

# Improving Certifier Independence: Options Paper

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October 2018

## Table of Contents

<b>Making a submission.....</b>	<b>3</b>
<b>Introduction.....</b>	<b>4</b>
<b>The importance of maintaining certifier independence.....</b>	<b>6</b>
<b>The role of the local council in the appointment of certifiers.....</b>	<b>9</b>
<b>Options for consideration.....</b>	<b>11</b>
<b>Option 1: The rotation scheme.....</b>	<b>14</b>
<b>Option 2: The cab rank scheme.....</b>	<b>18</b>
<b>Option 3: The time limit scheme.....</b>	<b>22</b>
<b>Appendix A.....</b>	<b>25</b>

## Making a submission

Interested organisations and individuals are invited to provide a submission on the Options Paper or any matter relevant to improving certifier independence.

Submissions can be made by email with any documents that are provided to be produced in an 'accessible' format. Accessibility is about making documents more easily available to those members of the public who have some form of impairment (visual, physical, cognitive). Further information on how you can make your submission accessible is contained at <http://webaim.org/techniques/word/>.

Please forward submissions by email to: [BDCBill2018@finance.nsw.gov.au](mailto:BDCBill2018@finance.nsw.gov.au)

**The closing date for submissions is close of business 30 October 2018.**

We invite you to read this paper and provide comments. You can download the Options Paper and the proposed *Building and Development Certifiers Bill 2018* from [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au) and [www.bpb.nsw.gov.au](http://www.bpb.nsw.gov.au).

Printed copies can be requested from NSW Fair Trading by phone on (02) 9895 0791.

### **Important note: release of submissions**

**All submissions will be made publicly available.** If you do not want your personal details or any part of your submission published, please indicate this clearly in your submission together with your reasons. Automatically generated confidentiality statements in emails are not sufficient.

You should also be aware that, even if you state that you do not wish certain information to be published, there may be circumstances in which the Government is required by law to release that information (for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*).

### **Interpretation note**

Any reference to Part 4A of the *Environmental Planning and Assessment Act 1979* (EP&A Act) is simultaneously taken to be a reference to Part 6 of the EP&A Act which commences from 1 September 2019. The key provisions relating to building regulation and certification, currently contained in Part 4A, will be consolidated into Part 6 of the EP&A Act when it commences.

## Introduction

Building certification involves the independent checking and approval of building work in accordance with the relevant consent, the National Construction Code, applicable Australian Standards and other legislative requirements. The certification process is an integral part of the building and construction sector in NSW, and is essential to managing risks to safety, health, amenity and sustainability of the design and performance of buildings.



Submissions to the 2015 Independent Review of the *Building Professionals Act 2005* (the Independent Review), also known as the Lambert Review, raised concerns about certifiers and the potential for conflicts of interest to impact upon the integrity of their work. This is an important issue because certifiers are entrusted with providing a public function. The community has a right to expect that certifiers will provide services without prejudice, and that the decisions they make are robust and independent.

In its response to the Independent Review, the NSW Government committed to several measures to improve the independence of certifiers. A number of reforms were introduced into the *Environmental Planning and Assessment Act 1979* (the EP&A Act), many of which commenced in March 2018.

For example, amendments were introduced to require principal certifying authorities (PCA) to issue directions for a non-compliance with an aspect of the development in certain circumstances. This provision of the EP&A Act is yet to commence, and details about

certifier directions are currently being developed. Amendments to the EP&A Act also introduced complying development ‘stop work’ provisions, which will allow councils to stop work on a complying development site for up to seven days to investigate complaints.

The NSW Government is focused on ensuring that certification and complying development processes continue to deliver substantial community benefits and that there is strong public confidence in the system. A number of reforms are contained in the draft *Building and Development Certifiers Bill 2018* (the Bill) which was released in August 2018 for public consultation. Reforms include extending the scope of the conflict of interest provisions, strengthening contract requirements and increasing regulatory oversight.

The changes in the Bill seek to support and improve overall independence, and the NSW Government recognises that more could be done to enhance the appointment of certifiers, particularly private certifiers.

Council certifiers and private certifiers are both responsible for certifying developments to ensure that there is compliance with relevant building and planning laws. While there are independence risks that can arise for both private and council certifiers, the risks are considered greater for private certifiers due to the challenge of managing a for-profit business against their duty to act as a public official.

This Options Paper explores the possibility of introducing new methods of appointment for private certifiers, by rotating who is available to be used for a specific development, to minimise the opportunities for these certifiers to face pressures that could compromise their ability to act in the public interest.

This paper describes thresholds (including if the development is a Class 2 to 9 building above three storeys with a total floor area greater than 2,000 square meters and is valued at more at \$5 million or more), that, if met, would require the development to be subject to one of the rotation options considered by this paper. These thresholds are intended to capture and apply to developments where there is the greatest complexity and potential risk to consumers.

This paper seeks feedback on whether any one of the three options described below could be introduced for developments that fall within the proposed thresholds:

### **Option 1: The rotation scheme**

This option involves the establishment of an eligibility list with certifiers who are selected at random from the list, similar to a lottery system. Under this option, if the development met the required thresholds, three eligible certifiers would be randomly selected and provided to the developer. As part of this process the developer would be able to appoint any one of the certifiers as the PCA and engage with each in a way that would occur in the ordinary course of business (e.g. by seeking quotes or comparing services).

### **Option 2: The cab rank scheme**

This option involves the establishment of an eligibility list where the next available certifier would be appointed to work on a development that met the thresholds, similar to a cab rank. The developer would be allocated one certifier in chronological order on a 'next-in-line' basis. The appointed certifier would have an obligation to accept any work that they were competently trained and qualified to undertake.

### **Option 3: The time limit scheme**

This option 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. During the three-year break, the certifier would be permitted to engage and work with any other client before commencing work for the same client again.

Each of these options are designed to work cohesively with the reform measures contained in the draft Bill and aim to support and enhance the independence of certifiers.

This paper also considers the existing role of local councils in the appointment of PCAs and examines whether local councils should have any role in the appointment process for higher risk developments.

## The importance of maintaining certifier independence

In NSW, certifiers are regulated by the EP&A Act. That Act prescribes the functions and duties of certifiers, while the *Building Professionals Act 2005* (the BP Act) creates accreditation schemes and generally regulates their professional conduct (including conflicts of interest).

