

# BUILDING PRACTITIONERS INQUIRY BOARD

## Decision Notice

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<b>Building Practitioner:</b>	John Scott & JWS Consultants Pty Ltd
<b>Referred by:</b>	Director of Building Control
<b>Proceedings:</b>	Referral of Inquiry to the Building Practitioners Board in accordance with section 34(1)(b) of the <i>Building Act 1993</i> .
<b>Inquiry Board:</b>	Mr Philip Timney (Presiding Member) Dr Elisha Harris (Certifying Engineer) Mr Sam Nixon (Building Certifier)
<b>Date of Hearing:</b>	5 December 2019
<b>Date of Decision:</b>	5 October 2020

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### INTRODUCTION

1. Mr John Scott was, at the relevant times, registered pursuant to the *Building Act 1993* (**the Act**) as a certifying engineer (structural), registration number 17207ES. At the relevant times JWS Consultants Pty Ltd was registered as a corporate certifying engineer (structural), registration number 26025ES<sup>1</sup>. At all relevant times Mr John Scott was the nominee for JWS Consultants Pty Ltd.
2. Both Mr Scott and JWS Consultants Pty Ltd were categorised as Building Practitioners pursuant to section 4A(1)(d) of the Act. For the purpose of this decision notice Mr Scott and JWS Consultants Pty Ltd are referred to as **the Practitioner**.
3. On 2 May 2019 the Director of Building Control (**the Director**) referred a matter relating to the Practitioner to the Building Practitioners Board for inquiry under section 34(1)(b) and 34F(2)(b) of the Act. Following the referral an Inquiry Board was established under section 34J of the Act to conduct an inquiry into the matters alleged against the Practitioner.
4. As stated above the matters were referred pursuant to two sections of the Act, namely:
  - section 34(1)(b) of the Act which provides that on completion of investigation of a complaint where the Director decides that there is evidence that the building practitioner may be guilty of professional misconduct the Director must refer the matter to the Practitioners' Board; and
  - section 34F(2)(b) which provides that on completion of an audit, if the Director is satisfied that there is evidence that the practitioner the subject of the audit has been guilty of professional misconduct the Director may refer the matter to the Practitioners Board for inquiry.

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<sup>1</sup> On 23 July 2019 Mr Scott advised the Inquiry Board that his insurer had declined to renew the Practitioner's Professional Indemnity Insurance with the consequence that the registration of the Practitioner was suspended.

5. The initial referral to the Board under section 34(1)(b) alleged professional misconduct in respect of alleged under design of 11 construction projects in Darwin and Palmerston. The referral alleged that the practitioner had failed to adequately design a strip footing for one of those projects. The allegations in respect of the remaining 10 projects are that the practitioner had failed to adequately design the transfer slabs for those properties.
6. Following the completion of an audit the Director also referred further matters to the Building Practitioners Board pursuant to section 34F(2)(b) of the Act on the basis there was evidence that the Practitioner was guilty of professional misconduct for technical and administrative failures in the maintenance of his building file records, predominantly in respect of the completion and retention of section 40 compliance certificates relating to the buildings alleged to have been under designed.
7. The initial complaint that resulted in the Director's referral was lodged on 29 December 2014 and concerned an allegation in respect of the under design of building works. Namely, the under design of a strip footing at premises located in the Darwin CBD. Investigation of that complaint on behalf of the Director identified alleged professional misconduct by the Practitioner. That complaint was not dismissed by the Director however the matter was not referred to the Building Practitioners Board pursuant to section 34(1)(b) at the conclusion of the investigation.
8. On 31 May 2017 the Director received a further complaint alleging that the practitioner had under designed the transfer slab for a property located at the First Property. That complaint resulted in the Director conducting an audit, pursuant to section 34A(1) of the Act, of similar projects for which the Practitioner was the certifying engineer.
9. Following the conduct of that audit the Director referred complaints in respect of a further 10 properties to the Building Practitioners Board.

#### **Non-Renewal of Professional Indemnity Insurance**

10. On 24 July 2019 Mr Scott advised the Inquiry Board that his insurer had declined to renew his professional indemnity insurance. As a consequence the Practitioner's individual and company registrations were suspended. The suspensions enlivened a number of sections of the Act that impact on the scope of the matters that may be the subject of the inquiry.
11. Regulation 40 of the *Building Regulations 1993 (the Regulations)* provides that it is a condition of registration that a practitioner hold professional indemnity insurance for the amount determined by the Minister. From 24 July 2019 the Practitioner was unable to meet that registration requirement. Section 34VA of the Act deals with the suspension of a practitioner's registration in circumstances where the practitioner no longer meets the requirements for registration:

#### ***34VA Suspension where building practitioner no longer meets registration requirements***

*(1) The Practitioners Board must, by order, suspend the registration of a building practitioner if it is satisfied that the building practitioner has ceased to comply with the qualifications or other requirements for registration.*

12. Section 34W of the Act provides that the suspension of a building practitioner's registration has, during the period of suspension, the same effect as the cancellation of the registration.
13. Of particular significance in this matter, section 34H of the Act prescribes a limitation period in respect of the matters an Inquiry Board may inquire into in circumstances where a practitioner ceases to be registered:

### **34H Inquiry into building practitioner who is no longer registered**

*(1) This section applies if a building practitioner the subject of an inquiry was registered at the time of the work or conduct being inquired into but, before or during the inquiry, ceases to be registered.*

*(2) The inquiry is limited to the building practitioner's work or conduct or both (as the case requires) during the 3 years immediately before the practitioner ceased to be registered. (Emphasis added).*

14. In accordance with subsection 34H(2) this Inquiry Board is statute barred from inquiring into Mr Scott's work or conduct prior to 24 July 2016. Of the 11 properties the subject of the initial referral by the Director nine were no longer within the jurisdiction of the Inquiry Board due to the prescribed limitation period. As a result, the particulars of the complaint lodged by the Director were refined to remove the reference to the building works that fell outside the limitation period.

