

**NORTHERN TERRITORY OF AUSTRALIA
BUILDING PRACTITIONERS BOARD**

In the Inquiry into
the matter of:

THE DIRECTOR OF BUILDING CONTROL

And

IAN DONALD GUM
A Registered Building Practitioner

**REASONS FOR DECISION – ORDERS PURSUANT TO SECTIONS 34T AND
34U OF THE *BUILDING ACT***

1. The Inquiry Board resumed the inquiry at Alice Springs on 2 March 2009 for the purpose of receiving oral submissions on the questions posed in paragraph 34 of our Reasons for Decision dated 12 February 2009. The expressions used below have the same meaning which was given to them in those Reasons for Decision.

2. Sections 34T and 34U of the Act provide:

“34T. Disciplinary action by Inquiry Board

If, on completion of an inquiry, the Inquiry Board decides under section 34P(1)(a) that a building practitioner is guilty of professional misconduct, the Board may take any of the following actions in relation to the practitioner:

- (a) reprimand the practitioner;
- (b) require the practitioner to pay all or a specified part of the reasonable costs of the Director in the inquiry;

- (c) require the practitioner to give an undertaking to do, or not to do, a specified thing-
 - (i) at any time or during any period; or
 - (ii) at a specified time or during a specified period;
- (d) require the practitioner to pay to the Territory a civil penalty not exceeding \$5,000;
- (e) suspend the practitioner's registration for a specified period (not exceeding 3 years);
- (f) cancel the practitioner's registration."

"34U. Inquiry Board may direct audit

In addition to any action under section 34T, the Inquiry Board may direct the Director to audit the building practitioner's work or conduct or both."

Director's Submissions

3. The Director made the following submissions at the hearing on 2 March 2009 and later in writing on 15 April 2009:
 - 3.1 The giving of a reprimand and/or a monetary penalty pursuant to section 34T(a) and (d) of the *Building Act* should be used to discipline minor and isolated offences with a specific deterrence in mind rather than a general deterrence. A reprimand or monetary penalty in the circumstances of this matter would be manifestly inadequate.
 - 3.2 The practitioner's conduct, the subject of the inquiry, is sufficiently serious to warrant the Inquiry Board taking action to suspend or cancel his registration. It was suggested that, if his registration is cancelled, the practitioner be not entitled to reapply to be registered for a period of 6 months. (The Director made no submission as to the appropriate length of the suspension if the Inquiry Board were minded to order a suspension).

- 3.3 If registration is suspended, an automatic right to be re-registered would arise at the end of the period of suspension whereas if registration is cancelled, the practitioner would have to apply for registration and in the process his fitness would be re-assessed. In addition, the practitioner would be required to satisfy the requirements of the Ministerial Determinations of 31 August 2006 and 5 February 2008.
- 3.4 If the Inquiry Board determined not to cancel the practitioner's registration, it would be appropriate to require him to give an undertaking to complete an educational course satisfactory to the Inquiry Board.
- 3.5 Whatever penalty is decided upon, the Inquiry Board should require the practitioner to give an undertaking to provide to the Inquiry Board a medical certificate addressing his visual problems and their impact on his fitness for registration.
- 3.6 Cancellation or suspension of the practitioner's registration would not have the result of prohibiting him from earning a livelihood in the building industry. The effect of such an order would mean that he could not undertake "prescribed building work" (that is new houses, townhouses, duplexes, or units up to 2-storeys or alterations/additions that increase the habitable area of existing buildings) but would be able to work under another registered practitioner's supervision or alternatively on non-prescribed works or commercial works.
- 3.7 The Inquiry Board should exercise its discretion in favour of the Director under section 34T(b) and, given that there has been no discrediting conduct on the part of the Director, the practitioner should be required to pay the Director's disbursements in the sum of \$22,290.88 within thirty (30) days. In support of this submission, the Director relied upon the decision of Justice Bailey in *NTA v Lands and Mining Tribunal & Anor* to which we will return.
- 3.8 At an earlier stage of the inquiry, the Director submitted that the Inquiry Board should require the practitioner to reimburse the Home

Building Certification Fund pursuant to section 34T(c) for the amount paid to meet the complainant's claim. Ultimately, the Director's representative informed the Inquiry Board that this order was no longer sought.