A unique characteristic of private certifiers is that they are considered ‘public officials’ under the *Independent Commission Against Corruption Act 1988* and ‘public authorities’ under the *Ombudsman Act 1974*. Such statutory functions, and the specific requirements under the BP Act, highlight the criticality of certifiers performing their role in manner that is both objective and impartial.



### A certifier's role

Certifiers are responsible for inspecting building work at critical stages, certifying compliance with various laws and issuing compliance certificates. There are 24 categories of accredited certifier, each category requires specific knowledge, skills, qualifications and experience in the construction sector.

Certifiers play a crucial role in the development and construction system by providing checks and balances at key stages of development, and supporting the work of other building practitioners to ensure that building work complies with approvals, codes and standards.

While all building practitioners who work on a construction project have an important role to play in the compliance and quality of building work, certifiers have a unique role in that they are required to carry out inspections at key points to ensure that the work of all parties is compliant at each stage of the process.

These checks and balances can help to identify defects and non-compliances before completion and occupation of a building. As rectification of defects can be costly, and ‘prevention is better than cure’, it is important that certifiers play a part in avoiding later, higher costs to industry and consumers from rectifying problems once the building is occupied.

### How certifiers are appointed

Under the EP&A Act, the person with the benefit of the development consent has the right to appoint the PCA. The PCA can be the local council or a private certifier. In the case of a ‘consumer-led’ development the appointee will usually be the property owner. Although a builder cannot appoint a certifier themselves, often they will suggest a choice of certifier. A consumer may accept a builder’s suggestion (or specifically ask for it) because they are not confident in making in their own decision or unaware of their right to choose (incorrectly assuming it is the builder’s role).

In cases where a development is being undertaken by a developer, the benefit of the development consent is often with the developer, who, in accordance with the EP&A Act, has the right to select the PCA. However, unlike consumer-led developments, the developer often transfers ownership of the development to one or more other parties once the project is complete. For example, the

developer sells the units in a newly built strata scheme to individual consumers. This means that the person that ultimately has the benefit of the development consent (i.e. the consumer or purchaser of the development once complete) is not involved in the decision to appoint the PCA and is unable to advocate for their own interests and ensure any conflicts of interest are avoided or managed. This is the case even where a number of units in the development have been sold 'off the plan' as the owners corporation of the strata scheme has not yet been formed and is not able to exert any influence over the selection process at that time.

### **Potential for conflicts of interest in certification work**

#### **Payments to a private service provider for a public regulatory function**

Despite the existing provisions in the BP Act and the proposed Bill, there are community concerns about certifiers, particularly private certifiers, being unduly influenced by the builders and developers they work for, given the certifier is being paid by the same party that they are supposed to be independently overseeing.

The role provided by a certifier has the potential to be affected by the inherent conflict that exists between maintaining a private certifier's regulatory responsibilities and fulfilling their own commercial interests. In some circumstances, certifiers can become reliant on the same entities for work (e.g. builders, developers or owners) and these financial relationships may, over time, impact on the ability for the certifier to make impartial decisions. This is particularly the case where the decision of the certifier may result in a substantial negative impact on one of the parties involved. For example, a delay in issuing an occupation certificate for a development would limit a developer's ability to complete the sale of the units in the development. In this regard developers may have an incentive to place pressure on the certifier to issue of certificates to help protect the profitability of the development.

A builder, owner or developer may not appreciate that part of a private certifier's role is to act in an independent manner and be responsible for ensuring that certain work complies with relevant building and planning legislation. There may be an expectation that because the certifier is being paid by the owner (or other party), that they are working for them and therefore have an obligation to ensure that the client's desired outcomes or timeframes are achieved. While this may not always be the case, this perception can result in undue pressure being placed on the certifier to allow for unlawful variations in the building's design or result in an occupation certificate being wrongly issued.

These pressures may become more pronounced where a certifier continues to work for the same client over a long period of time. In these situations, there may be a higher risk that a certifier will not identify non-compliances, particularly where rectification is costly. This may lead to poor quality certification and non-compliance with regulatory requirements.

However, in noting the potential conflicts that can arise, it should be recognised that having private certifiers chosen by persons other than the consumer will not necessarily always result in harmful outcomes. An experienced builder or developer is likely to gain expertise working with different PCAs, and this sector knowledge may place them in a strong position to be able to identify those with the most appropriate expertise. Also, having a level of familiarity may lead to efficiencies in the certification and construction processes as both parties will understand each other's approach.

#### **Different risks that arise for council certifiers versus private certifiers**

Council certifiers and private certifiers are both responsible for certifying developments to ensure that there is compliance with relevant building and planning laws. While there are independence risks that can arise for both private and council certifiers, the risks are considered greater for

private certifiers due to the challenge of managing a for-profit business against their duty to act as a public official.

By contrast, council certifiers are not personally financially dependent on winning business and are responsible to the relevant council rather than the building owner. They also tend to perform a range of roles other than certification (which limits the likelihood of forming an entrenched position) and in a working environment where there are formal internal processes to manage conflicts of interests, such as audit processes, additional reviews, etc.

- 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)?**
- 2) Do you think that an additional mechanism is required to support independence in private certification work?**

## The role of the local council in the appointment of certifiers

In NSW, certification functions can be performed by both private and public (local council) certifiers. The role of local councils in the certification of building and construction work will vary greatly depending on whether a council or a private certifier has been appointed as the PCA for a project. However, regardless of whether a private or public certifier is used, both are equally bound by legislative requirements and must ensure that building and engineering projects are conducted in accordance with relevant laws, regulations, standards and codes.

### The current role of local councils

#### What is the role of local council when they are appointed as the PCA?

The role of the PCA, whether private or as the local council, is described in section 6.5 of the EP&A Act to broadly include:

- issuing construction certificates for building work;
- carrying out inspections of building work;
- issuing occupation certificates; and
- issuing compliance certificates.

Council and private certifiers may also approve on the council's behalf a range of works described in clause 161 of the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation), including but not limited to earthwork, road work, stormwater drainage work, landscaping work, erosion and sedimentation control work, excavation work, mechanism work, structural work and hydraulic work. These certifiers may also approve work associated with driveways and parking bays, including road pavement and road finishing, and matters relating to the external finish of a building.



