

BUILDING PRACTITIONERS INQUIRY BOARD

Reasons for Decision

Building Practitioner:	Penelope (Penny) Whinney-Houghton (18889BR)
Referred by:	Director of Building Control
Proceedings:	Referral of Inquiry to the Building Practitioners Board (the Board) in accordance with section 34G of the <i>Building Act</i> .
Inquiry Board:	Duncan McConnel (Presiding Member) Clive Clements Grant O'Callaghan
Date of Decision:	20 April 2018

Introductory Matters

1. This is a decision of an Inquiry Board convened for the purposes of hearing a complaint of professional misconduct brought against a Practitioner under the *Building Act* by the Director of Building Control ("Director"). The complaint alleged 3 counts of Professional Misconduct.
2. Penny Whinney-Houghton ("the Practitioner") is a Building Certifier (Residential) registered under the *Building Act*.
3. The Inquiry Board comprises Duncan McConnel, Presiding Member, and Messrs Grant O'Callaghan and Clive Clements. We were appointed by the Deputy Chairperson of the Building Practitioners Board pursuant to section 34J of the *Building Act*.
4. The Inquiry commenced on 5 September 2017 with a directions conference. The Practitioner was notified of the conference by letter dated 28 August 2017. A copy of the particulars of the alleged misconduct was provided to the Practitioner with that letter¹.

¹ Exhibit 1

5. At the directions conference on 5 September 2017 the Practitioner appeared without representation. The Practitioner informed the Inquiry Board that she had no objection to any of the Inquiry Board members sitting on the Inquiry. The Practitioner sought an opportunity to secure legal representation and further time to consider her response to the charges.
6. The directions conference was adjourned to a further directions conference on 6 October 2017 and the inquiry was listed for hearing on 15 and 16 November 2017.
7. On 5 October 2017 The Inquiry Board requested responses to a number of matters relevant to the complaints from the Director of Building Control. In addition, we directed that the Director provide a statement of evidence of any witnesses to be called.
8. On 6 October 2017 a further directions conference was conducted. The Practitioner was represented by Mr John Bradley a Legal Practitioner. Further directions were made including an opportunity for the Practitioner to seek any further and better particulars of the complaints and any additional documentation from the Director of Building Control.
9. The hearing dates for the Inquiry were vacated and relisted for 6 and 7 December 2017. A further directions conference was listed for 13 November 2017.
10. On 20 October 2017 the Director provided his response to the Board's letter of 5 October 2017. That response became Exhibit 3 in the Inquiry.
11. On 30 October 2017 the Director provided affidavits of witnesses being called by the Director.
12. On 12 November 2017 the Practitioner filed an affidavit of the Practitioner together with written submissions on behalf of the Practitioner.

13. The Practitioner raised objections to the content of the affidavits filed by the Director.
14. On 13 November 2017 the Inquiry Board made directions regarding objections to affidavit evidence and listed the objections for hearing on 27 November 2017.
15. At the hearing on 27 November 2017 the board ruled on the objections. Those rulings were as follows:
 - (a) Affidavit of Jurgen Kammler 30/10/2017: Objections to paragraphs 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20 overruled; objection to paragraph 18 withdrawn; objection to paragraph 21 overruled but relied on for penalty only;
 - (b) Affidavit of Richard Lloyd 30/10/2017: objections to paragraphs 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 60 and 61 withdrawn; paragraph 8 struck out; Paragraph 9, from “on five occasions”... to “which suited her” struck out; paragraphs 57, 58 overruled; paragraph 59, second sentence struck out and the objection thereupon withdrawn; paragraphs 62, 63, 64, 65 and 78 struck out.
16. The hearing of the Inquiry commenced on 5 December 2017.
17. One of the complaints to be heard by the Inquiry Board was an allegation that the Practitioner had failed to lodge a Building Permit number 200/4419/005 with Building Advisory Services (“BAS”) within seven days of issue. That complaint is dealt with in detail later in these reasons. The Practitioner denied the complaint and filed evidence intended to disprove that she had filed the Building Permit later than seven days after its issue.

18. During the course of the hearing of the Inquiry, it appeared to the Inquiry Board that certain documentation which the Practitioner had filed with BAS relating to the Building Permit had been backdated and could not have existed at the time that the Practitioner claimed she had filed the documents².
19. In order to afford the Practitioner natural justice and procedural fairness, the Inquiry Board considered that it was necessary to alert the parties to the possibility that the Practitioner may have given false evidence to the Inquiry Board and may have falsified documents in the course of her practice, both of which may constitute further instances of professional misconduct. The Inquiry Board considered that in the interests of natural justice and procedural fairness, the Practitioner should be given an opportunity to provide any relevant explanation for the apparent anomalies and that the Director should be given an opportunity to pursue additional complaints of professional misconduct if it sought to do so. Moreover, if any additional complaint of professional misconduct was to be pursued by the Director, then the Inquiry Board considered that it would be necessary for the Director to lay an additional complaint and proceed with that complaint against the Practitioner only if that could be done in a manner which provided procedural fairness and natural justice to the Practitioner³.
20. As a consequence, the hearing of the Inquiry was adjourned.
21. The Director filed an additional complaint against the practitioner on 24 January 2018⁴. The hearing of the Inquiry, including the additional complaint, resumed on 7 February 2018.

² It also appeared that certain inspection certificates relating to the same project may have been backdated with an incorrect inspection date based on materials submitted by Mr Juergen Kammler in a complaint made to the Director against the Practitioner. However, subsequent inquiries by the Director identified that the inspection date on the certificates was the correct date.

³ T 108-111, 7/12/2017

⁴ Exhibit 23

22. Throughout the course of the pre-Inquiry processes, the Inquiry itself and the adjournment of the Inquiry, the practitioner was provided with the opportunity to seek appropriate directions and evidence for the conduct of the Inquiry including any adjournment and/or extension of time reasonably required to address the substance of the complaints. The Practitioner was represented by an experienced legal practitioner at all times since the second directions conference held on 6 October 2017.
23. The Practitioner made a number of requests for extensions of time in relation to various directions made by the Inquiry Board. The Inquiry Board granted some, but not all of the requested extensions. In respect of the occasions when an extension of time was refused, the Inquiry Board notes that the Practitioner ultimately complied with the direction and did not at any stage in the course of the Inquiry process, claim to have not been afforded an adequate opportunity to prepare her case.

