

BUILDING PRACTITIONERS INQUIRY BOARD

Reasons for Decision

Building Practitioner:	NQ Sheds and Patios, Luke Jager (the Practitioner)
Referred by:	Director of Building Control
Proceedings:	Referral of Inquiry to the Building Practitioners Board (the Board) in accordance with section 34 (1) (b) of the <i>Building Act 1993</i> .
Inquiry Board:	Patrick McIntyre (Presiding Member) Robert Cox Sam Nixon
Date of Hearing	15 November 2018
Date of Decision:	7 May 2019

Background

1. On 16 July 2018 the Director of Building Control (the Director) referred a matter to the Building Practitioners Board (the Inquiry Board) for inquiry under section 34 (1) (b) of the *Building Act 1993* (the Act). The matter relates to allegations that the Practitioner committed an offence against s 55 and s 34S (g) of the Act.
2. The Director had decided pursuant to s 34(1) (b) of the Act that there was evidence of professional misconduct, within the meaning of s 34S (a) of the Act.
3. Section 34S provides (relevantly) as follows:

34S Professional misconduct

A building practitioner is guilty of professional misconduct if, on completion of an inquiry, the Inquiry Board is satisfied on the balance of probabilities that the practitioner:

(a) has committed an offence against this Act or the Regulations; or

....

4. Section 55 of the Act provides as follows:

55 Building permit required

A person must not carry out building work unless a building permit in respect of the work has been granted and is in force under this Act and the work is carried out in accordance with the permit.

5. This is the decision of the Inquiry Board convened pursuant to s 34J of the Act to hear and determine that charge. This Inquiry Board consists of Patrick McIntyre (Presiding Member), Mr Robert Cox and Mr Sam Nixon.

Consideration of the Issues

6. At the Directions Hearing on the 31 October 2018 the parties were requested by the Inquiry Board to:
 - a. Confer with each other for the purposes of exploring what facts and documents could be agreed between them at the hearing; and
 - b. To provide the Inquiry Board with a written summary signed both the parties of any admissions that could be made by them prior to the next Directions Hearing listed for 15 November 2018.
7. At the Directions Hearing on 15 November 2018 the parties jointly asked that the Inquiry Board proceed immediately at that time to the substantive hearing of the charge on the following basis:
 - a. A written statement of agreed facts that had been signed by both the Director of Building Control and by the Practitioner on 14th November 2018 would be tendered with the consent of the parties as evidence to be adduced by the parties at the hearing;
 - b. No further evidence would be adduced by either party;
 - c. The Practitioner would concede that he was guilty of professional misconduct in the circumstances outlined in the written statement of agreed facts; and
 - d. The parties would make a joint submission on the appropriate disciplinary action to be taken by the Inquiry Board pursuant to s 34T of the Act.
8. The Inquiry Board agreed to proceed immediately at that time with the substantive hearing on that basis except to point out that it;
 - a. Needed to determine for itself pursuant to s 34P (1) (a) of the Act whether the content of the written statement of agreed facts disclosed facts sufficient to support a determination of the guilt of the Practitioner; and
 - b. Would determine for itself the appropriate disciplinary action to be taken by the Inquiry Board pursuant to s 34T of the Act despite giving consideration to the joint submission of the parties.
9. Section 34T of the Act provides as follows:

34T Disciplinary action by Inquiry Board

If, on completion of an inquiry, the Inquiry Board decides under

section 34P (1) (a) that a building practitioner is guilty of professional misconduct, the Board may take any of the following actions in relation to the practitioner:

- (a) reprimand the practitioner;
- (b) require the practitioner to pay all or a specified part of the reasonable costs of the Director in the inquiry;
- (c) require the practitioner to give an undertaking to do, or not to do, a specified thing:
 - (i) at any time or during any period; or
 - (ii) at a specified time or during a specified period;
- (d) require the practitioner to pay to the Territory a civil penalty not exceeding 40 penalty units;
- (e) suspend the practitioner's registration for a specified period (not exceeding 3 years);
- (f) cancel the practitioner's registration.