In addition to, and distinct from their functions as certifying authorities, council have functions as consent authorities under the EP&A Act that can be utilised to enforce development consent requirements.

#### What is the role of local council in appointing a council certifier?

Local councils are responsible for appointing their own employees who are suitably accredited council certifiers, or, in the absence of a suitable certifier, hired contractors who are equipped with

the necessary qualifications, skills and experience to assess a project and ensure it is compliant with all relevant laws and codes of practice. As there are many categories of certifiers who each have a unique set of skills, local councils must be careful when appointing the right certifier for the job. For example, certifiers who have experience working on swimming pools will have vastly different skills and experience to a certifier who works on major developments.

### **What is the role of local council in appointing a private certifier?**

Local councils do not currently have any role in appointing or allocating private certifiers to work on projects.

### **Can a local council replace a private certifier as the PCA?**

In most cases the person appointed as the PCA for a project will continue in that role for the duration of the project. However, an owner of a development is entitled to replace the PCA at any point during the project. The replacement PCA may be another private certifier or the local council but it is generally up to the owner who they wish to appoint as the replacement PCA.

The easiest and quickest way to appoint a new certifier is for the owner to reach an agreement with their current certifier and the new certifier. However, if an agreement cannot be achieved between all parties, an application can be made to the Building Professionals Board (the BPB) to request the PCA to be changed. At this point the BPB would attempt to assist the parties involved to find a replacement certifier.

In situations where the BPB cannot find a replacement certifier, the local council can be appointed as the back-stop for that development and would be obligated to accept an appointment as the PCA. This process is important as there must be a certifying entity through all phases of construction that can provide the relevant expertise necessary to ensure that the project is constructed in a compliant way.

### **Should councils have a role in the appointment of a certifier?**

Local councils are the governing bodies of their local area and are accountable to the people living in the local community. Prior to the introduction of private certification in 1998, local councils were responsible for almost all planning approvals and building certification within their area of responsibility.

Councils have an important and significant role to play in providing community services and enforcing other building, construction and environment laws, in addition to their responsibilities for council certifiers. However, in the current regulatory environment local councils compete with private certifiers. This raises questions about a council's ability to oversee the appointment process impartially.

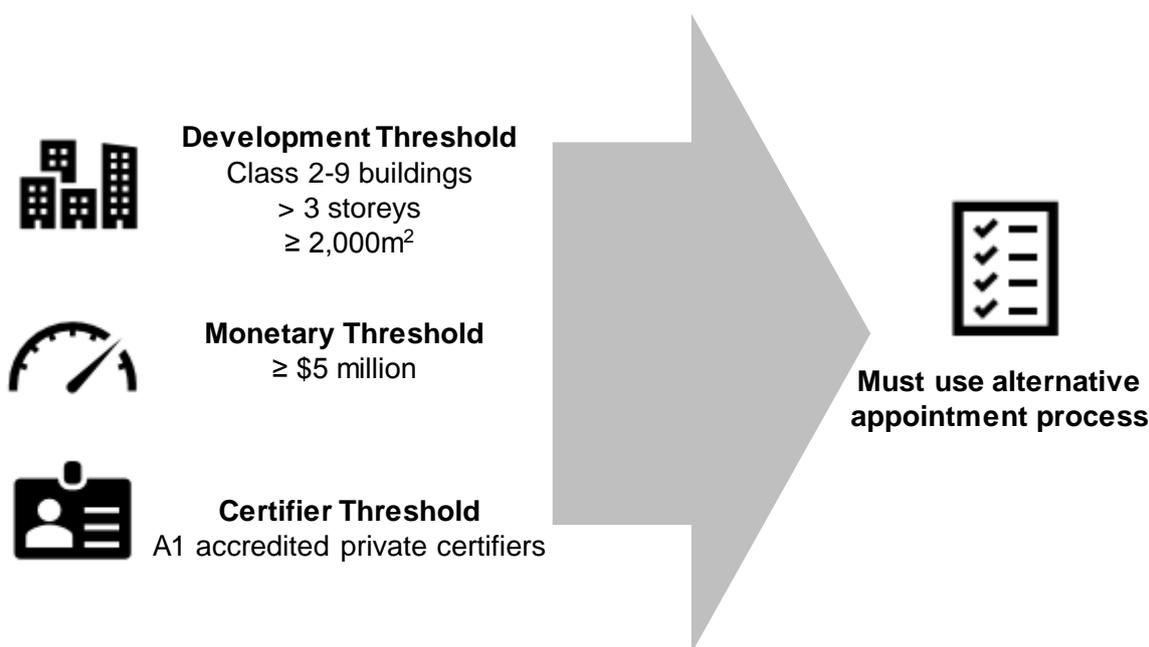
### **3) Should local councils have an additional role in appointing certifiers? If so, what kind of role should they play?**

## Options for consideration

In considering the options discussed in this paper, certain thresholds are proposed, which if met, would require a developer to appoint the PCA for their project by following one of the proposed alternative appointment options.

These thresholds are intended to capture and apply to developments where there is the greatest complexity and potential risk to consumers, and are not intended to extend to simple or lower-value developments.

### Threshold requirements



*Figure 1 – Overview of thresholds*

### Development threshold

It is proposed that the alternative appointment process will need to be followed for Class 2 to 9 buildings above three storeys with a total floor area greater than 2,000 square meters. This threshold seeks to focus the application of the alternative process on higher-risk developments where developers may be more inclined to rely on the same person or company to certify work.

Further, this threshold has been proposed as poor certification outcomes in these types of buildings have the potential to create significant public amenity impacts. They also represent the type of certification work where relationships between certifiers and developers may be more likely to arise.

