

LGNSW Submission on the Building and Development Certifiers Bill 2018

September 2018

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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 and Innovation's (DFSI's) Building and Development Certifiers Bill 2018. We are pleased the NSW Government has finally taken steps to introduce this long-awaited new legislation. The Bill proposes to strengthen current provisions governing certifiers, and as such it represents an improvement on the *Building Professionals Act 2005*. However, the new legislation will only be effective if it is activated, resourced and enforced.

Background

The Building and Development Certifiers Bill 2018 has been developed to replace the *Building Professionals Act 2005* (BP Act) which regulates accredited certifiers. The Bill was announced as part of the NSW Government's response to the Review of the *Building Professionals Act 2005* by Michael Lambert (the Lambert Review) in 2015. In response to the Lambert Review, the Government announced it would "overhaul the regulation of certifiers"¹, noting this includes:

- clarifying certifiers' roles and responsibilities;
- improving the independence of certifiers;
- tightening licensee probity requirements; and
- improving complaint handling and disciplinary procedures for certifiers.²

LGNSW made submissions³ to the Lambert Review in June 2015 and October 2015. LGNSW also made a submission in 2013 to a review by George Maltabarow of 'Building Certification and Regulation – Serving A New Planning System for NSW'.

LGNSW welcomes the Government's intention to strengthen the regulation of building and development certification. For too long, LGNSW and councils have had to argue for a stronger more effective regulatory regime for building certifiers.

This new Bill is a critical step towards achieving better building safety and quality outcomes in the future. It supports the recently introduced new object in the *Environmental Planning Assessment Act 2017* (EP&A Act) "to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants"⁴. However, it has been 2 years since the release of the Government's Response to the Lambert Review and it is disappointing that councils and the building industry have been given only 4 weeks to review the Bill.

In view of the limited consultation time, the approach taken in this submission is to consider how the Bill addresses key issues which have been of concern to local government for many years.

¹ NSW Government Response to the Statutory Review of the *Building Professionals Act 2005*, September 2016, p 4

² <https://www.fairtrading.nsw.gov.au/about-fair-trading/have-your-say/building-certification-reforms>

³ LGNSW submissions can be found at <https://www.lgnsw.org.au/about-us/submissions>

⁴ Refer EP&A Act 1979, section 1.3(h)

General Comments

- LGNSW welcomes the Bill, it is long overdue – LGNSW and councils have argued for stronger regulation of private certifiers for 20 years.
- Local government’s key issues with the building regulation and certification system in NSW have been well-documented. The single biggest issue for local government has been the Building Professionals Board’s (BPB’s) lack of ‘teeth’ in relation to compliance and enforcement.
- While local government accepts that private certifiers in the marketplace are here to stay, it expects this to operate within a much tighter regulatory regime.
- The importance of committing resources and attention to tighten regulation and enforcement of builders and certifiers and to move towards a best practice system overall, cannot be over-stated.
- LGNSW has consistently highlighted concerns with the diminished regulatory clout of the BPB as the regulator of building certifiers. We have vigorously argued for a strong and well-resourced single State agency with responsibility for building regulation. This also requires high-level ministerial backing.

Comments on Key Issues for Local Government

LGNSW has provided detailed comment on many aspects of the building certification process in previous submissions referred to above. Our 2015 submission highlighted several issues which councils have identified as key problem areas for many years. These are discussed in the table below, with comments on relevant sections of the Bill.

Issue	<u>LGNSW Comment on Bill (and Amendments to Related Acts)</u>
1. Roles and responsibilities	
<ul style="list-style-type: none"> • LGNSW has maintained for some time that many of the problems with building certification and regulation stem largely from the unclear roles and responsibilities of all players, but also from a lack of regulatory clout and oversight of the entire process by the BPB. • The Government undertook to clarify the role and responsibility of certifiers “through both the re-write of the BP Act and through administrative guidance and education”⁵. • LGNSW and councils have been calling for a system which ensures that all parties are responsible and accountable for their actions, and the community and public interest is at the forefront. The accountability of certifiers to act in the public interest would be enhanced with the establishment of a practice guide together 	<ul style="list-style-type: none"> • Clause 3 Objects of Act - LGNSW supports the inclusion of Objects in the Bill which are notably absent in the current legislation. Introducing Objects in the Bill (particularly clause 3(b)) reinforces the important role of certifiers as impartial public officials whose certification functions affect public health, safety and amenity • LGNSW supports proposed amendments to Sections 11B and C of the <i>Home Building Act</i> to provide greater clarity for community members about the role and responsibility of certifiers and clarify the right of home owners to choose their own certifier.

⁵ NSW Government Response to the Statutory Review of the Building Professionals Act 2005, September 2016, p 13

with a program of proactive investigations and audits of certifiers and certification.	
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2. Conflict between the public interest and commercial drivers

