Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Orfali v Commissioner for Fair Trading [2024] NSWCATOD 4**
Hearing dates:	11 and 12 September 2023
Date of orders:	11 January 2024
Decision date:	11 January 2024
Jurisdiction:	Occupational Division
Before:	Dr J Lucy, Senior Member
Decision:	The decisions under review are affirmed.
Catchwords:	ADMINISTRATIVE REVIEW – Registered certifier – Whether disciplinary grounds established – Whether decisions to cancel applicant's registration and disqualify him from registration for 10 years are the correct and preferable decisions
Legislation Cited:	Administrative Decisions Review Act 1997 (NSW) Building Professionals Act 2005 (NSW) (repealed) Building and Development Certifiers Act 2018 (NSW) Building and Development Certifiers Regulation 2020 (NSW) Building Professionals Regulation 2007 (NSW) (repealed) Environmental Planning and Assessment Act 1979 (NSW) Environmental Planning and Assessment Regulation 2000 (NSW) (repealed) Environmental Planning and Assessment Regulation 2021 (NSW) Standard Instrument—Principal Local Environmental Plan (2006 EPI 155a) (NSW) State Environmental Planning Policy (Affordable Rental Housing) 2009 (NSW) (repealed) State Environmental Planning Policy (Housing) 2021 (NSW) Strata Schemes Development Act 2015 (NSW) Swimming Pools Act 1992 (NSW)
Cases Cited:	Blacktown City Council v Haddad [2012] NSWLEC 224

	Briginshaw v Briginshaw (1938) 60 CLR 336 Building Professionals Board v Boulle [2008] NSWADT 80 Building Professionals Board v Cogo [2008] NSWADT 119 Freixas v Commissioner for Fair Trading, Department of Customer Service (No 2) [2020] NSWCATOD 78 Lilli v Building Professionals Board [2019] NSWCATOD 119 McAuley v Northern Region Joint Regional Planning Panel [2013] NSWLEC 125 Murrant v Building Professionals Board [2019] NSWCATOD 130 Qiu v Building Professionals Board [2013] NSWADT 289
Category:	Principal judgment
Parties:	Mohamad Orfali (Applicant) Commissioner for Fair Trading (Respondent)
Representation:	Counsel: J Bennett (Applicant) M Fozzard (Respondent) Solicitors: CCS Legal Pty Ltd (Applicant) NSW Department of Customer Service (legal) (Respondent)
File Number(s):	2023/00144492

REASONS FOR DECISION

1 Mr Orfali applied for review of the decisions of the Commissioner for Fair Trading (the **Commissioner**), made on internal review, to cancel his registrations as a registered certifier and to disqualify him from being registered for a period of ten years.

2 I have found that the disciplinary grounds the Commissioner relied upon are established. Having regard to the seriousness of Mr Orfali's conduct and other matters, I consider that the correct and preferable decisions are those made by the internal review officer. Accordingly, I have affirmed the Commissioner's decisions.

Background

3 Mr Orfali holds two certificates of registration as a registered certifier under the *Building and Development Certifiers Act 2018* (NSW). Both are in the class of "Building Surveyor – Unrestricted." The first certificate is for the period 1 April 2021 to 31 March 2026 and is subject to conditions which include the following:

> "Prior to the issue of a construction certificate or complying development certificate for a class 2-9 building, that is not required to be referred to Fire Rescue NSW, under clause 144 of the *Environmental Planning and Assessment Regulation 2000*, the certifier must apply to the Commissioner of Fire & Rescue NSW, for a 'BPB Condition Report'."

4 The second certificate is subject to the condition that Mr Orfali must only carry out certification work on behalf of a local council.

5 Mr Orfali was previously registered in the following classes of registration:

(1) from 16 February 2021 to 15 February 2022, "Building Surveyor – Restricted (class 1 and 10 buildings)";

(2) from 16 February 2020 to 15 February 2021, "A3 – Accredited Certifier – Building Surveying Grade 3";

(3) from 16 February 2017 to 15 February 2020, "A3 – Accredited Certifier - Building Surveying Grade 3."

6 Under these classes of registration, Mr Orfali was not authorised to exercise the function of a principal certifier for a building other than a class 1 or 10 building (Building and Development Certifiers Regulation 2020 (NSW), Sch 1, cl 2(1), (2), 8; Building Professionals Regulation 2007 (NSW) (repealed), s 4, Sch 1, Part 1).

7 Mr Orfali was issued with sixteen penalty notices between 15 May 2019 and 25 January 2023. These were issued under s 118 of the *Building and Development Certifiers Act* or under s 92 of the *Building Professionals Act 2005* (NSW) (now repealed).

8 On 6 April 2023, the Commissioner's delegate decided to cancel Mr Orfali's registrations as a registered certifier and to disqualify him from being registered for a period of eight years. The delegate made those decisions on the basis of the following findings:

(1) between 2018 and 2019, Mr Orfali acted as the Principal Certifying Authority for a class 2 property development at Kenthurst (the **Kenthurst Development**) when he was an accredited certifier for class 1 and class 10 buildings only;

(2) between 2021 and 2022, Mr Orfali issued thirteen complying development certificates (**CDCs**) and three modified CDCs for thirteen class 3 residential care developments which did not comply with minimum fire safety standards, which he incorrectly classified as class 1a, 1b or 10a and as group homes, and where he was only permitted to carry out certification work with respect to class 1 and class 10 buildings.

9 On 24 May 2023, the cancellation decisions were affirmed on internal review and the internal review officer determined to increase the disqualification period to ten years.

10 Mr Orfali applied to the Tribunal for a review of the decisions. On 20 June 2023, on Mr Orfali's application, the Tribunal reinstated Mr Orfali's certificates of registration, pending further order of the Tribunal, subject to a number of conditions.

Relevant legislation

11 The *Building and Development Certifiers Act*, which came into force on 1 July 2020, provides for the registration of persons as registered certifiers.

12 The objects of the *Building and Development Certifiers Act* are set out in s 3 of that Act:

> **3 Objects of Act**
>
> The objects of this Act are as follows—
>
> (a) to provide for the registration of persons to carry out certification work and the accreditation of persons to carry out other regulated work,
>
> (b) to recognise that certification work is an important public function with potential impacts on public health, safety and amenity and to ensure that it is carried out impartially, ethically and in the public interest,
>
> (c) to provide for the approval of certain bodies corporate as accreditation authorities to exercise accreditation functions under this Act,
>
> (d) to ensure appropriate scrutiny and review of actions taken by persons exercising functions under this Act and the certification legislation,
>
> (e) to provide a framework to permit the continuous improvement of the carrying out of certification work.

13 A person must be registered to carry out "certification work" (*Building and Development Certifiers Act*, s 5(1)). "Certification work" means:

> (a) the exercise of a function of a certifier (including a principal certifier) specified in section 6.5 of the *Environmental Planning and Assessment Act 1979*,
>
> (b) the determination of an application for a strata certificate within the meaning of the *Strata Schemes Development Act 2015*,
>
> (c) the inspection of swimming pools under Division 5 of Part 2 of the *Swimming Pools Act 1992* and the issuing of certificates of compliance and notices under that Division,
>
> (d) the exercise of any other function of a registered certifier under the certification legislation or under another Act or law,
>
> (e) any other work of a kind prescribed by the regulations,
>
> but does not include work of a kind that is excluded from this definition by the regulations (*Building and Development Certifiers Act*, s 4).

14 The "certification legislation" includes, relevantly, the *Building and Development Certifiers Act* and the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) and regulations made under those Acts (*Building and Development Certifiers Act*, s 4(1)).

15 One of the available grounds for suspension or cancellation of registration is that the Secretary has determined to suspend or cancel the registration under Part 4 of the *Building and Development Certifiers Act* (*Building and Development Certifiers Act*, s 16(f)). The "Secretary" is the respondent Commissioner (*Building and Development Certifiers Act*, s 4). Part 4 of the *Building and Development Certifiers Act* is entitled "Disciplinary action against certifiers".

