

BUILDING PRACTITIONERS INQUIRY BOARD

Reasons for Decision

Building Practitioner:	HABITAT (NT) PTY LTD (ACN: 126 602 300)
Referred by:	Director of Building Control
Proceedings:	Referral of Inquiry to the Building Practitioners Board in accordance with section 34G and section 34(1)(b) of the <i>Building Act 1993</i> .
Inquiry Board:	Gabrielle Martin (Presiding Member) Craig Leslie Robert Cox
Date of Decision:	6 June 2024

Background

1. On 4 May 2024, the Director of Building Control (the Director) referred a matter to the Building Practitioners Board (the Board) for inquiry.
2. The matter relates to building works undertaken by Habitat (NT) Pty Ltd (“Habitat”) for a landowner, Ms Lorna Pascoe (Owner) of 3A Neptuna Crescent Larrakeyah NT 0820 who made a complaint to the Building Advisory Services (BAS).
3. She complained that, due to Habitat’s non-compliance with the *Building Act 1993* (the Act), she had suffered substantial financial loss and she had to engage a second building practitioner to undertake rectification works and complete the building works.
4. The Director identified 28 separate allegations in the complaint; 24 of the complaints were dismissed leaving four allegations.
5. These four allegations were investigated and were found to be sufficient to support a finding that Habitat is guilty of offences under section 55 of the Act. In particular, Habitat undertook building works which were not in accordance with the approved Building Permit (200/8915/1).
6. Relevantly, section 55 provides:

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.
7. And further, that, having investigated the allegations, the Director confirmed that there is sufficient evidence to support a finding that Habitat is guilty of professional misconduct under section 34(1)(b) of the Act.

Consideration of the Issues

8. In summary, the breaches concerned the following building activities:
 - a. a change of wall cladding building material (Allegation 1);
 - b. a change to the method of installation and type of insulation batts (Allegation 2);
 - c. a change of material relating to roof cladding (Allegation 3); and
 - d. a change to the depth and width of the footings for the fence (Allegation 4).
9. Each of the alleged breaches of section 55 of the Act relate to changes to the “in force” building permit without applying for an amended building permit. The Director found these changes were “substantial” and not “minor” changes.

Building Practitioner’s Position - Summary

10. The Building Practitioner states that he applied for a building permit on behalf of the owner on 1 July 2020. Building Permit 200/08195/1 was issued on 7 July 2020.
11. He submitted that it was the owner’s obligation to seek any building permit amendment, not that of the Building Practitioner.
12. The Building Practitioner submitted that all the changes in each of the Allegations were able to be dealt with at the end of the contract relying on “as constructed drawings” and clause 11.2.2 of the *Occupancy Certification Guidelines* (April 2016 Version 1.0) (“the Guidelines”).
13. In relation to Allegation 4, the Building Practitioner submitted that the construction of the fence was outside the Building Permit because it is not “residential building” works under the class 10b Building Permit and, therefore, there was no requirement to apply for an amendment to the Building Permit
14. The Building Practitioner denies breaching section 55 of the Act.

Building Practitioner’s defences to each Allegation¹ are as follows:

Wall Cladding

- a. The Building Practitioner admits that he changed the type of wall cladding from James Hardie Scyon Matrix FC Wall Cladding Panels (“James Hardie cladding”) to a Duracom product.
- b. The James Hardie cladding was specified to the Building Practitioner by the architect by way of notes on the architectural plans.
- c. According to the Building Practitioner, the change of the wall cladding from James Hardie to an “equivalent product”, Duracom, did not change the compliance of the cladding works with the applicable building standards. The cladding installation was, therefore, in accordance with the building permit.

¹ See Building Practitioner’s Response to Referral lodged on 21.09.23; and Building Practitioner’s Reply to Director’s Submissions.

- d. If it was not, the obligation to address the change of the cladding rested with the Owner. The Owner completed the cladding works and, therefore, they were not in the control of the Building Practitioner.
- e. The “cladding notes” on Drawing A202-2 Note WF1 and WF4 could have been the subject of an “as constructed drawing”, noting the change to Duracom, when the building works were completed, as permitted under Clause 11.2.2 of the Guidelines.

