

Issuing of penalty infringement notices to accreditation holders: Policy and procedures

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Issuing of penalty infringement notices to accreditation holders

Policy statement

The Building Professionals Board (Board) investigates complaints and may, on its own motion, investigate the work and professional conduct of accredited certifiers.

If an investigation discloses that a certifier has engaged in *unsatisfactory professional conduct*, the Board may take disciplinary action.

The definition of *unsatisfactory professional conduct* includes contravening the *Building Professionals Act 2005* (BP Act), the *Environmental Planning and Assessment Act 1979* (EP&A Act) and the strata legislation.

The Board is also authorised to issue a penalty infringement notice (PIN) for a range of offences.

This is a discretionary power and an efficient way of addressing minor offences that warrant a penalty but don't otherwise justify disciplinary action being taken against a certifier.

Objectives for this policy

- To establish clear guidance on when and how the Board may issue a PIN.
- To provide an efficient way of dealing with relatively minor offences so the Board can focus on more serious investigations and on initiatives to reduce the likelihood of infringements.
- To promote professionalism among certifiers and deter repeat offences via behavioural change.
- To ensure that the Board's statutory functions are exercised consistently and impartially, in the public interest and with procedural fairness.

Context

What is a PIN? What is its effect?

- A PIN is a financial penalty of a specific amount, issued to a person who has committed an offence prescribed under legislation.
- The power to issue PINs is discretionary. PINs offer agencies an alternative to commencing a prosecution or taking disciplinary action.
- The recipient of a PIN may pay the specified amount, request a review or elect to have the matter dealt with by a court.
- Paying a PIN is not an admission of liability and does not lead to a criminal conviction. If the recipient pays he/she is not liable to further criminal proceedings for the offence.
- The payment of a penalty under a PIN is not recorded on the Board's disciplinary register.

Legislation

The *Fines Act 1996* sets the overall framework for the issue of penalty notices in NSW.

A number of PINs may be issued under the BP Act in relation to the work and activities of certifying authorities and other persons.

Other PINs may be issued under the EP&A Act in relation to the work and activities of certifying authorities.

Penalties range from \$250 to \$3,000 for an individual, and \$500 to \$6,000 for a corporation. The regulations to these Acts prescribe the offences and the amounts payable.

The Fines Act allows issue of a caution instead of a PIN, having consideration to the Caution Guidelines issued by the Attorney General.

The Fines Act also authorises the recipient of a PIN to apply to the Board to have it review its decisions to issue a PIN.

The PIN process

When a PIN can be issued

- **Offence must be listed as one for which a PIN can be issued**
The Board may issue a PIN for offences under the BP Act/ BP Regulation or EP&A Act/ EP&A Regulation that are identified in the legislation as being capable of being dealt with by the issue of a PIN. These are listed in Attachment 1.
- **Standard of proof**
All offences, including PIN offences, are criminal matters. The standard of proof that applies in criminal matters is evidence that shows beyond reasonable doubt that the offence occurred.
- **Within time limit**
A PIN can only be issued within the legislated time limit, which is:
 - for offences under the BP Act/ BP Regulation, two years of the date of the offence
 - for offences under the EP&A Act/ EP&A Regulation, two years of the date when evidence of the offence first came to the Board's attention.

PIN or disciplinary action?

- An investigation may relate to conduct that:
 - only involves a single PIN offence
 - involves multiple PIN offences
 - involves a mix of PIN offences and other types of unsatisfactory professional conduct (for which a PIN cannot be issued)
 - conduct that does not involve a PIN offence.

- The questions and flow chart at Attachments 2 and 3 set out:
 - the stages during an investigation at which critical decisions need to be made
 - the factors that need to be considered to decide the appropriate next action
 - the available outcomes for an investigation which may include a PIN offence.