#### Revised Particulars of Complaint:

15. On 23 August 2019 the Director lodged refined particulars of the referral which excluded the matters that were statute barred following the suspension of the Practitioner's registration. The relevant, and clarified, grounds of complaint that remained before the Inquiry Board are:

1. An allegation that the Practitioner is guilty of professional misconduct, pursuant to section 34S(g) of the Act, for a failure to carry out building work in accordance with the National Construction Code by:

*e. Issuing a certificate of compliance - structural construction, which certified the construction of the transfer slab for punching shear and bending capacity at the Second Property (XXX Street) in accordance with an inadequate design; and*

*k. Failing to adequately design and then issuing a certificate of compliance - structural design certifying the design of the transfer slab for punching shear and bending capacity at the First Property.*

2. It was further alleged in the refined particulars that the Practitioner is guilty of professional misconduct, pursuant to section 34S(g) of the Act, for administrative failures in his building file records, namely:

(a) Failing to complete all details or incorrectly completing details in section 40 certificates of compliance in relation to:

*i. First Property; and*

*ii. Second Property.*

(b) Failing to properly stamp and certify structural drawings with the Practitioner's name, registration number and date in relation to:

*i. First Property; and*

*ii. Second Property.*

(d) Failing to maintain full copies of section 40 certificates on record in relation to:

*i. Third Property; and*

ii. *Second Property.*

2A. Further or in the alternative to 2(d), it is alleged that the Practitioner is guilty of professional misconduct pursuant to sections 34S(a) or (g) of the Act, for failing to produce a document to an auditor in accordance with section 34D(1) of the Act:

(a) referable to the Board in its own right pursuant to section 34E(1)(a) of the Act (section 34S(g)), or

(b) constituting the commission of an offence under section 34E(2)(a) of the Act (section 34S(a)).

3. It was further or alternatively alleged by the Director that the Practitioner is guilty of professional misconduct, pursuant to section 34S(b) of the Act as the combined conduct alleged at 1. and 2. amounts to a pattern of negligence or incompetent conduct in carrying out building work.

## THE HEARING

16. Following Directions Hearings convened on 13 June 2019 and 19 August 2019 the Inquiry Board determined to conduct a hearing in respect of the allegations against the Practitioner. The hearing was held on 5 December 2019.

17. The Director appeared at the hearing through his counsel, Mr Joshua Ingrams. Mr Scott did not appear at the hearing, either through counsel or in person. On the morning of the Hearing Mr Scott forwarded a letter to the Senior Board and Commission Support Officer addressed to the "Practitioners Board". In that letter Mr Scott stated:

*"I have considered your email and considering the content disallowing my application for an adjournment. I am no longer prepared to participate in such a biased witch hunt and will not be attending today."*

*It's blatantly obvious that the submissions of the Director had a substantial amount of new material, particularly the affidavit of the Director which purports to make reference to, in vague and general terms, purported conversations with me without any reference to dates, times or actual words spoken and accordingly attribute to me an "attitude". In addition it includes emails of costings which are vastly excessive without any particulars or breakdowns, together with references to telephone calls from unknown members of the public without even naming them or providing their direct evidence.*

*I have been given none of the notes or file records for any of this material and yet counsel for the Director and clearly the Board itself, seem intent on pushing this matter through to conclusion without allowing me procedural fairness and is said simply to "be ready" for hearing notwithstanding I am unrepresented. He simply asserts "the same proof of evidence will suffice". On what basis does the Board even consider that fair?*

*This is grossly unfair and I am advised is in breach of the rules of procedural fairness. I have no idea as to the content of these discussions and have not been provide (sic) any copies or notes made by any public servants at the time. I am therefore caught by surprise as to this information.*

*In addition this is the first time I've been given any notice that the Director does not accept my current state of impecuniosity and their requirement that I produce evidence of such. Obviously my accountant would need time to do so however I am very willing to provide that proof if given a reasonable timeframe.*

*Given that the Board seems set on allowing this behaviour from the Director I no longer have any faith in the impartiality of the Board and will take no further part in the proceeding today.”*

*Yours faithfully*

*(Signature of John Scott)*

5.12.2019

18. The Inquiry Board notes the following matters in respect of Mr Scott’s letter:

- Mr Scott alleges that the Inquiry Board failed to consider his request for an adjournment of the hearing. That statement is incorrect. Mr Scott did seek an adjournment of the hearing on 3 December 2019 and was advised on 4 December 2019 that any submissions he wished to make in that regard would be heard prior to the commencement of the hearing proper. Mr Scott deprived himself of the opportunity to make submissions in support of his application for adjournment when he decided not to attend the hearing.
- Mr Scott also alleged that he was denied natural justice in that the Director had filed additional materials prior to the hearing and that he objected to the Inquiry Board receiving and considering those materials. Again, it was made clear to Mr Scott prior to the hearing date that the Inquiry Board would hear his submissions in respect of the additional materials and determine whether or not they should be admitted prior to the commencement of the hearing proper.
- In his letter Mr Scott also stated that the Director did not accept his current state of impecuniosity and required him to produce evidence in that regard. The Inquiry Board notes that Mr Scott’s financial situation is irrelevant in the context of the matters the required to be determined, namely whether or not the Practitioner’s conduct amounts to professional misconduct. Whilst the Practitioner’s financial state may be a factor for consideration for the Inquiry Board in respect of any potential monetary penalty it is not relevant to the inquiry as to whether or not the Practitioner engaged in professional misconduct. In addition, it is not a matter for the Director to investigate the Practitioner’s financial position. Had he attended the hearing it would have been open to Mr Scott to make submissions as to his state of impecuniosity. Again, he failed to take that opportunity by deliberately refusing to attend the hearing.