Professional Misconduct

24. Although we are, for the most part, dealing with admitted breaches of the *Building Act* which are deemed to be professional misconduct, nevertheless the Inquiry Board is required to evaluate the conduct and make an assessment of the degree of seriousness or culpability that attaches to the circumstances in which those breaches occurred. To do so, it is important to understand what is meant by “professional misconduct”.
25. Professional Misconduct is defined as “conduct referred to in s. 34S”. Section 34S does not attempt to define professional misconduct as such, rather it identifies those instances of conduct by a building practitioner which will amount to professional misconduct. Committing an offence against the Act or the regulations is professional misconduct. A pattern of negligent or incompetent conduct is professional misconduct.

However, subsection 34S(g) identifies that a practitioner may be “otherwise guilty of professional misconduct”. Thus, s. 34S recognises that ‘professional misconduct’ has a meaning beyond the specified instances of conduct listed in the section itself. In the absence of a prescriptive definition of the term, its meaning is to be derived from the language and context in which it appears in the Act⁵.

26. The notion of a ‘profession’ underpins the meaning of professional misconduct. There is no single accepted definition of a profession, but it is identifiable by a number of features including the existence of ethical responsibilities imposed by an association or collective organisation which regulates admission and upholds standards⁶. The *Building Act* provides such a regime of admission, regulation and maintenance of standards. A Building Practitioner must be registered under the *Building Act* to be entitled to practise. An application for registration is considered by the Building Practitioners Board. An applicant is entitled to be registered as building practitioner if they satisfy the Board, *inter alia* that they are “a fit and proper person” to be registered in that particular category.
27. It has been said that “the purpose of registration of building practitioners is to set standards in the public interest and to provide a means by which the Director can investigate a complaint in relation to practitioners”⁷. The purpose of registration which has as an element a requirement that person be a fit and proper person, is to ensure, as far as possible, the protection of the public from persons who are not suitable to practice⁸.
28. Professional misconduct is conduct which falls short of the standards of behaviour expected in the profession in question. Where the standards include a requirement that

⁵ *Prestia v Aknar* (1996) 40 NSWLR 165 at 186; *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]

⁶ Walmsley, Abadee, Zipser & Sirtes *Professional Liability in Australia* Third Edition, at [1.10]

⁷ *Director of Building Control v ACT Builders (NT) Pty Ltd and Glynatsis BPB*, 4 April 2013.

⁸ *Wentworth v NSW Bar Association* (1992) 176 CLR 239.

the person be a “fit and proper person” that generally imports notions of honesty, candour and integrity in the person’s professional dealings. In *Incorporated Law Institute of NSW v Meagher*⁹ fitness in this context, it was said, “includes honesty as well as knowledge and ability”.

29. The requirement of honesty as an element of being a fit and proper person to be registered as a building practitioner is reflected in the Building Practitioners Board Policy “Fit and Proper” issued on 22 March 2017, which states that “honesty and integrity are crucial concepts to the question of fit and proper”.
30. In *Kennedy v The Council of the Incorporated Law Institute of NSW*¹⁰, Rich J observed that professional misconduct generally, at least in the context of legal practitioners, “need not fall within any legal definition of wrong doing. It need not amount to an offence under the law. It [is] enough that it amounted to grave impropriety affecting his professional character and was indicative of a failure either to understand or to practice the precepts of honesty or fair dealing in relation to the courts, his clients or the public”¹¹.
31. Professional misconduct may in some circumstances go to the question of whether a person is a fit and proper person to practice as a building practitioner. In *Kennedy*¹², Dixon J observed that “[a practitioner’s] fitness to continue on the roll must be judged by his conduct and his conduct must be judged by the rules and standards of his profession; his unfitness appeared when he did what solicitors of good repute would consider disgraceful or dishonourable”.
32. As observed in *Director of Building Control v Izod*¹³ it is the responsibility of a building certifier to stand “as a guard against non-compliance [with the *Building Act*] which, if

⁹ (1909) 9 CLR 655

¹⁰ [1939]13 ALJ 563

¹¹ at 563.

¹² Ibid, at 564.

¹³ Building Practitioners Board 3 April 2014

not detected, can have implications for all concerned....[B]ecause certifiers are relied upon by the Director, home owners, builders and other sections of the community for the certification of building work, it is important that the certifiers comply with their obligations under the Act. The system of certification depends on retaining the confidence of the public that certifiers will carry out their statutory duties thoroughly and reliably”¹⁴.

33. It follows that in our view a building certifier is in a similar position to that of a legal practitioner in relation to standards of honesty, integrity and candour in relation to their dealings with the Building Practitioner’s Board, the Director, and clients. The Director of Building Control and the Building Practitioners Board occupy a comparable position to the Courts and the professional associations that supervise the conduct of legal practitioners. Any conduct by a building certifier that falls short of those standards and in particular, that shows “failure either to understand or to practice the precepts of honesty or fair dealing in relation to the [Director or the Board], his clients or the public”¹⁵ prima facie would raise an issue of whether the practitioner continues to be a fit and proper person to be registered as a building practitioner. This is reflected in the actions that are available to an Inquiry Board under s 34T, which include powers of suspension and cancellation of a practitioner’s registration. It is also reflected in the Policy, which observes that being a fit and proper person is a continuing requirement for registration, and in s. 34VA of the *Building Act*, which provides that the Building Practitioners Board must suspend the registration of any building practitioner if it is satisfied that they have ceased to comply with the requirements for registration.
34. The object of disciplinary proceedings against building practitioners is the protection of the public¹⁶. The imposition of disciplinary penalties against an individual practitioner is

¹⁴ At [49]-[50]

¹⁵ *Kennedy, at 563*

¹⁶ *NSW Bar Association v Evatt* (1968) 117 CLR 177; *Clyne v NSW Bar Association* (1960) 104 CLR 186

not to punish the practitioner but rather, serves the objective of upholding the professional standards of the profession in the public interest¹⁷.