16 The Commissioner's delegate relied upon the following grounds for taking disciplinary action in s 45, which is in Part 4 of the *Building and Development Certifiers Act*:

> **45 Grounds for taking disciplinary action**
>
> The Secretary may take disciplinary action against a registered certifier on any one or more of the following grounds—

(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,

(b) the registered certifier has contravened the certification legislation, whether or not the registered certifier is prosecuted or convicted for the contravention,

…

(g) the registered certifier has failed to comply with a condition of the registration, …

17 The delegate also found that Mr Orfali had engaged in unsatisfactory professional conduct under the *Building Professionals Act 2005* (NSW) (now repealed) in relation to certification activities carried out between 25 October 2018 and 23 January 2019 concerning the Kenthurst Development.

18 Conduct of an accredited certifier occurring before "the repeal day" (that is, 1 July 2020) that is unsatisfactory professional conduct or professional misconduct under the *Building Professionals Act* is a ground for taking disciplinary action under Part 4 of the *Building and Development Certifiers Act* (*Building and Development Certifiers Act*, Sch 1, cl 2 and cl 7).

19 The *Building Professionals Act* was in force up to and including 30 June 2020, and was superseded by the *Building and Development Certifiers Act*, which came into force the following day. Mr Orfali was accredited as an accredited certifier under the *Building Professionals Act* prior to its repeal.

20 "Unsatisfactory professional conduct" was defined in s 19(1) of the *Building Professionals Act* to include:

(1) "conduct occurring in connection with the exercise of the accredited certifier's functions as a certifying authority that falls short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier" (paragraph (a) of the definition); and

(2) "a contravention of [the *Building Professionals Act*], the *Environmental Planning and Assessment Act 1979* or the *Strata Schemes Development Act 2015*, or the regulations under any of those Acts, by the accredited certifier, whether or not the accredited certifier is prosecuted or convicted for the contravention" (paragraph (b) of the definition).

21 The Commissioner has a range of options if satisfied that a ground for taking disciplinary action against a registered certifier has been established. Subsections 48(1) and (2) of the *Building and Development Certifiers Act* provide:

48 Disciplinary action that may be taken by Secretary

(1) The Secretary may, if satisfied that one or more of the grounds for taking disciplinary action against a registered certifier has been established, do any one or more of the following—

(a) determine to take no further action against the registered certifier,

(b) caution or reprimand the registered certifier,

(c) make a determination requiring the registered certifier to pay to the Secretary, as a penalty, an amount not exceeding $220,000 (in the case of a body corporate) or $110,000 (in the case of an individual) within a specified time,

(d) impose a condition on the registration of the registered certifier, including a condition requiring the registered certifier to undertake specified education or training relating to a particular type of work or business practice within a specified time,

(e) suspend or cancel the registration of the registered certifier in accordance with Part 2,

(f) disqualify the registered certifier, either temporarily or permanently, from being registered or being registered in a particular class.

(2) In determining the disciplinary action to take, the Secretary—

(a) must take into account any other disciplinary action taken against the person under this Part, and

(b) may take into account any written undertaking that the person proposes to give under Part 8.

22 A person aggrieved by a decision of the Secretary to take disciplinary action under Part 4 of the *Building and Development Certifiers Act* may apply to the Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* (NSW) (*Building and Development Certifiers Act*, s 49(b)). In determining such an application, the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it, including any relevant factual material and any applicable written or unwritten law (*Administrative Decisions Review Act*, s 63(1)).

Hearing, evidence and submissions

23 Mr Orfali made five affidavits on which he relied. He also gave evidence and was cross examined at the hearing.

24 The Commissioner relied upon affidavits of Darren Benson and Paul Devaise, both of whom are Principal Investigators in NSW Fair Trading's Design and Building Practitioners Integrity Unit. The Commissioner also relied upon affidavit evidence of Mathew Wunsch, a policy manager, Building Codes and Regulation, Policy and Strategy Branch at the Department of Customer Service and of Sean Fagan, the manager of NSW Fair Trading's Certifier Integrity Unit. The Commissioner also relied upon materials filed under s 58 of the *Administrative Decisions Review Act*.

25 Mr Devaise and Mr Wunsch were cross examined at the hearing.

26 Both parties provided the Tribunal with written and oral submissions.

27 Mr Orfali explained in his affidavit evidence why, at the relevant time, he considered the Kenthurst Development to be a class 1a building and not a class 2 building. He also explained why he considered all but one of the other buildings for which he had issued

CDCs to be class 1b buildings and group homes, and not class 3 buildings or residential care buildings. He accepted that a development at Thornton was class 3 (and had classified it as such).

28 It was submitted for Mr Orfali that it was a question of degree as to whether a building falls within one class or another. In written submissions, Mr Bennett, counsel for Mr Orfali, submitted that it is arguable that the residential care developments align with the criteria for a class 1b classification and that they were approved for use under the SEPP code for a group home.

29 In closing oral submissions, Mr Bennett submitted that the classification of the "group home" developments may be something about which Mr Orfali was incorrect, but said this did not justify the Commissioner's disciplinary response. He said that the questions of whether or not a building is residential care building, and whether or not it is less than 300 square metres is one on which, to an extent, minds could differ. Mr Bennett said that if Mr Orfali was incorrect, he was at the lowest end of recklessness.

30 Mr Bennett submitted that the correct and preferable decision was not to cancel Mr Orfali's registration. Mr Orfali's position was that he should not be disqualified at all, or alternatively that he should not be disqualified for a period as long as ten years.

31 The Commissioner's position was that the disciplinary grounds were established and that the disciplinary response was appropriate. Mr Fozzard said, in respect of the Kenthurst Development, that there had been a fundamental failure in the exercise of Mr Orfali's duties. He described the failures in respect of that property as "extraordinarily severe" and said that those failures alone justified cancellation of Mr Orfali's registration.

32 Mr Fozzard submitted for the Commissioner that the sixteen CDCs should not have been issued. The failure of Mr Orfali in relation to the CDCs was an obvious failure. Mr Fozzard said that the circumstance that Mr Orfali maintained that the developments were group homes makes the matter more serious. The training he had done had not advanced his understanding.

Kenthurst Development

33 On 25 October 2018, Mr Orfali accepted appointment as principal certifying authority for the Kenthurst Development. The proposed development comprised a large shed, an outdoor swimming pool and deck, a two storey residential building with a single dwelling on the ground floor, a secondary dwelling on the lower ground floor and a garage and workshop on the lower ground floor.

34 On 22 November 2018, Mr Orfali issued a construction certificate for the development of a proposed two-storey dwelling with attached secondary dwelling, swimming pool and shed for the Kenthurst Development.

35 It is not in dispute that, at this time, Mr Orfali was only authorised to act as a principal certifying authority for class 1 and class 10 buildings under the Building Code of Australia (**BCA**). Further, at this time, the Building Code of Australia as in force as at 1

May 2016 (**BCA 2016**) applied. Part A3 of the BCA 2016 provided for classifications of buildings in A3.2 relevantly as follows:

> "**Class 1:** one or more buildings which in association constitute -
>
> (a) **Class 1a –** a single dwelling being
>
> (i) A detached house; or
>
> (ii) One of a group of two or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, town house or villa unit; or
>
> (b) Class 1b –
>
> (i) A boarding house, guest house, hostel or the like –
>
> (A) with a total area of all floors not exceeding 300m2 measured over the enclosing walls of the Class 1b; and
>
> (B) in which not more than 12 persons would ordinarily be resident; or
>
> (ii) 4 or more single dwellings located on one allotment and used for short-term holiday accommodation,
>
> which are not located above or below another dwelling or another Class of building other than a private garage.
>
> **Class 2:** a building containing 2 or more sole-occupancy units each being a separate dwelling.
>
> …
>
> **Class 10:** a non-habitable building or structure –
>
> (a) **Class 10a** – a non-habitable building being a private garage, caport, shed, or the like; or
>
> (b) **Class 10b** – a structure being a fence, mast, antenna, retaining or free-standing wall, swimming pool, or the like; or…"

36 The term "sole-occupancy unit" was defined to include a dwelling.

37 The construction certificate issued by Mr Orfali states that the "BCA/NCC Classification" is "Class 1a – Class 10a – Class 10b." An attachment to the construction certificate is a document headed "Consultant's Advice" which states that the building is to comprise two separate dwellings to form a class 2 building.