19. Mr Ingrams acknowledged that Mr Scott had sought an adjournment of the hearing date. He confirmed that the Director’s view that whether the hearing proceeded on 5 December 2019 was dependent on the outcome of the adjournment application and that the Director was prepared to respond to any application by Mr Scott in that regard.

20. The Inquiry Board determined that Mr Scott had been adequately notified of the time and date of the hearing and encouraged to appear, as evidenced by the letter he forwarded on 5 December 2019. The Inquiry Board is satisfied that Mr Scott made a conscious and deliberate decision to not appear at the hearing. Having heard submissions from Mr Ingrams in that regard, the Inquiry Board determined the appropriate course was to proceed with the hearing in Mr Scott’s absence.

**Submissions and Evidence presented on behalf of the Director:**

21. Mr Ingrams provided the Inquiry Board with written submissions in respect of the allegations against the Practitioner which may be summarised as follows.

### Building Works at the Second Property

22. On 15 February 2016 the Practitioner certified structural designs for the construction of the building at the Second Property. The building comprised a two story residential unit complex. The Director alleges that the first floor transfer slab for the building was under-designed in that shear reinforcing was not provided within the design of the transfer slab to resist punching shear.
23. The Director commissioned an audit, by the Building Advisory Service (**BAS**), of all of the Practitioner's designs for buildings with transfer slabs from 2012 onwards. The design and construction of the building at the Second Property was reviewed by consultant structural engineers, Pritchard Francis. That review concluded that the design for punching shear was non-compliant with the National Construction Code (**the NCC**) at column C2. Pritchard Francis also concluded that the design of the first floor transfer slab was also non-compliant for bending capacity in 6 areas.
24. The Practitioner did not identify the under-design of the transfer slab and the building was fully constructed and the residential units across the two floors were occupied before the issue was identified. The Practitioner certified the construction of the building and issued a Certificate of Compliance – Structural Construction pursuant to section 40 of the Act on 17 March 2017. In discussions between the Practitioner and Pritchard Francis, the Practitioner did not concede that the transfer slab was under-designed.
25. On 29 April 2019 the Director issued Building Notices which required the owners to engage a structural engineer to independently assess the building works and provide recommendations for appropriate remedial work.
26. Engineering consultants Wallbridge Gilbert Aztec were engaged for the assessment of the building at the Second Property and identified that the building was under-designed for punching shear capacity at four locations. The bending capacity was assessed by Wallbridge Gilbert Aztec to have been under designed in two areas. Wallbridge Gilbert Aztec also designed the remedial works required for the building to comply with the NCC in the form of stiffeners and bolts at the top of the effected columns. The Director submitted that he was unaware of the costs to the owners of the residential units for the remedial works.
27. On being advised of the findings of Wallbridge Gilbert Aztec the Practitioner accepted that the building work for the structural design at the Second Property was not designed in compliance with the NCC. However, the Practitioner submitted that the certification of the design occurred outside of the limitation period prescribed by section 34H of the Act with the result the Inquiry Board was statute barred from inquiring into that matter.
28. In response, the Director submitted that as the Practitioner had designed and certified the initial defective structural design, any subsequent certification of that building by the Practitioner continues to be defective building work until such time as The Practitioner rectifies the error.
29. As a result of the defective structural design of the building and the subsequent certification of the construction of the defective works the Director alleges that the Practitioner is guilty of professional misconduct pursuant to section 34S(g) of the Act for the failure to carry out the building works in accordance with the NCC.

### Administrative Issues in respect of the Second Property

30. In relation to the certification of the construction works for the Second Property, the Director submits that on 17 March 2017 the Practitioner failed to complete all details or incorrectly completed details in the section 40 Certificate of Compliance. The Director alleges that the

section 40 Certificate issued by the Practitioner on 17 March 2017 was lacking in the following areas:

- a) The relevant address was not complete in that the street number and the suburb were not included and it incorrectly referred to XXX Street;
- b) The location code was not correct in that it referred to Suburb and not location code XXX;
- c) The description of the building was insufficient in that it did not detail the number of storeys of the building;
- d) The building permit number was not completed - however it is noted that this is only required to be filled out if known; and
- e) All of the plans and revisions were referenced, however not all of those referenced plans and revisions were attached to the building permit.

31. The Director also alleged that the Practitioner had failed to properly stamp and certify structural drawings with the Practitioner's name, registration number and date in respect of the building works at the Second Property.
32. The Director alleged further that the Practitioner had failed to maintain full copies of the section 40 certificates on record in respect of the building works at the Second Property.
33. As a consequence of the alleged administrative issues identified immediately above the Director alleges that the Practitioner is guilty of professional misconduct pursuant to section 34S(g) of the Act.