Issuing more than one PIN to a certifier

- An investigation may disclose conduct for which more than one PIN may be issued.
- It is a matter of judgement as to whether it is appropriate to issue more than one PIN in respect of conduct disclosed during an investigation, or instead to take disciplinary action.
- Under this policy, PINs are appropriate for minor offences that warrant a penalty but don't otherwise justify disciplinary action being taken against a certifier. The higher the number of PIN offences that are detected during an investigation, the more appropriate the taking of disciplinary action becomes.
- Factors that are relevant to deciding the number of PINs that may be issued are set out at Attachment 4.

Caution instead of a PIN?

- Even though a PIN may be issued, the Fines Act requires consideration to be given to whether a caution should be issued instead of proceeding to issue a PIN.
- The Attorney General has published guidelines which must be considered for the purpose of deciding whether to issue a caution. These guidelines are available at the website of the Department of Justice at www.justice.nsw.gov.au

Who can issue a PIN?

- Under current delegations, the Board's Director and the Manager, Complaints are authorised to issue PINs under the BP Act and EP&A Act.

Internal review

- The Fines Act provides that a person to whom a PIN has been issued may apply for an internal review of the decision to issue the PIN. In addition, the agency (i.e. the Board) may review its decision to issue a PIN on its own motion.

- An application for review must be made within certain time limits (see s. 24A Fines Act).
- The agency may decline to conduct an internal review in certain limited circumstances [see circumstances at s. 24B (1) Fines Act]. In most cases the review will be conducted.
- If an internal review is conducted, the reviewer must not have been involved in the initial decision to issue the PIN.
- A PIN must be withdrawn if the reviewer finds any of the grounds set out in s. 24E (2) Fines Act, which include:
 - PIN was issued contrary to law
 - mistake of identity
 - exceptional circumstances exist
 - caution more appropriate
 - intellectual capacity of the recipient.
- An internal review may result in:
 - the decision to issue the PIN being affirmed
 - the PIN being withdrawn
 - a caution being issued in lieu of the PIN.
- The Attorney General has issued guidelines for conducting an internal review. These guidelines are available at the website of the Department of Justice at www.justice.nsw.gov.au

Court election

The recipient of a PIN may elect to have the matter dealt with by the Local Court.

State Debt Recovery Office

The State Debt Recovery Office (SDRO) administers the NSW fine enforcement system on behalf of the Board and other Government agencies.

After a PIN is issued, the SDRO is responsible for further action unless the recipient asks for a review (which is conducted by the Board).

The SDRO administers the fines system through its 'Self Enforcing Infringement Notice System', which is an automated processing system.

If the recipient of a PIN elects to have a matter dealt with by the Local Court, the Board may engage the SDRO to appear on its behalf.

Attachment 1: List of PIN offences

Building Professionals Act 2005

Section	Prescribed offence (<u>paraphrased</u> from the legislation for ease of reading)	Penalty - individual	Penalty - corporation
58 (2)	Not complying with a direction or requirement of the Board or an authorised officer made in relation to an investigation.	\$1,500	\$3,000
60 (1)	Certifier not keeping the records/ documents required to be kept by the regulations.	\$750	\$1,500
60 (2)	Certifier not complying with the Board's request to send copies of records/ documents, within the time required, with any verification required by the Board.	\$1,500	\$3,000
61 (1)	<p>Certifier not notifying the Board in writing within seven days of becoming aware of any of the following:</p> <ul style="list-style-type: none"> • changes to an equivalent authorisation (other jurisdictions): suspension/ cancellation/ variation of conditions/ new conditions imposed • start of legal proceedings, or complaint investigation, in another jurisdiction for an offence related to certification functions/ obligations • start of proceedings for an offence involving fraud or dishonesty • no longer holding professional indemnity insurance (unless the certifier has already advised that he/she has arranged further insurance from the expiry date, or that he/she can't obtain further insurance). 	\$1,500	\$3,000
61 (1); cl. 20B of the regulations	<p>Accredited body corporate not notifying the Board in writing within seven days of any of the following:</p> <ul style="list-style-type: none"> • appointment or termination of a new director or employee who is an accredited certifier 	N/A	\$3,000