38 On 20 May 2022, Mr Orfali was requested by Fair Trading officers to provide responses to questions about the Kenthurst Development. In response to a question about his classification of the building, he stated in an email to Fair Trading: "The classifications of the building was supposed to be Class 2, Class 10a, Class 10 b – This seems to be a typing error – as they tend to happen every now and again."

39 On 19 July 2022, Mr Orfali participated in a recorded interview at the Office of Fair Trading. In that interview, he gave inconsistent answers as to whether, at the time he issued the construction certificate, he considered it should be a class 2. Early in the interview, the following exchange took place:

> "Q. So, just confirming that the time you issued the CC you, in your mind you believe that it should be class 2.

A. Correct."

40 Mr Orfali was later asked in the interview why he issued a construction certificate when he was accredited as an A3 and it was outside his accreditation. He responded: "The reason why it was issued is, I think I got, wouldn't be, it would have been mistaken for a class 1a, going through all the thing and looking back at it now I, I shouldn't have issued that." He explained that he was very busy at the time and must have done it without actually realising it was a class 2. When asked about the inconsistency in his responses, at first he maintained that he had thought at the time of issuing the construction certificate that it was a class 1a, then changed his answer and said that when he "was actually assessing it" he thought it was a class 2 building.

Unsatisfactory professional conduct - Contravention of legislation

41 The Commissioner contends that Mr Orfali engaged in unsatisfactory professional conduct in relation to the Kenthurst Development in that he contravened ss 72 and 85 of the *Building Professionals Act* and clause 145 of the Environmental Planning and Assessment Regulation 2000 (NSW) (now repealed) (the **EPA Regulation 2000**). The Commissioner says that contravention of each of those provisions constituted "unsatisfactory professional conduct" under s 19(1) of the *Building Professionals Act*.

Alleged contraventions associated with classification as class 2

42 Section 72 of the *Building Professionals Act* provided, at the time Mr Orfali issued the construction certificate for the Kenthurst Development, as follows:

> **72 Acting in a manner not authorised by certificate of individual accreditation**
>
> A person who is the holder of a certificate of individual accreditation must not do any thing that is required by law to be done by a person with accreditation under this Act unless the person's certificate of accreditation authorises the doing of that thing.
>
> Maximum penalty—300 penalty units.

43 Section 85 of the *Building Professionals Act* provided:

> **85 False representations**
>
> (1) A person who—
>
> (a) issues a Part 4A certificate or complying development certificate that the person is not authorised by or under this Act or the Environmental Planning and Assessment Act 1979 to issue, or
>
> (b) makes any statement that is false or misleading in a material particular in, or in connection with, a Part 4A certificate or complying development certificate,
>
> is guilty of an offence against this Act.
>
> Maximum penalty—300 penalty units.

44 A "Part 4A certificate" included a certificate issued under Part 4A of the EPA Act before the repeal of that Part or a certificate under Part 6 of that Act issued after that repeal (*Building Professionals Act*, s 3 (definition of "Part 4A certificate")). Part 4A had been repealed by 22 November 2018, but was continued in effect until 1 December 2019

under savings and transitional legislation. In any event, at all times, a construction certificate could be issued either under Part 4A or Part 6 of the EPA Act (see EPA Act as at 26 October 2018, s 6.4; see also EPA Act as at 18 December 2017, s 109C).

45 Mr Orfali acknowledged in cross examination that the Kenthurst Development is a class 2 building although he had approved it as class 1. He accepted that his assessment was wrong.

46 I find that the Kenthurst Development was a class 2 residential property development, because it was a building containing two or more sole-occupancy units each being a separate dwelling. I also find that Mr Orfali was not authorised to issue a construction certificate for this development, because he was not authorised to issue construction certificates for class 2 buildings. As the delegate found, the issue of a construction certificate was a contravention of s 72 of the *Building Professionals Act*.

47 The issue of a construction certificate for the Kenthurst Development was also a contravention of s 85(1)(a) of the *Building Professionals Act*, because the certificate was a "Part 4A certificate" which Mr Orfali was not authorised by the relevant legislation to issue. The statement in the construction certificate that it was a "Class 1a – Class 10a – Class 10b" building was false and misleading as the correct classification was class 2. This was a contravention by Mr Orfali of s 85(1)(b) of the *Building Professionals Act*, as the delegate found.

Do the approved plans demonstrate that the proposed development will comply with the BCA?

48 At the time Mr Orfali issued the construction certificate for the Kenthurst Property, clause 145(1) of the EPA Regulation 2000 relevantly provided:

> **145 Compliance with development consent and Building Code of Australia (cf clause 79G of EP&A Regulation 1994)**
>
> (1) A certifying authority must not issue a construction certificate for building work unless:
>
> …
>
> (a) the design and construction of the building (as depicted in the plans and specifications and as described in any other information furnished to the certifying authority under clause 140) are not inconsistent with the development consent, and
>
> (b) the proposed building (not being a temporary building) will comply with the relevant requirements of the Building Code of Australia (as in force at the time the application for the construction certificate was made).

49 The Commissioner's delegate found that the architectural plans approved by Mr Orfali when he issued the construction certificate did not demonstrate that the proposed development would comply with the BCA for the following reasons:

(1) There was no provision for a fire hydrant to serve the building, which was required because the building had a floor area in excess of 500 m2 (Part E1.3 Fire hydrants)

(2) There was no provision for a smoke alarm system and/or a smoke detection

system (Part 32.2 Smoke Hazard Management);

(3) The approved architectural plans did not reference the requirements under BCA Volume 1, but instead stipulated compliance with requirements under BCA class 1a building (BCA Volume 2).

50 Mr Orfali did not seriously contest those findings. He accepted in cross examination that BCA requirements for fire safety for class 1 and 2 buildings differ and that getting classifications wrong potentially could impose greater risks concerning fire safety. He also accepted that he was not qualified to make an assessment in respect of fire hydrants for a class 2 building. The fire safety requirements for a class 2 building are more stringent than those for a class 1 building. The failure to make provision for a fire hydrant or smoke alarm system, as required by the BCA for a class 2 building, compromised the safety of the building.

51 I agree with the delegate's findings that the architectural plans approved by Mr Orfali when he issued the construction certificate did not demonstrate that the proposed development would comply with the BCA, for the reasons given by the delegate. Mr Orfali's conduct in issuing the construction certificate therefore constituted a contravention of clause 145(1)(b) of the EPA Regulation 2000.

52 The delegate also found that the approved architectural plans for the Kenthurst Development were inconsistent with the development consent in that they showed the pool to be surrounded by part of a residential building which contained openings to the swimming pool in contravention of ss 7 and 19 of the *Swimming Pools Act 1992* (NSW). Sections 7(1) and 19 of that Act provide as follows:

> **7 General requirements for outdoor swimming pools**
>
> (1) The owner of the premises on which a swimming pool is situated must ensure that the swimming pool is at all times surrounded by a child-resistant barrier—
>
> > (a) that separates the swimming pool from any residential building situated on the premises and from any place (whether public or private) adjoining the premises, and
> >
> > (b) that is designed, constructed, installed and maintained in accordance with the standards prescribed by the regulations.
>
> Maximum penalty—50 penalty units.
>
> …
>
> **19 House wall may be used as part of required child-resistant barrier**
>
> (1) A child-resistant barrier that is formed by, or that includes, a wall of a residential building or a building used for the purposes of tourist and visitor accommodation is regarded, for the purposes of sections 7 and 12, as separating any outdoor swimming pool from the building so long as—
>
> > (a) the wall contains no opening through which access may at any time be gained to the swimming pool, and
> >
> > (b) the wall is designed, constructed, installed and maintained in accordance with the standards prescribed by the regulations, and
> >
> > (c) the remainder of the barrier complies with section 7 or 12, as the case requires.

> (2) The regulations may prescribe circumstances in which an opening in a wall is or is not to be regarded as an opening through which access may at any time be gained to a swimming pool for the purposes of subsection (1) (a).