#### Building Works at the First Property

34. On 19 September 2016 and 5 July 2017, the Practitioner certified structural designs in a section 40 Certificate of Design for the construction of the building at the First Property. The building comprised a four story residential unit complex, known as the XX Apartments.
35. On 11 January 2017, whilst the building was still under construction, substantial cracking to the first floor transfer slab around the perimeter of a concrete column was noticed. The developer/builder sought independent advice from structural engineers, Irwin Consult. A punching shear failure was identified at the column/transfer slab and NT Work Safe was notified.
36. Irwin Consult undertook structural computations for the first floor transfer slab which further identified that punching shear was under designed over most of the column/floor intersections by an average of 30%. Due to the sudden and catastrophic nature of a punching shear failure, with limited or no warning signs, the consequence of the under design was that the construction site had to be closed until the first floor transfer slab was appropriately propped.
37. The Director commissioned an independent review of the design of the building, undertaken by Pritchard Francis. That review found that the design for punching shear was non-compliant with the NCC at 13 of 25 columns. The design of the first floor transfer slab was also identified as being non-compliant for bending capacity in 8 areas. The Practitioner did not identify the under-design of the transfer slab until the slab began to fail, posing a safety risk for both the construction workers and members of the public.

38. On 12 June 2017 the Practitioner conceded that he had used an incorrect loading factor which resulted in the under design of the transfer slab. On 11 September 2017 structural drawings for remedial work were prepared and certified by structural engineers JHA Australia Group. The remedial work was carried out and the construction project was safely completed on 28 September 2017.

Administrative Issues in respect of the First Property

39. In relation to the building works for the First Property, the Director submitted that the section 40 Certificate of Compliance – Structural Design issued by the Practitioner on 19 September 2016 was lacking in the following areas:
- a) The relevant address was not complete in that the street number and the suburb were not included;
  - b) The location code was not correct in that it referred to Suburb and not the location code of XXX;
  - c) The Town/Hundred was not correct in that it referred to Darwin and not XXX;
  - d) The description of the building was insufficient in that it did not detail the number of storeys of the building;
  - e) Not all of the plans and revisions were referenced;
  - f) The class of building was not completed and should have been 2 and 7A as per the building permit; and
  - g) The type of construction was not completed and should have been as per the building permit.
40. In relation to the amendment to the building permit, XXX/XX/X/XX on 5 October 2017, the Director submitted that the section 40 Certificate of Design issued by the Practitioner on 5 July 2017 was lacking in the following areas:
- a) The location code was not correct in that it referred to Suburb and not location code XXX; and
  - b) The description of the building was insufficient in that it did not detail the number of storeys of the building;

Administrative Issues in respect of Fourth Property

41. On 8 October 2014 and 9 February 2015, the Practitioner certified structural designs in a section 40 Certificate of Design for the construction of the building at the Fourth Property. The building's construction was certified by the Practitioner by section 40 Certificate of Construction on 19 June 2015.
42. The Director submitted that records of the building works should have been maintained by the Practitioner for 10 years after an occupation certificate was issued for the building work. The Director alleged, in relation to the building works for the Fourth Property, that the Practitioner failed to maintain full copies of section 40 certificates on record from both 8 October 2014 and 9 February 2015.



43. The Director submitted, in the alternative, that the Practitioner failed to produce the documents to an auditor when requested to do so, pursuant to section 34D(1) of the Act, on 11 July 2017.

#### Administrative Issues, Third Property

44. On 21 May 2014, 20 August 2014, 13 October 2014, 25 October 2014 and 23 June 2015, the Practitioner certified structural designs in a section 40 Certificate of Design for the construction of the building at the Third Property. The building's construction was certified by the Practitioner by section 40 Certificate of Construction on 19 June 2015.
45. In relation to the building works for the Third Property, the Director alleges that the Practitioner failed to maintain full copies of section 40 certificates on record from 25 October 2014.
46. The Director alleged, in the alternative, that the Practitioner failed to produce the documents to an auditor when requested to do so, pursuant to section 34D(1) of the Act, on 11 July 2017.

#### Failure to maintain full copies of section 40 Certificates

47. The Director states, that during the audit of the Practitioner, a range of documents were requested in relation to his building work and that he failed to produce the section 40 Certificates issued on 8 October 2014 and 9 February 2015, referred to in Building Permits issued on 8 October 2014 and 9 February for the certification of the structural design of the Fourth Property.
48. The Director further alleges that the Practitioner failed to produce copies of the section 40 Certificate issued on 25 October 2014, referred to in the Building Permit issued for the certification of the structural design of the Third Property.
49. The Director submitted that, pursuant to sections 159 and 160 of the Act, the limitation period for an action to be brought for the purposes of recovery of damages for loss or rectification needed as a result of defective building work under the Act, is a period of 10 years from the date of the grant of an occupancy permit. The Director submitted that a practitioner ought to maintain their records of building work that they undertaken for at least this period of time.
50. The occupancy permit for the Fourth Property was issued on 14 December 2015 and for the Third Property on 20 November 2015. At the time of the audit, 10 years had not passed and the Director submitted that the Practitioner should have had a copy of the relevant certificates on file.
51. The Director further submitted that the failure by the Practitioner to properly maintain his records is properly described as professional misconduct pursuant to section 34S(g) of the Act, further evidencing a lack of proper administrative processes on the part of the Practitioner.