- 3.9 If the Inquiry Board were to penalise the practitioner other than by cancelling or suspending his registration, it would be appropriate to direct the Director to audit the practitioner's work for a period of 6 months pursuant to section 34U.
- 3.10 The proposed audit of the practitioner's "work" would have two facets – the practitioner's administrative compliance (or "paperwork") and the practitioner's technical compliance (or "building work"). A paperwork audit would comprise a "desk-top" assessment by an auditor of the relevant documentary requirements of the Act and Regulations. A building work audit would necessitate inspection of the building work by the auditor or other technical officers or consultant practitioners with a view to assessing the compliance of the work itself with the documentation.
- 3.11 In addition, if the Inquiry Board were to direct the Director to audit the practitioner's "conduct" pursuant to section 34U, it would be open to the Director's auditor to contact consumers who had engaged the practitioner and make enquiries about the service provided by the practitioner and the resolution of any complaints or defects.
- 3.12 It is not the Director's preference to be assigned the task of auditing the practitioner's work as the Director has limited resources available to undertake a paperwork audit and no resources to undertake an "on the ground" audit of the quality of physical construction and compliance with standards. Nevertheless, if directed to do so, the Director will comply but proper arrangements should be made for recovery of the associated costs.
- 3.13 The Director is not confident about recovering payment of his audit costs from the practitioner. If the Inquiry Board is minded to make an order directing an audit, a consequential order should be made

requiring the practitioner to reimburse the Director for his reasonable costs or to give an undertaking to the Inquiry Board to that effect. The costs arrangements would invoke Item 2 of Schedule 1 to the Regulations.

3.14 The Director's representative was unable to make any estimate of the costs of carrying out the audit beyond a rather vague indication that the audit would entail travel and associated costs including, it would seem, the cost of sending staff (and perhaps consultants) from Darwin to Alice Springs.

3.15 It is appropriate that the Board's order be published so as to bring the matter to the attention of the public (section 34R).

The Practitioner's Submissions

4. The practitioner made the following submissions at the hearing on 2 March 2009 and in a written submission received 7 May 2009:

4.1 He has had a form of building contract prepared by Povey Stirk, lawyers of Alice Springs. He also has a bookkeeper helping with the paperwork.

4.2 He has been undertaking work for some new clients who are happy with him and have given him further work. It is not prescribed work for the purpose of the Act.

4.3 He relied upon his certifier a "hell of a lot"; he intends to reduce this reliance in future.

4.4 There was no hiding anything from anybody; there was no malice; changes were made to the building and they were done the wrong way. He was not the only one at fault.

4.5 Suspension or cancellation of registration would cause him to not only be ineligible to carry out prescribed work but he was fearful that he would lose access to non-prescribed work as well.

4.6 The Inquiry Board's decision would harm his reputation if published.

- 4.7 He would be prepared to undertake a course of educational training if required to do so.
- 4.8 He would be prepared to get a doctor's certificate about his physical fitness to carry out building work. He is now using special tools such as a drill and spirit level with lights.
- 4.9 He disputed the Director's claim for costs in the inquiry; in the event that an order is made, he sought time to pay.

Serious misconduct

5. The Inquiry Board adopts the Director's submission that the purpose of disciplinary proceedings is to protect the public and not to punish the practitioner in a criminal sense. Nevertheless, the imposition of penalties in disciplinary proceedings also has a specific and general objective of deterrence: see the decision of the NSW Administrative Decisions Tribunal in *Building Professionals Board v Hans (no. 2) (GD)*[2008] NSWADTAP 48 at para 155.
6. We are also guided by section 3 which sets out the objects of the Act. These objects appear to us to be particularly relevant :
- “(a) to establish, maintain and improve building standards;”
- “(b) to facilitate the adoption and efficient application of national uniform building standards;”
- “(d) to maintain, enhance and improve the safety, health and amenity of people using buildings;”.
7. The findings against the practitioner in the present case were very serious indeed. It is unnecessary to repeat them in detail. They included several breaches of the Act, serious negligence and incompetence on the job and failure to provide information and documents to the Director as required by section 33(1). It was quite astonishing that one job would attract so many breaches and instances of negligence and incompetence. A very disturbing feature of the work was that an attempt was made to disguise inadequate welding: see paragraph 20.1 of our reasons 12/02/09. While there is no

evidence that the practitioner was actually involved in the concealment, he must accept responsibility for the actions of his staff.

