



In this issue we examine a recent decision of the NSW Civil and Administrative Tribunal (NCAT) regarding a decision to cancel the registration of a certifier and disqualifying him from registration for a period of six years.

**THE NSW CIVIL AND ADMINISTRATIVE TRIBUNAL (NCAT) UPHOLDS DECISION CANCELLING CERTIFICATE OF REGISTRATION AND DISQUALIFYING CERTIFIER FROM REGISTRATION FOR SIX YEARS**

**Gearin v Secretary of the Department of Customer Service [2025] NSWCATOD 9**

The NSW Civil and Administrative Tribunal (**NCAT**) has upheld a decision of the Secretary of the Department of Customer Service which found that a registered certifier (**the Applicant**) had engaged in unsatisfactory professional conduct under the *Building Professionals Act 2005* (NSW) (now repealed) and had breached the *Building and Development Certifiers Act 2018* (NSW) (**the BDC Act**).

Certifiers play an important role in ensuring that development is undertaken in accordance with consents issued by councils. They are usually the first port of call when complaints are received from the community in relation to alleged unauthorised development and are empowered to issue written direction notices under s 6.31 of the *Environmental Planning and Assessment Act 1979* when breaches are observed.

This decision highlights the standards of competence, diligence and integrity expected of registered certifiers and the strong penalties which may be imposed.

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## **Background**

On 30 May 2014, Sutherland Shire Council (**Council**) granted Development Consent (**DC**) for a development (**the Development**) at a site in Caringbah South (**the site**), for the demolition of existing structures and the construction of a townhouse development. The Development was approved to be of three storeys and consist of five townhouses, a basement carpark, and an above ground pool.

The Applicant was appointed as the Principal Certifying Authority (**PCA**) for the Development.

On 14 September 2023, a delegate of the Secretary of the Department of Customer Service (**the Respondent**) cancelled the Applicant's registration as a certifier pursuant to s 48(1)(e) of the BDC Act and disqualified him from registration for a period of 6 years pursuant to s 48(1)(f) of the BDC Act.

These proceedings related to a subsequent application by the Applicant to the Tribunal for administrative review of the extent and severity of the penalty imposed.

## **Legislation**

Part 4, s 45 of the BDC Act sets out the grounds for taking disciplinary action against certifiers. The Secretary may take disciplinary action against a registered certifier on several grounds, including when:

- (a) The registered certifier has engaged in 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 registered certifier; and
- (b) The registered certifier has contravened the certification legislation, whether or not the registered certifier is prosecuted or convicted for the contravention.

## **The Breaches by the Applicant**

The Applicant conceded that the disciplinary grounds under ss 45(a) and (b) BCD Act had established and that he had engaged in unsatisfactory professional conduct under the Building Professionals Act.

## **The Applicant's Submissions**

### **Water tanks**

The approved DC plans from Council and the BASIX certificate required a rainwater tank for Townhouse 3 with a minimum capacity of 2,000 litres and additional rainwater tanks to service each of the remaining four townhouses to a minimum capacity of 2,000 litres. The Applicant issued a CC detailing one rainwater tank with a capacity of 10,000 litres to service all of the townhouses.

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The Applicant submitted that the provision of one rainwater tank of 10,000 litres met the intention of the DC and constituted only a minor error with no impact. The Tribunal disagreed and did not accept that the Applicant's decision was limited to a 'technical' breach or a minor error.

### **Critical stage inspection**

The Applicant had breached the BDC Act by issuing Interim Occupation Certificates (**IOCs**) and the Final Occupation Certificate (**FOC**) when the critical stage inspection, prior to covering the stormwater drainage connections, had not been carried out. The Applicant submitted that inspections were carried out by an engineer and an accredited A1 engineering certifier and that this decreased the severity of the breach.

The Tribunal held that while the conduct could be classified on the lower end of the spectrum, the remaining conduct was so serious that the overall severity of the Applicant's conduct was not altered.

### **Laundry facilities and lifts**

The CC issued by the Applicant included a redesigned basement which included two additional lifts to townhouses 1 and 2. These were not shown on the approved architectural plans approved as part of the DC. The CC plans for the ground floor were similarly amended to incorporate the basement lift.

The CC plans also did not include laundry facilities for townhouses 1 and 2.

### **Additional levels**

An unauthorised mezzanine was constructed in each of Townhouse 1 and 2. The Tribunal was satisfied that the additional levels could be classified as substantial, being 95m<sup>2</sup> and 91m<sup>2</sup> respectively.

### **Assessing harm**

The Tribunal considered the "Guidelines for Determining a Disciplinary Outcome" (**Guidelines**) in assessing the degree of harm caused, which recommend that both actual and potential harm of the conduct be considered.

Placing significant weight on the Applicant's issue of IOC's 1 to 3 prior to completed final inspections, and IOC 4 and the FOC when Townhouse 1 and Townhouse 2 included additional levels, the Tribunal considered there to have been a real potential for other works to have been completed without the Applicant's knowledge. In the Tribunal's view, the Applicant's conduct had an impact on past, current and future occupants of the Development, causing at least some consumer detriment and resulting in moderate damage or loss.

The Tribunal found that the Applicant's failure to carry out his public function resulted in a high risk to the integrity of the certification licencing scheme from a consumer perspective. While the conduct did not constitute an actual risk to public safety, it had the potential to cause a high risk to public safety and cause significant consumer detriment resulting in extensive damage or loss. Applying the Guidelines, the Tribunal characterised the harm caused by the Applicant as "extensive".

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### **Assessing culpability**

The Tribunal found that the Applicant's inspections should have been sufficient for him to be aware of the additional levels in both townhouses and the works contained within them, notwithstanding any attempt to deceive him, or hide the areas from him. The conduct fell short of the standards expected by members of the public and amounted to a high level of disregard of the standards. In totality, the Tribunal categorised the conduct as reckless or at the least negligent behaviour, and upheld the decision that the conduct was of "major severity".

### **Subjective factors**

The Applicant raised subjective factors purporting to mitigate the severity of his conduct, including that the conduct related only to one development, his apparent contrition and the negative impact of any disciplinary action on his professional prospects due to his age of 61 years. The Tribunal viewed these factors as countered by the fact that the Applicant's conduct spanned from 1 July 2014 until 21 April 2021 including several discrete actions, and the Applicant's disciplinary history including nine previous disciplinary actions between 25 July 2005 and 30 April 2015.

### **Decision**

The Tribunal was not satisfied that it was in the public interest to allow the Applicant to continue to practice as a certifier, even subject to conditions, and upheld the proposed disciplinary action cancelling the Applicant's registration and disqualifying him from practice for a period of six years.

### **Matters to consider**

Certifiers play an important role in ensuring that development is undertaken in accordance with consents. Council compliance officers are required to regularly deal with Certifiers in response to complaints from the community about alleged breaches of the planning law. This can impose a significant burden on councils' resources.

We regularly assist councils with compliance related matters where early intervention to stop works which were not permitted under the relevant development consent, can ensure that matters are resolved in a timely fashion. This can include reducing the need for councils to retrospectively assess matters pursuant to a building information certificate applications.

**For more information about this update, please contact Tom Ward.**

Pikes & Verekers Lawyers

Level 2  
50 King Street  
SYDNEY NSW 2000

T 02 9262 6188  
F 02 9262 6175

E [info@pvlaw.com.au](mailto:info@pvlaw.com.au)  
W [www.pvlaw.com.au](http://www.pvlaw.com.au)

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