#### Failure to produce a document to an auditor

52. In addition to, or in the alternative to, the allegation of failure to maintain the section 40 certificates referred to above, the Director alleges that the Practitioner failed to produce the section 40 certificates for the Fourth Property and the Third Property, mentioned above, to the auditor when requested to do so.
53. The Director submitted that this allegation is made as a separate ground of professional misconduct to the requirement to maintain records. The Director stated that section 34D(1) of the Act requires a building practitioner to produce to the auditor any documents that may be relevant to the audit. The Director submitted this should be the preferred ground to find against

the Practitioner, being a more serious allegation constituting a direct breach of section 34E of the Act and constituting professional misconduct pursuant to section 34S(f) of the Act.

**Evidence presented at the Hearing by the Director:**

54. Mr Ingrams called on Mr Mark Meldrum, the Director, to provide evidence in respect of the allegations against the Practitioner. Mr Meldrum stated that he had held the position of Director since April 2017 and that he had been involved in the audit and investigation of the matters before the Inquiry Board since May 2017.
55. Mr Meldrum explained that one of his roles under the Act is to investigate complaints lodged under the Act and to determine whether offences have been committed and whether or not the alleged offences warrant the referral of a practitioner to the Building Practitioners Board.
56. Mr Meldrum stated that where he is aware of evidence to suggest a building is not compliant with the NCC he is authorised to take action under the Act, including the issue of building notices to the owners of non-compliant buildings and seeking responses from owners. Subject to the response, the Director may also issue building notices, including emergency notices where the degree of non-compliance is significant. Mr Meldrum stated that a building notice was issued for the building at the Second Property. The issues with the building at the First Property had been rectified prior to the completion of the construction and as a result there was no requirement to issue a building notice.
57. Mr Meldrum acknowledged that BAS did not have the expertise to conduct audits of the structural engineering designs with the result he commissioned an independent structural engineering firm, Pritchard Francis, to carry out that work. The costs to the Department of engaging Pritchard Francis for the two properties the subject of this inquiry were approximately \$20,000. In addition, the Department has incurred legal costs of approximately \$18,000. Mr Meldrum stated that he had assigned two full-time staff to the investigation into the complaints against the Practitioner.
58. Mr Meldrum stated that to the best of his knowledge all properties that had been assessed as being under engineered by the Practitioner had been rectified or were in the process of being rectified. He also confirmed that none of the residents of the affected buildings had been required to vacate the buildings as he determined that the issue of building notices was the more appropriate way to proceed.
59. Mr Meldrum, in his capacity as Director, also filed a statutory declaration dated 9 November 2019 for the purposes of the inquiry which may be summarised as follows.
60. Throughout the audit in relation to the nine non-complaint buildings in XXX the Auditor afforded the Practitioner reasonable timeframes to respond to requests for information. Despite this the Practitioner requested extensions of time to respond to requests from the Auditor on twelve occasions between August 2017 and March 2019, amounting to 106 additional days to respond to requests for information. The reasons cited by the Practitioner for the extensions included personal issues, operating a small business, travelling overseas, insufficient time to respond, illness, family obligations and technical issues with receiving emails.
61. In the Director's opinion the Practitioner was stalling the Auditor and, whilst he seemed cooperative, he made no time concessions in trying to resolve the audit in the quickest possible time available. Throughout the audit process the Director observed that the Practitioner was dismissive of the allegations against him and was also vague about the actual technical requirements for the structural design of transfer slabs. At a meeting between the Auditor and the Practitioner on 15 August 2018, the Practitioner stated to the Auditor that he did not know the building classifications in the NCC and that he did not possess a copy of the NCC.

62. In relation to the alleged administrative failures, when the Auditor questioned the Practitioner as to why he could not produce certificates as requested he explained that he simply does not keep everything and, if a second version of a certificate is issued, he replaces previous versions with any updated versions.
63. The Director stated that there was significant media attention on the investigations in respect of the Practitioner's conduct with the situation being reported in the media in the Northern Territory and nationally. His Department received a number of letters and phone calls from distressed unit owners seeking information. The Director stated further that a number of owners expressed distress at the financial strain the non-complaint buildings were causing. The Director stated that at no stage of the process did the Practitioner advise the Auditor that he wanted to help the building owners with rectification of the non-compliant buildings.
64. On 29 and 30 April 2019 the Director met with all building owners and their representatives in separate meetings and served the Building Notices for each of the non-compliant buildings. The rectification for all ten buildings has been substantial, particularly for the buildings the subject of the inquiry. The costs of rectification of the noncompliant transfer slab at the First Property was estimated at \$7 million, as confirmed by the builder and previous owner for that building in an attachment to the Director's statutory declaration.
65. The Director stated that the investigation and audit in respect of the Practitioner's conduct also caused considerable strain on the human and financial resources in the Department. BAS commissioned Northern Territory registered structural engineers Pritchard Francis to undertake a number of assessments of the non-compliant buildings as BAS does not have the relevant in-house expertise to conduct investigations of that nature. The Director stated that the difficulties experienced were compounded by the Practitioner's refusal to properly engage with the engineers commissioned to conduct the investigations. The Director stated that the total costs for the engineering investigations and assessments was \$101,508.