8. Although a relatively small job, the works in this case were not straightforward. Undoubtedly, they presented significant challenges not the least of which were unworkable drawings. The practitioner did not cope very well with those challenges. It is in the practitioner's favour that he acknowledged many of his errors and made admissions which facilitated proof of the Director's case against him. He clearly relied upon his certifiers more than he should have and assumed, perhaps unwisely although we make no findings in this regard, that they were appropriately covering all compliance issues.
9. The practitioner had a bad working relationship with Mr Symons. The practitioner gave evidence of unreasonable behaviour on Mr Symons' part and this evidence was not refuted. We leave open that possibility that, even if Mr Symons was unreasonable, the practitioner's poor performance contributed to that condition. So without making a finding about the cause(s) of these personal differences, we merely note that, according to the practitioner's evidence, Mr Symons' behaviour made the job more difficult for the practitioner.
10. The practitioner gave evidence that other clients are well satisfied with his work. We have no reason to reject that evidence which tends to suggest that his conduct in carrying out the work at the residence was below his usual standards.
11. Nevertheless, the practitioner is guilty of misconduct which can only be described as serious. On the evidence, many of the practitioner's failings were due to poor knowledge or judgement. These examples can be cited:
 - 11.1 Commencing and continuing building work without a building contract;
 - 11.2 Carrying out work before a building permit issued;
 - 11.3 Carrying out work at variance with the building permit;
 - 11.4 Not maintaining his own record of inspections by the certifier; and

11.5 Failing to observe manufacturers' guidelines.

Education and audit

12. We have given some thought to cancelling or suspending the practitioner's registration. On the balance of the evidence cancellation would be too harsh; the supply of non-prescribed work is likely to be limited in a town the size of Alice Springs. We believe that suspension is warranted but would not be an effective sanction in itself. Additional measures appear to be required to help the practitioner to attain a better standard of work in his own interests and for the benefit of the public.
13. Therefore, we do consider it essential that if the practitioner is to continue carrying out prescribed works then he must improve his knowledge and submit to audit of his work by the Director. We consider that the purpose of the inquiry will be properly served if a period of suspension is imposed but stayed providing the practitioner complies with the educational and audit requirements as specified in the following orders. Although we acknowledge the Director's reservations about the practicalities involved in the audit, in this way we can at least have some measure of confidence that the interests of the public will be safeguarded particularly if the practitioner is to continue to carry out building work while advancing his education.
14. It is a requirement for registration as a building contractor that a person must have "the relevant qualifications and experience determined by the Minister": section 24B(1)(b). When introducing that requirement, the Act also made provision for transitional arrangements whereby existing builders who did not have the necessary formal qualifications were able to apply for registration on the basis of past experience and competency: section 24C. The practitioner was registered by dint of section 24C. We are convinced that if he is to continue working as a building contractor the various shortcomings revealed in his performance in this particular case must be addressed by some remedial education.
15. The relevant qualifications determined by the Minister for the purpose of section 24B(1)(b) include the Certificate IV in Building course conducted by Charles Darwin University. We have been informed that the cost of the

course is approximately \$3,870. The next course at Alice Springs is about to start. A diligent student working part-time should be able to complete the course by the end of 2009. The content of the course includes the application of building codes, preparation of construction contracts, quality control and record keeping of all which the practitioner should find most useful. The cost of the course appears to be a reasonable impost taking into account the costs consequences of the orders which we propose making and the enduring benefit which will accrue to the practitioner.

16. Having regard to the Director's submissions, it does appear that the audit process is likely to be both expensive and unwieldy in its application to work-in-progress. Given that we only have before us the complaint of one individual (serious as it undoubtedly is) we have reason to be conservative about imposing an audit regime which is likely to become unreasonably burdensome for both the practitioner and the Director if conducted over a long period. When coupled with extra education, the audit programme as directed should serve the dual purpose of protecting the interests of the public in the interim and demonstrating for the long-term future that the practitioner's competence has been adequately established.
17. The Inquiry Board considers it sufficient if the practitioner's "work" is audited. We do not propose making any order for the practitioner's "conduct" to be audited.
18. The Director has submitted that the practitioner should be liable to pay his audit fees by virtue of Item 2 of Schedule 1 to the Regulations. Regulation 41 states that: "The fees set out in Schedule 1 are payable in relation to the matters specified in that schedule". Schedule 1 sets out "Prescribed Fees". Item 2 states: "For carrying out any function by the Director, full reasonable costs of exercising the function".
19. Fees of the kind referred to in Schedule 1 should be distinguished from specific provisions for the recovery of costs and expenses such as Sections 101 and 121 relating to work that may be carried out by the Director. Both of those sections provide for the costs and expenses incurred becoming a debt due and payable. Item 2 of Schedule 1 appears to be of wide application referring to "any function". The various functions of the Director are specified

in section 8 of the Act. In this context it is only necessary to refer to the first three of the specified functions:

“(aa) to investigate complaints against, and to audit the work and conduct of, building practitioners;

(ab) to conduct disciplinary proceedings in relation to building practitioners before the Practitioners Board;

(ac) to prosecute alleged offences against this Act or the Regulations, whether the alleged offender is a building practitioner or another person”.