Standard of Proof: *Briginshaw v Briginshaw*

35. In these reasons, we refer to *Briginshaw* when discussing the degree of satisfaction of proof required for a finding of professional misconduct. As explained in these reasons, the Practitioner initially defended Charge 3 (failure to lodge Building Permit and Occupancy Permit within 7 days) on the basis of evidence which, although it did not conclusively prove that the Practitioner *did* lodge the Permits within 7 days, at least meant that the Inquiry Board could not be satisfied 'to the *Briginshaw* standard', that she had failed to do so.
36. *Briginshaw v Briginshaw*¹⁸ stands for the proposition that in cases involving potentially serious consequences for the respondent, the tribunal weighing the evidence should be careful to ensure that the findings are supported by clear and cogent evidence. A tribunal should not be content to make such findings on the basis of "inexact proofs, indefinite testimony, or indirect references".
37. As this Inquiry is a matter involving potential findings of professional misconduct, and the consequences for the Practitioner's professional reputation which inevitably follow, we have adopted the approach to satisfaction of facts suggested by Dixon J in *Briginshaw*.
38. We turn now to consider the complaints.

¹⁷ *NSW Bar Association v Meakes* [2006] NSWCA 340

¹⁸ (1938) 163 CLR 336

Background

39. The complaints arise out of two independent, but interconnected events.
40. First, the Practitioner was the subject of an audit pursuant to s.34A of the *Building Act* and was notified of the audit by letter dated 7 June 2016¹⁹. This audit included a re-audit to follow up the Practitioner's compliance with previous recommendations made in an audit conducted in 2013. The matters to be followed up included confirmation of whether Building Permits had been issued and lodged with BAS for a number of properties including Building Permit number 200/4419/005. The auditor nominated 29 June 2016 as the date of the appointment.
41. Building Permit number 200/4419/005 related building works for alterations and an extension to a dwelling at 5 Bul Bul Court Ludmilla owned by Jurgen Kammler ("the Kammler file").
42. The Director alleges that the Practitioner was served with a Notice to Produce Documents for the audit on 7 June 2016 and, by continuously rescheduling and deferring the appointment with the auditor, the Practitioner ultimately failed to produce the documents requested in the Notice to Produce.
43. Second, and unrelated to the audit, Mr Kammler complained to the Director on 21 September 2016 alleging repeated unsuccessful attempts, dating back to March 2015, to obtain an Occupancy Permit from the Practitioner following completion of the building works undertaken on his house under Building Permit number 200/4419/005. The Director commenced an investigation pursuant to s. 30(1) of the *Building Act* on 11 November 2016 and issued a Notice to Produce documents to the Practitioner.

¹⁹ Exhibit 2, document A1

44. The Director alleges that the Practitioner produced some, but not all of the documents in the Notice²⁰.
45. Material to both the audit and the investigation of the complaint was the question of whether the Practitioner had ever filed the Building Permit and the Occupancy Permit for Mr Kammler's building works with BAS. The audit was concerned with whether the Building Permit had ever been filed. The complaint was concerned with whether the Occupancy Permit had ever been filed.
46. The referral to the Inquiry Board occurred following the failure of the Practitioner to produce documents from Kammler file to the Director. The Practitioner ultimately lodged a Building Permit with BAS on 25 November 2016²¹ and lodged an Occupancy Permit with BAS on 9 December 2016, but claimed to have lodged both Permits previously²².
47. The Director alleges that neither document had been filed within the 7 days required under the *Building Act*. In fact, the Director alleged that the Building Permit was only filed on 25 November 2016 (almost 8 years after it was issued) when the Practitioner purportedly produced documents in response to the Director's Notice to Produce. The Director also alleged that the Occupancy Permit was likewise only filed on 9 December 2016 when the Practitioner purportedly produced documents in response to the Director's Notice to Produce.

Complaint 1

48. Complaint 1 alleges that the Practitioner failed to comply with a reasonable request from an auditor in breach of section 34E(1)(a). The particulars of the alleged failure to

²⁰ The documents not produced were listed in Response 12 of the Director's letter to the Inquiry Board, contained in Exhibit 3

²¹ Exhibit 25 Agreed Facts

²² Exhibit 2, documents 22; 40; Exhibit 10 Affidavit of Penny Whinney Houghton 12/11/2017 at [33] – [47].

comply are that the Practitioner failed to produce documents identified in a Notice to Produce Documents – Audit served on the Practitioner on 7 June 2016.

49. The Practitioner denies the complaint. The Practitioner argues that the time for production of the documents had not crystallised. The Practitioner argues that “the audit does not commence until the auditor and Practitioner get together to conduct the audit”²³. In support of that interpretation of the meaning of “in the course of the audit”, the Practitioner relies on documentation provided by the Department.
50. The question of the meaning of the words “in the course of the audit” is one of statutory construction. The task of statutory construction must begin with a consideration of the text itself in the context of the Act as a whole²⁴. The words “in the course of” are words of ordinary construction and their meaning is clear. They mean while something is ongoing, or on foot. They establish parameters around which the interaction between the relevant departmental personnel (auditor) and the Practitioner may attract a referral to the Building Practitioners Board (“Board”).
51. The power of referral to the Board is for inquiry into the professional conduct of the Practitioner in those interactions. It is understandable that the legislature would wish to be clear that not every interaction between an auditor and a Practitioner should attract a power of referral. Rather, it is when the auditor is conducting the functions of an audit that the interactions become important and the power of referral might be employed. If there is no audit, then the interactions between the Practitioner and the auditor are no different to any other professional interactions the Practitioner may have with departmental personnel, or, for that matter, members of the public.
52. The critical element which attracts the provisions of the section is the fact of an audit. The power to conduct an audit is established by s. 34A of the *Building Act*. The power

²³ Practitioners submissions filed 12 November 2017, paragraph [9].

²⁴ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]

may be exercised whenever the Director considers it appropriate to do so or in consequence of a complaint. The Director is compelled to audit a Practitioner's work or conduct (or both) if directed to do so by the Building Practitioners Board.

53. The term "audit" is not defined by the Act. Its ordinary meaning is the inspection and review of work or systems of work, usually by a person independent of the person who did the work. Its usual purpose is to identify compliance or non-compliance with the applicable standard for the work involved. It is most commonly understood as an accounting term referring to the process of examination of the accounts of an organisation or company for the benefit of the members including as a measure to guard against fraud or misappropriation.
54. The essential quality of an audit is the external scrutiny of the work undertaken, almost invariably with coercive powers to ensure the auditor is not prevented from discovering any instances of non-compliance.
55. Consistently with that meaning of the term audit, the Director has issued a Fact Sheet for the information of Building Practitioners which describes an audit as a "systematic, independent and documented process to determine compliance of a building practitioner with their obligations in accordance with the Act"²⁵.
56. The objective of an audit undertaken pursuant to the *Building Act* is made clear on a reading of section 34F. The auditor's function is to identify whether or not there is evidence that a Practitioner has committed an offence against the Act or Regulations, or that the Practitioner is guilty of professional misconduct. Moreover, if there is such evidence, the Director has powers to prosecute and, importantly, to embark on remedial action with a practitioner.