Section	Prescribed offence (<u>paraphrased</u> from the legislation for ease of reading)	Penalty - individual	Penalty - corporation
	<ul style="list-style-type: none"> when a person becomes concerned, or ceases to become concerned, in management of the body corporate. 		
61 (2)	<p>Certifier not advising the Board in writing at least seven days before his/her insurance expires that:</p> <ul style="list-style-type: none"> he/she has made arrangements to be covered from the expiry by further insurance, and provide evidence, OR he/she hasn't been able to obtain further insurance. 	\$750	\$1,500
61 (3)	<p>Certifier not notifying the Board in writing within 14 days of becoming aware of any change needed to his/her online 'find a certifier' listing, except changes due to events listed under 61 (1).</p>	\$250	\$500
63 (1)	<p>Carrying out any certification work while not insured, or pretending to be insured.</p>	\$1,500	\$3,000
64 (2)	<p>Building practitioner carrying out any building or subdivision work, or pretending to be insured, whilst not insured. <i>Note: the regulations don't prescribe any 'building practitioners' for the purposes of this section.</i></p>	\$1,500	\$3,000
66 (1)	<p>A certifier issuing a Part 4A certificate or CDC despite having a conflict of interest.</p>	\$1,500	\$3,000
72	<p>A certifier carrying out certification work outside his/her accreditation authority.</p>	\$1,500	\$3,000
73	<p>A certifier breaching or not complying with a condition of accreditation.</p>	\$1,500	\$3,000
74 (1)	<p>A certifier appointed as PCA not informing the applicant if his/her accreditation is cancelled or suspended, or a condition is imposed that prevents them from continuing the PCA appointment.</p>	\$750	\$1,500
85 (1)	<p>A person issuing a Part 4A certificate or CDC that he/she is not authorised to</p>	\$1,500	\$3,000

Section	Prescribed offence (<u>paraphrased</u> from the legislation for ease of reading)	Penalty - individual	Penalty - corporation
	issue, or making a false or misleading statement in connection to a certificate.		

Environmental Planning and Assessment Act 1979 and Regulation 2000

Section/ clause	Prescribed offence (<u>paraphrased</u> from the legislation for ease of reading)	Penalty - individual	Penalty - corporation
Environmental Planning and Assessment Act 1979			
85A (10A)	A certifier issuing a CDC without first ensuring that any required long service levy is paid (either the full levy, or the first installment).	\$1,500	\$3,000
109D	A certifier issuing an OC (subsection 2) or subdivision certificate (subsection 3) when not the PCA for the development.	\$3,000	\$6,000
109E (3)(d)	Issuing an OC despite a missed inspection (excluding 'unavoidably missed' inspections).	\$1,500	\$3,000
109F (1)(b)	A certifier issuing a CC without first ensuring that any required long service levy is paid (either the full levy, or the first installment).	\$1,500	\$3,000
109H (3)(a-b), (4)(a), (5)(a-b), (6)(a)	Issuing an OC (interim or final) without a develop consent and CC, or a CDC, being in place.	\$3,000	\$6,000
109J (1)(a-b)	Issuing a subdivision certificate for subdivision prohibited under the EP&A Act, or without a development consent or CDC being in place.	\$3,000	\$6,000
109J (1)(e-e1)	Issuing a subdivision certificate without the applicant having a certificate of compliance from the water supply authority (if required).	\$3,000	\$6,000
109J (1)(f)	Issuing a subdivision certificate before the council has acquired any and all drainage easements required by order of the Land and Environment Court.	\$3,000	\$6,000