Change of Installation Method & Insulation Material

- f. R2.5 Bradford Anticon 110mm foil faced insulation batts (Bradford Anticon) were specified in the Building permit (Drawing no A000-0) and brought to the attention of the Building Practitioner.
- g. The Building Practitioner alleges he took instructions from the Owner’s Agent, Mitchell McNamee, on this change. The Building Practitioner alleges that Mr McNamee “approved the use of “Air-Cell Insulbreak 70” (Air-Cell) subject to the Bradford Anticon being used underneath the purlins adopting a form of “sandwich” to create a sound barrier. Apparently, Mr McNamee also said to the Building Practitioner to “use whatever insulation you want so long as it has a similar rating”.
- h. According to the Building Practitioner, the Air-Cell has a similar rating to the Bradford Anticon. He used the Air Cell with the Bradford Anticon as requested by Mr McNamee.
- i. The only change was the addition of the layer of Air-Cell which improved the sound barrier and doubled the insulation factor. It improved on the standard of insulation required by the Building permit and for this reason, the Building Practitioner claims this change can be in accordance with the Building Permit as the subject of “as-constructed drawings” under Clause 11.2.2 of the Guidelines.
- j. If there was a requirement to amend the Building Permit, it was up to the Owner to do that.

Change of Roof Material

- k. The Building Practitioner claims that he was directed to change the roof product from Colorbond 0.42 BMT Spandek (Spandek) to Trimdek. The Building Practitioner alleges he took instructions from the Owner’s Agent, Mitchell McNamee, on this change.
- l. It is alleged that Mr McNamee directed the Building Practitioner to order Trimdek and install it promptly (to avoid the expected rain) because it necessitated a change from a “3 degree” fall to a “2.5 degree” fall.
- m. The Building Practitioner submits that this change did not affect compliance with building standards under the Act. Spandek was specified by way of three notes on the Architectural Plans.

- n. The Building Practitioner submits that the change in roofing products is not a sufficient departure from the works described in the Building Permit drawings necessitating an amendment to the Building Permit.
- o. The change of roofing materials could be dealt with under Clause 11.2.2 of the Guidelines utilising “as-constructed drawings”.
- p. If there was a requirement to amend the Building Permit, it was up to the Owner to do that.
- q. The Building Practitioner submits that he did not complete the roofing.

Change to the Footings for the Fence

- a. The Structural Engineer inspected and approved the construction of the fence footings.
- b. The Building Practitioner alleges that the decision to change the footings was based on the Structural Engineer’s certified Drawing, “A705-03 of 13.08.20” to deal with a hard rock situation. It contained alternative footing solutions and this drawing was not included in the Building Permit.
- c. He said that the Contract provides for variations to the footings at clause 13.
- d. The Building Practitioner submits that he was obliged to adhere to the Structural Engineer’s design of the fence footings (ie drawing No A705-3 of 13.08.20) (the “varied design”).
- e. Secondly, according to the Building Practitioner, the building of a fence is not “residential building work” under the class 10b Building Permit and therefore, the in force Building Permit does not have to be amended when there is a change to the footings.
- f. The change is not substantial and can be dealt with under Clause 11.2.2 of the Guidelines utilising “as-constructed drawings”.
- g. If there was a requirement to amend the Building Permit, it was up to the Owner to do that.

Director of Building Control - Submissions²

Building Permit and Building Practitioner

- 15. The application for the building permit was made by George Kamitsis on behalf of Habitat (NT) Pty Ltd on 1 July 2020 and there is a signature on the permit which appears to be Mr Kamitsis’ signature.³
- 16. According to the Investigator, this indicates that it was Habitat (NT) Pty Ltd that had a contract of service with the building certifier, not the owner.⁴

² See Referral by Director, Building Control to the Building Practitioners Board of Inquiry on 4 May 2023 and Director of Building Control’s Submissions lodged on 25 January 2024

³ Attachment 9A – Attachment A – Investigation Assessment Report

⁴ Ibid

17. Mr Peter Donus of Hendry Group Pty Ltd, the building certifier, confirmed with the investigator that the building application was made by George Kamitsis of Habitat (NT) Pty Ltd and issued to Habitat (NT) Pty Ltd as the builder.⁵
18. Where a situation arose, requiring an amendment to the Building Permit, it was the Building Practitioner who was obliged to make that application and cease any related construction until the amended permit had been issued.