²⁵ The Fact Sheet is part of Annexure PWH5 of the affidavit of the Practitioner (Exhibit 10)

57. There is no reason to construe the words “in the course of the audit” as requiring the auditor and practitioner to physically meet in order for the audit to commence. The content of any particular audit is determined by the auditor based on an examination of building records relating to a particular practitioner. The practice, as indeed occurred here, is for the auditor to identify particular files beforehand. We can think of no reason why the audit process should not be understood to commence from the moment that notice of an audit is given to the practitioner.
58. If the narrow construction contended for by the Practitioner applied, a practitioner could simply defer the date of the audit appointment indefinitely and thereby avoid the audit completely and avoid any consideration of the practitioner’s conduct in so doing by the Building Practitioners’ Board. That cannot have been the intention of the legislature.
59. Accordingly, we are satisfied that the audit commenced once the Practitioner was on notice of the audit on or shortly after 7 June 2016 and the Practitioner’s interactions with the auditor from that time on were matters which were capable of being the subject of a referral to the Building Practitioners Board by the Director under s.34E.
60. In this case, the Practitioner deferred the appointment with the auditor on a number of occasions. As a consequence, the appointment did not proceed. The documents referred to in the Notice to Produce were never produced.
61. We are satisfied that the request for production of documents in the Notice to Produce was reasonable. The Practitioner has not submitted that the documents listed were onerous or for any other reason unreasonable. There is nothing on the face of the list to suggest that production of the documents would be impractical, onerous or for some other reason unreasonable.

62. The Practitioner's affidavit sworn 12 November 2017²⁶ provided evidence of her personal circumstances during the course of 2016. Some of that evidence was directed at other complaints, in particular, in answer to complaint 2, but was also relied upon to argue that the Practitioner had a reasonable excuse for the failure²⁷ to produce the documents.
63. The Practitioner's evidence and submissions in this regard conflate the powers of referral contained in s. 34E(1) with the offence contained in s. 34E(2). This complaint is based on s. 34E(1) which does not refer to a reasonable excuse.
64. However, the function of the Inquiry Board on such a complaint is to determine whether the refusal or failure constitutes professional misconduct. If there are good reasons behind the refusal or failure then the Inquiry Board is required to satisfy itself whether, in light of these reasons, the refusal or failure constitutes professional misconduct.
65. Therefore, the circumstances referred to by the Practitioner are relevant to the Inquiry Board's consideration of this complaint.
66. For the reasons which follow, we are not satisfied that the Practitioner had good reasons for refusing or failing to produce the documents in the notice.
67. The Practitioner was notified of the original date for the appointment with the auditor in the letter dated 7 June 2016. The appointment was to be 29 June 2016. The Practitioner sought a number of deferrals of the appointment. Each deferral was agreed by the Director but with increasing reluctance²⁸.
68. The Practitioner first sought a deferral because she was on jury duty. The Practitioner has provided evidence that she was in fact on jury duty commencing from 15 June

²⁶ Exhibit 10

²⁷ Practitioner's submissions filed 12 November 2017, [34] – [38]

²⁸ Exhibit 2 documents 4 – 16

2016 until 5 July 2016²⁹. The deferral on those grounds was reasonable. However, the Practitioner was obliged to ensure that, having been accommodated, the meeting with the auditor did proceed as soon as practicable after she was free of jury duty.

69. On 22 June 2016, the Director advised of a new appointment date of 4 August 2016. The Practitioner completed jury duty on 5 July 2016 and then her mother arrived from Victoria and stayed with her from 8 July 2016 until 20 July 2016³⁰. On 26 July 2016 the Practitioner advised she needed to reschedule the meeting with the auditor as she would be interstate on 4 August 2016¹. We are not satisfied that the Practitioner's reasons for further rescheduling the meeting from 4 August 2016 were valid. The meeting should have gone ahead, and the documents produced, on that date.
70. The Inquiry Board requested copies of travel bookings by the Practitioner relating to these dates for the purposes of verifying the dates of travel and the time of booking. They showed that the Practitioner was in Darwin on 4 August 2016, the scheduled time of the audit appointment. The Practitioner left Darwin again for travel on 5 August 2016.³¹
71. The Director agreed to the Practitioner's request and requested that the Practitioner provide alternative dates for the audit³². The Practitioner did not provide alternative dates and had to be reminded to do so on 22 August 2016. She responded on 31 August 2016³³ referring to personal matters and being interstate and working limited hours when she was home³⁴. She said she was still sorting interstate dates and suggested an appointment date of 17 October 2016.

²⁹ Exhibit 10, Practitioners Affidavit 12 November 2017 Annexure PWH3

³⁰ Exhibit 10, Practitioners Affidavit 12 November 2017 Annexure PWH2

³¹ Exhibit 2 Document 5

³² Exhibit 2 Document 6

³³ Exhibit 2 Document 7&8

³⁴ Exhibit 2 Document 9

72. The chronology provided by the Practitioner¹ reveals that she was in fact in Darwin from 9 August 2016 until 8 October 2016. We consider that the Practitioner has not demonstrated a good reason for not rescheduling the appointment for some time between 9 August 2016 and 8 October 2016. The Practitioner is a senior member of her profession, with over 33 years' experience. She understands the significance and importance of audits under the *Building Act*.³⁵
73. On 6 October 2016, the Practitioner was notified of the complaint that had been made by Mr Kammler³⁶. As noted earlier, the Kammler file was one of the files which was to be reviewed to determine the Practitioner's compliance with previous audit findings. We are satisfied that as at that date, the Practitioner was aware that she had not followed up the non-compliance identified in respect of the Kammler file. It will be evident from our findings below that from 6 October 2016, the practitioner was therefore confronted with both a complaint from Mr Kammler (about a failure to produce an Occupancy Permit) and a re-audit of the Kammler file, which would inevitably turn up a failure to lodge a Building Permit.
74. The Practitioner was questioned about whether those were matters that she considered when she sought further deferral of the appointment with the auditor. She said that it probably crossed her mind but she didn't get around to doing them, and she didn't know why³⁷.
75. The Practitioner's response to those questions is remarkable for two reasons. First, if it was the case that they crossed her mind but she didn't get around to them, then it suggests that the Practitioner is so cavalier about the state of her files and her compliance with the requirements of the Building Act that these two breaches on the one file did not concern her. Secondly, it does not accord with common sense. The