53 When Mr Orfali was interviewed by Fair Trading about the Kenthurst Development on 19 July 2022, the following exchange occurred:

> "Q. … on the plans there's no reference … to the swimming barrier needing to comply …
>
> A. No.
>
> Q. … with the Swimming Pool Act. Why … do you think that's the case?
>
> A. Back then I was just relying on … the DA plans…
>
> Q. Mm mm…
>
> A. Yeah, I didn't …
>
> Q. … okay
>
> A. … like I'm being upfront, I didn't check it."

54 In his affidavit evidence, Mr Orfali stated as follows:

> "In relation to the concern about the swimming pool, the DA consent specifies pool fencing and other pool conditions. It is usually the case that conditions which [sic: form] part of the DA consent conditions will canvass the concerns arising from swimming pool regulations. Therefore, in the vast majority of cases in which one is issuing a CC for a Residential build such as this, any concerns arising from swimming pool regulations are more than adequately met by conditions of consent imposed by the DA, and conditions and swimming pool fence locations that are shown on plans for the subject of a CC are frequently altered and changed before a build is completed in any event. In that sense, the continuing standard by which enforcement of swimming pool regulations is administered is principally by a council according to conditions attaching to a DA consent along with the inspections."

55 When being cross examined, Mr Orfali said he could not recall whether the development had a swimming pool fence and denied making a mistake in assessing the plan. He agreed, however, that the plan did not show where the pool fence was and that it should have done so. He said that he had learned from his mistakes to show more details on the plan.

56 I am satisfied that the approved architectural plans for the Kenthurst Development are inconsistent with the development consent in that they show the pool to be surrounded by part of a residential building which contains openings to the swimming pool, in contravention of ss 7 and 19 of the *Swimming Pools Act 1992* (NSW). As stated above, Mr Orfali acknowledged that the plans should have shown the pool fence but did not do so. The issue of a construction certificate in these circumstances constituted a contravention of clause 145(1)(a) of the EPA Regulation 2000.

Did Mr Orfali's conduct constitute unsatisfactory professional conduct?

57 I find that Mr Orfali's contraventions of the *Building Professionals Act* and the EPA Regulation 2000 fell within paragraph (b) of the definition of unsatisfactory professional conduct in s 19(1) of the *Building Professionals Act*.

58 It was submitted for Mr Orfali that the conduct was not so egregious as to be unsatisfactory professional conduct, given that minds may differ as to the appropriate classification of a building. Mr Orfali relied upon *Building Professionals Board v Cogo* [2008] NSWADT 119 at [85], where the former Administrative Decisions Tribunal

observed “that the objective gravity of the conduct should be the focus when considering where the conduct might fall on the spectrum set by the legislation, i.e. is it conduct, objectively viewed, which is of a kind that might warrant suspension or disaccreditation.” It is to be noted that that comment was made in the context of considering a finding of professional misconduct.

59 The *Building Professionals Act* provided in s 19(1) that “unsatisfactory professional conduct … means … a contravention of” the relevant legislation. In my view, once a contravention of that legislation has been established, the person has engaged in unsatisfactory professional conduct.

60 If, contrary to my view, there remains a discretionary element in determining whether a contravention constitutes unsatisfactory professional conduct, Mr Orfali’s conduct does so. The failure to classify the building correctly was a significant failure. The classification of this building was not, in my view, a matter about which reasonable minds may differ, as Mr Orfali’s counsel suggested. It was “an obvious error which a careful accredited certifier would not have made” (*Freixas v Commissioner for Fair Trading, Department of Customer Service (No 2)* [2020] NSWCATOD 78 (***Freixas***) at [51]). The classification error potentially had serious consequences, including a breach of fire safety standards. This was coupled with a failure to ensure that the swimming pool fence was included on the approved plans and that the building did not contain openings on to the pool. Mr Orfali’s admission that the error was due to his failure to check indicates a lack of appropriate diligence and care. His subsequent explanation that “any concerns arising from swimming pool regulations are more than adequately met by conditions of consent imposed by the DA” shows a lack of appreciation of the gravity of his errors.

61 For these reasons, I am satisfied that Mr Orfali’s conduct in relation to the Kenthurst Development constitutes unsatisfactory professional conduct within paragraph (b) of the definition of unsatisfactory professional conduct in s 19(1) of the *Building Professionals Act*.

62 That is a ground for taking disciplinary action under Part 4 of the *Building and Development Certifiers Act* (*Building and Development Certifiers Act*, Sch 1, cl 2 and cl 7).

Unsatisfactory professional conduct – Conduct falling short of relevant standard

63 The Commissioner contends that Mr Orfali engaged in unsatisfactory professional conduct within s 19(1) of the *Building Professionals Act* in that his conduct in relation to the Kenthurst Development fell short of the standard of competence, diligence and integrity that a member of the public was entitled to expect of a reasonably competent accredited certifier.

64 The Commissioner submits that Mr Orfali's conduct fell short of the expected standard of competence, diligence and integrity in that he:

(1) Knowingly acted outside his accreditation by issuing a construction certificate for a class 2 building which was outside his accreditation;

(2) Made false and misleading statements in the construction certificate as to the BCA classification of the proposed development;

(3) Approved architectural plans for the Kenthurst Development which were inconsistent with the development consent requirement to comply with the *Swimming Pools Act*;

(4) Approved architectural plans for the Kenthurst Development which did not demonstrate that the proposed building would comply with the relevant fire safety requirements of the BCA.

65 It is not strictly necessary to determine whether Mr Orfali's conduct constitutes unsatisfactory professional conduct on this alternative basis, given that I have already found that the conduct constitutes unsatisfactory professional conduct on a different basis. However, in case I am wrong about the first basis on which I have found that Mr Orfali engaged in unsatisfactory professional conduct, I have dealt with this alternative argument.

66 The allegation that Mr Orfali knowingly acted outside his accreditation by issuing a construction certificate for a class 2 building which was outside his accreditation is based upon a statement Mr Orfali made in an interview with Fair Trading officers on 19 July 2022 that, at the time he issued the construction certificate, he believed it should be a class 2. In his affidavit evidence, Mr Orfali stated that he thought at the time it was a class 1A development and that if he had understood that the interview was a disciplinary meeting, he would not have been so casual in what he said. That does not adequately explain his admission that he believed at the time of issuing the construction certificate that the building was class 2. It is also inconsistent with his explanation to Fair Trading on 20 May 2022, when he stated that "[t]he classifications of the building was supposed to be Class 2, Class 10a, Class 10b – This seems to be a typing error." When being cross examined at the hearing, Mr Orfali accepted that he realized at the time that the development was a class 2 but approved it as a class 1.

67 On this basis, I find that Mr Orfali knowingly acted outside his accreditation by issuing a construction certificate for a class 2 building which was outside his accreditation. He was aware at the time that he was not authorised to issue a construction certificate for

a class 2 building and has not suggested otherwise. I have made this finding having had regard to the caution sounded by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 363:

> "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

68 I do not accept the applicant's submission that his position that the building was class 1a is understandable when regard is had to the plans for the building, as described in his evidence. Mr Orfali's evidence is that class 2 is most often applied to apartment buildings and not as frequently applied to granny flat style plans. Even if it is accepted that the two dwellings "are in an odd location and feature within a luxury home as opposed to the more usual occupancy arrangement for a class 2 building," as the applicant submitted, his role was to classify the building appropriately. As he now accepts, he did not do so.

69 The Commissioner's allegation that Mr Orfali made false and misleading statements in the construction certificate refers to Mr Orfali's statement in that certificate that the building was "Class 1a, 10a and 10b" when it was class 2. This allegation has been established for reasons given above.

70 I am also satisfied that Mr Orfali approved architectural plans for the Kenthurst Development which were inconsistent with the development consent requirement to comply with the *Swimming Pools Act* and which did not demonstrate that the proposed building would comply with the relevant fire safety requirements of the BCA, for reasons given above.