<ul style="list-style-type: none"> • The Lambert Review observed the important issue of “the conflict between the accountability of certifiers for acting in the public interest and their commercial drivers for commercial success, including maintaining good relations with builders and owners/developers.”⁶ • An ongoing point of tension is the inherent conflict between the obligations of the certifier to the property owner (i.e. their client/customer), and their legal obligations in their capacity as a ‘public officer’. • Local government maintains the view that the certifier (whether they are a council or private certifier) is a public officer and needs to act in a manner that reflects community standards. 	<p><u>Part 3, Division 2 Conflicts of interest</u></p> <ul style="list-style-type: none"> • LGNSW welcomes the clarification and strengthening of existing conflicts-of-interest provisions in this division. • Clause 29 Meaning of “conflict of interest” – This clause requires further clarification. Licensed certifiers – both council and private – may come into contact with a development application (DA) in some minor capacity from time to time, which may not necessarily constitute “working on” a DA and therefore be regarded as a conflict of interest. • LGNSW supports the amendments and strong penalties proposed to Sections 11B and C of the Home Building Act the Home Building Act which refer to the power imbalance between an owner and a home builder when negotiating the appointment of a certifier. These provisions will go some way to addressing potential or perceived conflicts of interest.
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3. Compensation for landowners

<ul style="list-style-type: none"> • The financial burden on unsuspecting purchasers as a consequence of having to rectify defective, incomplete or unauthorised/illegal building work is one of many areas of increasing frustration to local government. These impose significant remediation costs on individual landowners and regulatory costs on councils. • Council officers endeavour to have the relevant private accredited certifier facilitate the remediation of the defective development, however these attempts are not often successful. • Unfortunately for occupants/owners, defective developments may remain latent for a number of years before coming to the attention of council. (For example, as a result of either Fire 	<ul style="list-style-type: none"> • <u>Disciplinary action that may be taken by Secretary - Clause 48(c) - Under the corresponding provision in the BP Act (section 31(4)(g)) an accreditation holder may be ordered to pay a “complainant” compensation for damages arising from their unprofessional conduct or professional misconduct, to a maximum of \$20,000. Compensation for damages may also be available in common law. Clarification is requested as to whether similar provisions exist in this Bill. The reference to “complainant” appears to have been removed, and the payment appears to be limited to the Secretary.) LGNSW would like to see this clause be amended to include provision so that compensation may be required to be paid to not only the Secretary (which in many cases is the council) but to anyone who has suffered loss as a result of a certifier’s</u>
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⁶ Lambert, M., Review of the *Building Professionals Act 2005*, October 2015, p 289

<p>& Rescue NSW or an owner/neighbour complaint.)</p> <ul style="list-style-type: none"> • Provision should be made to provide for adequate compensation for landowners who suffer measurable financial hardship as a result of the incompetence or unprofessional practices of private accredited certifiers. 	<p>unprofessional conduct or professional misconduct.</p>
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4. Compliance and enforcement

<ul style="list-style-type: none"> • Inadequate compliance and enforcement of private certifiers has been an ongoing frustration for local government. The system has been characterised by a lack of clear policing of certifiers, insufficient penalties, poor disciplinary action and ineffective audits. • The Government Response to the Lambert Review promised that the re-write of the BP Act will review certifier penalties⁷. • Any new and/or higher powers will have little effect if insufficient resources and funding are allocated to compliance and enforcement. 	<ul style="list-style-type: none"> • LGNSW supports the introduction of new and/or higher penalties in the Bill compared with current provisions in the BP Act. For example: <ul style="list-style-type: none"> ○ Clause 43 – new penalty of 300PU for “representing work is work requiring a licensed certifier”. ○ Clause 44 – revised penalty increased to 10,000PU for “knowingly issuing a false certificate”. ○ Part 6 – a range of new penalties have been introduced to correspond with the new Part which enables industry accreditation schemes to be formed. ○ Clause 100 – revised penalty increased to 1,000PU for “obstruction of authorised officers”. ○ Part 7 – LGNSW supports the introduction of a new set of directions (not previously included in the BP Act) for which a penalty can be issued. ○ Schedule 2 [1], 11B – new penalties relating to certifiers providing consumer information —y of before entering into a contract. ○ Schedule 2 [1], 11C – new penalties relevant to “undue influence relating to appointment of certifiers.
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5. Complaints handling

<ul style="list-style-type: none"> • LGNSW and councils have maintained for some time that the BPB’s complaints handling procedures are inadequate. • The Government Response to the Lambert Review promised that as part of the re-write of the BP Act existing complaints handling 	<ul style="list-style-type: none"> • Clause 47 Notice to show cause - LGNSW welcomes the proposal to replace the onerous complaints process under the BP Act (ref Part 3, Division 2 Making of complaints and preliminary procedures) with a streamlined process that aligns with processes used under other licensing
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⁷ NSW Government Response to the Statutory Review of the Building Professionals Act 2005, September 2016, p 38

<p>procedures will be reviewed and measures will be explored to improve responsiveness to complaints⁸.</p>	<p>regimes administered by DFSI. This clause provides for the Secretary to undertake investigations, however it is unclear how/whether councils and/or members of the public can request the Secretary to investigate a certifier. LGNSW requests clarification of this process.</p> <ul style="list-style-type: none"> • Clause 106(1) & (2) - Complaints, investigations and audits of certifiers and accreditation authorities - LGNSW supports provisions in this clause which clarify that the Secretary may investigate a certifier, whether a complaint has been received or not.
<p>6. Audits</p>	
<ul style="list-style-type: none"> • The NSW Government response to the Lambert Review included an undertaking to redirect the BPB's funding to data, compliance and audit activity⁹. • Audits are an important tool to ensure compliance. LGNSW requests that the Government provides information about the DFSI's "system of audit"¹⁰ and outline what resources are being or will be put into these. 	<ul style="list-style-type: none"> • Clause 106(3) – LGNSW supports this provision, which authorises the Secretary to conduct an audit of a licensed certifier or an accreditation authority at any time. • Clause 71 Condition relating to independent audits - LGNSW supports this clause which contains provisions requiring an accreditation authority to engage an auditor to conduct an audit of its functions if required to do so by the Secretary.
<p>7. Written contracts</p>	
<ul style="list-style-type: none"> • Some councils have expressed concerns with the practicalities of written contracts for certification work. (These were introduced in 2013 with amendments to the BP Act). • The Lambert Review identified that formal contracts may not be the most appropriate way to deal with certifier/client obligations as a means to address various issues associated with certification functions¹¹. Lambert also identified an "appearance of conflict in the arrangement as a commercial contract implies that the certifier is acting as the agent of the 	<p><u>Clause 31 - Requirements relating to contracts for certification work</u></p> <ul style="list-style-type: none"> • LGNSW reiterates the position taken in our 2015 submission, that in their current form, written contracts are considered impractical by both council and private certifiers. A simple agreement which identifies the respective rights and responsibilities of each stakeholder should be sufficient. • LGNSW recommends consideration be given to replacing the requirement for formal contracts with a less formal process

