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Disciplinary action against certifiers

Part 4 of the Building and Development Certifiers Act 2018 (NSW)





Acknowledgement of Country

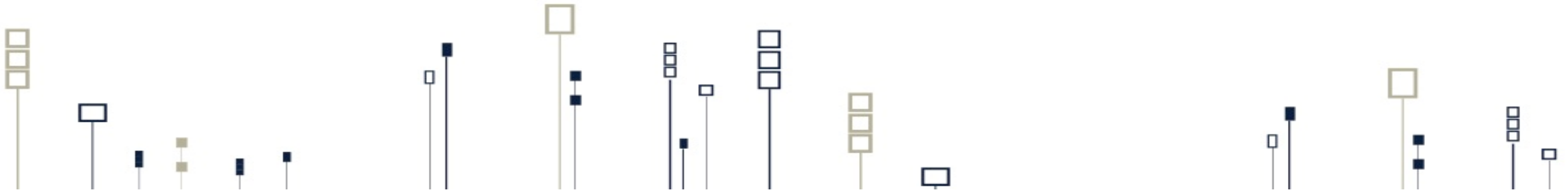
I acknowledge the Gadigal People of the Eora Nation as the traditional custodians of the land on which we gather today, land which has never been ceded.

It is a privilege to be able to present to you from this land today.

Overview

- Grounds for taking disciplinary action against a certifier
- The disciplinary process
 - Investigations
 - Responding to a notice to show cause
 - Review rights
- Case Study
 - *Orfali v Commissioner for Fair Trading* [2024] NSWCATOD 4

Grounds for taking disciplinary action



Grounds for taking disciplinary action

- Disciplinary action may include a caution, fine, the imposition of a condition on registration, suspension or disqualification (BDC Act, s48)
- It occurs in an administrative law context (a certifier may also be criminally liable if an offence has been committed)
- It may be taken on any one or more of the grounds set out in s45 of the BDC Act
- It may be taken in respect of any conduct in connection with the carrying out of certification work

*“that 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 certifier” (BDC Act, s45(a))*

- What is the role of a certifier, according to the regulator?

“Certifiers are public officials and independent regulators of development. They are required to uphold the public interest. They don’t work for builders or developers.”

<https://www.fairtrading.nsw.gov.au/housing-and-property/building-and-renovating/preparing-to-build-and-renovate/what-certifiers-do>

- Certifiers must carry out their work with the mindset of a public official

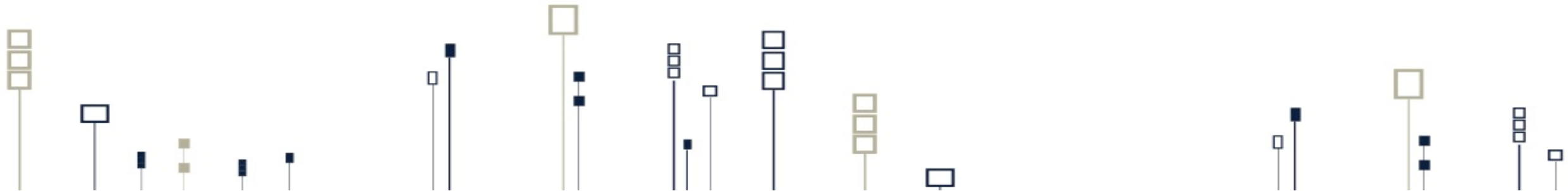
Grounds for taking disciplinary action

- Any breach of any law in the course of carrying out of certification work is grounds for disciplinary action
- No need for the breach to have been prosecuted or have resulted in a conviction
- No need for the breach to have been intentional
- Includes offences against the BDC Act and Regs
 - Failure to comply with a condition of registration (s45(g))
 - Carrying out work where there is a conflict of interest (unless an exemption has been obtained) (s28)
 - Seek, accept or offer to accept a benefit on the understanding that work will be carried out otherwise than impartially (s42)
- Includes breaches of the EPA Act, Regs, and any relevant EPIs
 - certifiers are required to interpret and apply complex planning controls – and when they get it wrong there can be severe consequences
 - If you don't know, seek advice early