71 I find that Mr Orfali's conduct fell short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier, and his conduct was accordingly unsatisfactory professional conduct as defined in s 19(1) of the *Building Professionals Act* (definition, paragraph (a)). The conduct in knowingly issuing a construction certificate for a class 2 building which was outside his accreditation was very serious and fell short of the standard of integrity a member of the public is entitled to expect. On that basis alone, the conduct was unsatisfactory professional conduct. Moreover, his other conduct, referred to above, also fell short of the applicable standard of competence, diligence and integrity.

Complying development certificates

72 Between 17 March 2021 and 15 August 2022, Mr Orfali issued thirteen complying development certificates and three modified complying development certificates for thirteen developments. He described these developments as "group homes" and classed them as class 1a, 1b or 10a buildings (with the exception of a development at Thornton (the **Thornton Development**), which he identified as a class 3 building).

73 Mr Orfali issued the CDCs under the State Environmental Planning Policy (Affordable Rental Housing) 2009 (NSW) (now repealed) (**2009 SEPP**) and the State Environmental Planning Policy (Housing) 2021 (NSW) (**2021 SEPP**). Those instruments provide that development for the purpose of a group home is complying development in some circumstances (2009 SEPP, clause 45; 2021 SEPP, clause 64).

74 Each CDC was accompanied by stamped plans for each proposed development. Each plan was for a proposed building or buildings comprising self-contained residential units designed to meet standards for residents needing high physical support (the National Disability Insurance Scheme (**NDIS**) Special Disability Accommodation (**SDA**) standards). Each CDC was also accompanied by an operational management plan prepared by Auscare, setting out the requirement for the owner at each property to:

(1) engage a carer who would be available and on-duty 24 hours per day;

(2) ensure the operator would also be available and on-call 12 hours per day; and

(3) record each resident's special needs.

75 The Commissioner's position is that all of the developments related to class 3 residential care buildings.

76 On 22 August 2022, Fair Trading issued Mr Orfali with a notice requiring information and records in respect of nine properties for which he had issued CDCs. In his response, he indicated that he considered the buildings to be class 1b buildings.

77 The Commissioner alleged that Mr Orfali:

(1) issued certificates for proposed buildings which would not comply with the minimum fire safety standards required by the BCA, thereby contravening the EPA Regulation 2000 and the Environmental Planning and Assessment Regulation 2021 (NSW) (**EPA Regulation 2021**);

(2) incorrectly classified the developments as class 1a, 1b or 10a;

(3) misrepresented the developments to be complying group homes, when the proposed homes were self-contained residential units and not complying group homes under the EPA Act;

(4) contravened the *Building and Development Certifiers Act* by issuing complying developments for three class 3 building developments between 16 February 2021 and 31 March 2021 when his registration authorised him to carry out

certification work with respect to class 1 and 10 buildings only; and

(5) failed to comply with a condition of his registration by issuing the certificates without first applying to the Commissioner of Fire and Rescue NSW for a report.

78 The Commissioner relied upon these allegations as the factual basis for the Commissioner's position that the following grounds for taking disciplinary action were established:

(1) Mr Orfali 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 (*Building and Development Certifiers Act*, s 45(a) (the **standards ground**));

(2) Mr Orfali contravened the certification legislation (*Building and Development Certifiers Act*, s 45(b) (the **contravention ground**)); and

(3) Mr Orfali failed to comply with a condition of the registration (*Building and Development Certifiers Act*, s 45(g) (the **conditions ground**)).

Did Mr Orfali incorrectly classify the proposed buildings for which he issued CDCs?

79 At the relevant times when Mr Orfali issued the CDCs, the BCA provided:

> (1) "Class 1a is one or more buildings, which together form a single dwelling including the following:
>
> (a) a detached house.
>
> (b) one of a group of two or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, town house or villa unit.
>
> (2) Class 1b is one or more buildings which together constitute—
>
> (a) a boarding house, guest house, hostel or the like that—
>
> (i) would ordinarily accommodate not more than 12 people; and
>
> (ii) have a total area of all floors not more than 300 m2 (measured over the enclosing walls of the building or buildings); or
>
> (b) four or more single dwellings located on one allotment and used for short-term holiday accommodation.
>
> …
>
> A Class 3 building is a residential building providing long-term or transient accommodation for a number of unrelated persons, including the following:
>
> (a) A boarding house, guest house, hostel, lodging house or backpacker accommodation.
>
> (b) A residential part of a hotel or motel.
>
> (c) A residential part of a school.
>
> (d) Accommodation for the aged, children, or people with disability.
>
> (e) A residential part of a health-care building which accommodates members of staff.
>
> (f) A residential part of a detention centre.
>
> (g) A residential care building."

80 The term "residential care building" was defined in the BCA as follows:

> "A Class 3, 9a or 9c building which is a place of residence where 10% or more of persons who reside there need physical assistance in conducting their daily activities and to evacuate the building during an emergency (including any aged care building or residential aged care building) but does not include a hospital."

81 Mr Orfali provided reasons, in his affidavit evidence, as to why he classified the developments as class 1a, 1b or 10a. He stated that any references to "class 1a" contained a typographical error. He intended to refer to class 1b. He said that class 10 related to garages and carports and that the central issue was therefore whether the buildings were correctly classified as class 1b.

82 Mr Orfali explained in an affidavit that he did not consider the facilities in the proposed buildings to be residential care facilities by reference to the definition of "residential care facility" in the SEPP. He said he classified some of the homes as group homes because they had no more than ten bedrooms and they each had a floor area of less than 300 square metres. He also relied upon the operational management plans which specified that they were permanent or transitional group homes.

83 In a subsequent affidavit, Mr Orfali stated that he "thoroughly disagreed" with the Commissioner's view that each of the buildings were residential care buildings. Mr Orfali referred to the definition of "residential care facility" in the Standard Instrument—Principal Local Environmental Plan (2006 EPI 155a) (NSW) (the **Standard Instrument**) to support his view that the buildings were not residential care buildings within the BCA.

84 Mr Orfali also referred to the definition of "group home" in the Standard Instrument (a definition applied by s 4 of the 2021 SEPP). Under the definition of "group home" in the Standard Instrument, in order to be a group home, a dwelling must be occupied by persons as a single household. That definition excludes from the meaning of "group home" development to which the 2021 SEPP, Chapter 3, Part 5 applies. Part 5 of Chapter 3 of the 2021 SEPP is headed "Housing for seniors and people with a disability."

85 Mr Wunsch gave evidence for the Commissioner and expressed the opinion that the class 3 "residential care building" was the appropriate BCA classification for each of the buildings for which Mr Orfali issued CDCs. He commented that each of the occupants proposed to reside in those buildings would appear to need physical assistance in conducting their daily activities and to evacuate the building in an emergency.

86 Mr Orfali's approach to classifying the proposed buildings under the correct BCA class was confused. The classification of buildings under the BCA is a different exercise from the determination of whether a building meets the requirements for complying development under a planning instrument, but Mr Orfali relied upon planning instruments to classify the proposed buildings. Mr Orfali should have determined first the classification of the proposed buildings, so as to form a view as to whether he was authorised to exercise the function of a principal certifier for each of those buildings and, if so, under what circumstances. Up until 15 February 2022, he should not have

proceeded to consider the requirements of the planning instrument unless he was satisfied that the building was a class 1 or class 10 building, and therefore a building within the scope of his registration.

87 Mr Orfali's approach of applying definitions in environmental planning instruments to determine the class of the proposed buildings under the BCA is misguided. As Mr Wunsch stated in his affidavit, the terms in an environmental planning instrument are generally not relevant to interpreting the same or a similar term in the BCA.

88 The definitions of terms in the Standard Instrument are also of little relevance to the meaning of those terms in the BCA. In any event, the term used in the BCA, "residential care building," is a different term from that used in the Standard Instrument, on which Mr Orfali relied, being "residential care facility." Contrary to Mr Orfali's approach, the definition in the Standard Instrument does not apply to the term used in the BCA.

89 The correct approach when classifying a proposed building under the BCA is to consider, first, the purpose of the development. As explained in the BCA (as it applied at the time), the "classification of a building or part of a building is determined by the purpose for which it is designed, constructed or adapted to be used."