**Evidence Presented at the Hearing by Ms Michele Altaras:**

66. Mr Ingrames next called Ms Michele Altaras, Senior Auditor, Investigations Office, BAS to provide evidence. Ms Altaras advised that she commenced employment with BAS on 5 March 2018 and in late April 2018 she was tasked with providing assistance in relation to the matters before the Inquiry Board. Around December 2018, Ms Altaras took full carriage of the audit of the building works that resulted in the complaints against the Practitioner.
67. In respect of the audit, Ms Altaras stated that there were delays in the Practitioner providing documents that were requested for the purpose of the audit. She estimated that those delays amounted to approximately 106 days in total. She stated that the Practitioner requested extensions of time on numerous occasions, the extensions were granted and in some instances the requested documentation was still not provided following which the documents were requested again by a further delayed date.
68. Ms Altaras stated that the Practitioner's explanations for the delays were various and included family issues, travel overseas, business commitments and illness. Ms Altaras stated that in her dealings with the Practitioner he was respectful and polite however she felt that he was hindering and delaying the process by continually asking for extensions of time and by delaying in providing documents and responses.
69. Ms Altaras stated that in her opinion the Practitioner appeared to not actually understand the gravity of the matters under investigation or acknowledge the seriousness of the investigations. She stated that she met with the Practitioner on 28 February 2019 where it became apparent to

her that the Practitioner did not have a copy of the NCC. She found that to be quite concerning and provided the Practitioner with copies of the NCC at a subsequent meeting.

70. Ms Altaras stated that during the meeting when she asked why the Practitioner was unable to provide copies in certain section 40 certificates the Practitioner explained that when he was preparing a later construction certificate or design certificate he would merely copy over the top of the original version and not retain the original. She stated that the Practitioner could not provide any further explanation for not being able to produce requested documents.

## CONSIDERATION OF THE ISSUES

71. Under section 4 of the Act, "construct", in relation to a building, includes:

- (a) build, re-build, erect or re-erect the building; and
- (b) repair the building; and
- (c) make alterations to the building;..."

"Building' for the purposes of the Act "includes a structure and a part of a building or structure."

72. At all relevant times the Practitioner was engaged in building work as a registered building practitioner in the category of certifying engineer (structural).

### National Construction Code

73. Regulation 4(2) of the *Building Regulations 1993 (the Regulations)* provides that building work must conform with the Regulations. Regulation 4(1) adopts the Building Code of Australia (**BCA**) for any building work referred to in the Act or in the BCA. The BCA is defined at regulation 2 as "*the Building Code of Australia set out in Volume One and Volume Two of the NCC*".

74. Part B1.4 of the NCC is headed "*Determination of structural resistance of materials and forms of construction*", and refers to a number of Australian Standards (AS) documents. For concrete elements, part B1.4(b) refers to AS3600 for concrete construction. Further to this, Specification A1.3 within the Building Code of Australia (BCA) contains a list of documents adopted by reference. Within this table, it is specified that AS3600 refers to the 2009 release of this code (including amendments 1 and 2).

75. Previous versions of the BCA also refer to AS3600. As all designs under review were carried out within the previous five years, the 2009 version of AS3600 would have applied to all properties being considered in this inquiry. AS3600-2009 is the Australian Standard for Concrete Structures, and as specified in Section 1.1 .1 "*sets out minimum requirements for the design and construction of concrete building structures and members that contain reinforcing steel or tendons, or both*". This Standard applies to the transfer slabs the subject of this inquiry.

76. Clause 9.2 of this standard is titled Strength of Slabs in Shear. Clause 9.1 of this standard is Strength of Slabs in Bending, which also refers to Clause 8.1 - Strength of Beams in Bending for the calculation of bending capacity of a concrete member.

77. Punching shear failure occurs where the load on the slab cannot be transferred from the slab into a column, and as a result the column "punches" through the slab. This is a sudden failure mechanism and has little to no visible warning signs. The only indication of imminent failure is cracking around the column head.

78. Bending failure occurs where the slab does not have sufficient depth and/or reinforcement to span over the clear distance between supports (columns). Bending failure will generally occur in one of two locations, but will generally be a more ductile method of failure and is more likely to give visible warning signs prior to a collapse. Bending failure may happen at the mid-span, halfway between supports, at which signs of cracking may be evident on the underside of a slab.
79. Where bending capacity is not adequate at a support signs such as cracking would be observed on top of the slab, and would potentially be obscured by floor finishes and the like. Other signs of a bending failure may include increased deflections in the slab and possible cracking of brittle partitions.

### **Design Issues - First Property**

80. On 19 September 2016 and 5 July 2017, the Practitioner certified structural designs in section 40 Certificates of Design for the construction of the building at the First Property. The building is a four story residential unit complex.
81. It is accepted by the parties that on 11 January 2017, during the construction of the building, substantial cracking to the first floor transfer slab around the perimeter of a concrete column and a punching shear failure was identified at the column/transfer slab intersection. That failure was the subject of a notification to NT Work Safe. As a result, structural computations of the first floor transfer slab were undertaken by Irwin Consult and it was further identified that punching shear was under designed over most of the column/floor intersections by approximately 30% on average, ranging from 50-10% over stressed. Due to the sudden and catastrophic nature of a punching shear failure, with limited or no warning signs, the consequence of the under design was that the construction site had to be closed until the first floor transfer slab was appropriately propped.
82. The propping was designed by the Practitioner and was put in place. The punching shear non-compliances were independently reviewed by consultant structural engineers, Pritchard Francis, who identified that the design for punching shear was non-compliant with the NCC at 13 of 25 columns. In addition, the design of the first floor transfer slab was also identified to have non-compliances for bending capacity in 8 areas.
83. On 12 June 2017 the Practitioner conceded that he had used an incorrect loading factor which resulted in the under design of the transfer slab. On the basis of the Practitioner's admissions and the reports commissioned from the independent engineers, the Inquiry Board finds that the complaint by the Director in respect of the under design of the First Property is made out.
84. As a consequence of that finding the Inquiry Board also finds that the Practitioner is guilty of professional misconduct pursuant to section 34S(g) of the Act.