³⁵ Exhibit 2 Document 12, T35 6/12/2017

³⁶ Exhibit 2, Document 39

³⁷ T24, 5/2/2018

response of most people to the prospect of disciplinary action for non-compliance with their professional obligations would be one of concern. The fact that the one file would now be scrutinised for both a follow up audit and a complaint from a client would usually cause a degree of personal stress and anxiety because of the obvious risk to the Practitioner's reputation.

76. Despite nominating the date of 17 October 2016 for the rescheduled audit appointment back in August 2016, the Practitioner then made plans to travel interstate on 8 October 2016, returning in the week of 17 October 2016. The Practitioner emailed the Director on 6 October 2016 asking to reschedule the appointment until the week commencing 7 November 2016.

77. On 6 October 2016 the Practitioner emailed the Department:

"Hi Tanya,

Sorry I could not respond any earlier as I was not sure of what dates I would be in Darwin due to other family matters interstate that have taken me away this past month (there were none – the Practitioner was in Darwin all of September) and some other personal commitments that have taken me away from my work.

I have to go back to Victoria this weekend and at this stage I will not be back until sometime during the week of 17 – 23 October 2016 but at present I do not have a return date."³⁸

78. The Practitioner's airline booking itineraries³⁹ showed that in fact her return flight to Darwin was booked on that same date, 6 October 2016. Not only did she have a return date booked, but she booked it that day for the very day the audit appointment should have gone ahead.

79. The Practitioner was questioned regarding the booking of the return flight for 17 October when she was aware that she had deferred the audit to 17 October 2016. The Practitioner denied that the booking had been made in order to obstruct the audit appointment. However, by this time the Practitioner had already had the audit appointment deferred twice, and it was now almost 4 months after the original date for

³⁸ Exhibit 2, Document 11

³⁹ Exhibit 12

the appointment. We would expect that the Practitioner would, in those circumstances, only have deferred the appointment again if she had a good reason. The reason given by the Practitioner was that she was going to be away for at least some of that week and was not precisely sure of her movements. That reason was not true.

80. On the same date, 6 October 2016, the Practitioner received Mr Kammler's complaint. She responded immediately, telling the Departmental officer that she was "aware of building permit paperwork missing from the BAS files" but that it had been previously lodged⁴⁰. The Practitioner advised that she would re-lodge the paperwork but would be away for the next two weeks (including the week of 17 – 23 October 2016). In fact, she intended to return to Darwin on 17 October 2016.
81. The Practitioner thereby gained for herself additional time within which to both locate and resubmit the Building Permit paperwork she claimed had been previously filed but had gone missing, and to prepare for the audit. The meeting with the auditor was deferred again, until 15 November 2016.
82. This pattern was repeated just before the next rescheduled audit appointment time. On 8 November 2016 the Director sent a reminder to the Practitioner that the audit appointment had been deferred to Tuesday 15 November 2016⁴¹. On 10 November 2016 the Practitioner advised the Department that she had to go interstate for personal reasons and "won't be back on Tuesday"⁴². In fact, while the Practitioner did go interstate on 12 November 2016 she returned to Darwin on 14 November 2016 and so was back in Darwin on the Tuesday. The audit appointment could have proceeded on 15 November 2016.

⁴⁰ Exhibit 2, Document 40

⁴¹ Exhibit 2, Document 13

⁴² Exhibit 2, Document 14

83. The pattern of deferral of the audit was also repeated in relation to the Complaint from Mr Kammler, demonstrated by the following:
- (a) The Practitioner told the investigator on 6 October 2017 that she could not look at the complaint until some time after 17 October 2016;
 - (b) The Practitioner then made a late request for an extension of time to respond to the complaint, which was granted, with 8 November 2016 nominated⁴³;
 - (c) The investigator subsequently attempted to contact the Practitioner on 8 November 2016 and again on 24 November 2016 but could not reach her⁴⁴. The Practitioner did not make any contact with the investigator despite the fact the extended date for her response had been reached and passed;
 - (d) On 10 November 2016 the investigator issued a Notice to Produce pursuant to s. 32 of the *Building Act*⁴⁵. It was emailed to the Practitioner on 11 November 2016⁴⁶. The Notice required production of the documents within 7 working days (22 November);
 - (e) The Practitioner immediately responded, seeking another extension of time to 24 November 2016⁴⁷;
 - (f) On that occasion the request for an extension of time was refused by the Department. It was made clear in the correspondence that the Notice required the Practitioner to produce the documents contained in it, not to tidy up (or finalise) the certification that was still outstanding⁴⁸;

⁴³ Exhibit 2 Document 42; document 45

⁴⁴ Exhibit 2, Document 45

⁴⁵ Exhibit 2 document 48

⁴⁶ Exhibit 2 document 46

⁴⁷ Exhibit 2 document 49

⁴⁸ Exhibit 2, Document 50

- (g) The Practitioner did not produce the documents by the due date. After returning from interstate on 14 November 2016, the Practitioner remained in Darwin from 14 November until 7 December 2016.
84. On 23 November 2016, the Practitioner received a letter from the Director regarding the audit⁴⁹, in effect telling her that there would be no further extensions of the audit and that if the audit appointment did not proceed on 7 December 2016 a recommendation would be made to refer the Practitioner to the Building Practitioners Board for failure to co-operate with the auditor.
85. The Practitioner did not respond to that letter. The audit appointment on 7 December did not proceed.
86. We are satisfied that it was the Practitioner's intention from at least 26 July 2016 to defer the audit appointment to avoid producing the documents referred to in the Notice to Produce - Audit, because she had not reviewed her files, and had not remedied any of the outstanding matters from the 2013 audit.
87. We are satisfied that the state of the Practitioner's files was such that even without checking, the Practitioner would have suspected that they were likely to disclose non-compliance with the *Building Act*. In arriving at this conclusion we are informed by the following:
- (a) Evidence of a number of instances of non-compliance across a number of files, as disclosed by the Practitioner's own Permits Register⁵⁰;