⁸ NSW Government Response to the Statutory Review of the Building Professionals Act 2005, September 2016, p 38

⁹ NSW Government Response to the Statutory Review of the Building Professionals Act 2005, September 2016, p 21 (refer also p 12): "DFSI will establish a system of audit to be funded by the consolidation of the current industry Board and redirecting its costs. Appropriate risk focus of audit activity will be considered as part of establishing the audit function. Ongoing cost recovery and statutory arrangements for future pro-active investigation and audit activity will also be considered as part of re-writing the BP Act".

¹⁰ NSW Government Response to the Statutory Review of the Building Professionals Act 2005, September 2016, p 21

¹¹ Lambert, M., Review of the *Building Professionals Act 2005*, October 2015, p 261

<p>owner/developer whereas the certifier is a regulator”¹².</p>	<p>such as a letter of agreement or engagement.</p> <ul style="list-style-type: none"> • LGNSW requests that DFSI works with council and industry certifiers to develop a simple and more workable alternative to the current formal written contracts.
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8. Council cannot refuse appointment as Principal Certifying Authority (PCA)

<ul style="list-style-type: none"> • 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 are sometimes compelled to take on projects in certain circumstances (e.g. where a private certifier has been sanctioned by the accreditation body (i.e. the Building Professionals Board). Councils cite examples where they have been directed by the BPB to take over a number of projects which are problematic and have poor records/documentation. • This issue, combined with potential emerging insurance concerns, may place an undue burden on local government having to remedy problematic certification projects. 	<p><u>Schedule 3, paragraph 9 and 10 (Amendments to EP&A Act 1979)</u></p> <ul style="list-style-type: none"> • Under the amendments proposed here, councils will continue to be unable to refuse appointment as a principal certifier. • The amendments will enable the Secretary to appoint a certifier for certain “classes of development”. In practice this would mean that not only would councils continue to be required to take on the role of ‘replacement certifier’ (when a private certifier becomes incapacitated, suspended etc) but they may also be appointed to specific and as-yet-undefined work or categories of development. This is likely to result in councils having carriage of problematic projects. • Local government must be consulted in the development of any “alternative process to be implemented for the appointment of a principal certifier for certain, higher-risk developments”.
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9. Practice Guide for certifiers

<ul style="list-style-type: none"> • The NSW Government has undertaken to create a ‘Practice Guide’ which will be a recommended reference document for certifiers, created and maintained administratively, rather than a statutory instrument.¹³ 	<ul style="list-style-type: none"> • Clause 14 Compliance with standards or methodologies – LGNSW supports this new provision which introduces powers to for the Secretary to issue standards or methodologies, such as a practice guide, as a condition of the certifier’s licence in the future. • The Practice Guide must be in place when the Act commences. This is critical to ensure that licensed certifiers are aware of and understand their obligations in the Bill. • LGNSW seeks assurance that the Practice Guide will be well resourced, well communicated and regularly reviewed and updated with new material and examples
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¹² Ibid.

¹³ NSW Government Response to the Statutory Review of the Building Professionals Act 2005, September 2016, p 5

	<p>of good practice as they come to light through proactive auditing, training and the like.</p> <ul style="list-style-type: none"> • LGNSW recommends wider consultation with industry and local government on the form and content of the Practice Guide before it is finalised.
<p>10. Industry accreditation/co-regulation</p>	
<ul style="list-style-type: none"> • In response to the Lambert Review, the Government proposed to allow industry accreditation schemes to be recognised as the basis of, or instead of, Government-issued accreditation¹⁴. • Parts 5 and 6 of the Bill are new sections intended to create a framework for enabling co-regulation for certain building professionals. 	<ul style="list-style-type: none"> • The application of Part 6 assumes that suitably qualified accreditation bodies will be interested in and capable of satisfying the requirements of a co-regulatory model. • This pre-supposes that industry bodies will be able to demonstrate that they have reasonable policies, processes, qualifications, skills and resources to manage licencing and complaints, disciplinary action etc for the practitioners to whom they issue a licence. (This process is currently underway for accrediting fire safety bodies, however, LGNSW understands that it has proven to be more challenging than first expected.)

Specific comments on the Bill

Specific comments on selected clauses in the Bill are provided in **Attachment 1**.

Other issues

LGNSW would like to make the following comments on broader aspects of building regulation which, although outside the direct scope of the Bill, are nevertheless important to local government in supporting the effective functioning of the building regulation system.