### Monetary threshold

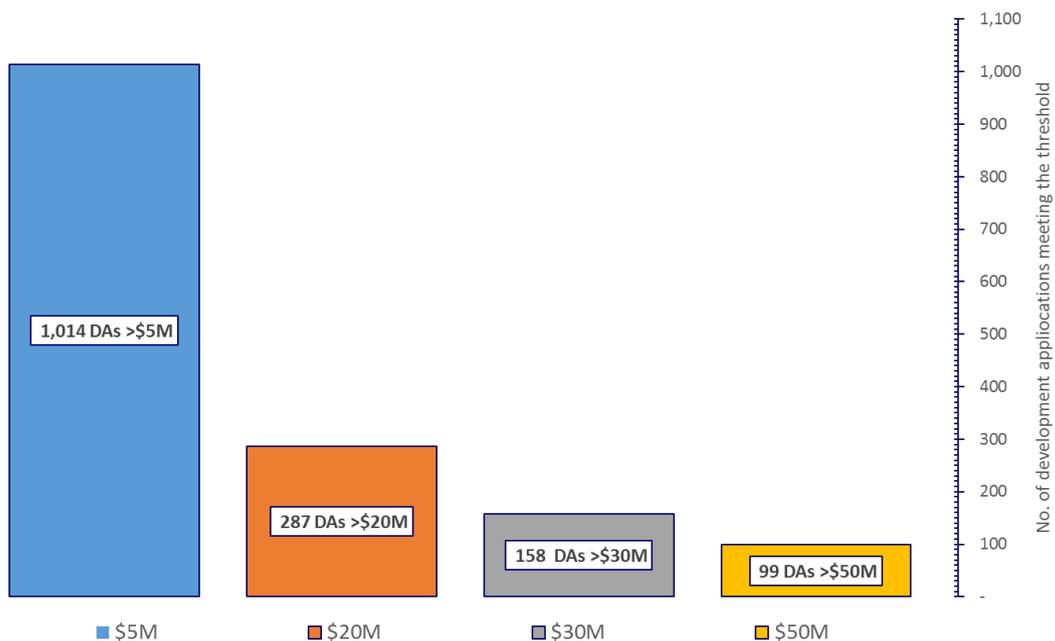
In addition to the building class, height and floor area requirements listed above, a monetary threshold is also proposed to apply before a certifier and/or development would be required to use an alternative appointment process proposed by this paper. A monetary threshold is intended to help ensure the options are targeted to developments where there is the greatest complexity and risk to consumers, with a higher cost development seen as being representative of higher risk and greater complexity.

Following consideration of a range of alternatives, a monetary threshold of \$5 million or more is proposed. For a development to meet the threshold requirements, its capital investment value (CIV), as defined in the EP&A Regulation, would need to be at this amount or greater.

Figure 2 illustrates the number of development applications approved in 2015-16 by their respective CIV. While this data includes all development applications, not just those relating the type of developments proposed to be captured under the options (i.e. Class 2 to 9 buildings over three storeys with a total floor area of 2,000 square meters), it provides an indication of the total number of development applications that may be required to use or engage with one of the options, and is particularly relevant for Options 1 and 2, the rotation scheme and the cab rank scheme.

For Options 1 and 2, a monetary threshold of \$5 million or more is likely to capture around 1,000 development applications each year. It is also noted that this value aligns with the Department of Planning and Environment’s threshold for the mandatory Independent Hearing and Assessment Panel (IHAP) process.

The available data suggests that there is a greater propensity for using private certifiers in the Greater Sydney metropolitan area rather than in regional NSW. While the data for construction certificates and occupation certificates includes all types and scales of development and is therefore only indicative, it does suggest that there is a high likelihood that private certifiers, rather than councils, are being appointed as PCAs for developments greater than \$5 million.



**Figure 2 – Number of development applications at different CIV values**

Source: 2015-16 Local Development Performance Monitoring, Department of Planning and Environment.

Developments worth more than \$5 million tend to be located in the Greater Sydney metropolitan area. In the period of 2015-16, 49 out of 128 Local Government Areas did not have developments greater than \$5 million.

Of those 49, all but one (Hunters Hill) were located outside of the Greater Sydney metropolitan area. While there are some developments greater than \$5 million located in regional areas, these appear to be atypical rather than indicative of a pattern of a type of development (for example, the construction of an aged care facility in Molong and a solar farm in Gidginbung).

In considering the most appropriate monetary threshold, a value of \$20 million was also identified as a reasonable alternative. It is arguable that this threshold would overly reduce the effectiveness of any one of the options by excluding many developments and regions where independence has been identified as a concern.

### **Certifier threshold**

Given that it is proposed for the three options to apply to Class 2-9 buildings above three storeys with a total floor area greater than 2,000 square metres, these criteria practically determine that only A1 accredited private certifiers could be involved in any one of the proposals as they are the only class of certifier able to undertake this type of work. As at September 2018, there were 245 accredited A1 private certifiers in NSW.

- 4) Do you agree with the proposed threshold requirements for when one of the options would apply? If not, why not?
- 5) Do you support a monetary threshold of \$5 million, \$20 million or another amount? Why?
- 6) Is the type of certification proposed to be captured by one of the options sufficient?
- 7) Is it appropriate to only include A1 level accredited private certifiers if introducing one of the options?

### **Discussion of options**

The aim of rotating certifiers is to prevent the certifier from working with the same client for an extended period of time on the basis that this ongoing and familiar relationship could impair the certifier's ability to remain independent and result in poor certification outcomes. The rotation of certifiers can be done by requiring a developer to choose a certifier through an eligibility list, or by limiting the number of a years a certifier can work for the same client.

This paper presents three options for consideration. Where a development meets the thresholds set by this paper, the developer or certifier would be required to go through an alternative appointment process. The options for this process are outlined in Figure 3 and discussed in detail below.



**Option 1: The rotation scheme**  
Establishment of an eligibility list where the certifier is appointed in a randomised order.



**Option 2: The cab rank scheme**  
Establishment of an eligibility list where the certifier is appointed in a randomised order.



**Option 3: The time limit scheme**  
Requiring a certifier to take a two-year break after working for the same client after a certain period of time.

