

# BUILDING PRACTITIONERS INQUIRY BOARD

## Reasons for Decision

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<b>Building Practitioner:</b>	Asbuild (NT) Pty Ltd
<b>Building Practitioner Category:</b>	Building Contractor Residential (Unrestricted)
<b>Referred By:</b>	Director of Building Control
<b>Proceedings:</b>	Referral of Inquiry to the Building Practitioners Board in accordance with s 34(1)(b) of the <i>Building Act (1993) NT</i>
<b>Inquiry Board:</b>	Maria Savvas (Presiding Member) Robert Cox (Member) Sam Nixon (Former Member)
<b>Date of Hearing:</b>	29 July 2020
<b>Date of Decision:</b>	7 December 2021

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### Background

1. On 27 June 2019 the Director of Building Control (**the DBC**) referred Asbuild (NT) Pty Ltd (**the Practitioner**) to the Building Practitioners Board for Inquiry pursuant to section 34(1)(b) of the Act (**the Referral**).
2. The Referral related to the following breaches of the *Building Act (1993) NT* (**the Act**) and the Building Regulations (**the Regulations**) by the Practitioner:
  - (a) Section 54AC(1)(a)(ii) of the Act – the Practitioner carried out prescribed residential building work at 2 Burrows Street, Kilgariff when no fidelity certificates were in force.
  - (b) Section 54AC(1)(b)(ii) of the Act – the Practitioner carried out prescribed residential building work at 2 Burrows Street, Kilgariff when the other party to the contract (Graham Nominees (NT) Pty Ltd) had not received fidelity certificates.
  - (c) Section 55 of the Act - the Practitioner carried out building work at 2 Burrows Street, Kilgariff without a building permit in respect of the work having been granted and being in force under the Act.

### (the Alleged Offences)

3. The relevant agreed facts are as follows.
4. The Practitioner was registered as a Building Contractor Residential (Restricted) on 10 December 2007. Paul Jonathan Graham was and is the sole director of Asbuild.
5. On around 4 December 2017, Asbuild commenced building works to construct 4 single dwellings (**the Building Works**) at 2 Burrows Street, Kilgariff (**the Properties**) without:
  - a. a building permit having been granted - in breach of section 55 of the Act.;
  - b. an authorised RBI policy or a fidelity certificate being in force - in breach of section 54AC of the Act.
6. A building permit was only issued on 5 February 2018 (building permit no. 000/7307/1) by which time significant Building Works had already been undertaken including excavation works, footings and reinforcing, slab reinforcing and blockwork:
  - a. On 7 December 2017, the building certifier inspected the footings, excavation and reinforcing as per the approved drawings at the prepour stage and approved those building works;
  - b. On 9 January 2018, the building certifier inspected the slab reinforcing and blockwork as per the approved drawings at the prepour slabs stage and approved those building works;
  - c. On 30 January 2018, the building certifier inspected the blockwork and reinforcing as per the approved drawings at the prepour corefill stage and approved those building works.
7. Neither an authorised RBI policy nor a fidelity certificate was ever obtained:
  - a. On 12 December 2017, Asbuild applied for a fidelity certificate (noting that the Building Works has already been commenced by that time);

- b. On 2 July 2018, Master Builders Association NT advised that it was unable to issue a fidelity certificate as the Building Works were almost complete and it could not issue fidelity certificates outside of the *Building Act 1993*.
8. On 6 December 2018, a complaint was made by the Manager Building Control Building Advisory Services to the Director of Building Control (**DBC**) that, amongst other things, Asbuild had carried out the Building Works without a fidelity certificate being in force.
9. The DBC did not dismiss the complaint under section 28(a), (b) or (c) of the Act and on 7 February 2019 a notification of complaint letter was sent to Asbuild pursuant to section 29 of the *Building Act 1993*, attaching a copy of the complaint and inviting a response by 21 February 2019.
10. On 7 February 2019, Mr Graham provided a response which relevantly stated:

*"We were aware of this. We had attempted to obtain fidelity certificates over the course of the project however by the time Master Builders NT Fidelity Fund were satisfied with the paperwork and the project neared completion they advised on 2 July 2018 that they were unable to issue the certificates. As Master Builders NT doesn't have the authority to issue certificates outside of the Building Act."*

*"We attempted several times to find out when the certificates would be issued.*

- 13 Dec 2017 -Additional info sent*
- 18 Dec 2017 - Follow up request*
- 06 Feb 2018 - Follow up request*
- 27 Feb 2018 - Needed to make another application*
- 27 & 28 Feb 2018- additional questions answered*
- 16 Mar 2018 - additional queries answered*
- 29 Mar 2018 - additional information sent*
- 30 Mar 2018 - additional information answered*
- 26 Jun 2018- additional form filled out*
- 27 Jun 2018 - was asked if construction had commenced.*

*Answered 'yes' - in March."*

11. An assessment of the complaint by the DBC included a review of the building records, which then relevantly found that Asbuild had also commenced and carried out some of the Building Works when no building permit had been granted.
12. Again, the DBC did not dismiss the complaint under section 28 of the Act and pursuant to section 30 investigated the complaint. On 28 March 2019, the DBC notified Asbuild of the investigation and that the DBC had extended the investigation to include additional matters pursuant to section 31 of the Act including the fact that Asbuild had carried out building works without having obtained a building permit. The DBC invited a response to the additional matters raised by 23 April 2019.
13. On 23 April 2019, Mr Graham relevantly responded that:

*"Building work was carried out without a permit - I am not aware of this, the application made was 7 December, the permit was issued 14 December, it appears the dates in your report could be a human error. 9<sup>th</sup> January seems correct for pre-pour, and core fill inspection date on 30<sup>th</sup> January also seems correct."*
14. On 29 April 2019, Building Advisory Services emailed Mr Graham stating that the subject building permit was not issued by the certifier until 5 February 2018 and attaching documentation in relation to that issue.
15. Later that day, on 29 April 2019, Mr Graham replied by email stating *"It appears I may have been looking at another building permit for another project at the time."*
16. The Properties have been sold and are now privately owned. Because no fidelity certificates were obtained, the individual property owners do not have any residential building cover.
17. This is the decision of the Inquiry Board convened pursuant to s34J of the act to hear and determine whether the Practitioner is guilty of the Alleged Offences and guilty of professional misconduct pursuant to s34S of the Act.
18. Section 34S of the Act relevantly provides that:

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
- (b) ....
- (c) ....
- (d) ....
- (e) ....
- (f) ....
- (g) is otherwise guilty of professional misconduct.