10. At the hearing Mr. Joshua Ingrames of counsel appeared representing the Director of Building Control and the Practitioner represented himself.

11. It is convenient to set out here the written statement of agreed facts in its entirety.

'Agreed Facts

Allegation 1

The Building Practitioner has committed professional misconduct by committing an offence, on the balance of probabilities, against section 55 of the Act, namely – Carrying out building work other than in accordance with a building permit which was granted and in force prior to the building work being carried out at 15 McArthur Court Leanyer.

1. On 29 April 2015, a building permit was granted for building work to be carried out by the Building Practitioner at 15 McArthur Court Leanyer. The building permit number was 685/4785/6 (Building Permit).
2. The Building Permit referenced plans, dated June 2014, approved by structural engineer John Scott, of JWS Consultants Pty Ltd, on 14 July 2014.
3. An alternative and correct set of plans had been prepared but were not included as part of the Building Permit.
[3A. There was no record of that the alternative plans were sent to the certifier or received.]
4. The error in the Building Permit was not picked up by the Building Practitioner before building work was undertaken, and the building certifier, Project Building Certifiers Pty Ltd (Certifier), had not raised the discrepancy at the time of the slab inspections on 11 May 2015 or 23 June 2015.
[4A. The Building Practitioner acknowledges he did not check the building permit when received from the Building Certifier and commenced construction as per the amended drawings in a construction folder instead of the building permit.]

5. Sometime between 29 April 2015 and 20 July 2015, the Building Practitioner carried out work for the Property Owners at 15 McArthur Court Leanyer including the framing / structure for the back awning / verandah. This building work constitutes building work for the purposes of Section 4 of the Act.
6. On 20 July 2015, the Certifier, undertook a roof and wall framing inspection and discovered discrepancies between the plans submitted with the build permit and what had actually been built. The inspection was failed by the certifier with a note 'External walls have not been provided with trimmers at bottom cords, please confirm design with your engineer'.
7. On 6 November 2015 (amended building permit application date), THE Building Practitioner provided the certifier a series of structural engineering drawings attached to a Section 40 Certificate of Compliance- Structural Design dated 7 April 2015 by John L Towler. The certificate and drawings formed an amendment to the building permit (685/4785/6/A1), which was granted on 26 November 2015.
8. The building permit amendment was granted after the building work had been carried out, up to at least the roofing/wall framing stage, demonstrating the works had been carried out other than in accordance with the Building Permit in force at the relevant time.
9. The offence was rectified as soon as the Building Practitioner was made aware of the issue. The Building Practitioner has made changes to its work systems so that this sort of error will not occur in the future.

Joint Submission on action for the Board to take under s.34T of the Act:

1. The Building Practitioner be reprimanded (Section 34T(a); and
2. The Building Practitioner pay a portion of the Directors costs totalling \$3,500 (Section 34T(b).'
12. With the consent of the Inquiry Board the parties added paragraphs 3A and 4A (shown as inserted into the written statement of agreed facts) at the hearing.
13. The amended written statement of agreed facts (as set out above) constitutes the whole of the factual evidence adduced in support of the charge.
14. A finding by this Inquiry Board that the Practitioner is guilty of professional misconduct involves potential serious consequences for the practitioner, not only because of actions that this Inquiry Board may take under s 34T of the Act, but also in terms of potential detriment to the professional reputation and income of the Practitioner.
15. In these circumstances this Inquiry Board adopts, as the appropriate measure of evidentiary proof required, the standard described in *Briginshaw v Briginshaw*.
16. It is convenient to set out here the remarks of Dixon J, in that decision of the High Court of Australia, that provide the celebrated summary of that standard:
 'But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. 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.¹

