers in the long term, place additional pressure on the limited resources of councils to deliver these services. No consumer choice with this option – the owner/developer should have a degree of choice. • A cab rank scheme may have the perverse outcome of poor-performing or less credible certifiers receiving more work rather than being selectively 'weeded out'. • Less experienced or capable certifiers may end up being allocated complex or specialised projects for which they are not skilled/experienced to deal with, resulting in poor certification outcomes.
17. Is it appropriate to mandate the developer appoint the local council as PCA where the developer rejects the private certifier provided?	<p>No.</p> <ul style="list-style-type: none"> • Councils should have choice. • Refer to response at Q 12.
18. Is it appropriate to mandate the developer appoint the local council as PCA where the developer rejects the private certifier provided?	No. Refer to response at Q 12.
21. Do you support Option 2? If not, why not?	No. Refer to response at Q 15.
Option 3: The time limit scheme	
22. Do you agree that a three-year break between certifier and client would sufficiently mitigate a conflict of interest from occurring? If not, what would be a more appropriate break time?	<p>While an enforced break may assist in addressing the perception of conflicts of interest, it has some practical challenges and would not necessarily achieve the outcomes sought. For example:</p> <ul style="list-style-type: none"> • Many large and complex projects take longer than three years to complete, making an enforced break complex and difficult to apply. Such a system would need adjustments to accommodate these longer timeframes. • This may not work in regional areas where supply of certifiers is an issue and councils without in-house expertise are reliant on the availability of private certifiers.

	<ul style="list-style-type: none"> • This may be impractical or risk constraining supply of certifiers in cases where development companies with multiple concurrent projects may be relying on the availability of a number of certifiers. • An alternative is to consider placing a limit on the number of projects which are handled by a certifier for one builder/developer over a specified time period, rather than imposing a mandated break.
<p>24. Do you support an exemption that permits a certifier to work with the same client for more than the maximum number of years (e.g. To see a project through to completion)? If so, what kinds of situations should be exempt?</p>	<p>Instead of imposing an arbitrary turnover or break in certification services after three years, an alternative measure could be as follows:</p> <ul style="list-style-type: none"> • A sustained reliance by a builder/developer on one or a few certifiers over a defined period should trigger an audit of that certifier and builder/developer. • Having a system where such audits are triggered in prescribed circumstances may help target the dishonest practices without compromising competent business practices which are achieving the desirable building outcomes.
<p>25. Do you support Option 3 If not why not?</p>	<ul style="list-style-type: none"> • The time limit scheme may have some merit, but as with Options 1 and 2, it again has practical limitations. For example: <ul style="list-style-type: none"> ○ Building/development companies could get around this requirement with periodic company name changes; ○ May be difficult to implement in regional areas where the availability of certification expertise (both within councils and in the private sector) is limited. ○ Many large and complex projects (which would be captured under the proposed thresholds) take longer than three years to complete.