90 There were clear indications, in the application documents provided to Mr Orfali, that the purpose for which the buildings were designed was to accommodate residents with disabilities. Each of the CDCs was accompanied by SDA and NDIS design certificates and a plan of management referring to each resident's special needs.

91 Mr Orfali did not consider the purpose for which the buildings were designed to be significant in classifying the buildings under the BCA. He appeared to be reluctant to anticipate how the building would likely be used, stating in an affidavit:

> "There is no way of knowing, at the time of certification, what type of residents will be occupying a dwelling (unless explicitly stated in the Plan of Management). Nor is there any way of knowing what percentage of residents, if any, will suffer from a disability, or need physical assistance in their day-to-day activities (again, unless stated in the Plan of Management)."

92 Such an approach is inconsistent with that required when classifying buildings under the BCA. For example, a certifier is required to determine whether the purpose of a building is to be "a place of residence where 10% or more of persons who reside there need physical assistance in conducting their daily activities" when deciding whether it is a residential care building (class 3). Further, the determination of purpose depends upon an assessment of all relevant documents. It is not simply a matter of adopting what is stated in the Plan of Management.

93 Mr Orfali should have asked himself, when considering whether each proposed building was a class 1b building, whether it was "a boarding house, guest house, hostel or the like." That is not something which featured in his reasoning, as set out in his affidavit

evidence. A building containing self-contained units for persons with a disability is not a boarding house, guest house or hostel, and is sufficiently different from those forms of accommodation as not to be captured by the phrase, “or the like”.

94 On the other hand, each of the proposed buildings was plainly “accommodation for … people with disability” (within class 3) as well as “a residential care building” (within class 3). Each was a residential care building because it was plain that the purpose of the building was to house people who would need physical assistance in conducting their daily activities and to evacuate the building during an emergency, and that it was intended that at least 10% of the residents (in fact, a much greater proportion) would be such people.

95 In these circumstances, each of the proposed buildings for which Mr Orfali issued a CDC was a class 3 building.

Fire safety standards

96 The BCA contains more stringent fire safety requirements for class 3 buildings than the requirements applicable to class 1 buildings. Under Part E1 of the BCA, a sprinkler system must be installed in some class 3 buildings and must be installed throughout all class 3 buildings used as a residential care building. Under Part E2, class 3 buildings must be provided with an automatic smoke detection and alarm system complying with certain specifications.

97 Mr Orfali did not identify that these minimum fire safety measures were required in the proposed fire safety schedule attached to each CDC and to each modified CDC (except in the case of the Thornton Development). In the case of the Thornton Development, Mr Orfali identified the requirement for an automatic smoke detection and an alarm system with a building occupant warning system.

98 No provision for these required fire safety measures appeared in any of the CDC stamped plans (including the plans for the Thornton Development).

Contravention ground

99 As indicated above, the Commissioner relies upon the disciplinary ground in s 45(b) of the *Building and Development Certifiers Act*, namely that Mr Orfali contravened the certification legislation (which includes the *Building and Development Certifiers Act,* the EPA Act and regulations made under those Acts).

100 The Commissioner alleges that Mr Orfali contravened s 5 of the *Building and Development Certifiers Act* by issuing three CDCs for class 3 building developments between 16 February 2021 and 31 March 2021 (at South Penrith, St Mary’s and Wyoming). During this period, he was not authorised to issue CDCs for class 3 buildings. Section 5 relevantly provides:

> **5 Certification work requires registration**
>
> (1) A person must not carry out certification work unless—

(a) the person is registered and the registration authorises the person to carry out the certification work, or

(b) the person is otherwise lawfully authorised to carry out the certification work.

…

Maximum penalty—1,000 penalty units (in the case of a body corporate) or 300 penalty units (in any other case).

101 The Commissioner also contends that Mr Orfali contravened clause 130 of the EPA Regulation 2000 and clause 137(1) of the EPA Regulation 2021 by issuing sixteen CDCs and modified CDCs in the period 17 March 2021 to 15 August 2022 when each proposed building would not comply with the fire safety requirements of the BCA.

102 Clause 130 of the EPA Regulation 2000 provided:

130 Procedure for determining application for complying development certificate and notification requirements (cf clause 77 of EP&A Regulation 1994)

(1) A certifier must not issue a complying development certificate for building work unless the proposed building (not being a temporary building) will comply with the relevant requirements of the Building Code of Australia (as in force at the time the application for the certificate was made).

103 Clause 137(1) of the EPA Regulation 2021 is in near identical terms.

104 I accept the Commissioner's contention that Mr Orfali contravened s 5 of the *Building and Development Certifiers Act* in issuing CDCs for class 3 buildings between 16 February 2021 and 31 March 2021. As Mr Orfali's registration in this period authorised him to carry out certification work with respect to class 1 and 10 buildings only, the issue of three CDCs for class 3 buildings was a contravention of s 5 of the *Building and Development Certifiers Act*.

105 I also accept the Commissioner's allegation is that Mr Orfali contravened clause 130(1) of the EPA Regulation 2000 and clause 137(1) of the EPA Regulation 2021 for the sixteen CDCs and modified CDCs which he issued. For reasons given above, none of those buildings complied with the fire safety requirements of the BCA for residential care buildings.

106 Accordingly, I am satisfied that the ground for taking disciplinary action against Mr Orfali on the basis that he has contravened the certification legislation is established.

Conditions ground

107 The Commissioner's delegate found, in his decision, that Mr Orfali had failed to comply with a condition of his registration between 17 March 2021 and 15 August 2022 by issuing CDCs for class 3 developments without first applying to the Commissioner of Fire and Rescue NSW for a BPB Condition Report, as required by his condition of registration. He was required to apply for such a report before issuing a CDC for a class 2-9 building.

108 Mr Orfali's evidence is that he did seek such a certificate on 15 January 2020 and he annexed the relevant application to his affidavit. The annexed application to Fire and Rescue is for a BPB Condition Report for the Thornton Development. That application

is consistent with Mr Orfali classifying the buildings the subject of the Thornton Development as class 3. The application did not relate to any other of the CDCs the subject of these proceedings.

109 I am satisfied that Mr Orfali did not apply to the Commissioner of Fire and Rescue NSW as required by the condition of his registration, except in relation to the Thornton Development. He had no reason to do so, given his incorrect assessment that the buildings were class 1.

110 This disciplinary ground is established in respect of all CDCs except the CDC for the Thornton Development (*Building and Development Certifiers Act*, s 45(g)).

Standards ground

111 Another disciplinary ground the Commissioner relies upon is that Mr Orfali's conduct in issuing the CDCs fell 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 (*Building and Development Certifiers Act*, s 45(a)).

112 The Commissioner relies upon a number of matters in support of this ground. I have already found that some of these matters have been established, namely that Mr Orfali:

(1) issued CDCs for proposed buildings which did not comply with the minimum fire safety requirements under the BCA;

(2) issued CDCs which incorrectly classified the buildings and failed to identify that the buildings were class 3 (except for the CDC for the Thornton Development);

(3) issued CDCs for three class 3 building developments between 16 February 2021 and 31 March 2021 when his registration authorised him to carry out certification work with respect to class 1 and 10 buildings only; and

(4) between 17 March 2021 and 15 August 2022, failed to comply with a condition of his registration by issuing CDCs for class 3 buildings without first applying to the Commissioner of Fire and Rescue NSW for a report (except in relation to the Thornton Development).

113 The Commissioner also contends, in support of this ground, that Mr Orfali:

(1) between 17 March 2021 and 15 August 2022, issued CDCs for proposed complying "group homes" when the proposed homes were self-contained residential units and not complying "group homes"; and

(2) between 4 and 25 November 2021, issued two modified CDCs and one CDC which misrepresented the total floor area of the proposed developments.

Were the proposed buildings group homes?

114 As indicated above, Mr Orfali's evidence is that each of the proposed buildings for which he issued CDCs was a "group home." He said in his affidavit that he relied upon the principles in *McAuley v Northern Region Joint Regional Planning Panel* [2013]

NSWLEC 125 (***McAuley***). He did not explain which principles he relied upon in that case or how they applied.