Decision

17. This Inquiry Board is comfortably satisfied, to the Briginshaw standard, on the evidence adduced that the Practitioner carried out building work in respect of which no building permit then existed in breach of s 55 of the Act.
18. By virtue of s 35S (a) the practitioner is therefore guilty of professional misconduct.
19. In determining what action this Inquiry Board ought to take pursuant to s 35T we have considered (and are grateful to the parties for providing) their joint submission under the title 'Joint Submission on action for the Board to take under s.34T Act (the Joint Submission) set out in the written statement of agreed facts.
20. However, we are not persuaded to accept the Joint Submission.
21. During the hearing Mr Ingrames submitted that the offence committed by the Practitioner:
 - a. Was 'of limited direct impact on the customer'; and
 - b. Involved 'no construction defect'.
22. The Practitioner submitted that the offence occurred because at the time he was in the practice of providing a folder of construction drawings to his workers and sub-contractors that are not stamped with the certifier's building permit.
23. The Practitioner further submitted that he no longer adopts that practice and has introduced a new system which he is confident will prevent a similar offence occurring in the future. Mr Ingrames supported this latter submission.
24. The objects of the Act are set out s 3 of the Act as follows:

3 Objects of Act

The objects of this Act are:

- (a) to establish, maintain and improve building standards; and
- (b) to facilitate the adoption and efficient application of national uniform building standards; and
- (c) to facilitate national uniform accreditation of building products, construction methods, building designs, building components and building systems; and
- (d) to maintain, enhance and improve the safety, health and amenity of people using buildings; and
- (e) to promote and provide for the construction of environmentally efficient buildings; and
- (f) to provide an efficient and effective system for granting building permits and occupancy certification, administering building matters and resolving building disputes; and
- (g) to reform aspects of the law relating to the legal liability of regulatory agencies and building practitioners; and
- (h) to facilitate national uniformity in the training and qualifications of certain building practitioners and the recognition of qualifications on a national basis; and

¹ (1938) 163 CLR 336 at 360-363

- (ha) to provide for the registration of building practitioners; and
- (hb) to provide for the investigation, audit and disciplining of building practitioners; and
- (hc) to establish a scheme relating to residential building consumer protection and the provision of residential building insurance or fidelity certificates; and
- (j) to facilitate the cost effective construction of buildings; and
- (k) to aid the achievement of an efficient and competitive building industry.

25. The object of disciplinary proceedings under the Act was a subject analysed in detail at paragraphs 16-24 of the decision of the Inquiry Board in *Director of Building Control v ACT Builders (NT) Pty Ltd & Glynatsis*². That analysis was adopted by the Inquiry Board in *Director of Building Control v Building One Pty Ltd & Ian Izod*³ and is respectfully adopted by this Inquiry Board.
26. That analysis does not need to be reproduced here. It is sufficient to state that these disciplinary proceedings advance the objects include protection of the public and the other objects of the Act.
27. The Inquiry Board in *Director of Building Control v P Whinney-Houghton*⁴ examined what is meant by 'Professional Misconduct' in the context of the Act and in doing so highlighted the importance of building certifiers and building permits in the promotion of the objects of the Act. That analysis is respectfully adopted by this Inquiry Board.
28. This Inquiry Board is of the opinion that the Joint Submission does not reflect the seriousness of the Practitioners offending.
29. The system of regulation of the building industry under the Act establishes a regime pursuant to which Building Practitioners require statutory authority to undertake certain building works. Such statutory authority is dependent upon the existence of appropriate permits issued by registered building certifiers.
30. This Inquiry Board is concerned to ensure that the action that it takes pursuant to s 34T in respect of the Practitioner not send a message to the wider building industry of tolerance for a reckless or negligent disregard by them of their statutory duty to desist from undertaking building works in the absence of the requisite permit.
31. This Inquiry Board has determined that the appropriate action to be taken pursuant to s34T is as follows:
 - a. The Building Practitioner be reprimanded pursuant to Section 34T (a) the Act.
 - b. The Building Practitioner is required to pay to the Territory 1 civil penalty unit amounted to \$155.00. The amount payable within 30 days of the date of this determination pursuant to Section 34T (d) the Act.
32. At the hearing this Inquiry Board informed Mr. Ingrams that it was not aware of any previous Inquiry Board having required a Building Practitioner to pay all or a specified part of the reasonable costs of the Director of Building Control in the inquiry pursuant to s34T (b).