Section/ clause	Prescribed offence (<u>paraphrased</u> from the legislation for ease of reading)	Penalty - individual	Penalty - corporation
109J (1)(g)	Issuing a subdivision certificate before 28 days elapses since the council has notified any objectors to the work, or before any appeals by objectors are determined.	\$3,000	\$6,000
109J (2)(a)	Issuing a subdivision certificate before work is completed (unless the applicant and consent authority have reached an agreement for completing the work).	\$3,000	\$6,000
Environmental Planning and Assessment Regulation 2000			
126 (2)	Not immediately endorsing a CDC application with the date of receipt.	\$500	\$1,000
130 (3)	Not endorsing plans/ specifications accompanying a CDC application, with evidence that the CDC was issued.	\$1,500	\$3,000
130 (4)	A certifier not notifying the council and submitting relevant documents within two days of issuing a CDC.	\$1,500	\$3,000
134 (1)	Issuing a CDC that doesn't include the certifier's name and accreditation number.	\$1,500	\$3,000
134 (2)	Issuing a CDC without an accompanying fire safety schedule (if required).	\$3,000	\$6,000
134 (2A)	Issuing a CDC without relevant accompanying plans.	\$1,500	\$3,000
138 (1)	Issuing a compliance certificate that doesn't include all the information required under cl.138 (1).	\$1,500	\$3,000
138 (2)	Issuing a compliance certificate without attaching all documents referred to in the certificate.	\$1,500	\$3,000
138 (3)	A certifier not providing copies of compliance certificates relied on to issue an OC, when sending documentation to council.	\$1,500	\$3,000
142 (1)	A certifier determining a CC in an improper manner (e.g. without advising the applicant in writing or giving reasons for refusal if refused).	\$1,500	\$3,000
142 (2)	A certifier not notifying the council and submitting relevant documents (including any inspection reports and the fire safety	\$1,500	\$3,000

Section/ clause	Prescribed offence (<u>paraphrased</u> from the legislation for ease of reading)	Penalty - individual	Penalty - corporation
	schedule if required) within two days of issuing a CC.		
143A (2)	Issuing a CC for a residential apartment without having received a statement from a qualified designer (if required).	\$3,000	\$6,000
144 (2)	Not forwarding a CC application to Fire and Rescue (if required) within seven days of receipt.	\$3,000	\$6,000
144 (6-7)	Issuing a CC without having regard to any recommendations in an interim fire safety report from Fire and Rescue, or issuing a CC without including terms of any adopted recommendation/s.	\$3,000	\$6,000
146	Issuing a CC without relevant conditions of development consent being satisfied.	\$1,500	\$3,000
147 (1)	Issuing a CC that doesn't meet regulatory requirements for the form of a CC.	\$1,500	\$3,000
147 (2)	Issuing a CC without a fire safety schedule (if required).	\$3,000	\$6,000
151 (1)	A certifier determining an OC in an improper manner (e.g. without advising the applicant in writing or giving reasons for refusal if refused).	\$1,500	\$3,000
151 (2)	A certifier not notifying the council and submitting relevant documents (including inspection reports and compliance certificates) within two days of issuing an OC.	\$1,500	\$3,000
152 (2)	Not requesting a final fire safety report from Fire and Rescue (if required) as soon as practicable after receiving an application for an OC.	\$1,500	\$3,000
152 (3)	Not notifying Fire and Rescue if an OC application is refused, if Fire and Rescue has been asked for a final fire safety report.	\$1,500	\$3,000
152 (5)	Issuing an OC without having regard to a final fire safety report, if issued within seven days of Fire and Rescue receiving the certifier's request.	\$1,500	\$3,000

Section/ clause	Prescribed offence (paraphrased from the legislation for ease of reading)	Penalty - individual	Penalty - corporation
153 (1)	Issuing a final OC before a final fire safety certificate (if required) is issued.	\$3,000	\$6,000
153 (2)	Issuing an interim OC before an interim or final fire safety certificate (if required) is issued.	\$3,000	\$6,000
154A (2)	Issuing an OC for a residential apartment without having received a statement from a qualified designer (if required).	\$1,500	\$3,000
154B (2)	Issuing an OC without BASIX commitments being met.	\$1,500	\$3,000
154C (1)	Issuing a final OC without applying for a BASIX completion receipt.	\$500	\$1,000
155 (1)	Issuing an OC that doesn't meet regulatory requirements for the form of an OC.	\$1,500	\$3,000
155 (2)	Issuing an OC without a fire safety certificate and a fire safety schedule (if required).	\$3,000	\$6,000
157 (5)	Not immediately endorsing a subdivision certificate application with the date of receipt.	\$500	\$1,000
160 (1)	A certifier determining a subdivision certificate in an improper manner (e.g. without advising the applicant in writing or giving reasons for refusal if refused).	\$1,500	\$3,000
160 (2)	Not notifying the council and submitting relevant documents within two days of issuing a subdivision certificate.	\$1,500	\$3,000
162 (1)	A replacement PCA not notifying council within two days, with evidence of approval of appointment.	\$1,500	\$3,000
162B (1)	A certifier not making a record of each inspection.	\$1,500	\$3,000
162B (1)	A certifier, carrying out inspections on the PCA's behalf, not submitting inspection reports to the PCA within two days.	\$500	\$1,000
162C (4)	Not informing the PCA of a missed inspection and why it was missed.	\$1,500	\$3,000