20. It can be expected that these functions will be exercisable in circumstances which will sometimes precede or involve an inquiry by an Inquiry Board or a prosecution in a court. In the event of an inquiry is it open to the Inquiry Board to make an order for the cost of the preceding investigation or audit, as the case may be? This appears doubtful given that section 34T(b) of the Act gives the Inquiry Board specific power to require a practitioner to pay the Director’s costs “in the inquiry” but without any mention of the preceding audit or investigation.

21. Next, would it be a proper application of the Regulations to somehow require a practitioner to pay the Director’s costs of an audit or investigation which did not result in an inquiry or a prosecution? We think this even less likely. It is difficult to see on what basis and by what means a practitioner would become liable for those costs. Be that as it may, it is unnecessary to explore these hypothetical scenarios in order to reach a conclusion about the Director’s costs of the audit. It is enough to observe that, where the audit is at the direction of the Inquiry Board, it does seem to us to be consistent with the scheme of the Act that the Director’s reasonable costs of the audit should be paid by the practitioner whose work is audited.

Medical clearance

22. A requirement common to all applicants for registration under the Act is that they be “a fit and proper person to be registered”. In our view, this requirement must be interpreted broadly so that an applicant should possess

sufficient moral integrity, knowledge and competence to carry out work as a building contractor with the protection of the public as a paramount consideration.

23. In the context of the statutory requirement “fit” does not mean “physically fit”. While the practitioner has by his own admission defective eyesight, we are by no means convinced that this problem was a significant contributor to the findings of misconduct which we have made. We are alive to the possibility that a building contractor with a disability (either permanent or temporary) may nevertheless have the capacity to carry out building work in a satisfactory way. This possibility includes (but is not limited to) management or supervision of work where others do the “hands-on” work.
24. At any event, the practitioner is using special tools to assist him in his work. And the audit which we have directed the Director to undertake should serve to reveal whether the quality of the practitioner’s work is such that the interests of the public are adequately protected.

Director’s costs in the inquiry

25. As already mentioned, section 34T(b) gives the Inquiry Board power to “require the practitioner to pay all or a specified part of the reasonable costs of the Director in the inquiry”. The Director has asked the Inquiry Board to require the practitioner to pay the costs set out in attachment “A” to these reasons. Each party blamed the other for prolonging the proceedings unnecessarily but we do not uphold those submissions.
26. We are of the view that the weight of the findings against the practitioner justifies imposing a requirement on him to pay all of the Director’s reasonable costs in the inquiry. However to determine what are the Director’s reasonable costs it is necessary to give careful consideration to the Director’s claim as detailed.
27. In *NTA v Lands and Mining Tribunal & Anor* [2002] NTSC 57 Justice Bailey considered an application that the power to award costs under section 18 of the *Lands and Mining Tribunal Act* (NT) was restricted to reimbursement for work done or expenses incurred on a party’s behalf by a legal practitioner or a legal practitioner’s employee. Without going into His Honour’s reasons in

full detail it is sufficient to say that Justice Bailey held that the Legislature did not restrict the Tribunal's power to award costs. By way of contrast, Justice Bailey pointed to the restrictions which can be found in the Rules of the Supreme Court of the Northern Territory. On the other hand, the Legislature provided for a party to be represented by an agent in the Lands and Mining Tribunal and Justice Bailey held that it would be absurd if a party could only recover fees paid to an agent if a lawyer was engaged to present the agent's work.

28. We adopt His Honour's reasoning with regard to the expenses incurred by the Director in the attendances of his representative, Mr Mossman, and the witnesses, Mr Clarke, Ms Parry and Mr Zagorski. In coming to this conclusion, it must be recognised that Mr Mossman is an employee of the Director as are the witnesses, Ms Parry and Mr Zagorski. We are of the opinion that the Act permits the recovery of these expenses notwithstanding whatever the Rules of the Supreme Court might say to the contrary if they were applicable. We consider that Justice Bailey's reasoning is applicable on the grounds that Section 34M of the Act provides for a party to appear "by a representative" and, far from being restricted in its scope, Section 34T(b) refers to recovery of "all or a specified part of the Director's reasonable costs in the inquiry".
29. We also note that litigants who qualify as witnesses are ordinarily entitled to an allowance for their expenses and the courts have held that this allowance can extend to time spent providing assistance to a representative: see *Lawrence v MD Nikolaidis & Co* [2003] 57 NSWLR 355 at 373. Ms Parry and Mr Zagorski both gave a considerable amount of evidence. Ms Parry was the case officer and therefore familiar with the processes involved in the investigation of the complaint and the referral to the Inquiry Board. Mr Zagorski gave evidence relating to technical aspects and questions of compliance and the requirements of the Building Code of Australia. We are of the opinion that it was reasonable for them to be in attendance at the inquiry even when not giving evidence so that they would be in a better position to provide further assistance to enable the Inquiry Board to get a full and balanced view of the facts.