⁴⁹ Exhibit 2, Document 15

⁵⁰ Exhibit 19

- (b) the BAS records related to the other files listed in the audit request which indicate that those files were non-compliant⁵¹;
- (c) the previous non-compliances identified in the first audit in 2012;
- (d) the pattern of dealings between the Practitioner and BAS following up the agreed actions arising from the 2013 audit⁵², which evidence that follow-up action was not taken by the Practitioner in the 3 years between 2013 and 2016;
- (e) the pattern of dealings between the Practitioner and the investigator in relation to the complaint by Mr Kammler; and
- (f) the findings we have made below that the Practitioner had not completed the Building Permit documents and did not lodge the Occupancy Permit documents in respect of the Kammler file until late 2016.

88. In arriving at a satisfaction as to the Practitioner's state of mind, we are conscious of the requirement of *Briginshaw v Briginshaw* that we should be comfortably satisfied of those matters and not just prepared to draw an inference from surrounding circumstances.

89. We are unable to be satisfied as to the Practitioner's actual intention beyond the deferral itself. She denied even that motivation. There is no positive evidence of an intention not to ever participate or produce the documents. Rather, it appears from all of the evidence, including the circumstances of the Practitioner's continued excuses made to Mr Kammler throughout 2015 and 2016, from the similar pattern in her dealings with the Department, and from the evidence she gave to the Inquiry, that the

⁵¹ exhibit 24

⁵² Exhibit 5, Affidavit of Richard Lloyd, Paragraphs [13] – [55]

Practitioner was avoiding an uncomfortable truth about the state of her files, and the Kammler file in particular, which led her to keep deferring those matters.

90. When the whole of the Practitioner's behaviour regarding the audit is considered, the inescapable conclusion is that the Practitioner deliberately sought to put off the audit because she was concerned that she was not ready to be audited, that her previously identified non-compliances had not been addressed and that she faced the possibility of disciplinary action.
91. Regrettably, it appears to us that the Practitioner's excuses stretched the truth about her situation to justify her continuous requests for deferral. This is evident from the statements made to the effect that she would be interstate for periods of time when she was not; that she had previously lodged documentation when she had not; that she had personal matters to attend to, and that she had urgent family matters and personal and health matters.
92. The Practitioner was questioned about her references to health matters in emails to the Department. In particular, she was asked to disclose whether her mother had health issues that she was able to disclose to the Inquiry for the purposes of assessing the significance of those matters. The Practitioner gave an honest and heartfelt response to questions which revealed that the Practitioner had experienced a difficult period with her mother during 2016⁵³. During the relevant period, it was decided that the Practitioner's mother would leave Melbourne and move to Darwin. The Practitioner had to pack up the house which had been her grandfather's, then her mother's and put it up for sale.
93. It is accepted that the Practitioner had to travel to Melbourne to pack up and sell the house during the second half of 2016. However, the evidence was not enough to

⁵³ T30, 5/2/2018

persuade us that the Practitioner's mother had health issues at the time that the Practitioner made those statements to the Department⁵⁴. In addition, the details of the timing of sale of the Practitioner's mother's house indicate that this happened later than the Practitioner claimed and so does not offer a reasonable explanation for the repeated requests for deferral of the audit appointment.

94. We find complaints 1 (a) and (b) proved. The Practitioner failed to comply with a reasonable request from an auditor to produce documents. The last opportunity for the practitioner to produce the documents was 7 December 2016.
95. The circumstances of the failure to comply include that the Practitioner was given the greatest amount of latitude possible to comply with the Notice and still did not do so, and further, that the reasons she gave for being unable to produce the documents referred to in the notice were not adequate, and in some cases untrue. We are satisfied that the failure was deliberate, but that it was motivated by avoidance and personal embarrassment rather than any intention to defeat the objects of the Act.
96. We consider that the failure to comply with the request relied upon for complaints 1(a) and (b) constitute serious instances of professional misconduct.

Complaint 2

97. Complaint 2 deals with the Practitioner's failure to comply with a reasonable request from the Director. The request was a Notice to Produce Documents for the purposes of investigating the Complaint by Mr Kammler.
98. The Notice to Produce was served on the Practitioner on 15 November 2016⁵⁵.

⁵⁴ Exhibit 2, Documents 49; 51

⁵⁵ Exhibit 2, Document 48

99. The Practitioner sent 2 emails to the investigator on 25 November 2016 containing the Building Permit documents⁵⁶ but did not produce the remaining documents referred to in the Notice. The Practitioner claimed that a third email was also sent on that date, which contained the Occupancy Permit⁵⁷. However, the department had no record of a third email and it was never produced. The Occupancy Permit was subsequently lodged on 9 December 2016.
100. The Practitioner has admitted the complaint. She says that the failure to produce the remainder of the documents was due to a failure to read the Notice properly. S 33(1)(a) excuses a failure to comply with a request if the Practitioner has a reasonable excuse.
101. The Inquiry Board must therefore consider whether we accept the Practitioner's explanation that the non-production was due to not reading the Notice properly and if so, if that constitutes a reasonable excuse. For the reasons which follow, we are not satisfied that the reason the documents were not produced was simply because the Practitioner did not read the Notice properly.
102. First, we note that the Notice to produce was sent to the Practitioner in the period of time that she was also continuously requesting a deferral of the audit. As we have mentioned, it compounded an existing problem particularly in relation to the Kammler file.
103. Secondly, as is evident from our reasons below we are also satisfied that in fact at the time that the Practitioner received the Notice she had not completed the Building Permit for the Kammler file. The Practitioner put the Building Permit together with the supporting documents shortly before submitting them on 25 November 2016.

⁵⁶ Exhibit 3, Tab 3 folios 33 - 56

⁵⁷ Exhibit 10, Practitioner's affidavit 12/11/2017 at [25].