*Figure 3 – Overview of the proposed options*

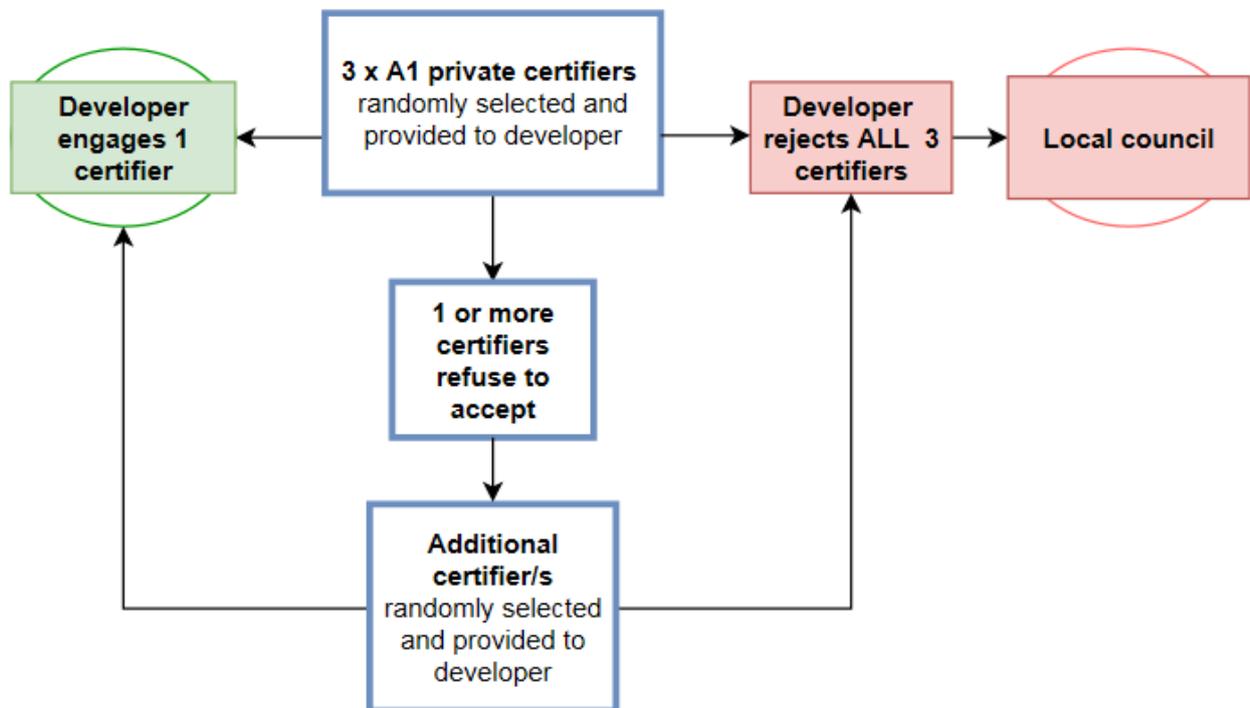
## Option 1: The rotation scheme

Option 1 proposes a rotation scheme. This option involves the establishment of an eligibility list where eligible certifiers are randomly selected or selected on a rotating basis and appointed from a short list. The independent ‘random’ selection of the certifiers on the list reduces the opportunity for clients to manipulate the allocation of a certifier to a client.

Where a development meets the threshold requirements, a PCA would need to be appointed using the rotation scheme. The rotation scheme would provide a choice of three randomly selected PCAs from a master list and the parties involved in the development would be able to engage with any of these certifiers (e.g. seek quotes, etc.) as part of finalising the appointment. If less than three private certifiers are available to perform the work, the developer could be provided with any other available and appropriate certifier/s or the relevant local council.

It is fair and necessary to provide the developer with the opportunity to obtain quotes from three comparable certifiers to ensure the benefits of competition are maximised and any anti-competitive effects (such as over-charging) are minimised. If only one certifier were presented, the certifier may be able to set a price and other appointment conditions that is out of step with the market.

The rotation scheme seeks to minimise the opportunities for certifiers to face actual or perceived conflicts of interest, or be subject to commercial pressures that can compromise their ability to act in the public interest by rotating the certifiers available to be used for specific developments. The rotation scheme aims to advocate for the interests of the consumer who may not be present at the time of development, to ensure that the integrity of the private certification system is maintained.



**Figure 4 – Overview of the rotation scheme**

- 8) Does the proposed selection method raise any concerns that may impact the integrity of the rotation scheme?**
- 9) How should certifiers preferences for working in certain Local Government Areas be managed?**

### **Practical implementation**

The rotation scheme would be implemented by amending the EP&A Regulation to prescribe classes of development in which the PCA was to be appointed. This amendment would require that the person could not refuse to be appointed as a PCA, so long as the appointment was made in accordance with the requirements of the scheme and the regulations.

It is important that the rotation scheme incorporates additional conduct requirements outside of the existing licensing framework to ensure that the scheme operates as intended. For example, if the person did not have any conflicts of interest to disclose for the development.

It is likely that an online system would be the most efficient means of implementing this option. It may be possible to integrate such a system with existing regulatory products used by certifiers in NSW, such as the NSW Planning Portal or the CertAbility App. To manage the issue of location, it is proposed that certifiers would be able to nominate certain Local Government Areas in which they would be available to work, or be open to working and traveling to any area. These preferences would be maintained in an online register and could be updated on request.

Based on the thresholds outlined above, it is estimated that around 1,000 developments per year would be required to use the rotation scheme.

#### **Will a developer be able to reject all three certifiers?**

Provisions would need to be established to allow the developer to reject all three certifiers. However, to ensure the intent of the rotation scheme is not compromised, there would be a limited set of circumstances in which this would be permitted to occur. While the exact circumstances would need to be finalised, some examples could include:

- if there is a conflict of interest between the developer and each of the nominated certifiers;
- if the quotes provided by each certifier are unreasonable to the developer given the type of development; or
- if the nominated certifiers do not have capacity to take on the job.

In circumstances where all three certifiers are rejected, the developer could be required to use the local council.

#### **Will a certifier be able to refuse to accept if selected under the rotation scheme?**

The rotation scheme would include a provision that required a certifier to refuse an appointment if they had a conflict of interest that may result in an impartial or objective assessment of the development and its compliance with the law. It is noted that being nominated by the rotation scheme would not eliminate a certifier's obligations to comply with other conflict of interest provisions that apply to certifiers generally.

It could also be appropriate to allow a certifier to refuse to accept selection for a development in other circumstances, and these would need to be prescribed. Situations where a certifier may refuse to be selected for a development could include:

- the development is beyond the certifier's capability, skill and/or experience;
- the certifier is not available for the period in which the certification work is required (e.g. due to other commitments such as existing workload or planned holidays); or
- the certifier has a conflict of interest.