115 The Commissioner's witness, Mr Wunch, expressed the view in his affidavit that none of the CDCs issued by Mr Orfali constituted a group home within the 2009 SEPP or 2021 SEPP (as applicable). He said that none of the approved developments was a dwelling occupied by persons as a single household.

116 The Standard Instrument requires a dwelling to be occupied by persons as a single household in order to be a "group home" (see Standard Instrument, Dictionary). As Pepper J observed in *Blacktown City Council v Haddad* [2012] NSWLEC 224 at [50], "the necessity to live together as a unit" is part of what it means to be in a household. The proposed developments approved by Mr Orfali were buildings containing a number of separate self-contained units. They did not contain an area in which the occupants could congregate together, such as a communal living room. The design of the buildings did not permit its occupants to live together as a single household.

117 *McAuley* does not assist Mr Orfali. In *McAuley*, Craig J referred at [75] to the "commonality or community of purpose sufficient to identify the unifying element of a 'single household'". Here there was no such unifying element.

118 In these circumstances, the proposed buildings were not "group homes". It is not necessary for me to go on to consider whether each proposed building met other elements of the definition of "group home," such as being a dwelling.

Did Mr Orfali misrepresent the total floor area of three developments?

119 The remaining allegation made by the Commissioner in support of this disciplinary ground is that, between 4 and 25 November 2021, Mr Orfali issued two modified CDCs and one CDC which misrepresented the total floor area of the proposed developments. These developments were at South Penrith, St Marys and South Granville.

120 Mr Orfali's evidence was that the South Penrith development had a total floor area of 299.75 square metres; the St Marys development had a total floor area of 299.6 square metres; and the South Granville development had a total floor area of 299.67 square metres. The significance of this is that, to be classified as a class 1b building, the building was required to be less than 300 square metres, measured over the enclosing walls of the building or buildings.

121 I have already found that Mr Orfali wrongly classified these buildings as class 1b buildings. However, the question of whether he misrepresented the floor area of those buildings has some continuing relevance, as it has some bearing on assessing the degree of care he took, and his level of competence, in performing his certification tasks.

122 Mr Devaise provided affidavit evidence for the Commissioner in which he stated that the total floor area of all floors within the enclosing walls of the buildings at South Penrith, St Marys and South Granville was 375.31 square metres, 378.92 square metres and 357.08 square metres, respectively. In a responsive affidavit, Mr Orfali

stated that Mr Devaise had wrongly included in his calculations spaces which fall outside of enclosing walls, such as open storage areas on the ground floor and shared spaces like stairwells, lifts and a foyer.

123 In cross examination, Mr Devaise stated that he partly agreed with Mr Orfali's responsive comments. He accepted that a stairwell should not be calculated in the floor area of a building because it goes between floors. In respect of a lift, he said he only calculated its area on one level, because it only stops at one level. Mr Devaise said that the foyer areas were enclosed, but some of the storage areas only had three walls. He did not, however, accept Mr Orfali's calculations of the floor areas.

124 Mr Orfali accepted, when being cross examined, that he had not included two enclosed store rooms when calculating the total floor area for the St Mary's buildings, and did not include the landing or lift shaft. He also accepted that, in relation to the South Penrith building, he had not included the lift shaft and, for the South Granville building, he had not included in his calculations the storage areas or the lift shaft.

125 I find that each of the buildings had a floor area of greater than 300 square metres and that Mr Orfali misrepresented the floor area of each building. Where an area is enclosed on three sides, but open on another, it is at least arguable that the area is not within the enclosing walls of the building or buildings. However, the enclosed storage rooms and lobby areas at St Marys, the lobby area at South Granville, the lobby area and enclosed store room at South Penrith, and the lift area (on one floor only) in each building were part of the buildings' floor areas.

Conclusion

126 I am well satisfied, on the basis of my findings above, that Mr Orfali's conduct in issuing each of the CDCs fell 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 (*Building and Development Certifiers Act*, s 45(a)).

127 This disciplinary ground is established.

Appropriate disciplinary action

128 The purpose of disciplinary action under the *Building and Development Certifiers Act* is to protect the public (see, for example, *Freixas* at [37]-[39]). The action should be proportional to the nature of the improper conduct viewed as a whole (*Freixas* at [42]).

129 The range of disciplinary action which may be taken by the Commissioner, and by the Tribunal standing in the Commissioner's shoes, is set out in s 48(1) of the *Building and Development Certifiers Act*, which is quoted earlier in this decision. The available

responses range from determining to take no further action against the registered certifier to cancelling the registered certifier's registration and disqualifying the registered certifier, either temporarily or permanently, from being registered.

130 The Commissioner has issued "Guidelines for determining a disciplinary outcome," being a policy providing guidance as to the appropriate disciplinary action in any given case. The guidelines provide that for a case of "major severity," cancellation with a disqualification of up to six years is an appropriate penalty. In a case of "extreme severity," cancellation with a disqualification of up to ten years or permanent disqualification is an appropriate penalty. The guidelines provide for the determination of the degree of severity, depending upon the degree of harm caused by the conduct and the degree of culpability (negligent or reckless, or deliberate).

131 I have had regard to the guidelines when determining the correct and preferable decision, as the Tribunal has done in previous decisions (see, for example, *Lilli v Building Professionals Board* [2019] NSWCATOD 119 at [73]-[74] and *Murrant v Building Professionals Board* [2019] NSWCATOD 130 at [43]-[47]). As the Tribunal observed in *Freixas* at [73], "[p]olicy guidelines promote values of consistency and rationality in decision-making, and the principle that administrative decision-makers should treat like cases alike." However, a policy should not be treated as a fetter on administrative decision-making and the Tribunal is not bound by the guidelines.

132 Mr Orfali's position is that cancellation is too harsh a disciplinary response or alternatively, if the Tribunal decides that cancellation of his registration is the correct and preferable decision, that a disqualification for ten years is too harsh. Mr Orfali's counsel referred to the Commissioner's guidelines for determining a disciplinary action outcome and said that Mr Orfali's conduct was, at worst, negligent or at the lower end of recklessness. The conduct was not, in his submission, deliberate or fraudulent and so did not justify as harsh a disciplinary outcome as was imposed. Mr Orfali's counsel also referred to what he said was Mr Orfali's candour when giving evidence before the Tribunal as a factor in favour of a less serious disciplinary response.

133 The Commissioner's position is that the conduct is objectively very serious and that the disciplinary action taken by the Commissioner is appropriate.

134 I do not accept that Mr Orfali's conduct was, at worst, negligent or at the lower end of recklessness, as his counsel submitted. Mr Orfali knowingly acted outside his accreditation by issuing a construction certificate for a class 2 building which was outside his accreditation. That was a deliberate contravention.

135 As indicated earlier in these reasons, in an email to Fair Trading on 27 May 2022, Mr Orfali stated that the description of the building as "class 2" was a typing error. His evidence at the hearing was that it was not a typing error, and that he knew that the

building was class 2 when he issued the construction certificate. When asked at the hearing whether he was being truthful when he wrote that email, Mr Orfali stated that he could not remember whether he was being truthful or not.

136 I find that Mr Orfali was untruthful in his response to Fair Trading of 27 May 2022 when stating that the description of the building as class 2 was a typing error. That is a serious matter. Whilst Mr Orfali acknowledged some failings at the hearing, I am not persuaded that he was generally candid with the Tribunal. His statement that he could not remember whether he was being truthful in his email is an example of this.

137 When assessing the degree of harm caused as a result of Mr Orfali's conduct, for the purpose of the guidelines, the guidelines provide that actual or potential harm may be considered. In my view, the harm is properly characterised as extensive, because a large number of consumers were impacted by Mr Orfali's behaviour, it gave rise to a

high risk to public safety and vulnerable consumers were directly affected. When assessing culpability, some of the conduct was deliberate and some appears to have been reckless.

138 This means that the conduct could be categorised as being of “major severity” or “extreme severity” under the guidelines. For the reasons which follow, I consider it more appropriate to characterise Mr Orfali’s conduct as falling within the latter category.