104. The Practitioner maintained that she had previously filed the Building Permit and Occupancy Permit with BAS, but they had gone missing. As is detailed below in relation to complaints 3 and 4, the Practitioner could not show that the Building Permit and Occupancy Permit had been previously filed and must have known that her file would reveal that to be the case. She therefore had a strong incentive not to produce the remaining documents to the Director.
105. Thirdly, Departmental Officer James Carlos spoke to the Practitioner in the BAS office on 30 November 2016 and reminded her that she had not fully complied with the Notice, in particular, including any correspondence with the complainant and her response to the complaint. Even if the Practitioner had not read the Notice properly, the effect of that conversation was that she was on notice and that she had not completely complied with the Notice and she should have checked it again.
106. Fourthly, the Practitioner was reminded by email that the Notice to Produce was not an exercise to try and bring about the filing of the Occupancy Permit. The investigator wanted to see all of the listed documents⁵⁸.
107. Finally, the language of the Practitioner's correspondence indicated that the Practitioner believed (or at least hoped) that if she provided the Building Permit and the Occupancy Permit, the complaint would go away⁵⁹. This was confirmed by her evidence given at the hearing of the Inquiry, as follows:

Did it ever occur to you during the course of that investigation or, indeed, afterwards to simply hand over your whole file for Mr Kammler to BAS?---No, it didn't actually cross my mind at all. I suppose my mind was on getting a copy of the permit documents that they didn't appear to have. That was what was all that was relevant.

So, that if the permit documents were produced, that should be enough to satisfy everybody?---Well, I thought that was all they wanted at that time. I misread the paperwork. That was my own fault, I misread that.

⁵⁸ Exhibit 2 Document 50

⁵⁹ Exhibit 2 Document 49

108. It follows that we do not accept the Practitioner's explanation for not complying with the notice. We find that the non-production of documents was a deliberate decision by the Practitioner to treat the eventual filing of the Occupancy Permit and Building Permit documentation as the substantive objective behind the Notice to Produce and that on filing those Permits, she need not comply further.
109. We consider that the failure to comply with the Notice was intentional and was motivated by a desire to keep the contents of the Practitioner's file from the Director. This had the effect of obstructing the Director's investigation of a formal complaint against the Practitioner. In the circumstances we consider that the failure to comply was a serious instance of professional misconduct.

Complaint 3.

110. Complaint 3 alleged that the Practitioner failed to lodge the Building Permit and Occupancy Permit respectively for the Kammler file (200/4419/005) within 7 days of issue as required under s 42 (1) (c)(i) of the *Building Act*.
111. This complaint was initially denied by the Practitioner but was admitted on the resumption of the Inquiry hearing on 5 February 2018.
112. Insofar as the admitted breaches amount to an offence under the *Building Act*, by admitting the non-compliance the Practitioner has admitted that she is guilty of professional misconduct. However the complaint also alleges that the misconduct amounts to serious negligence or incompetence by the Practitioner in carrying out her work as a building certifier (s. 34S(b)). Moreover, the task of the Inquiry Board is not limited to finding one way or the other that professional misconduct occurred but must also evaluate the degree of seriousness or culpability of the misconduct in question.

Building Permit

113. The Practitioner filed an affidavit in the Inquiry stating that she prepared a cover sheet for delivery of the building permit documents to BAS on 4 February 2009. She stated that “Although I do not have a first-hand recollection of delivering the documents to Building Services I am sure that I did. There is nothing on my file that is unusual or out of place and nothing on my file has anything out of the ordinary to suggest that I changed my standard operating procedure”⁶⁰.
114. The Practitioner sought to rely on secondary records to prove that she lodged the Building permit on 4 February 2009, including phone records, her Permit Register and her diary. It is not necessary for us to express a view on whether that evidence would have been sufficient to establish that the Practitioner had filed the Permit on the date she said. The Practitioner initially submitted that having regard to the principles in *Briginshaw v Briginshaw* that in the face of that evidence the Inquiry Board could not be comfortably satisfied that she *did not* file the Building Permit and in the circumstances, could not be satisfied that the Practitioner had failed to do so.
115. The Practitioner also relied on evidence that tended to indicate that from time to time BAS have lost records and that therefore a plausible explanation for why there was no BAS record of the Building Permit was administrative error within BAS.
116. The Practitioner’s subsequent admission of this complaint came about after the Inquiry Board identified an anomaly within the Building Permit documents sent to BAS by the Practitioner on 25 November 2016. Included in the documents were a number of drawings which were stamped by the Practitioner and dated 2 February 2009, the date the Building Permit was issued. The problem was that the drawings were in fact

⁶⁰ Exhibit 10, Practitioner’s Affidavit 12/11/2017 at [41]

amendments of drawings made in 2011 and hence did not exist on 2 February 2009 and could not possibly have been part of a Building Permit prepared on 2 February 2009 and filed at BAS on 4 February 2009. This ultimately became the subject of the new complaint 4 alleging the Practitioner produced a document that was false or misleading, which has also been admitted by the Practitioner.

117. We are satisfied that the Practitioner did not ever file a Building Permit for the Kammler file until it was emailed to BAS on 25 November 2016. We find that the Practitioner prepared the Building Permit documents shortly before that date from documents that were then on her file and that is why the amended drawings were used.
118. The Building Permit was therefore outstanding for almost 8 years. Moreover, the failure to file the Building Permit was brought to the Practitioner's attention in the audit conducted in August 2013. The Building Permit in question, BP 200/4419/005 was shown on the Practitioner's Reserved Permits Report submitted for the 2013 audit which had been outstanding since a previous audit in 2012. The Practitioner was requested to confirm whether Building Permits had been issued for a number of jobs including the subject permit, by 13 December 2013⁶¹.
119. Had the Practitioner acted on this request it is reasonable to conclude that a Building Permit would have been filed in December 2013. This would have achieved one of the important functions of an audit under the Act, being to identify any instances of non-compliance in order to make recommendations to the Director including for remedial action to be taken by a practitioner.
120. Unfortunately, the evidence discloses that the Practitioner serially failed to respond to the auditor's request for a further 3 years despite repeated requests. That fact is

⁶¹ Exhibit 5, Affidavit of Richard Lloyd 30/10/2017 Annexure RL19

relevant to our assessment of the seriousness of the professional misconduct and further, whether it amounts to serious negligence or incompetence. The circumstances of the Practitioner's failure to respond to the Auditor's request are set out in paragraphs [13] – [55] of Mr Lloyd's affidavit⁶².