1. Accountabilities of other building practitioners

- The Bill is solely focussed on the actions and operations of certifiers and does not address the accountability of other practitioners in the building process.
- It has been an ongoing concern - and indeed recognised by the BPB itself - that “one of the emerging trends associated with defects in buildings is that some accredited certifiers, as the only holders of mandatory professional indemnity insurance, are reportedly being pursued in legal claims for building work”¹⁵.

¹⁴ NSW Government Response to the Statutory Review of the Building Professionals Act 2005, September 2016, p 4

¹⁵ BPB Submission to NSW Planning System Review, November 2011, p. 11

- LGNSW would like to see proposals to ensure that the principal contractor and other professionals involved in the design and construction of a building are accountable for their work and hold professional indemnity and run off insurance accordingly.

2. Administration and funding of building regulation and certification

- The Government Response to the Lambert Review did not support having a dedicated Minister for Building Regulation. Instead, responsibilities for building regulation have been consolidated within DFSI reporting to the Minister for Innovation and Better Regulation¹⁶.
- The Government also proposed to establish a Building Regulators Committee which has been charged with improving coordination between DP&E and DFSI and giving 'further consideration' to recommendations in the Lambert Review which were not fully adopted by the Government¹⁷.
- While the stronger penalties and other regulatory powers in this Bill are welcomed, the new legislation will only be effective if it is resourced and enforced. There must be a commitment from the NSW Government to sufficiently and effectively resource the Secretary/DFSI in its role overseeing building industry activities. Without such priority and focus, it is more likely that the move to a single agency will be no guarantee of success.

3. Management of asbestos and other hazardous material

There is a great responsibility on the principal certifying authority (PCA) to ensure that asbestos is identified and managed correctly as per section [136E of the *Environmental Planning and Assessment Regulation 2000*](#)¹⁸. However, councils continue to be plagued by complaints about building sites that do not manage asbestos safely as well as the scourge of the illegal dumping of asbestos from building sites. It is unclear if all PCA's are checking for asbestos, and other hazardous materials, and it is unclear if the changes proposed in the Bill will do anything to improve this situation. This is a great opportunity to strengthen safeguards against asbestos and LGNSW requests that PCA's be held more accountable for their responsibilities in ensuring asbestos is removed and disposed of safely and legally.

Conclusion

The Bill provides a long-overdue tightening of the regulatory framework governing certification. In summary, LGNSW supports provisions in the Bill that:

- include a greater range and size of penalties;
- emphasise the responsibility of the certifier as a public officer i.e. to act in the public interest;

¹⁶ NSW Government Response to the Statutory Review of the Building Professionals Act 2005, September 2016, p 10

¹⁷ Ibid.

¹⁸ EP&A Regulation 2000, Section 136E Development involving bonded asbestos material and friable asbestos material

- seek to clarify the role of the certifier, and also endeavour to improve the understanding of the certifier's role;
- include stronger provisions to address potential and perceived conflicts of interest.
- enable the Secretary to issue requirements on certifiers (e.g. standards, methodologies which may include a practice guide), as a condition of the licence.

LGNSW recommends that the DFSI consult local government to develop the regulations and practice guide(s) to support the Bill, and that sufficient time be allowed for councils' input.

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 1

Comments on selected provisions in the *Building and Development Certifiers Bill 2018*

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	LGNSW Comment
Part 1 – Preliminary					
3	Objects of Act	NEW	s 1.3 EP&A s 3 RV s 3 MD&R	Objects have been included to identify the purpose of the Bill and place a particular emphasis on the role of certifiers as impartial public officials whose certification functions affect public health, safety and amenity.	<p>LGNSW supports the introduction of Objects to clarify the Bill's purpose and in particular to emphasise the role of certifiers as impartial public officials (ref cl 3(b)).</p> <p>Local government has consistently argued that the certifier (whether they are a council or private certifier) is a public officer and needs to act in a manner that reflects community standards. LGNSW and councils have been calling for a system in which the community and public interest is at the forefront.</p> <p>It will be critical to establish and maintain a practice guide to create a benchmark for the process that should be followed by a certifier to act "impartially, ethically and in the public interest".</p>

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	LGNSW Comment
4	Definitions	3	-	<p>Definitions have been updated, with key changes including:</p> <p><i>“accreditation authority”</i> – the Government intends to approve non- government organisations to administer accreditation schemes for competent fire safety practitioners, which is part of the Competent Fire Safety Practitioner Co-Regulatory Accreditation Framework which permits industry accreditation schemes.</p> <p><i>“certification legislation”</i> – definition was updated to account for all current legislation under which certificates are issued.</p> <p><i>“certification work”</i> – definition was broadened to consider the breadth of responsibilities imposed on certifiers, such as the standards of behaviour which are contained in the statutory Code of Conduct. The expanded definition also promotes the accountability of certifiers, and affects matters such as grounds for disciplinary action.</p> <p><i>“licensed certifier”</i> – ‘accredited certifiers’ under the BP Act are now ‘licensed certifiers’ under the Bill to differentiate between Government- issued licenses for people who carry out ‘certification work’ and certificates of accreditation issued by approved non-government bodies who carry out ‘regulated work’.</p> <p><i>“relevant offence”</i> – the revised definition covers a range of offences in the Bill and has implications for licensing processes throughout the Bill, including the assessment of licensing applications and notifying the regulator in certain circumstances.</p> <p><i>“regulated work”</i> – the definition is amended to also refer to work carried out by those accredited by approved non-government accreditation authorities, including the work of competent fire safety practitioners and any other work declared by this or any other Act to be regulated work.</p>	<p>The Bill introduces a new term –“regulated work” – LGNSW would like a clearer understanding of the meaning and intended application of this new term. Further, what else is likely to become regulated work in the future? What are the implications of this?</p>