Grounds for taking disciplinary action

- Conduct that falls short of what is expected of a certifier is grounds for disciplinary action, including:
 - Carrying out work in a partial manner or in a manner that is not in the public interest (s45(e))
 - Wilful disregard of matters required to be considered (s45(f))
 - Improper or unethical conduct that indicates that the certifier is not a fit and proper person to carry out certification work (s45(l))
- Conduct during an investigation (or any dealings with the Secretary) can be further grounds for disciplinary action, including:
 - Wilfully misled or obstructed the Secretary (s45(k))
 - Failed to comply with a direction by an authorised officer (s45(j))
 - Breach of an undertaking (s45(h))
- Failure to comply with the Code of Conduct (Schedule 5 of BDC Reg)
 - The conduct required is not always clear, e.g. a certifier must not *'knowingly act or enter into any conduct that could bring, or tend to bring, the profession into disrepute'* (Sch 5 (3)(d))

The disciplinary process



The disciplinary process

Investigation

- The Commissioner may investigate a certifier whether or not it has received a complaint (BDC s106)
- Part 7 of the BDC Act gives powers to authorised officers
- An authorised officer may require information and records (s91)
- An authorised officer may require answers (s92)
- An authorised officer may record evidence (s93)
- An authorised officer may enter premises (Pt 7, Div 4) at any reasonable hour in the daytime or during usual business hours.
- A search warrant is required to enter any part of premises used only for residential purposes (s95)

The disciplinary process

Notice to Show Cause

- If the Commissioner forms the opinion that there may be grounds for taking disciplinary action, the Secretary *may* serve a written notice inviting the certifier to '*show cause*' why action should not be taken (s47(2))
- The notice must specify how long the certifier has to respond (no less than 14 days) (s47(3))
- In response, the certifier may make submissions (orally or in writing) and provide evidence (s47(4))
- The Commissioner may conduct an inquiry or make any investigation with respect to the matters raised in submissions (s47(5))
- The Commissioner must take into consideration any submissions made before determining whether or not to take disciplinary action (s47(6))

The disciplinary process

Responding to a Notice to Show Cause

- Provide the relevant facts, circumstances, and documents
- Be honest and transparent, and where appropriate show remorse, understanding and demonstrate a commitment to improvement
- Address the matters in *Qiu v Building Professionals Board* [2013] NSWADT 289 at [98] including:
 - Loss or damage resulting from the contraventions
 - Whether the certifier has engaged in any similar conduct and any prior record
 - The presence of fraudulent or dishonest intent and any prior deliberation
 - The extent of carelessness or wilfulness of the conduct
 - The efforts made to correct the situation and what measures have been taken
 - What consciousness the certifier had and displayed of their obligations
 - The effect of disciplinary action on the certifier
 - Attitude, professional history and future compliance
- Consider whether to seek legal advice

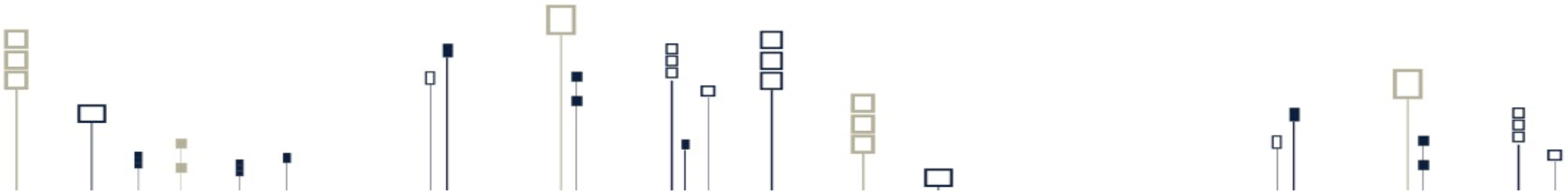
The disciplinary process

Review Rights

- Before deciding whether to seek a review, consider seeking a statement of reasons (*Administrative Decisions Review Act 1997 (NSW) (ADR Act)*, s49)
- Need to consider whether the original decision was fair and reasonable, as a review could result in a more severe penalty
- An internal review is available pursuant to s53 of the ADR Act
- Review by the NSW Civil and Administrative Tribunal (NCAT) (BDC Act, s49)
- NCAT may affirm, vary, set aside or remit the decision (ADR Act, s63)

Case Study

Orfali v Commissioner for Fair Trading [2024] NSWCATOD 4



Orfali v Commissioner of Fair Trading

Overview

- At the relevant time, the certifier was registered as a *"Building Surveyor – Restricted (class 1 and 10 buildings)"*
- Between 2018 and 2019 the certifier acted as the Principal Certifying Authority (PCA) for a class 2 development at Kenthurst (**Kenthurst Development**), and
- Between 2021 and 2022 the certifier issued thirteen CDCs and three modified CDCs for class 3 residential care developments which did not comply with minimum fire safety standards (**CDCs**)
- Initially, the Commissioner determined to disqualify the certifier for 8 years. The certifier sought an internal review of the decision. The internal reviewer increased the period to 10 years
- The Tribunal upheld the decision of the internal reviewer, finding that the certifier