19. On 3 March 2020 the Director and the Practitioner provided the Inquiry with a Statement of Agreed Facts as between the Director and Practitioner.

20. The hearing before the Inquiry Board occurred on 29 July 2020. The Director appeared with counsel, Hamish Baddeley. The Practitioner was self-represented.

21. The Practitioner has made full admissions that it breached:

- (a). section 55 of the Act by carrying out building works without a building permit having been granted; and
- (b). section 54AC of the Act by carrying out building works without an authorised RBI policy or fidelity certificate being in force.

22. The Inquiry Board is satisfied on the balance of probabilities that the Practitioner's conduct is a breach of s 34S(a) of the Act and finds the Practitioner guilty of professional misconduct.

23. Submissions were subsequently made in relation to penalty by both the DBC and the Practitioner.

### **Decision on Inquiry**

24. Section 34P provides as follows:

(1) On completion of an inquiry, the Inquiry Board must:

- (a) decide, in accordance with section 34S, whether or not a building practitioner the subject of the inquiry is guilty of professional misconduct; and
- (b) if the practitioner is guilty – decide the action to be taken under section 34T and whether or not to take additional action under section 34U.

25. The Inquiry Board has determined that the Practitioner has breached the provisions of the Act as stated herein and finds that the Practitioner is guilty of professional misconduct for the reasons as stated above.

26. Section 34T of the Act provides 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.

27. The objective of disciplinary proceedings are to promote the objects of the Act and to ensure adherence with the legislative framework by all building practitioners. The Inquiry Board endeavors to communicate to building practitioners its concerns regarding industry

practices that don't comply with the Act. In particular, any intentional, reckless or negligent disregard of the statutory requirements of the Act is not acceptable and will likely attract serious penalties.

28. The Board agrees with the submissions of the DBC that any disciplinary action taken should send a message to the building industry and practitioners that reckless or negligent disregard of the Act will not be tolerated.
29. In relation to the Practitioner's breach of section 54AC, the Board notes that the Practitioner explains its conduct in carrying out the works as it believed a fidelity certificate would be issued shortly after it applied for same. Notwithstanding that the Board accepts the Practitioner's submission that it believed the fidelity certificate was forthcoming, the decision to proceed with the prescribed building work with full knowledge that there was no fidelity certificate demonstrates an intentional and reckless disregard of its statutory obligations. Similarly, it commenced building works without having a building permit, an obligation which was, or should have been known, to the experienced Practitioner.
30. The Board notes that the Practitioner explained that its breach of section 55 was a result of being confused by looking at another building permit for another project at the time. Regardless of whether there was some confusion by the Director of the Practitioner, the Board has formed the view that the Practitioner's conduct falls below the professional standard expected of a building practitioner who should have ensured there was a building permit.
31. The consequences of the Practitioner's conduct are concerning in that the property owners having no residential building cover for structural defects. The Board notes that the Practitioner has, in its submission dated 16 March 2021, submitted that the appropriate disposition is that it covers any defect that would be covered by the fidelity fund if the certificates had been issued in line with the terms of the Fidelity Fund. The Board is not empowered to make any such orders or impose such obligations on the Practitioner under the Act.
32. In considering the appropriate action under section 34T, the Board has had regard to the seriousness of the breaches and mitigating factors submitted by the Practitioner. The Board has had regard to the DBC's submissions on penalty and the submissions made by the Practitioner in this regard
33. The Practitioner is entitled to consideration in its favour for:

- (i) its early admissions in relation to his offending and its cooperation with the DBC during the investigation and inquiry process, which has reduced the time and costs that would have been incurred had the Inquiry proceeded to a contested hearing.
  - (ii) the fact that the Practitioner has no known history of breaching the Act.
  - (iii) its apology and expression of regret and acknowledgement that this won't happen again.
34. The Inquiry Board had determined that the appropriate action to be taken pursuant to section 34T is as follows:
- a. The Practitioner is reprimanded and this reprimand is to be published.
  - b. The Practitioner is to pay a civil penalty of 10 penalty units for the offence against s 54AC of the Act.
  - c. The Practitioner pay is to pay a civil penalty of 10 penalty units for the offence against section 55 of the Act.
35. The Inquiry Board has determined that no further action be taken by the Director pursuant to s34U of the Act.
36. The Inquiry board directs that a copy of this determination be published and distributed to the parties.

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

37. Section 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.
38. 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.
39. 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.
40. Section 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.
41. Section 36B states:
- a) in determining the appeal, the Local Court may:



- b) confirm the appealable decision; or
- c) vary the appealable decision; or
- d) set aside the decision and substitute another decision that could have been made instead of the appealable decision.

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

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

46. Section 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.

(3) The order:

(a) is subject to the conditions specified in the order; and

(b) has effect:

(i) for the period specified in the order; or

(ii) if no period is specified – until the Local Court has decided the appeal.

Dated 7 December 2021



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Maria Savvas  
Presiding Member



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Robert Cox  
Member