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	LGNSW Comment
Part 2 – Licensing of certifiers					
Division 1 – Preliminary					
7	Grounds for finding that a person is not a suitable person to carry out certification work	7	-	<p>General licensing criteria for individuals and body corporates have been consolidated to ensure that certifiers and directors of body corporates can better carry out their supervisory responsibilities, and include the following key changes:</p> <ul style="list-style-type: none"> • Introducing the requirement that a body corporate must have at least one director with an individual licence in the same category as that held by the licensed body corporate; • Introducing a general probity provision which allows an application to be refused if an individual, body corporate or director of a body corporate has been convicted of a relevant offence within the previous ten years; • Excluding an individual, body corporate or director of a body corporate if the Independent Commission Against Corruption has made a finding or is of the opinion that the person has engaged in corrupt conduct within the previous ten years; • Excluding a person who is disqualified from holding an equivalent authorisation under the law of another jurisdiction; • Refusing a licence if a “close associate” of an applicant is not a fit and proper person to hold a licence and the close associate exercises a significant influence over the applicant, or the operation and management of the 	<p>LGNSW supports strengthened provisions for issuing certification licences.</p> <p>Does this provision include breaches of any relevant code of conduct or where penalty infringement notices (PINs) have been issued?</p>

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	<i>LGNSW Comment</i>
				applicant's business. The provision is consistent with other legislation administered by Fair Trading.	
Division 2 – Application for licence					
11	Duration of licence	10	-	The Bill extends the duration of a licence from one year to up to five years which aligns with the Government Response and reflects the Government's commitment to reduce administrative burden and red tape.	LGNSW supports this change. Application fees set in the Regulation should reflect a reduced fee for the 3 and 5 year periods. Is there provision in the Bill for the Secretary to reduce the licence period from 3 or 5 years to 1 year, if the licenced certifier is found guilty of an offence that would necessitate a limitation be placed on the licence period of the licence holder?
Division 3 – Conditions of licence					

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	LGNSW Comment
14	Compliance with standards or methodologies	NEW	-	In the Government Response, the Government committed to introducing a best practice industry standards guide to set out the required approach to certification and creating a framework for better cooperation with other parties, such as councils to improve certification outcomes. The Bill has been drafted to provide the Secretary with the power to issue any standard or methodology, such as a practice guide, as a condition of the certifier's licence in the future.	The establishment and maintenance of a practice guide for certifiers is vital. One area, for example, that will need and supporting information is to clarify what behaviour constitutes acting "impartially, ethically and in the public interest" (ref Cl 3(b) Objects).
Division 4 – Suspension or cancellation of a licence					
19	Suspension or cancellation may be subject to conditions	NEW	s 210 BS	This provision supports administration of licence suspension and cancellation to enable the Secretary to issue a licence variation on a case-by-case basis. For example, it may be appropriate for a certifiers licence to be suspended, but only subject to certain conditions.	Refer to comments above under cl 11 – Will clause 16 include provision for the Secretary to reduce the licence period from 3 or 5 years to 1 year, if the licenced certifier is found guilty of an offence that would necessitate a limitation be placed on the licence period?
Part 3 – Requirements on certifiers					
Division 2 – Conflicts of interest					
28	Conflicts of interest	66	-	Conflict of interest provisions have been updated to better capture the breadth of work undertaken by certifiers. This provision further broadens the exemptions for certifiers from the conflict of interest process to more accurately reflect the types of work which may be subject to a potential conflict.	LGNSW supports having clear and strong conflict of interest provisions. The certifier (whether they are a council or private certifier) is a public officer and needs to act in a manner that reflects community standards. The potential conflict of interest brought about by the inherent conflict between meeting the needs of the client and satisfying wider community and public expectations remains an ongoing point of tension.
29	Meaning of "conflict of interest"	67, 68 & 69	-	The Bill replicates some of the examples of a 'private interest' to match those in the BP Act and redefines the other conflict of interest provisions to more effectively target and capture instances of conflicting interest.	Cl 29(2)(d) needs further clarification. Currently wording implies that anyone who has "worked on" (or come into contact with) and development application (DA) has a conflict of interest. There may be practical consequences if this is not made clearer. Licensed certifiers – both council and private – may come into contact with a DA in some minor capacity from time to time, but would this constitute "working on" a DA and therefore is a conflict of interest?