Owner – No Obligation re Amendment to a Building Permit

19. Consequently, the owner was a third party to the contract between the Building Practitioner and the Building Certifier.
20. The contract is silent on the owner's obligations to seek building permit amendments.
21. Therefore, there was no contractual obligation on the owner to apply for building permit amendments.

Change of Wall Cladding, Insulation Installation & Insulation Material, and Roof Material

22. In summary, the Building Advisory Services investigation revealed that, in all three changes to the building materials, wall cladding, insulation etc and roofing materials, those changes could not be described as "minor" changes to the in force building permit.
23. The new materials represented substantial alterations to the specifications, plans and/or drawings and ought to have been the subject of amended building permits.

Fence and Footings – Not Under Building Permit

24. Drawing A705-2 of the in force Building Permit provides for the dimensions of the fence footings. It did not provide alternative footing details, only the specific footing dimensions.
25. The Building Practitioner could not, under the Building Permit, undertake construction of the footings in accordance with the "varied design".
26. A contemporaneous record of a meeting between the Building Practitioner and Building Control Officers on 22 April 2022⁶ states that the Building Practitioner acknowledged that the Structural Engineer's recommended footing dimensions required an amended Building Permit.
27. Section 55 refers to "building work" and it is defined under the Act to include "*work for or in connection with the construction, demolition or removal of a building, or plumbing or drainage services*", and "building" includes "*a structure and part of a building or structure*".
28. The Building Practitioner failed to obtain the required amended Building Permit for the "varied design" and as such, was in breach of section 55 of the Act.

Occupancy Certification Guidelines 2016 ("Guidelines")

⁵ Ibid

⁶ Attachment 8E – Investigation Assessment Report

29. Relevantly, clause 11.2.2 of the Guidelines provides:

Events may arise during construction that prevents an Occupancy Permit being granted as precise compliance with the Building Permit was not achieved. For example, the owner may arrange a minor change to the plans, such as the placement of a window, without first applying for an amendment to the Building Permit. A building certifier may grant a Certificate of Substantial Compliance by applying professional skill and judgment to assess the nature of the departure from precise compliance with the Building Permit and its importance to the compliance with technical standards and health and safety risks.

30. The Act requires the Guidelines to be consistent with the Act (section 167B).

31. Even though the term “as constructed drawings” (or “ascon drawings” as it is more commonly known in the building industry), does not appear in the Guidelines, Act or Regulations, it is accepted by the building industry that the Guidelines contemplate the use of “ascon drawings” by a certifier in Clause 11.2.2.

32. Clause 11.2.2 provides for works which have already been completed by a building practitioner but for minor or insubstantial deviations from the in force building permit in support of an application to a building certifier for a Certificate of Substantial Compliance.

33. It is also recognised in the building profession that relying on “ascon drawings” by a building practitioner has been used inappropriately.

34. Clause 11.2.2 identifies what a building certifier may do in relation to a situation where there has not been 100% compliance by a building practitioner with an in force building permit.

35. In the application of the building certifier’s “professional skill and judgment” in relation to a building practitioner’s compliance with “technical standards and health and safety risks”, the building certifier may consider and assess the “departure from precise compliance” with a building permit to determine whether an Occupancy Permit ought to be granted.

36. This clause emphasises the obligation on a building practitioner to comply with all technical standards and health and safety risks when considering avoiding an amendment of the building permit by relying on a change to the building plans using “ascon drawings”.

37. A building practitioner must understand that avoiding the obligation to amend an in force building permit applies to limited circumstances only.

38. The circumstance in which a building practitioner may carry out a change to a specification, plan and/or drawing in a building plan, without amending a building permit, is when that change is a **minor** change to the plans.

39. An example referred to in Clause 11.2.2 of a **minor** change is the change in the placement of a window in the plans. Note, this is not a change in the size of, or materials used in the construction of a window, merely where it will be placed in the plans. Further, any change without prior building approval may result in the building certifier not being able to issue a Certificate of Occupancy, and, perhaps, only a Certificate of Substantial Compliance.