If a certifier is unable or refuses to be selected for a development, the developer could be entitled to obtain the next eligible certifier to ensure the developer always has three certifiers in which to obtain quotes. The additional certifier would be considered in conjunction with the two certifiers nominated in the first instance.

Only in cases where the developer rejects all three certifiers would the developer be required to then engage the services of the local council as occurs now if there is no private certifier available for the development.

**10) Do you support the provision of three certifiers for each development that meets the threshold requirements? If not, what other way could help eliminate competition concerns?**

**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?**

**12) Is it appropriate to mandate the developer appoint the local council as principal certifying authority where the developer rejects the three certifiers provided?**

**13) Should a certifier be able to refuse selection and/or appointment under the rotation scheme? If yes, in what circumstances would this be appropriate?**

### Impacts on stakeholders

The rotation scheme balances the need to manage conflicts of interest while still providing the developer with the ability to participate in the free market. Under this option, the developer is still able to pursue all standard activities that generally occur prior to the appointment being confirmed (e.g. obtaining quotes, confirming availability and confirming experience) with any or all of the three certifiers selected by the scheme. The design of the scheme encourages certifiers to competitively price their services and offer value for money.

The introduction of the rotation scheme may also strengthen confidence in the certification system by sending a clear signal to the public that the government takes potential conflicts of interest seriously, and will intervene in the standard appointment process where necessary.

On the other hand, the introduction of a rotation may also work to remove the incentive for certifiers to continually improve and deliver quality work. As certifiers will be chosen at random rather than through market forces, individual performance may become less important and over time result in a

deterioration of skills and quality amongst certifiers. In addition, a certifier can be appointed regardless of whether they are the best person for the job. This is because the rotation scheme is designed to use a process of random selection and does not consider the experience or skills of a certifier outside of what is prescribed by the thresholds.

Certifiers may be penalised for establishing long term working relationships with developers, regardless of whether an actual conflict of interest exists. Having a level of familiarity may lead to efficiencies in the certification process as both parties can understand each other’s preferences and approach. Established working relationships can also encourage parties to engage in proper and robust checks and balances, which can contribute to greater compliance. Such benefits could be minimised or eliminated with the introduction of the scheme.

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Balances the need to manage conflicts of interest while still providing the developer and certifier with freedom to participate in the market.</li> <li>• May improve public perception and create better certification outcomes in the future.</li> <li>• Reducing conflicts of interests is likely to increase the integrity of certification work, which could reduce the need for rectification work.</li> </ul>	<ul style="list-style-type: none"> <li>• Administratively complex and potentially costly to implement, particularly in regional areas.</li> <li>• May reduce incentives for certifiers to provide exceptional service as certifiers are not rewarded or chosen for their skills or experience.</li> <li>• May slow down the development and construction approvals process, particularly where a local council becomes involved.</li> <li>• May unfairly punish certifiers who have established effective working relationships with their clients.</li> </ul>

**Figure 5 – Overview of the advantages and disadvantages of Option 1**

**14) Do you support Option 1? If not, why not?**

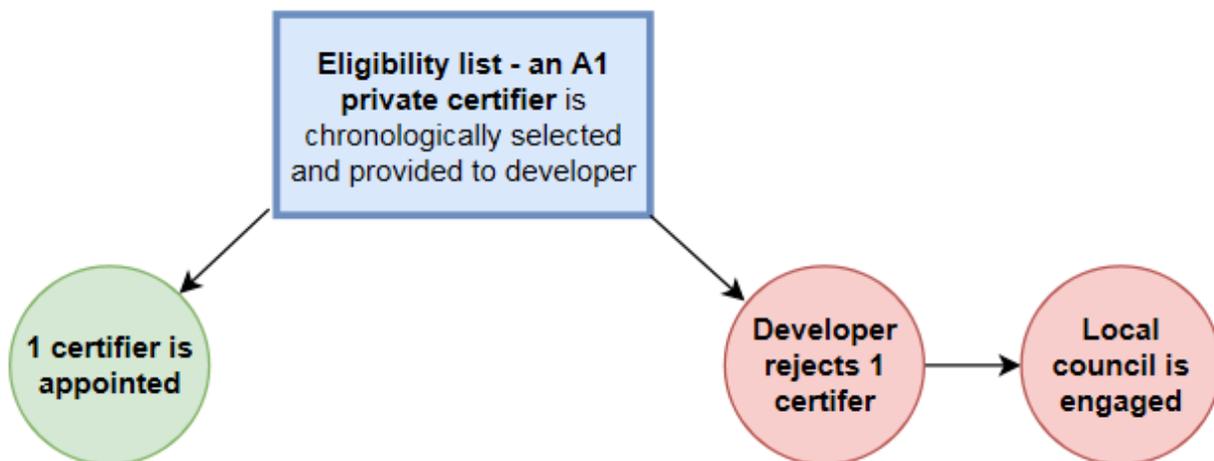
## Option 2: Cab rank scheme

A cab rank scheme is the second option proposed to enhance certifier independence. This option involves the creation of an eligibility list for certifiers, and contemplates that the next available certifier on the list is allocated to the job.

This option differs to Option 1 (the rotation scheme) in that the cab rank scheme would mean that if a development met the thresholds, the developer would be allocated one, rather than three certifiers, in cab rank order. The certifier would have an obligation to accept any work that they were competently trained and qualified to undertake.

The introduction of a cab rank would provide Fair Trading, as the building regulator responsible for monitoring the conduct of certifiers, the power to restrict developers from relying on the same certifier for every project. Enforcing a cab rank scheme would mean that every certifier would eventually have a turn at being appointed as the PCA for a development that fell within the thresholds. After a certifier was appointed using the cab rank, the certifier would then be placed at the end of the eligibility list and would not be selected again until that certifier made their way to the beginning of the list.

At present, a type of cab rank system is applied to barristers who are required to accept cases that meet the requirements of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*. This system ensures that all people can gain access to the justice system in a fair and impartial manner.



**Figure 6 – Overview of the cab rank scheme**

### Practical implementation

The cab rank scheme would be implemented by amending the EP&A Regulation to prescribe classes of development in which the PCA is to be appointed as per the cab rank scheme. This amendment would require that the person could not refuse to be appointed as a PCA, so long as the appointment was made in accordance with the requirements of the cab rank and the regulations.