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	LGNSW Comment
30	Meaning of having a pecuniary interest	70	-	The Bill revises the provision to broaden its application to include relationships with the certifier, whether family, personal, employment, business or other.	LGNSW welcomes clear and strong pecuniary interest provisions.
Division 3 – General requirements					
31	Requirements relating to contracts for certification work	73A	-	The Bill strengthens the requirement for a written contract by providing that it is a condition of a licence that a licensed certifier must carry out certification work under a written contract between the certifier (or certifier's employer), and the beneficiary of the development consent or other person prescribed by the <i>Environmental Planning and Assessment Regulation 2017</i> . 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.	<p>Some councils have expressed concerns with the practicalities of written contracts for certification work. (These were introduced in 2013 with amendments to the BP Act). The Lambert Review identified that formal contracts may not be the most appropriate way to deal with certifier/client obligations as a means to address various issues associated with certification functions (refer p 261). Lambert also identified an “appearance of conflict in the arrangement as a commercial contract implies that the certifier is acting as the agent of the owner/developer whereas the certifier is a regulator” (refer p 261).</p> <p>LGNSW reiterates the position taken in our 2015 submission, that in their current form, written contracts are considered impractical by both council and private certifiers. A simple agreement which identifies the respective rights and responsibilities of each stakeholder should be sufficient.</p> <p>LGNSW recommends consideration be given to removing the requirement for formal contracts and replacing them with a less formal process such as a letter of agreement or engagement.</p> <p>Will the proposed contract provisions referred to in cl 31 be reviewed/revised to make them more workable?</p>
32	Code of conduct	4(2)(b)	-	The Bill gives greater prominence to the Code of conduct by inserting a regulation making power to prescribe the Code. The supporting regulations may create offences for failing to comply with the Code of Conduct where appropriate, to promote certifier independence and accountability.	LGNSW supports giving statutory prominence to the Code of conduct by prescribing it in the regulations.

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	LGNSW Comment
Division 5 – Miscellaneous offences relating to certification					
42	Improper influence with respect to carrying out certification work	84	-	The Bill carries over and updates existing provisions from the BP Act.	LGNSW supports retention and clarification of this provision. Council certifiers are already governed by strict provisions and policies governing the acceptance gifts and benefits. To ensure that private certifiers are aware of and understand these obligations, the regulations, practice guide and/or code of conduct should include information which can provide clarity to certifiers on what is considered to represent “any benefit of any kind”.
Part 4 – Disciplinary action against certifiers					
Division 1 – Preliminary					
45	Grounds for taking disciplinary action	19	-	The Bill deletes the terms “unsatisfactory professional conduct” and “professional misconduct”, and instead provides grounds for taking disciplinary action. While the proposed grounds are similar to matters previously covered under the definition of “unsatisfactory professional conduct” in section 19 of the BP Act, the list has been supplemented to be more comprehensive by introducing additional grounds. The additional grounds are intended to more accurately account for the scope of work undertaken by certifiers, for which they should be accountable.	LGNSW supports having clearer and stronger provisions which articulate ground for disciplinary action. The practice guide will be critical to clarify by way of examples as to what is expected of a licensed certifier who: “has fallen short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent licensed certifier” - cl 45(a); or “has engaged in improper or unethical conduct that indicates that the licensed certifier is unfit to properly carry out certification work” - cl 45(l).
47	Notice to show cause	NEW	s 61 HB s 72 FT	The complaints and disciplinary process for certifiers has been streamlined under the Bill to align with the process used in other licensing regimes administered by Fair Trading.	LGNSW welcomes the proposal to replace the onerous complaints process under the BP Act (ref Part 3, Division 2 Making of complaints and preliminary procedures) with a streamlined process that aligns with processes used under other licensing regimes administered by DFSI. This clause provides for the Secretary to undertake investigations, however it is unclear how/whether councils and/or members of the public can request (or complain to) the Secretary to

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					investigate a certifier. LGNSW requests clarification of this process.
48	Disciplinary action that may be taken by Secretary	31	-	The Bill carries over and updates existing provisions from the BP Act.	<p>LGNSW supports the introduction of higher penalties than currently provided for in the BP Act.</p> <p>Under the corresponding provision in the BP Act (s 31(4)(g) an accreditation holder may be ordered to pay a complainant compensation for damages arising from their unprofessional professional conduct or professional misconduct, to a maximum of \$20,000. Compensation for damages may also be available in common law.</p> <p>This provision appears to have been removed from the Bill.</p> <p>Provision should be made for adequate compensation for landowners who suffer measurable financial hardship as a result the incompetence or unprofessional practices of private accredited certifiers.</p>
50	Enforcement of monetary penalties and payment of costs	90	-	The Bill strengthens the regulator’s powers and aligns with other licensing legislation administered by Fair Trading.	LGNSW supports having stronger powers to enforce penalties, by suspending a licence holder’s licence until the penalty is paid.
Part 5 – Accreditation of persons carrying out regulated work					
52	Meaning of “regulated work”	NEW	-	<p>Part 5 is a new Part and delivers on the Government’s commitment to exploring co-regulation for certain building professionals.</p> <p>Part 5 establishes the concept of “regulated work”. While “regulated work” is not work that requires a licensed certifier, it is work that requires the person carrying out the work to have certain skills, competencies and experience.</p> <p>The work of competent fire safety practitioners is considered by the Bill to be</p>	<p>Refer to comments above under cl 4. The Bill introduces a new term -“regulated work” – LGNSW would like a clearer understanding of the meaning and intended application of this new term. It is understood that regulated work currently only includes work carried out by a competent fire safety practitioner. What else is likely to become regulated work in the future? What are the implications of this?</p>
53	Regulated work requires accreditation	NEW	-		
54	Accreditation of persons to carry out regulated work	NEW	-		
55	Regulations may authorise licensed certifiers to carry out regulated work	NEW	-		