"lacked the necessary understanding and capacity to comply with the certification legislation and to carry out his functions as a registered certifier safely, competently and reliably"

Orfali v Commissioner of Fair Trading

The conduct

- In respect of the Kenthurst development, the certifier:
 - knowingly acted outside his accreditation by issuing a construction certificate (CC) for a class 2 building
 - made false and misleading statements in the CC by reason of misstating that the building was “Class 1a – Class 10a – Class 10b”
 - approved architectural plans with the CC that were inconsistent with requirements of the applicable development consent in respect of swimming pool compliance
 - approved architectural plans with the CC that did not demonstrate that the proposed building would comply with the relevant fire safety requirements of the BCA

- In respect of the CDCs, the certifier:
 - incorrectly classified the proposed buildings for which he issued CDCs. The Tribunal accepted that the developments the subject of the 13 CDCs were properly classified as ‘residential care buildings’
 - issued CDCs without required fire safety measures for class 3 buildings
 - misrepresented the total floor area of 3 of the developments approved via CDC

Orfali v Commissioner of Fair Trading

The failure to correctly classify the buildings

- The failure to classify the Kenthurst Development correctly was a *'significant failure'* and an *'obvious error'*
- The certifier's approach to classifying the developments subject of the CDCs was *'confused'*
- The classification of buildings under the BCA is different from characterising development or determining compliance with an EPI
- The failure to classify the buildings as class 3 resulted in less stringent fire safety measures – compromising the safety of residents
- The certifier *'fundamentally misunderstood his function in classifying buildings under the BCA, and how he was required to perform it'*
- The conduct *'displayed a disregard for, or at the very least a misunderstanding of, the requirements of the legislative scheme'*
- A reminder that certifiers should first check that the work required is within the conditions of their certificate of registration

Orfali v Commissioner of Fair Trading

Conduct during the investigation

- The Tribunal found that the certifier was untruthful in his responses to Fair Trading
- His responses to Fair Trading were inconsistent with evidence given at hearing but he did not admit to being untruthful in the first instance
- He did not express real remorse or any real consciousness of his obligations under the relevant statutes and to the owners or future occupants of the buildings
- He did not demonstrate an appreciation of the effect his errors could have on vulnerable people
- These matters were considered in determining the severity of the penalty imposed
- A reminder that conduct during investigations and review hearings can be as important as the original offending conduct

Resources

- Practice Standard for Registered Certifiers
 - [Volume One: new residential apartments](#)
 - [Volume Two: Class 1a Buildings](#)
- Former [*Building Certifiers Code of Conduct: a guide*](#)
- Subscribe to LTL [*In Focus*](#)



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ICAC's guide on how to manage conflict of duties

The Independent Commission Against Corruption (ICAC) has issued a guide to assist public officials and agencies in identifying and managing conflicts of duties. The guide relates to conflicts of duties, not conflicts between a public duty and a personal or...

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March 27, 2024 0 comments

ALERT: Housing SEPP transitional provisions corrected to apply ADG to former SEPP65 pending DAs

The Government has amended State Environmental Planning Policy (Housing) 2021 (Housing SEPP) to correct an oversight which had meant that neither Chapter 4 of the Housing SEPP nor the former SEPP 65 applied to relevant residential apartment DAs made prior...

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March 26, 2024 0 comments

ALERT – NSW Parliamentary Inquiry into the ability of local government to fund infrastructure and services

The NSW Legislative Council's Standing Committee on State Development recently announced an inquiry into the ability of local government to fund infrastructure and services. When announcing the inquiry, the Chair of the Committee, Emily Suvaal MLC, noted that: 'Councils are...

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Fair Work Commission decision raises doubt about legal status of local councils in NSW

Section 220 of the Local Government Act 1993 (NSW) declares that a council is 'a body politic of the State' and 'is not a body corporate...

March 24, 2024 0 comments

UPDATE – New planning circular addressing flood risk in planning decisions

On 1 March 2024, the Department of Planning, Housing and Infrastructure (Department) published Planning Circular PS 24/001

March 22, 2024 0 comments

ALERT – Bill Increasing Penalties for POEO Act Offences & Giving Additional Powers to EPA Passed by Parliament

On 21 March 2024, the Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Bill 2024 (Bill) was