40. The legislative requirement on a building practitioner is that, if there is a substantial change to a specification, drawing and/or detail in a building drawing, the building practitioner *must* lodge an amendment to the building permit and shall not proceed with carrying out the change until the amended building permit has been issued.
41. Hence, a change in the size and/or type of materials could be interpreted as a material and/or substantial change to a specification, plan and/or drawing in a building plan and would require an application to amend a building permit.
42. If a building practitioner is not sure whether a specification, plan and/or drawing in a building plan is minor or substantial, it is recommended that the advice of a building certifier is sought at the time the question arises, not after the completion of the building construction relying on “ascon drawings”.

Re: Building Practitioner and “As Constructed Drawings”

43. It is clear that the Building Practitioner has misunderstood the application of the Guidelines and what is actually meant by a *minor* change in the plans.
44. In all four of the Allegations, the change of materials or dimensions made by the Building Practitioner were *substantial* changes to the specifications, plans and/or drawings in the Building Permit.

Decision

45. Section 55 of the Act places responsibility on the Building Practitioner (in this case, Habitat) to ensure that building works are undertaken in accordance with the approved building permit.
46. Any offence against section 55 of the Act is a regulatory offence which is an offence of strict liability.
47. So, the subjectively held belief by Habitat that it was the owner’s responsibility to apply for an amendment to the Building Permit, is irrelevant.
48. As a registered Building Practitioner, Habitat, through its directors, is expected to understand its legislative obligations and ensure those obligations are being met.
49. The Building Practitioner, in all four situations, where changes were made to the specifications, plans and/or drawings in the approved Building Permit, was obliged to apply for an amendment to the approved Building Permit.
50. None of the changes could be considered minor, like the simple change of the placement of a window.
51. Habitat failed to build the residence at 3A Neptuna Crescent Larrakeyah NT 0820 in accordance with approved Building Permit 200/08195/1 in contravention of section 55 of the Act on 4 occasions.
52. In consideration of the breach concerning the change of insulation installation and the type of material used, the Board finds that this breach is more serious than the other three breaches.
53. An alteration to the roof insulation like this could impact on the energy efficiency performance of the building. The energy efficiency assessor and the building certifier would have to verify compliance with the National Construction Code prior

to the construction of the roof and installation and therefore, such a change is not “minor” and could not be considered appropriate for “ascon drawings” under clause 11.2.2 of the Guidelines.

54. The Board finds that the two other “materials” breaches are not as serious because the wall cladding and roofing are more cosmetic rather than integral to the energy efficiency performance of the building. However, they may still impact the structural and weatherproofing performance of the building and are still breaches of section 55 of the Act because they were not “minor” changes.
55. Insofar as the footings are concerned, there was an amended Structural Engineer’s design plan A705-3, but that should have been submitted for building approval by the Building Practitioner prior to construction of the fence.
56. Section 34S(a) of the Act 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 committed offences against this Act.
57. The Board finds that Habitat has committed four offences under the Act, as alleged, and demonstrated an insufficient level of understanding of the Act, its Regulations and the *Occupancy Certification Guidelines 2016*.
58. The Board is satisfied on the balance of probabilities that Habitat (NT) Pty Ltd, through its directors, is guilty of professional misconduct pursuant to section 34S(a) of the Act.

Penalty

59. Pursuant to section 34T, the Act provides for disciplinary action, 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:*
 - (i) *if the practitioner is an individual – 160 penalty units; or*
 - (ii) *if the practitioner is a corporation – 800 penalty units;*
 - (e) *suspend the practitioner's registration for a specified period (not exceeding 3 years);*
 - (f) *cancel the practitioner's registration.*
60. The Board must have regard to the seriousness of the breaches and mitigating factors submitted by the Building Practitioner.
61. The Board agrees with the Director in regard to the mitigating factors of the Building Practitioner, namely:
 - a. The approved Building Permit 200/08195/1 was prescriptive in nature and quite detailed;