Section/ clause	Prescribed offence (<u>paraphrased</u> from the legislation for ease of reading)	Penalty - individual	Penalty - corporation
162C (5 a-b)	PCA not informing the person who appointed them within two days of becoming aware of a missed inspection.	\$1,500	\$3,000
227A (2)	PCA not displaying a sign on a development site showing the PCA's particulars.	\$580	\$580

Attachment 2: Is a PIN appropriate?

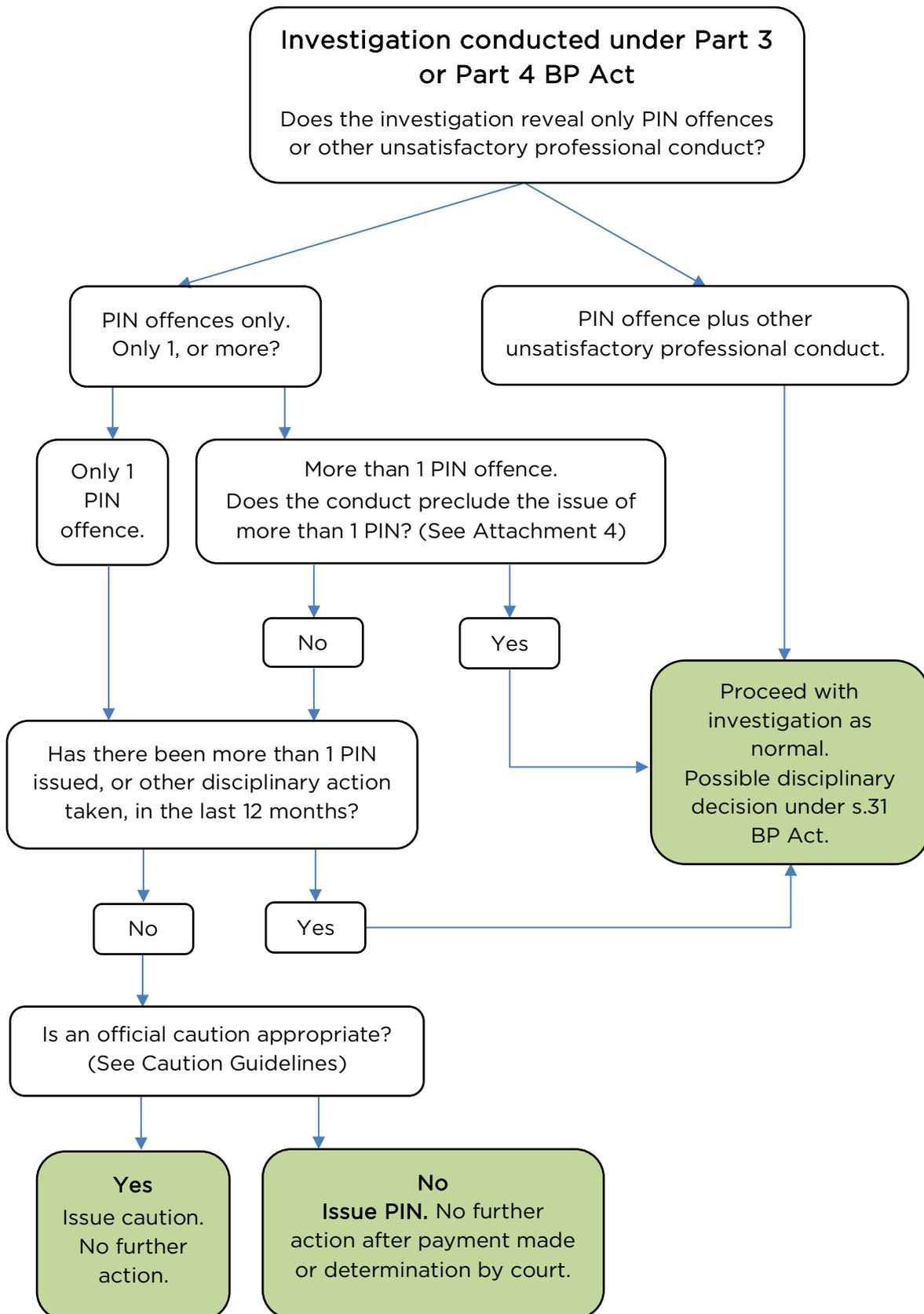
Investigators are to consider the following questions as a set. The assessment must not be influenced by:

- the certifier's race, religion, sex, national origin, social or political affiliation
- personal feelings concerning the certifier or complainant
- possible political outcomes or media or community reactions.

Questions to consider

- Did the conduct involve risks to public safety, damage to property or financial loss, or have significant impact on other members of the public?
- Is the person homeless?
- Does the person have a mental illness or intellectual disability?
- Is the person a child (under 18)?
- Does the person have a special infirmity or very poor physical health?
- Is the offending conduct at the lower end of the seriousness scale for that offence?
- Did the person not knowingly or deliberately commit the offence?
- Was the person cooperative and/ or compliant with a request to stop the offending conduct?
- Will the public interest be better served by e.g. requiring the certifier to complete an education course, or imposing a condition on accreditation?
- Was the offence identified as part of an audit intended to educate the certifier?
- Has the certifier shown remorse or made or offered compensation or other ways to resolve the problem?
- Has the certifier already been warned about the matter?
- Has the Board issued relevant practice advice that preceded the offence?
- Will a PIN provide sufficient specific and general deterrence, considering how prevalent the offence is among certifiers?
- Is it reasonable, in all the circumstances of the case, to give the person a caution?

Attachment 3: Process flowchart



Attachment 4: Should more than PIN be issued?

There are no limitations on the number of PINs that may be issued to a certifier.

The Board has the option of taking disciplinary action against a certifier instead of issuing one or more PINs.

It is preferable that PINs be issued to deal with isolated, minor offences, instead of taking disciplinary action.

An investigation may reveal multiple PIN offences being committed. In some instances, it may still be preferable to issue more than one PIN than to take disciplinary action.

Considerations against issuing more than one PIN, and instead taking disciplinary action

- The conduct involves a wide variety of offences and is indicative of a general lack of conviction or capacity to comply with regulatory requirements.
- The conduct involves multiple instances of the same type of offence committed after some form of notice of correct requirement was given to the person e.g. previous communication from the Board or other regulatory body; previous PIN for same offence; previous disciplinary action for same offence.
- The conduct was performed knowingly or deliberately.
- The issue of multiple PINs would not be likely to correct the certifier's conduct.
- The public interest would be better served by making a corrective order under s. 31(4) BP Act e.g. requiring the certifier to complete an education course, or imposing some condition on accreditation.
- The cumulative penalty resulting from the issue of multiple PINs would exceed any penalty that would be likely to be imposed under s. 31(4) BP Act.
- The person is homeless.

Considerations in favour of issuing more than one PIN for multiple breaches

- The multiple contraventions are for the same offence and indicate a single course of conduct arising through lack of understanding of the statutory requirements, and the conduct is likely to be corrected by the certifier.
- The offences were identified as part of an audit program which was intended to educate the certifier.
- The certifier has an unblemished disciplinary record.