### **Administrative Issues - First Property**

85. In relation to the building works for the First Property, the documents provided to the Inquiry Board by the Director demonstrate to the Inquiry Board that the Practitioner made the following administrative errors, as set out in the audit report:
- a) Failing to complete all details or incorrectly completing details in section 40 Certificates of Compliance; and
  - b) Failing to properly stamp and certify structural drawings with the Practitioner's name, registration number and date.

### **Design Issues – Second Property**

86. On 15 February 2016 the Practitioner certified structural designs in a section 40 Certificate of Design for the construction of the building at the Second Property. The building is a two storey residential unit complex. The transfer slab is the first floor and adequate shear reinforcing, or other means, was not provided within the design of the transfer slab to resist punching shear.
87. As a result of an audit conducted by BAS of all of the Practitioner's designs for buildings with a transfer slab from 2012 onwards, the building was reviewed by consultant structural engineers, Pritchard Francis, who identified that the design for punching shear was non-compliant with the NCC at 5 of 12 columns. The design of the floor transfer slab was also identified to have non-compliances for bending capacity in 6 areas.
88. Initially the Practitioner did not concede that the transfer slab was under-designed. Despite that, Building Notices were issued by the Director under the Act on 29 April 2019 which required the owners to have the building and design independently assessed by a structural engineer, including recommendations made for remedial work.
89. The design for the building at the Second Property was reviewed by structural engineers Wallbridge Gilbert Aztec who confirmed that the building was under designed for punching shear capacity at four locations. The bending capacity was assessed to have been under designed in two areas.
90. As noted above, the Practitioner certified structural designs for the building on 15 February 2016. That date falls outside the limitation period of 24 July 2016. However, the building's construction was certified by the Practitioner by Certificate of Construction dated 17 March 2017 which does fall within the limitation period.
91. The Practitioner's response in respect of the construction at the Second Property was that the inquiry in respect of that building was statute barred. The Practitioner contended that the Certificate of Construction was correct in the sense that it certified that the building was constructed in accordance with the certified structural designs, albeit that the designs were assessed as defective by the engineering firms who conducted the independent audits of the design and construction.
92. In the Director's submission the failure to properly design the building necessarily infected any later section 40 certification of the construction. While the Practitioner may not ordinarily reconsider his calculations before certifying a construction under section 40 of the Act, the Director submits that the onus is ultimately on the Practitioner to provide proper certification of the buildings he has been engaged to design. The Director contends that had the Practitioner reconsidered his calculations to ensure his certification was accurate he may have noticed the issue before, again, certifying a building with a defective design.
93. In the Director's submission, a contrary view would create a fundamental undermining of the regulatory system protecting the construction industry and the public that engages that industry. The Director submitted that, as a result of the Practitioner not discovering the defect himself at the time he certified the construction, the building was occupied by the time the defect was ultimately discovered. Consequentially, alterations and rectifications were required after the building was completed causing unnecessary disruption and angst to those people who owned or were living in the building.

## **Compliance Certificate – Second Property**

94. As noted above, on 17 March 2017 the Practitioner certified a Certificate of Compliance Structural Construction (**the Compliance Certificate**) in respect of the building works at the Second Property. The Compliance Certificate includes a certification clause which states as follows:

*“I certify that reasonable care has been taken to ensure that the structural engineering aspects of the works described above have been constructed in accordance with the approved plans and permit.”*

95. The Inquiry Board does not accept the submission from the Director to the effect that in certifying the Compliance Certificate the Practitioner was required to re-consider the calculations used in respect of the certified engineering design plans. The wording of the statement of certification, as set out immediately above, does not lend itself to the conclusion that the engineering re-calculations were required to be carried out by the Practitioner.

96. In the Inquiry Board’s view the Compliance Certificate required the Practitioner to certify that the engineering aspects of the building works were carried out in accordance with the approved plans and permit. The Practitioner certified that that was the case, albeit that the “approved plans” so far as the engineering design was concerned were in fact defective.

97. The Inquiry Board is satisfied that the engineering design for the premises at the Second Property was defective, as confirmed by the report prepared by Pritchard Francis. However the Practitioner carried out that design work outside the limitation period which is applicable to this inquiry.

98. As a consequence the engineering design work for the Second Property premises falls outside the limitation period. The Compliance Certificate – Structural Construction executed by the Practitioner on 17 March 2017 does fall within the limitation period. However, at that time the Practitioner was merely certifying that the building was constructed in accordance with the defective design plans. That certification was in fact correct with the result, in the view of the Inquiry Board, the conduct of the Practitioner does not amount to professional misconduct.

## **Administrative Issues – Second Property**

99. In relation to the building works for the Second Property, specifically in respect of the certification of the construction of the building on 17 March 2017, the documents provided to the Inquiry Board demonstrate that the Practitioner did in fact fail to complete all details or incorrectly completed details in the section 40 Certificate of Compliance.

## **Administrative issues – Third Property and Fourth Property:**

100. The allegations in respect of this element of the Director’s referral is set out in some detail in this decision notice at paragraphs 47 to 53 above. In essence it is alleged by the Director that the Practitioner failed to maintain full copies of section 40 certificates on record in relation to the Third Property and Fourth Property. The Director also submitted, in the alternative, that the Practitioner failed to produce the section 40 certificates when requested to do so by the auditor, contrary to section 34E(2)(a) of the Act.

