

Disciplinary Guideline

Building Professionals Act 2005

This document provides information on the application of penalties where an accredited certifier is to be disciplined under the Building Professionals Act.

The Guideline does not cover the issue of Penalty Infringement Notices (PINs). The issue of PINs is a separate process.

When may an accredited certifier be disciplined?

An accredited certifier may be disciplined where the Building Professionals Board (Board) or the NSW Administrative Decisions Tribunal (Tribunal) finds that the certifier's professional conduct has been unsatisfactory. These findings are made following the determination of a complaint by the Board about the certifier's conduct or following an audit/investigation into the accredited certifier's work and activities.

The *Building Professionals Act 2005* (BP Act) provides powers and sets out specific procedures to be followed when dealing with complaints and investigations and, particularly, when applying a disciplinary action.

How is unsatisfactory conduct defined?

The conduct of an accredited certifier that could result in disciplinary action is defined in [section 19](#) of the BP Act.

Unsatisfactory professional conduct generally means conduct not to the standard of competency, diligence and integrity required by statute and by good practice of a reasonably competent accredited certifier.

Professional misconduct means conduct that is unsatisfactory professional conduct of a sufficiently serious nature to justify suspension or cancellation of the accreditation holder's certificate of accreditation.

The **difference** between professional misconduct and unsatisfactory professional conduct is that professional misconduct is more serious.

Generally, professional misconduct relates to behaviour which is knowingly unlawful, results in significant harm or fails to give sufficient regard to a matter which requires significant regard. Fraud, corruption and gross negligence are examples that might constitute professional misconduct.

Further information on professional misconduct can be found in the ADT decisions of [Building Professionals Board v Hans \(No.2\) \(GD\)\[2008\] NSWADTAP 48](#) and [Building Professionals Board v Boulle \[2008\] NSWADT 80](#).

How is a complaint determined?

The Board deals with a complaint at a meeting in accordance with [section 30](#) of the BP Act. The Board must decide:

- Whether the behaviour complained of is unsatisfactory professional conduct
- Where the behaviour is unsatisfactory professional conduct, whether it should be categorised as professional misconduct
- Where the conduct is unsatisfactory professional conduct or professional misconduct, whether the matter should be dealt with by the Board or whether an application be made to the Tribunal for a decision.

Where the Board determines to make application to the Tribunal, that application must be made within 28 days of the Board's decision.

What matters does the Board consider in determining penalties?

The application of penalty must be consistent for the offence. The following matters are considered when determining penalties/ disciplinary actions:

- Deterrence, both personal and general.
- The objects of the legislation.
- The nature, width and extent of the contravention(s).
- The loss or damage and prejudice resulting from the contravention(s).
- The circumstances in which the contravention(s) took place.
- Whether the accredited certifier has engaged in any similar conduct which has been the subject of a disciplinary finding.
- The presence of fraudulent or dishonest intent and deliberation on the part of the accredited certifier.
- The extent of carelessness or wilfulness of the conduct.
- The efforts made to correct the situation, including any measures that have been taken by the accredited certifier.
- The consciousness the accredited certifier had and displayed, of his or her legislative obligations.
- The effect upon the accredited certifier of the penalty or sanction imposed.
- Antecedents, i.e. previous findings of unsatisfactory professional conductor professional misconduct.
- The attitude of the certifier, his or her certification history and steps taken by the certifier to ensure compliance will be observed in the future.
- The penalty range relating to the particular contravention(s).

What decisions may be taken?

Building Professionals Board

When an investigation into alleged misconduct is completed, the Board must, under [section 31](#) of the BP Act, make one or more of the following decisions:

- Dismiss the complaint.
- Apply to the Tribunal for a disciplinary determination.
- Order no further action in relation to the complaint.
- Caution the certifier*.
- Reprimand the certifier*.
- Impose conditions on the certifier's certificate of accreditation.
- Order the certifier to undertake educational courses.
- Order the certifier to report on practice.
- Order the certifier to pay a fine of not more than 10,000 penalty units.
- Order the certifier to pay the complainant compensation not more than \$20,000.
- Suspend the certifier's accreditation.
- Cancel the certifier's accreditation.
- Order that accreditation holder cannot reapply for accreditation for a specified period.
- Disqualify the certifier from being a director of, or managing, an accredited body corporate for a specified period.

* A **caution** has the nature of a warning and a **reprimand** has the nature of a rebuke or censure. A reprimand is more serious than a caution.