139 Mr Orfali’s errors in issuing the CDCs were both significant and numerous and had the potential to compromise the safety of vulnerable people. For each of the CDCs he approved, he failed to ensure that the buildings met the required fire safety standards. There was, as Mr Wunsch stated, also an absence of fire separation between occupancies in the buildings subject to the CDCs which is a “serious life safety matter”.

140 The purpose of the buildings the subject of the CDCs was to provide accommodation for persons with a disability. Those persons could have been fatally impacted by Mr Orfali’s errors. Mr Orfali did not take sufficient care when classifying these buildings and issuing the CDCs.

141 Mr Orfali also compromised the safety of the future occupants of the class 2 building for which he issued a construction certificate, because he approved a development without the requisite fire safety measures, and without the requisite safety measures for a proposed swimming pool.

142 Mr Orfali fundamentally misunderstood his function in classifying buildings under the BCA, and how he was required to perform it. He was also reckless as to the performance of his role, relying (for example) upon potential conditions of development consent to address the deficiencies in the plans he approved which did not comply with the legislative requirements for swimming pools.

143 Mr Orfali’s conduct over a number of years displayed a disregard for, or at the very least a misunderstanding of, the requirements of the legislative scheme under which and in support of which he was empowered to act as a certifier.

144 Mr Orfali has provided the Tribunal with a number of references. One reference, from a civil engineer, provides an endorsement of Mr Orfali’s character and professional acumen. The engineer states that Mr Orfali has “demonstrated unwavering dedication

to the enforcement of the Building Certifiers Act and all other building and construction legislation" and that Mr Orfali "conducts himself with the highest levels of professionalism and personal integrity."

145 Another reference, from a former senior building surveyor with the City of Parramatta Council, and a former colleague of Mr Orfali, describes Mr Orfali's "extraordinary competence, diligence and adherence to the highest ethical standards." The referee comments upon Mr Orfali's "vast professional expertise, exemplary personal integrity, and exceptional skills within the building industry."

146 A referee who has known Mr Orfali for fifteen years, both personally and professionally, expresses the view that Mr Orfali has demonstrated "an unwavering commitment to excellence and compliance with regulatory standards" and refers to his personal integrity. Another referee, being an accredited certifier who has known Mr Orfali for seven years, states that Mr Orfali has "consistently demonstrated his commitment to upholding all relevant legislation, ensuring all construction and approval he oversees adheres strictly to the standard outlined in the Act and approved documentation." A town planner comments that "Mr Orfali embodies a character that inspires trust and respect" and refers to his "comprehensive professional skills." A home owner states that Mr Orfali is "good at what he does" and that he "always sticks to the rules."

147 I have taken into account the opinions expressed in these references. However, they are, to some degree at least, inconsistent with the evidence before the Tribunal which establishes that Mr Orfali has misunderstood and failed to comply with the regulatory regime.

148 Mr Orfali has not demonstrated that his understanding of his function as a registered certifier or of the relevant legislation has improved since the conduct the subject of these proceedings. He issued two CDCs following his interview with Fair Trading officers on 19 July 2022, in contravention of the certification legislation. That shows a failure to learn from mistakes which have been pointed out to him.

149 Mr Orfali maintained throughout the proceedings that the CDCs were correctly issued, notwithstanding the detailed reasons given in the delegate's decision, the internal review decision and the Commissioner's evidence and submissions as to why they should not have been issued. He gave evidence that he had attended training sessions, but these do not appear to have improved his understanding in relation to the classification of the buildings the subject of the CDCs, or the characterisation of buildings as group homes.

150 Mr Orfali conceded that he made errors in relation to the class 2 development. However, he did not express any real remorse for his conduct in relation to that development or the other developments he incorrectly approved, or display any real consciousness of his obligations under the relevant statutes and to the owners or future occupants of the buildings concerned (see *Qiu v Building Professionals Board* [2013]

NSWADT 289 at [98]). He did not demonstrate an appreciation of the effect his errors could have on vulnerable people, his clients and the public more generally and did not acknowledge most of his errors he made.

151 Another factor relied upon by the Commissioner is the circumstance that Mr Orfali has been issued with a significant number of penalty notices. Mr Benson has provided evidence about these notices. They were provided for various reasons, including a failure to endorse structural and stormwater plans accompanying a CDC in contravention of clause 130(3) of the EPA Regulation 2000 and issuing a certification of compliance under the *Swimming Pool Act* without providing required reasons.

152 Mr Orfali has addressed the penalty notices in his evidence and admits what he describes as Fair Trading's allegations, either "to some extent" or entirely, in relation to twelve of the notices and does not admit or denies the allegations in relation to the remainder.

153 Even without taking into account the penalty notices which Mr Orfali challenges, there remains a significant number of penalty notices issued to Mr Orfali since 2018 in respect of breaches of the legislation which he concedes.

154 The Commissioner also relied upon the evidence of Mr Fagan that a complaint had been made against Mr Orfali by an officer of Campbelltown City Council on 22 May 2023. The conduct in question related to Mr Orfali issuing an allegedly invalid CDC on 1 November 2022 (being a CDC which was not the subject of the delegate's decisions which are under review in these proceedings). Campbelltown City Council filed a summons in the Land and Environment Court of New South Wales on 1 February 2023 seeking a declaration that the CDC was invalid and of no effect. The owners of the property subsequently provided a signed notice of surrender of the CDC and the Council then discontinued the proceedings.

155 I have not placed a significant amount of weight on the penalty notices or the complaint when considering an appropriate disciplinary response. I have focused instead on the conduct the subject of the disciplinary grounds. However, I have also placed little weight on Mr Orfali's evidence (which I accept) that before April 2023, he was "never the subject of any major disciplinary proceedings." Insofar as he relies upon this as a reason why he should be disqualified for a lesser period, I am not persuaded that the absence of major disciplinary proceedings in the past provides a good reason to do so.

That is particularly so in circumstances where the evidence indicates that there have been other instances of non-compliance with the certification legislation in the recent past.

156 Mr Orfali gave some evidence about the adverse effects which cancellation and a long period of disqualification would have upon him and his family. It was submitted that, with a disqualification for a period of ten years, he would be compelled to pursue an alternative means to support himself and others.

157 Whilst I accept that a long period of disqualification will have an adverse effect on Mr Orfali and his family, I do not consider that the impacts upon him and his family are matters which should be given much weight in determining the appropriate action under s 48 of the *Building and Development Certifiers Act* (see *Freixas* at [52]; *Building Professionals Board v Boulle* [2008] NSWADT 80 at [57]).

158 Mr Orfali referred to other disciplinary decisions where, as he submitted, breaches of the legislation have not resulted in penalties or consequences as harsh as those that have been issued against him. Caution needs to be exercised when referring to other disciplinary decisions as a basis for determining an appropriate disciplinary outcome, because each will turn on the particular circumstances of the individual case, and it is not always possible to gain a full understanding of those circumstances from available materials.

159 Taking all relevant factors into account, I find that the correct and preferable decisions are those made by the internal review officer, being cancellation of Mr Orfali's registrations and disqualification for a period of ten years. Disqualification for ten years is, in my view, necessary to protect the public.

160 As the Tribunal has previously observed in the context of the *Building Professionals Act*, "[t]he system of accreditation and discipline under the [*Building Professionals Act*] has been established to protect the public from the harm that might flow from incompetence, lack of diligence or lack of integrity in the performance of the important public responsibilities exercised by certifiers. The orders to be made in the event of an adverse disciplinary finding must serve those objectives" (*Boyce v Building Professionals Board (No 2)* [2020] NSWCATOD 14 at [152]). The same observation applies to the *Building and Development Certifiers Act*.

161 An object of the *Building and Development Certifiers Act* is to "recognise that certification work is an important public function with potential impacts on public health, safety and amenity and to ensure that it is carried out impartially, ethically and in the public interest." Mr Orfali's conduct, the subject of these proceedings, had very serious potential impacts on public health, safety and amenity. Ensuring that certification work is carried out impartially, ethically and in the public interest, and that it is carried out competently, requires, in Mr Orfali's case, a long period of disqualification. He presently lacks 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.

Order

162 For these reasons, I have decided to affirm the Commissioner's decisions.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

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Decision last updated: 11 January 2024