² BPB 4 April 2013

³ BPB 3 April 2014 at paragraph 45.

⁴ BPB 20 April 2018 at paragraphs 24-32.

33. We were grateful to Mr. Ingrames for bringing to our attention the decision of the Board of Inquiry in *Director of Building Control v Gum*⁵ in which a Building Practitioner was required to pay a sum of money pursuant to s34T (b) to reimburse the Director of Building Control for the costs associated with having witnesses available at the hearing.
34. In this matter Mr. Ingrames did not seek any amount of an equivalent nature.
35. There have been a large number of previous disciplinary hearings by various Inquiry Boards relating to much more serious and lengthy matters in none of which was any Practitioner required to pay a sum of money pursuant to s34T (b) to reimburse the Director of Building Control for (other than witness costs in *Director of Building Control v Gum*) costs associated with the hearing.
36. This is not a matter in which the Practitioner has by his conduct lengthened or in any other way complicated or delayed the prosecution of the charge.
37. On the contrary, the Practitioner has cooperated with the Director of Building Control as is evident in the production of and the tendering by consent of the written statement of agreed facts and its amendment at the hearing.
38. In any event the Practitioner is entitled to some benefit for his having effectively entered an early plea of guilty.
39. This Inquiry Board has determined that it will take no action pursuant to s 34T (b).
40. This Inquiry Board directs that a copy of this determination be distributed to the parties and the Practitioner be advised in writing of the availability to the Practitioner of the relevant appeal mechanisms.

Rights of Appeal and Procedure for Commencing an Appeal under Division 4 of the Act

41. S. 35(d) of the Act states that a decision under s. 34P that a building practitioner is or is not guilty of professional misconduct is an appealable decision.
42. Under s. 36 of the Act, an appeal is to be made to the Local Court within 30 days of being notified of the decision.
43. Under s. 36A of the Act, subject to s. 36A(2), the appeal is to be a re-hearing of the evidence, or review of the information, before the Practitioners Board.
44. S. 36A(2) states that the Local Court may admit evidence or information that was not before the Practitioners Board only if the Court is satisfied there were special circumstances that prevented its presentation before the Board.
45. S. 36B states:
 - a. in determining the appeal, the Local Court may:
 - b. confirm the appealable decision; or
 - c. vary the appealable decision; or

⁵ BPB 4 June 2009 at paragraph 32.5

d. set aside the decision and substitute another decision that could have been made instead of the appealable decision.

46. The Court may give orders it considers appropriate to give effect to its decision under subsection (1).

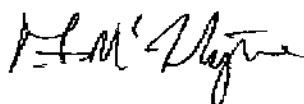
47. S. 36C states that the decision of the Local Court is final and is not subject to appeal.

48. S. 36D states:

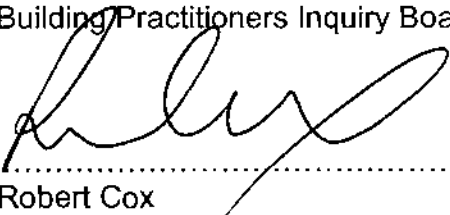
(1) Commencing an appeal does not affect the operation or implementation of the appealable decision.

(2) However, the Local Court may make an order staying or otherwise affecting the operation or implementation of so much of the appealable decision as the Court considers appropriate to effectively hear and decide the appeal.

Dated the 7th day of May 2019.



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Patrick McIntyre
Presiding Member
Building Practitioners Inquiry Board



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Robert Cox
Member
Building Practitioners Inquiry Board



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Sam Nixon
Member
Building Practitioners Inquiry Board