The cab rank scheme would operate similarly to the rotation scheme outlined in Option 1. However, the cab rank system would require each successive job to be taken by the next available certifier, rather than by random allocation from a short list of certifiers to jobs. It is proposed that certifiers would be able to nominate preferred suburbs and/or Local Government Areas in which they could work. These preferences would be updated at any time to ensure that the cab rank system accurately reflected the areas in which a certifier was available to work.

Given the thresholds set by this Options Paper, it is estimated that approximately 1,000 developments would be captured by the cab rank system each year. Similar to Option 1, the cab rank would incorporate additional conduct requirements outside of the existing licensing framework to ensure that certifiers who were on the eligibility list could be allocated to the developer in a timely manner. For example, a person could be permitted to participate if the person did not have any conflicts of interest to disclose for the development.

The development of an online system is considered the most efficient means of implementing this option. Further efficiencies could be achieved by integrating the online system with one or more of the existing online regulatory services provided to certifiers as discussed under Option 1.

### **Will a developer be able to reject a certifier?**

As discussed above under Option 1, provisions would need to be established to allow a developer to reject a certifier selected using the cab rank scheme, such as:

- if there is a conflict of interest between the developer and the nominated certifier;
- if the quote provided by the certifier is unreasonable to the developer given the type of development; or
- if the nominated certifier did not have capacity to take on the job.

In circumstances where the developer rejected the maximum number of certifiers provided, the developer would be required to use the local council as the PCA for that development.

Additionally, to encourage price competition, a developer could possibly be given two rights of refusal on price grounds, and these refusals would not be subject to review.

### **Will a certifier be able to refuse to accept an appointment if selected under the cab rank scheme?**

It is preferable that the cab rank system includes a provision that could permit a certifier to refuse an appointment. An example could include requiring a certifier to refuse an appointment if they had a conflict of interest that was likely to result in an impartial or objective assessment of the development and its compliance with the law. Another example could include if the development was beyond the certifier's skill or experience, or the certifier was not available to undertake the job (for example, because the certifier was away, taking a break or on holiday).

As with the other options, a certifier would be required to comply with other conflict of interest provisions that apply to certifiers generally. In circumstances where a certifier was unable to accept an appointment due to a conflict of interest, the developer would be entitled to obtain the next eligible certifier on the list.

- 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?**
- 16) Is it appropriate to allow a developer to reject the single certifier provided under the cab rank? If so, in what circumstances would this be appropriate?**
- 17) Is it appropriate for developers to have two rights of rejection? Would this encourage price competition?**
- 18) Is it appropriate to mandate the developer appoint the local council as PCA where the developer rejects the private certifier provided?**
- 19) Should a certifier be able to refuse selection and/or appointment under the cab rank? If yes, in what circumstances would this be appropriate?**

### **Impacts on stakeholders**

The introduction of a cab rank is a strong measure that would minimise conflicts of interest and ensure impartiality was maintained. This is because the developer would be allocated one certifier who, if capable, would be required to accept the job, removing any discretion in regard to the appointment of the PCA.

Under the cab rank system, certifiers may also be more motivated to identify non-compliances as they would not be reliant on the same client for ongoing work. This may reduce the pressure on certifiers to meet the clients wishes or demands if they are unreasonable or non-compliant. The cab rank system could also be valuable in alleviating public concerns that certifiers are not sufficiently independent when undertaking work, particularly when engaging with the same clients over an extended period.

However, an experienced developer is likely to gain expertise by working with different PCAs and this sector knowledge may place them in a strong position to identify those with the most appropriate expertise for the job. The introduction of a cab rank scheme would prohibit a developer from engaging with a certifier of their choice and interfere with the ability to appoint the best person for the job.

Additionally, for the cab rank system to operate as intended, there would need to be a sufficiently large pool of certifiers available to accept work. Otherwise, the local council would be required to act as the PCA for developments where there are no certifiers available on the list. This could result in additional pressure being placed on local council to do work that would otherwise be performed by private certifiers in a free market.

A cab rank system could also be viewed by some as being inflexible and too stringent. For example, in the United Kingdom a cab rank burial system was criticised after discriminating against the religious needs of certain communities. The system involved dealing with burials in a chronological order, but did not consider the religious priority requirements of the communities to proceed with a burial as soon as possible after death. A similar issue could arise for developments that were subject to the cab rank scheme. A cab rank may not be flexible enough to meet the demands or priorities of a construction schedule. This could result in some developments missing important deadlines or being sold or occupied later than planned.

Additionally, a cab rank system which did not involve competition would likely lead to inflated certification costs.

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Reduces the likelihood of a conflict of interest occurring between a certifier and developer.</li> <li>• May improve public perception, create greater confidence and lead to better outcomes in the certification system.</li> <li>• May reduce the pressure on the certifiers to rely on the same entity for a source of income, leading to better certification outcomes.</li> <li>• Reducing conflicts of interests would likely increase the integrity of certification work, reducing the need for rectification.</li> </ul>	<ul style="list-style-type: none"> <li>• Administratively complex and inflexible system, and would require careful design to manage impacts on development project timelines, the approvals process.</li> <li>• Limits competition and may lead to inflated certification costs.</li> <li>• Would require a sufficiently large pool of certifiers to engage in the cab rank to ensure the option could operate as intended.</li> <li>• May place undue pressure on the certification industry and create disincentives for individuals to join the industry in the future.</li> </ul>

**Figure 7 – Overview of advantages and disadvantages of Option 2**

**20) Do you think that a ‘cab rank’ system will result in additional costs or delays for industry? If so, what sorts of costs or delays?**

**21) Do you support Option 2? If not, why not?**

## Option 3: The time limit scheme

Another option is to enforce a limit on the amount of time a certifier can continually work for the same client. This option would limit the number of years a certifier can work for one individual or company before taking a three year 'time out' from working for that client.

If the thresholds are met, the time limit scheme would encourage the certifier to seek new clients to diversify their client base. Such an option may lessen the pressure on certifiers to be tempted to compromise their independence to ensure future work from a client. Certifiers would also retain the freedom to work with any client, as long as the both parties complied with the time out requirements.

While this option does not put forward a suggested time as to the number of consecutive years a certifier would be able to work for the same client, there is evidence to suggest that a period of three to five years could be appropriate.