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	LGNSW Comment
				regulated work. The Bill and any other Act may also declare other work to be “regulated work” in the future.	
Part 6 – Approval of accreditation authorities					
Division 1 – Accreditation authorities					
56	Accreditation authority – meaning	NEW	-	<p>Similar to Part 5, Part 6 is also new and delivers on the Government’s commitment to exploring industry co-regulation for certain building professionals.</p> <p>Part 6 establishes the regulatory mechanism under which competent fire safety practitioners can be accredited by non-government organisations who operate industry accreditation schemes.</p> <p>Although Part 6 is a new Part, majority of the requirements in this Part are broadly similar with the requirements under Part 2, Division 2 of the BP Act, and reflect existing practice across similar legislation where accreditation is authorised – see <i>Biosecurity Act 2015</i>, <i>Passenger Transport Act 1990</i> and <i>Teacher Accreditation Act 2004</i>.</p> <p>The 2017 amendments to the <i>Environmental Planning and Assessment Regulation 2017</i> empowered the Secretary of DFSI to recognise individuals who have undergone training or assessment by a specified professional or industry organisation as “competent fire safety</p>	<p>The application of Part 6 assumes that suitably qualified accreditation bodies will be interested in and capable of meeting the requirements of a co-regulatory model. There is an expectation on industry bodies to demonstrate to the Government that they have reasonable powers, provisions, processes etc to manage licencing and complaints, disciplinary action etc for the practitioners to whom they issue a licence. What is the status of the accreditation process for fire safety associations? Has there been sufficient interest from these industry bodies? What will happen if these industry bodies cannot successfully satisfy these accreditation criteria?</p>
57	Functions of an accreditation authority	NEW	-		
58	Person must be approved to exercise functions of accreditation authority	NEW	-		
59	Approval of accreditation authority to exercise functions	NEW	-		
60	Effect of approval	NEW	-		
61	Accreditation authority approval guidelines	NEW	-		
Division 2 – Approval procedure					
62	Application for approval	NEW	-		
63	Grant or refusal or approval	NEW	-		
64	Duration of approval	NEW	-		
65	Variation of approval	NEW	-		
Division 3 – Condition of approval					
6	Conditions of approval	NEW	-		

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	LGNSW Comment	
67	Condition that functions exercised in accordance with approved accreditation	NEW	-	<p>practitioners”.</p> <p>The Bill subsequently repeals clause 167A of the Regulation to give effect to this new Part and enables organisations wishing to operate industry accreditation schemes to do so, subject to the Secretary’s approval. The Bill reintroduces the definition of ‘competent fire safety practitioner’ into the <i>Environmental Planning and Assessment Act 1979</i> as a holder of an accreditation under the Bill that authorises the holder to exercise the functions of the competent fire safety practitioner as per their accreditation.</p> <p>A person who is not satisfied with the decision of the Secretary to cancel, suspend or deny an authority approval can apply to NCAT for an administrative review of the decision in accordance with the <i>Administrative Decisions Review Act 1997</i>. Processes and timeframes for administrative review are detailed in the that Act, rather than being replicated in the Bill.</p>		
68	Condition that work be carried out only by individuals notified to Secretary	NEW	-			
69	Condition that functions be exercised in the public interest	NEW	-			
70	Condition requiring provision of information to the Secretary	NEW	-			
71	Condition relating to independent audits	NEW	-			
72	Condition relating to investigations and audits conducted by Secretary	NEW	-			LGNSW supports this new condition which gives power to the Secretary to require accreditation authorities to conduct audits and investigations.
73	Condition requiring publication of information	NEW	-			
74	Condition requiring the keeping of records	NEW	-			
Division 4 – Suspension or cancellation of approval						
75	Grounds for suspension or cancellation of approval	NEW	-			
76	Suspension of approval	NEW	-			
77	Cancellation of approval	NEW	-			

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	LGNSW Comment
78	Suspension or cancellation may be subject to conditions	NEW	-		
Division 5 – Miscellaneous					
79	Requirements for an accreditation scheme	NEW	-		
80	Offence of contravening condition	NEW	-		
81	Offence of carrying out accreditation authority functions during suspension	NEW	-		
82	Surrender of approval	NEW	-		
83	Review by NCAT	NEW	-		
84	Disclosure of information	NEW	-		
Part 7 – Powers of authorised officers					
Division 1 – Preliminary					
85	Definitions	NEW	-	The provision is introduced to clarify Part 7 which governs the powers of authorised officers and aligns with similar provisions in other licensing frameworks administered by Fair Trading.	Who will be appointed as ‘authorised officers’? Will these be council officers, or employees of DFSI or DP&E?
Division 2 – Authorised officers					
87	Appointment of authorised officers	NEW	s 18 FT s 149 MD&R	The Bill contains a range of enforcement provisions which reflect the integration of the Building Professionals Board’s functions into DFSI. These powers significantly enhance the ability of authorised officers to undertake compliance and enforcement operations under the legislation, and aligns with other licensing legislation administered by Fair Trading.	LGNSW supports enhancements to existing powers that will improve compliance and enforcement operations. However, these stronger powers will have little effect if insufficient resources and funding are allocated to compliance and enforcement. LGNSW has been calling for a stronger regulatory body, yet this Bill will remove the BPB altogether, placing the onus on ‘authorised officers’.