Administrative Decisions Tribunal

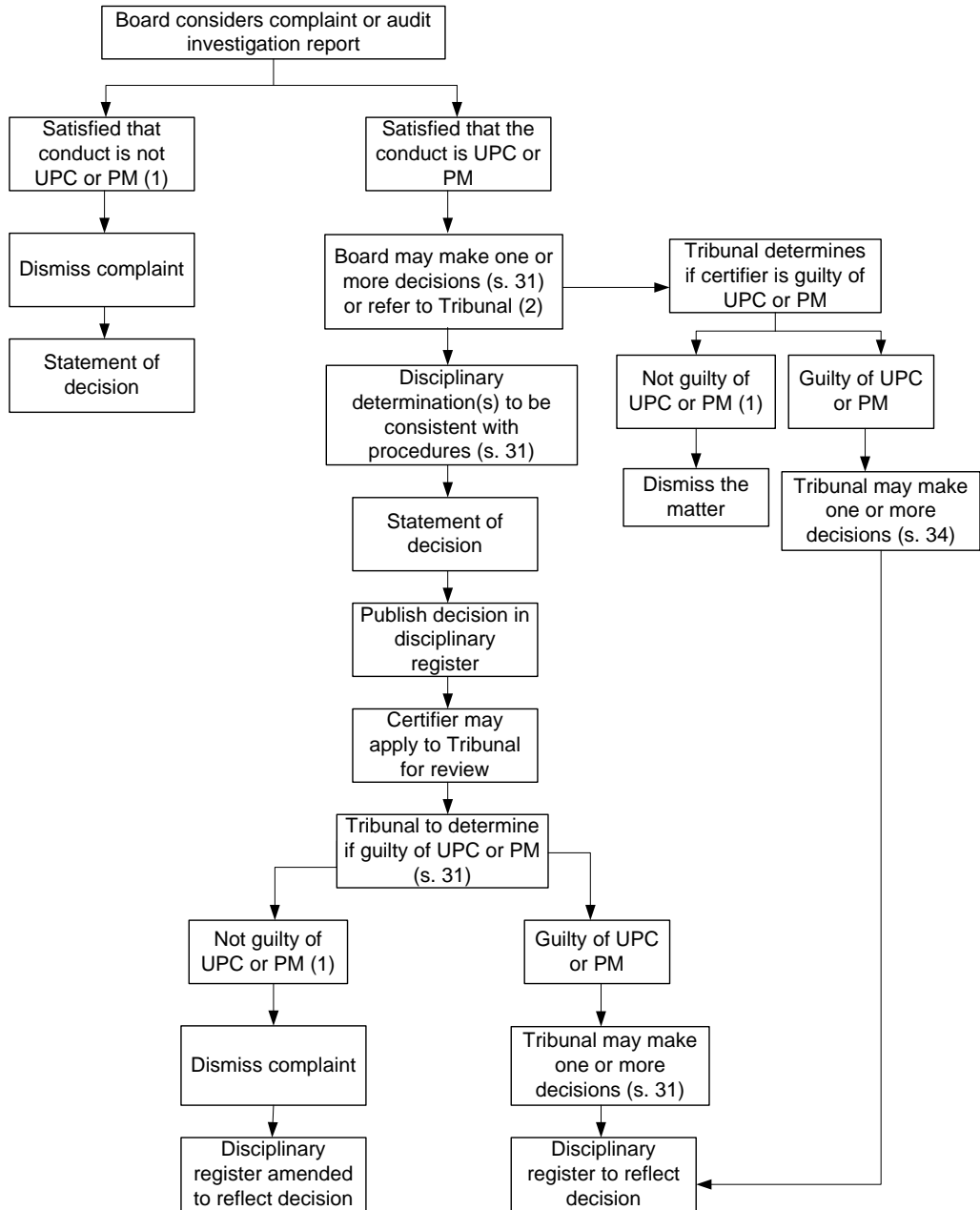
Where the Board applies to the Tribunal for a decision, the Tribunal may, under [section 34](#) of the BP Act, take the same decisions as the Board with the exception that the Tribunal does not have the power to take no further action.

Are there appeal rights against the Board's decisions?

Accredited certifiers who are dissatisfied with penalties imposed by the Board for unsatisfactory conduct may appeal to the Tribunal for a review. There are also limited appeal rights for certifiers dissatisfied with decisions of the Tribunal.

The complaint/ investigation determination process is summarised in the following flow chart.

Determination of conduct matters – BP Act



(1) These terms are defined in section 19 of the *Building Professionals Act 2005*
 (2) Tribunal = NSW Administrative Decisions Tribunal
 UPC = unsatisfactory professional conduct
 PM = professional misconduct