- b. The building industry's reliance on "as constructed drawings" and a misconception of clause 11.2.2 of the Guidelines as a practice has become common place in the Northern Territory;
 - c. The Building Practitioner conducted themselves in an efficient and *bona fide* manner throughout the investigation and inquiry process; and
 - d. Many of the changes were agreed to by the Owner notwithstanding that they did not comply with the approved Building Permit 200/08195/1.
62. The breaches were substantial in nature due to a lack of understanding of the Act its Regulations and the Occupancy Certification Guidelines (April 2016 Version 1.0) by the Building Practitioner.
63. Consumer protection is paramount under the legislation and the Board is cognisant of this when issuing any penalty.
64. Noting that the applicable penalty unit is \$158.00 (2020-2021), the Board has determined that the breach concerning the change in insulation (Allegation 2) is in the mid-range of offending and that it is appropriate to issue a civil penalty of 15 penalty units in respect of that breach.
65. In relation to the other breaches (Allegations 1, 3 and 4), the Board has determined that they are in the lower range of offending and it is appropriate to issue a civil penalty of 10 penalty units for each breach.

PUBLICATION OF DECISION

66. The Inquiry Board acknowledges the building industry's use and misuse of "ascon drawings" in place of obtaining an amended building permit.
67. Pursuant to section 34R(2) and (3) of the Act, after the Building Practitioner has been notified of this decision, it is recommended that the Building Practitioners Board publish a copy of the decision in whatever manner it considers appropriate.

RECOMMENDATION

68. Further, the Inquiry Board recommends that the Director considers issuing a Building Note advising all registered practitioners, ie builders, certifiers and engineers, that building permit amendment is required prior to construction of a change or variation to the approved building permit's drawings and/or specifications.

REVIEW OF DECISION UNDER THE ACT

69. Section 35(1) of the Act, with reference to Schedule 5 "Reviewable Decisions", provides that the Northern Territory Civil and Administrative Tribunal ("the Tribunal") has jurisdiction to review:
- a. a decision of the Inquiry Board under section 34P(1)(a) (in accordance with section 34S) that a building practitioner is guilty, or is not guilty, of professional misconduct; and/or
 - b. a decision of the Inquiry Board under section 34P(1)(b) to take, or to not take, an action against a building practitioner under section 34T or 34U.
70. Under section 35(3) of the Act, you may apply to the Tribunal for a review of this decision.

71. The *Northern Territory Civil and Administrative Tribunal Rules 2016* set out the procedure for applying to the Tribunal for review of this decision and other relevant matters in relation to reviews.

72. Rule 5 provides:

- (1) *This rule applies to an application commencing a proceeding in the Tribunal's original jurisdiction or review jurisdiction (an **initiating application**).*
- (2) *A person wishing to commence a proceeding (the **applicant**) must file an initiating application in the approved form with the Tribunal.*

Note for subrule (2)

The current approved form for an initiating application is Form 1.

73. An application to commence a proceeding for the review of a reviewable decision must be filed within 28 days after the decision was notified to the applicant pursuant to section 93(3) of the *Northern Territory Civil and Administrative Tribunal Act* ("the NTCAT Act").

74. Section 94(1) of the NTCAT Act provides for the procedure to make an application:

- (1) *An application to commence a proceeding in the Tribunal must be:*
 - (a) *filed with the Registrar; and*
 - (b) *made in accordance with the relevant Act, this Act and the rules; and*
 - (c) *accompanied by the fee prescribed by regulation.*
- (2) *A proceeding in the Tribunal commences when the application is accepted under section 95.*

75. Section 95 of the NTCAT Act provides:

- (1) On receipt of an application to commence a proceeding under section 94(1), the Registrar may:
 - (a) *accept the application; or*
 - (b) *reject the application.*
- (2) *The Registrar may accept the application under subsection (1)(a) on conditions determined by the Registrar.*
- (3) *The Registrar may reject the application under subsection (1)(b) on the following grounds:*
 - (a) *the application is made by a person who is not entitled to make it;*
 - (b) *the application is made after the expiry of the time limit within which the application is required to be made;*
 - (c) *the application does not relate to a matter within the jurisdiction of the Tribunal;*
 - (d) *the application otherwise does not comply with the relevant Act, this Act or the rules.*



Gabrielle Martin
Presiding Member
Building Practitioners Inquiry Board
6 June 2024