101. In her evidence presented at the hearing, Ms Altaras stated that when she asked the Practitioner why he was unable to provide copies of the section 40 certificates he explained that

when he was preparing a later construction certificate or design certificate he would merely copy over the top of the original version and not retain the original.

102. That practice of “over-writing” previous certificates is entirely inappropriate in any circumstances and more so when serious issues subsequently arise as to the engineering design and construction of buildings. In the absence of all certificates the process of assessing whether the engineering design and construction were compliant with the relevant standards being adhered to becomes more difficult.
103. The Inquiry Board accepts that the Practitioner had been unable to produce the certificates for the purpose of the Director’s investigations or when requested to do so by the auditor.
104. The fact that the Practitioner was unable to produce the certificates leads to the inevitable conclusion that he had failed to maintain them, as acknowledged by the Practitioner in his dealings with Ms Altaras. That failure to produce the certificates for the purpose of an audit constitutes a breach of section 34E(2)(a).
105. In respect of the building works at the Third Property and Fourth Property, the Inquiry Board finds that the Practitioner has breached section 34E(2)(a) of the Act by failing to produce the certificates when requested to do so by an auditor.

### **Professional Misconduct**

106. The errors made by the Practitioner in designing aspects of the building constructed at the First Property, other than in accordance with the NCC, constitutes conduct that falls short of the standards of professional competence expected of a registered certifying engineer (structural) when engaging in building work. The consequences of the Practitioner’s professional misconduct resulted in a catastrophic failure of the building and the requirement to close the construction site whilst remedial work was undertaken. It was a matter of good fortune that no-one was injured due to the Practitioner’s professional misconduct and that the defects in the engineering design came to light prior to the building being occupied.
107. The Inquiry Board is of the firm view that the Practitioner’s professional misconduct in under-designing the building was at the extremely serious end of the scale in terms of the nature and consequences of the misconduct.
108. Similarly, the failure to maintain proper records, and to be able to produce those records when required to by an auditor, and the failure to complete appropriate certification details when engaging in building work, constitutes conduct that falls short of the standards of behaviour expected of a registered certifying engineer (structural).
109. The failure to properly design in accordance with the NCC and the failure to complete appropriate certification details, has the effect of limiting or nullifying the effective reliance on the section 40 certification by a building certifier pursuant to regulation 21 of the Regulations, fundamentally undermining the regulatory system for the construction industry.
110. The conduct of the Building Practitioner is properly described as negligent or incompetent and, when taken together, demonstrates that the Practitioner is guilty of a pattern of negligent or incompetent conduct over a period of time while engaging in building work. The Practitioner is therefore guilty of serious professional misconduct.



## PENALTY

111. On the completion of an inquiry and a finding that a practitioner is guilty of professional misconduct, section 34P(1)(b) of the Act requires the Inquiry Board to decide the action to be taken against the Practitioner pursuant to section 34T. As set out above, in this case the Inquiry Board has determined that the Practitioner is guilty of three counts of professional misconduct. Namely:

- The defective engineering design for the building at the First Property;
- Failure to produce section 40 certificates when requested to do so by an auditor contrary to section 34E(2)(a) of the Act; and
- failure to complete all details or incorrectly completing details in the section 40 Certificate of Compliance.

112. The penalties that may be imposed following a finding that a practitioner has been guilty of professional misconduct are set out in section 34T as follows:

*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.*

113. On the basis of the matters set out above in this Decision Notice, including the Practitioner's dismissive attitude towards the function of the Inquiry Board and the refusal to attend and participate in the hearing of the matter, the Inquiry Board is of the view that the Practitioner's professional misconduct was of such seriousness and gravity that the appropriate penalty is to cancel the Practitioner's registration as a certifying engineer (structural) pursuant to section 34T(f) of the Act.

114. In addition, and for the same reasons, the Inquiry Board has determined to impose a monetary penalty of 40 penalty units, the maximum allowable under section 34T(d) of the Act.


115. In accordance with that determination by the Inquiry Board, the registration of Mr John Scott as a certifying engineer (structural), registration number 17207ES and the registration of JWS

Consultants Pty Ltd as a corporate certifying engineer (structural), registration number 26025ES are cancelled, effective from the date of receipt of this decision notice.

116. In reaching that determination the Inquiry Board notes that the Practitioner's registration was suspended on 24 July 2019 as a result of his failure to renew his Professional Indemnity Insurance. Section 34W of the Act provides that a suspension or a practitioner's registration under section 34VA has the same effect as the cancellation of the registration during the period of suspension.
117. However, a suspension of registration under section 34VA, and the deeming of that suspension to be a cancellation of registration, is properly categorised as a temporary suspension/ cancellation. In the event the Practitioner was able to renew his Professional Indemnity Insurance the suspension under section 34VA of the Act would cease along with the deemed cancellation. In all the circumstances, the Inquiry Panel is of the view that cancellation under section 34T(f) is the appropriate penalty.

## NOTICE OF RIGHTS

118. Section 35(d) of the Act provides that a decision under section 34P that a building practitioner is or is not guilty of professional misconduct is an appealable decision. In addition, section 34T(e) of the Act provides that a decision to take action under section 34T of the Act is also an appealable decision. The decision set out above falls within each of those sections which are therefore appealable decisions. Section 36 of the Act prescribes the persons who are entitled to appeal to the Local Court against an appealable decision, in this instance those persons are the Practitioner and the Director.
119. Section 36(2) of the Act provides that any appeal must be lodged with the Local Court within 30 days of the person being notified of the decision.



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Philip Timney  
Presiding Member

Dated: 5 October 2020