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	LGNSW Comment
88	Scope of authority	NEW	s 18 FT	The provision significantly enhances the ability of authorised officers to undertake compliance and enforcement operations under the legislation, and aligns with other licensing legislation administered by Fair Trading.	
Division 3 – Information gathering powers					
90	Exercise in conjunction with other powers	NEW	-	The provision significantly enhances the ability of authorised officers to undertake compliance and enforcement operations under the legislation, and aligns with other licensing legislation administered by Fair Trading.	See above comments (under cl 87 and 88).
92	Power of authorised officers to require answers	NEW	s 127 HB	The provision significantly enhances the ability of authorised officers to undertake compliance and enforcement operations under the legislation, and align with other licensing legislation administered by Fair Trading. The provision also introduces new penalties to correspond with additional matters that can be issued by an authorised officer as a direction.	See above comments (under cl 87 and 88).
93	Recording of evidence	NEW	s 152 MD&R	The provision significantly enhances the ability of authorised officers to undertake compliance and enforcement operations under the legislation, and aligns with other licensing legislation administered by Fair Trading.	See above comments (under cl 87 and 88).
Division 5 – Miscellaneous					
99	Taking possession of records to be used as evidence	NEW	s 152 MD&R s21 FT	The provision significantly enhances the ability of authorised officers to undertake compliance and enforcement operations under the legislation, and aligns with other licensing legislation administered by Fair Trading.	See above comments (under cl 87 and 88).

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	LGNSW Comment
100	Obstruction of authorised officers	58	s 128 HB s 23 FT s 155 MD&R	The provision significantly enhances the ability of authorised officers to undertake compliance and enforcement operations under the legislation, and aligns with other licensing legislation administered by Fair Trading. This is supported by an increase in penalty amounts.	LGNSW supports the significantly higher penalties proposed in this clause (up to 1,000 penalty points for corporations and 200 penalty points for individuals), compared with the current provisions (50 penalty points).
101	Failure to comply with direction	59	s 127 HB s 28 FT	The provision significantly enhances the ability of authorised officers to undertake compliance and enforcement operations under the legislation, and aligns with other licensing legislation administered by Fair Trading. This is supported by an increase in penalty amounts.	LGNSW supports the strengthened provisions in this clause.
Part 8 – Other functions of the Secretary					
106	Complaints, investigations and audits of certifiers and accreditation authorities	27	-	This provision is amended to clarify that the Secretary may investigate, whether a complaint has been received or not, in relation to a range of matters. The power affirms the regulator’s ability to proactively conduct investigations, in addition to investigations that are linked to complaints.	LGNSW supports having clearer provisions around complaints and investigations, as this has been a major cause of concern and frustration for councils over many years. LGNSW supports provisions in this clause which authorise the Secretary to conduct an audit of a licensed certifier or an accreditation authority at any time. However, these provisions will have limited effect unless sufficient resources, funding and priority are allocated to investigate and audit certifiers.
Key amendments to other legislation to be introduced by the <i>Building and Development Certifiers Bill 2018</i>					
Sections 6.6 and 6.12 – <i>Environmental Planning and Assessment Act 1979</i>					
Schedule 3, paragraph 9 and 10	Requirements before building work commences/requirements before subdivision work commences	NEW	-	The provisions enable the Minister responsible for the <i>Environmental Planning and Assessment Act 1979</i> to authorise the Secretary of DFSI as a person who can appoint a principal certifier for a development, when it is in the public interest to do so. A principal certifier might suddenly die,	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. Under the amendments proposed here, councils will continue to be unable to refuse appointment as a principal certifier. Councils cite examples where they have been directed to take over projects which are problematic and have poor

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	LGNSW Comment
				become incapacitated, or be suspended and not be willing or able to make transfer arrangements. Other situations where it may be appropriate for the principal certifier to be appointed by the Secretary include a conflict of interest or where it is likely for potential harm to be caused. The provision is scheduled to commence in September 2018.	records/documentation. This issue, combined with potential emerging insurance concerns, may place an undue burden on local government having to remedy problematic certification projects.
Schedule 3, paragraph 9 and 10		NEW		<p>The provisions enable the Minister responsible for the <i>Environmental Planning and Assessment Act 1979</i> to prescribe classes of development in which the principal certifier is to be appointed in a manner prescribed by the regulations, including but not limited to, being approved in accordance with a scheme.</p> <p>These provisions will enable an alternative process to be implemented for the appointment of a principal certifier for certain, higher-risk developments.</p> <p>It is intended that the final form of an alternative appointment process and the developments to be captured by the alternative appointment process will be subject to public consultation in the future.</p>	<p>The amendments will enable the Secretary to appoint a certifier for certain “classes of development”. In practice this would mean that not only would councils continue to be required to take on the role of ‘replacement certifier’ (when a private certifier becomes incapacitated, suspended etc) but they may also be appointed to specific and as-yet-undefined work or categories of development. This is likely to result in councils having carriage of problematic projects.</p> <p>Local government must be consulted LG must be consulted in the development of any “alternative process to be implemented for the appointment of a principal certifier for certain, higher-risk developments”.</p>
Sections 11B and C – Home Building Act 1989					
Schedule 2,	Consumer information – certifiers	NEW	-	This provision provides greater clarity to the community about the role and responsibility of certifiers, to reduce or eliminate misconceptions. The prescribed information aims clarify the right of home owners to choose their own certifier.	

Bill reference	Provision in Bill	BP Act section	If a new provision – similar legislation*	Rationale on the provision	<i>LGNSW Comment</i>
paragraph 1					
	Undue influence relating to appointment of certifiers	NEW	-	The proposed change is intended to address the power imbalance between an owner and a home builder when negotiating the appointment of a certifier. To emphasise the seriousness of the offence, the proposed penalty is 1000 penalty units in the case of a corporation, and 300 penalty units in any other case.	LGNSW supports this provision and the strong penalties proposed.