The enforcement of a time limit exists for other professionals who are similarly faced with situations where a conflict of interest may arise. For example, there are provisions which are used for auditors to monitor auditor independence and reduce the 'familiarity threat' created by long audit firm tenure. Under section 324DA of the *Corporations Act 2001* (Cth), an auditor who plays a 'significant' role in the audit of a client (i.e. five years or more), must take a time out period of two years before commencing work for that client again. The Corporations Act applies to auditors nationally and is a legal measure implemented to reduce issues of conflicts of interest within the industry.

In the building and construction space, a period of five years may also be necessary for bigger clients with long-term construction contracts or projects. For example, it would make sense for one certifier to see a project through to completion and ensure the project was compliant with the relevant requirements.



**Figure 8 – Overview of the time limit proposal**

### Practical implementation

The time limit scheme would be implemented by amending the EP&A Regulation, the draft Bill or the supporting regulation to introduce a provision to prohibit a certifier from working with the same

client for more than a certain period at a time, such as five years. Regardless of the period set, there would need to be an exemption for situations where a certifier was appointed to a project within the period (e.g. five years), but continued working on the project for longer than the required period (i.e. in this example, over five years). This would provide certifiers the ability to continue working on projects that they have already been appointed to. Where this exemption applies, the ‘time out’ period would not commence until the date of completion for that project.

The provision would prescribe that a certifier could return to the client after a three-year break. This option would be paired with one or more enforcement provisions to promote compliance. For example, a certifier who broke the time limit requirements could face penalties for non-compliance and/or have their accreditation suspended or revoked. Similarly, any party that attempted to wrongly engage a certifier during their three-year break could face penalties for non-compliance.

The time limit scheme would not require the design, development or implementation of an additional system. As such, under Option 3 certifiers would be largely responsible for complying with all relevant provisions to ensure they do not breach their obligations under the law.

Fair Trading would also be required to engage in compliance and enforcement measures more frequently (such as proactively auditing or investigating certifiers who were captured by the thresholds of this paper) to ensure certifiers were complying with the law.

**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?**

**23) Do you support that a certifier can work for the same client for a period of five years before taking a break? If not, what would be a more appropriate period?**

### Impacts on stakeholders

The introduction of a time limit is unlikely to be administratively complex or unfairly restrictive on certifiers. This option strikes a balance between managing conflicts of interest and encouraging certifiers to diversify their client base by rotating their clients after a certain period has passed. Only where a certifier has failed to comply with the requirements would they be subject to a compliance and enforcement measures such as penalties.

Additionally, the time limit scheme is unlikely to slow down the building and construction approvals process because developers would be open to engage with most certifiers in the market. This also means that certifiers would be able to operate competitively by charging different fees and offering value for money. Also, this option would be easier to manage by local councils, who would be able to more easily meet the demands of the option if it were introduced.

A key cost of the option is that it may unfairly punish certifiers who have fostered good long-term working relationships with their clients. Certifiers may have to spend extra time seeking out and establishing new working relationships with other clients to remain in business.

Further, the introduction of Option 3 is not guaranteed to minimise or eliminate conflicts of interest. Certifiers may still face the same challenges and be influenced by actual or potential conflicts of

interest in a similar way. This is because certifiers can still form close relationships with clients within five years (or a similar or longer period). These financial relationships may impact on the ability of the certifier to make impartial decisions. The option may be too flexible and prevent the legislation from operating as intended. As five years is still a long period of time, a certifier with poor conduct may continue to be influenced by private interests.

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Administratively simple to develop and implement.</li> <li>• Certifiers who take a time out from long term clients may be more likely to be objective in future appointments.</li> <li>• Fosters an environment of self-regulation for certifiers and their clients.</li> <li>• Balances the need to manage conflicts of interest while still providing the certifier with freedom to choose clients.</li> <li>• Encourages competition by forcing certifiers to diversify their client base.</li> <li>• Unlikely to impose a significant burden on the development and construction approvals process.</li> </ul>	<ul style="list-style-type: none"> <li>• Likely to impact certifiers who have effective working relationships with long-term clients.</li> <li>• Certifiers may have to spend extra time seeking out and establishing new working relationships with clients.</li> <li>• Conflicts of interest may still arise before or after the time-out period option.</li> </ul>

**Figure 9 – Overview of advantages and disadvantages of Option 3**

**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?**

**25) Do you support Option 3? If not, why not?**

## Appendix A

### Summary of questions for comment

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)?
2. Do you think that an additional mechanism is required to support independence in private certification work?
3. Should local councils have an additional role in appointing certifiers? If so, what kind of role should they play?
4. Is it appropriate to only include A1 level accredited private certifiers if introducing one of the options?
5. Do you agree with the proposed threshold requirements for when one of the options would apply? If not, why not?
6. Do you support a monetary threshold of \$5 million, \$20 million or another amount? Why?
7. Is the type of certification proposed to be captured by one of the options sufficient?
8. Does the proposed selection method raise any concerns that may impact the integrity of the rotation scheme?
9. How should certifiers preferences for working in certain Local Government Areas be managed?
10. Do you support the provision of three certifiers for each development that meets the threshold requirements? If not, what other way could help eliminate competition concerns?
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?
12. Is it appropriate to mandate the developer appoint the local council as principal certifying authority where the developer rejects the three certifiers provided?
13. Should a certifier be able to refuse selection and/or appointment under the rotation scheme? If yes, in what circumstances would this be appropriate?
14. Do you support Option 1? If not, why not?
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?
16. Is it appropriate to allow a developer to reject the single certifier provided under the cab rank? If so, in what circumstances would this be appropriate?
17. Is it appropriate for developers to have two rights of rejection? Would this encourage price competition?

18. Is it appropriate to mandate the developer appoint the local council as PCA where the developer rejects the private certifier provided?
19. Should a certifier be able to refuse selection and/or appointment under the cab rank? If yes, in what circumstances would this be appropriate?
20. Do you think that a 'cab rank' system will result in additional costs or delays for industry? If so, what sorts of costs or delays?
21. Do you support Option 2? If not, why not?
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?
23. Do you support that a certifier can work for the same client for a period of five years before taking a break? If not, what would be a more appropriate period?
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?
25. Do you support Option 3? If not, why not?