30. On the other hand, we are inclined to think that the expenses incurred by the Registrar, Ms Goudie, and the members of the Inquiry Board should properly be regarded as costs of the Inquiry Board rather than costs of the Director. The cost of a transcript falls into this category also. We are of the view that the costs of the Director "in the inquiry" should be limited to his costs as a party and, having reached that conclusion, whilst we are prepared to accept that the costs of the Inquiry Board come within the Director's budget, we reject the submission that they should, therefore, be regarded as costs of the Director for the purpose of section 34T(b).
31. The expenses as detailed in the attachment "A" - \$2,249.41 for Mr Mossman, \$2,249.39 for Ms Parry, \$2,133.14 for Mr Zagorski and \$2,040.64 for Mr Clarke – are all, in our opinion, reasonable. The total is \$8,672.58. As can be seen, the Director did not make a claim for the cost of the time spent by his representative or any of his witnesses.

Orders

32. The orders are in these terms:
- 32.1 The practitioner's registration as a building contractor is suspended for a period of 6 months to commence 28 days after the present date but the suspension will be stayed if the practitioner undertakes to the Building Practitioner's Board in writing to comply with the orders in paragraphs 32.2 and 32.4 hereof.
- 32.2 The practitioner is to successfully complete the Certificate IV in Building course conducted by Charles Darwin University before his current registration expires on 3 July 2010 or within such extended period as the Inquiry Board may allow if due cause is shown.
- 32.3 The Director is directed to audit (in the manner referred to in paragraph 3.10 hereof) 3 projects involving the construction of prescribed building work (or non-prescribed work where each project has a minimum value of \$12,000 but constitutes the construction of a completed structure in the form of a carport, verandah, building additions, internal renovation work and/or the like) carried out by the practitioner as a building contractor before his current registration

expires on 3 July 2010 or within such extended period as the Inquiry Board may allow if due cause is shown.

- 32.4 The practitioner is ordered to pay the full reasonable costs of the Director in carrying out the audit of the practitioner's work such costs to be as agreed in writing between the parties from time to time or, if not agreed, then as determined by this Inquiry Board and to be paid within 14 days of the date of such agreement or determination, as the case may be. It would be premature to attempt to determine the point but we must observe that it is unlikely that we would regard it as reasonable to expect the practitioner to pay any extra costs of involving personnel from outside Alice Springs in the audit.
- 32.5 In addition, the practitioner is ordered to pay the Director's costs of the inquiry in the amount of \$8,672.58 within a period of 3 months after the date of these orders.
- 32.6 In the event that the practitioner complies with the orders in paragraphs 32.2 and 32.4 hereof and with the requirements of section 34E of the Act (cooperation with the auditor), the suspension referred to order 32.1 shall be annulled by further order of the Inquiry Board.
- 32.7 In the event that the practitioner fails to comply with the orders in paragraphs 32.2 and/or 32.4 hereof and/or any of the provisions of section 34E of the Act in whole or in part, the practitioner shall be required to show cause to the Inquiry Board why the suspension should not take effect as soon as possible.
- 32.8 Upon completing the audit of the practitioner's work the Director shall provide the Building Practitioner's Board with a copy of the written notice to the practitioner referred to in section 34F(4) of the Act.
- 32.9 The parties are at liberty to apply to the Inquiry Board in the event of any concern about the form of these orders or any disagreement about the quantum of reasonable costs for the purpose of order 32.4 or for the purpose of resolving any difficulty as to time or otherwise arising in relation to the practical implementation of these orders.

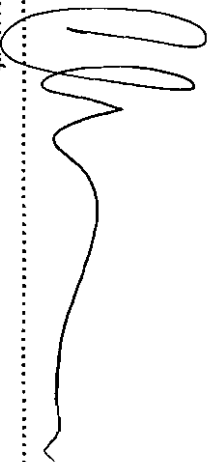
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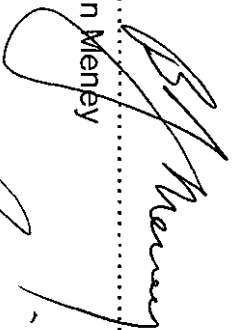
June

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John Stewart



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Brendan Meney



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Paul Nowland

