

BUILDING PRACTITIONERS INQUIRY BOARD

Reasons for Decision

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

Background

1. On 27 June 2019 the Director of Building Control (**the DBC**) referred Anthony (Paul) Hinkly (**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 59(1B) of the Act – the Practitioner granted a building permit for prescribed residential building work for building works undertaken at 2 Burrows Street, Kilgariff under building permit 000/7307/1 without having been given and RBI policy document or a copy of the fidelity certificate, in force for the work, by the residential builder who would carry out the work.
 - (b) Regulation 14(1)(e)(ii) of the Regulations – the Practitioner failed to provide copies of the RBI policy document or fidelity certificate in force for the building work to the Director on the granting of building permit 000/7307/1.

(the Alleged Offences)

3. The relevant agreed facts are as follows.
4. The Practitioner was registered as a Building Certifier (Unrestricted) on 20 September 2012.
5. In breach of section 59(1B) of the *Building Act 1993*, the Practitioner issued a building permit no. 000/7307/1 (**the Building Permit**) for prescribed residential building works (being the construction of 4 single dwellings at 2 Burrows Street, Kilgariff (**the Properties**)) without having been given an RBI policy document or a copy of a fidelity certificate in force for the work.
6. In breach of regulation 14(1)(e)(ii) of the *Building Regulations*, on granting the Building Permit, the Practitioner did not give the DBC the RBI policy document or fidelity certificate in force for the building work.
7. On 12 December 2017 Asbuild (NT) Pty Ltd (**the Builder**) completed a "Master Builders Fidelity Fund Project Application Form Multi-Unit Development only" form.
8. On 12 December 2017 the Practitioner completed a "Request for Information" (**RFI**) form. This form was developed by the Practitioner as a checklist to identify whether all the pre-requisites to issuance of the permit were fulfilled. The version of the form used by the Practitioner at the time did not include a checkbox to confirm receipt of the fidelity certificate.
9. On 12 December 2017 and 12 January 2018 the Practitioner emailed the builder requesting the fidelity certificate.
10. On 6 December 2018, a complaint was made by the Manager Building Control Building Advisory Services to the DBC that the Practitioner had granted and provided a copy of the Building Permit to the DBC without residential building insurances (fidelity certificates).
11. 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 the Practitioner pursuant to section 29 of the *Building Act 1993*, attaching a copy of the complaint and inviting a response by 21 February 2019.

12. On 17 February 2019, the Practitioner provided a response to the complaint advising that he had issued the building permit on 5 February 2018 on the assumption that *"the fidelity certificate was innument (sic) in being issued after discussions with the builder"*. The Practitioner also advised that *"in hindsight my call to issue the permit without the fidelity certificate was not the correct call, however neither myself or the builder expect 4 months for the Master Builders to respond to request for certificate"*.

13. Again, the DBC did not dismiss the complaint under section 28 of the Act and pursuant to section 30 investigated the complaint. By letter dated 26 March 2019, the DBC notified the Practitioner of the investigation and that the DBC had extended the investigation to include additional matters pursuant to section 31 and invited a response to the additional matters raised by 23 April 2019.

14. On 31 March 2019, the Practitioner provided a response, relevantly including that:

"Fidelity certificates not provided to the DBC on the granting of the building permit 000/7307/1 - It was not expected to take the time it did for fidelity to reply with the answer provided, it was an honest mistake with no professional misconduct."

15. 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 for structural defects.

16. 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.

17. 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.

18. On 11 March 2020 the Director and the Practitioner provided the Inquiry with a Statement of Agreed Facts as between the Director and Practitioner.

19. The hearing before the Inquiry Board occurred on 29 July 2020. The Director appeared with counsel, Hamish Baddeley. The Practitioner appeared with his counsel, Alison Phillis.

20. The Practitioner has made full admissions that he breached section 59(1B) of the Act and regulation 14(1)(e)(ii) of the Regulations.

21. 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.

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

Decision on Inquiry

23. The co-operation of the parties and the provision of the parties written submissions greatly assisted the Inquiry Board in its work.

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 and Regulation 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. In his written submissions, the Practitioner contends that he made an error of judgment in issuing the building permit before the fidelity certificate was issued. By way of explanation he states that he did so on the premise that the certificate was imminent,

noting that a reasonable period of time had elapsed since the application for a certificate was lodged.

29. The Practitioner further submits that his conduct is less serious than that considered in *DBC v Tick of Approval Pty Ltd and Elizabeth Ashton* (2 March 2018) as the Practitioner, unlike Ms Ashton, did not foresee that his actions would cause any subsequent purchasers to be deprived of fidelity insurance.
30. DBC contends in its submissions that the Practitioner was aware that he did not have a copy of the fidelity certificate as at 12 January 2018, being the day he followed up the Builder for same. DBC further submits that given the Practitioner's concessions that he was aware that there was no fidelity certificate in place, notwithstanding that he believed it was forthcoming, that the Practitioner's conduct cannot amount to an honest and reasonable mistake.
31. While the Board accepts the Practitioner's submission that he believed the fidelity certificate was forthcoming, there is no question that he made the decision to issue the building permit with full knowledge that there was no fidelity certificate and was, or should have been, aware that he was in breach of the Act and Regulations. This demonstrates an intentional disregard for his statutory obligations.
32. The Board has formed the view that the Practitioner's conduct falls below the professional standard expected of building certifiers and notes that the Practitioner acknowledged that in hindsight his decision to issue the building permit was not the correct call.
33. Further, the consequences of the Practitioner's conduct are of concern to the Board. It has resulted in the property owners having no residential building cover for structural defects.
34. 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.
35. The Practitioner is entitled to consideration in his favour for:
 - (i) his early admissions in relation to his offending and his 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) taking steps to amend the RFI form to ensure that a similar incident doesn't occur again.
- (iv) his good standing in the community as demonstrated by his character references.

36. The Inquiry Board had determined that the appropriate action to be taken pursuant to s 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 59(1B) of the Act.
 - c. The Practitioner pay is to pay a civil penalty of 10 penalty units for the offence under regulation 14(1) of the Regulations.
37. The Inquiry Board has determined that no further action be taken by the Director pursuant to s34U of the Act.
38. 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

39. 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.
40. 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.
41. 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.
42. 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.
43. 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.

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

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

44. 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



Maria Savvas
Presiding Member



Robert Cox
Member