121. We observe that the pattern of excuses and failures bears a similarity to the Practitioner's dealings with the auditor and the investigator in 2016 which has been set out in detail in these reasons in relation to complaint 1. That undermines to some degree the Practitioner's claim that her responses in 2016 were due to the distraction of personal issues outside her practice. Rather, it appears that the Practitioner's approach to, and compliance with, the audit functions under the Act has been unsatisfactory from the outset.
122. One of the reasons given by the Practitioner for not completing her review of outstanding permits was that she had to obtain the files from archives. However, she agreed that in the period between 2012 and 2015 the Kammler file would not have been archived because it remained open pending completion of the building works and an Occupancy Permit being issued.
123. In the circumstances, including those findings set out below in relation to complaint 4, we are satisfied that the Practitioner's professional misconduct in failing to lodge the Building Permit was serious. We are satisfied that the Practitioner did stamp a set of drawings in 2009 when a Building Permit number was allocated to the Kammler file, but that she did not actually prepare a Building Permit for lodgement at any time prior to shortly before 25 November 2016. The Practitioner was aware that building works were being undertaken based on the permit. The Practitioner conducted inspections of

⁶² Exhibit 5

the works on 10 occasions⁶³. She would have had the Kammler file on hand from time to time and would have placed inspection records and certificates on to it from time to time. She received a multitude of requests for the Building Permit from BAS and every time, she ignored the request or put it off.

124. The misconduct is serious in two respects. First, it was a longstanding and persistent failure in circumstances where it was repeatedly brought to the Practitioner's attention. This is not a case where the fact that the Building Permit was missing went unnoticed by everyone including the Practitioner. Second, the Practitioner denied the failure to the Inquiry Board and blamed BAS for the Building Permit going missing. She did so knowing that she had put the Building Permit documentation together, and backdated it, in 2016 representing that it was a copy of what was originally filed in 2009.
125. There is some overlap between the circumstances which make this particular misconduct more serious and the circumstances which are the subject of complaint 4. This is something which the Inquiry Board will keep in mind when it considers what action to take under s 34T or s 34U as required by s 34P of the *Building Act*.
126. The Director also alleges that the failure to lodge the Building Permit amounts to "serious negligence or incompetence by the Practitioner in carrying out her work as a building certifier in respect of 5 Bul Bul Court Ludmilla"⁶⁴. We consider that the evidence discloses serious incompetence in the carrying out of particular work, namely the lodgement of the Building Permit for the Kammler file. Despite repeated requests (arising out of an audit no less) over a period of almost 8 years, the Practitioner did not attend to doing so. This meant that the building work undertaken was never properly certified beforehand. It is obvious from the state of the Practitioner's file that documentation went missing and was replaced as the project went on. The fact that the

⁶³ based on the records provided to BAS with the Occupancy Permit (Exhibit 3 Tab 9) and the 2 additional inspection certificates provided to the Inquiry Board by the Practitioner's solicitor on 16 February 2018

⁶⁴ Exhibit 23

Practitioner was unable to create a true copy of the Building Permit as it should have been issued in 2009 demonstrates that her file was incompetently maintained.

127. There is no suggestion that in respect of the building works themselves, that the content of the Building Permit is deficient in any way or that the Building Permit authorised work that was not safe or compliant with the relevant Building Codes. Accordingly, we do not find that the failure amounts to serious negligence in respect of the Building Permit for the Kammler file.
128. We have had regard to the fact that the Building Permit was compiled using plans that were not available at the time the Practitioner claimed to have prepared and submitted the original Building Permit. The Practitioner used those plans and submitted them with the Building Permit in 2016. The risk of doing so, if a Building Permit had already been lodged, would be to create inconsistent records of the building permit documentation. Such a practice would undermine the integrity of the building administration system because it would make Building Permits less reliable. In this case, we are satisfied that there never was an original set of Building Permit documentation filed in 2009 and so in fact, this risk could not have eventuated in this case.
129. We find that the failure to lodge the Building Permit was also professional misconduct generally, in the sense provided in s34S(g). That is, the Practitioner's persistent failure to attend to lodgement of the Building Permit documentation over many years, despite repeated requests from BAS is the type of conduct that would attract the opprobrium of her peers and which would tend to bring her profession into disrepute.

Occupancy Permit

130. The Practitioner has also admitted that she did not submit the Occupancy Permit within 7 days of its issue. Initially, the Practitioner denied the charge and adopted the same

approach to proof of filing as she did in respect of the Building Permit, relying on diary entries and telephone records to establish her physical presence at BAS office on 25 March 2015 (the Occupancy Permit was dated 24 March 2015).

131. The Inquiry Board has not been provided with any explanation for why the Practitioner maintained that she had filed the Occupancy Permit on 25 March 2015 and then changed her position⁶⁵. We can only infer that once evidence regarding the Building Permit appeared to establish that she could not have lodged the Building Permit on 9 February 2009, that she considered that the similar evidence relied on to disprove a failure to lodge the Occupancy Permit for *Briginshaw* purposes would be insufficient and that she accepted that could not prove lodgement of the Occupancy Permit within 7 days of 24 March 2015.
132. In deciding the seriousness of the professional misconduct it is relevant to consider the circumstances of the failure to lodge the Occupancy Permit. In this case, the Occupancy Permit was dated 24 March 2015 but was not lodged until 9 December 2016. The delay in lodgement is therefore 1 year and 8 months.
133. In addition, throughout that period Mr Kammler made repeated attempts to get the Practitioner to lodge the Occupancy Permit and provide him with a copy⁶⁶. He complained to Mr Lloyd in June 2016, who personally intervened to try and get the Practitioner to comply⁶⁷, but even that did not result in the Occupancy Permit being produced.
134. The evidence supports an inference that the Occupancy Permit was in fact not issued on 24 March 2015 at all. In particular, in January 2016 the Practitioner noted in a text to Mr Kammler "I need to copy/sort some final paperwork to send to you, so will defiantly

⁶⁵ The Practitioner submitted a statement of agreed facts and admissions to the Inquiry Board on about 6 February 2018 but this was withdrawn by the Practitioner at the resumption of the hearing. The Inquiry Board has not had regard to the contents of that document.

⁶⁶ Exhibit 2, Document 35

⁶⁷ Exhibit 5, Affidavit of Richard Lloyd 30/10/2017 at [58] – [61]

(sic) sort this week”⁶⁸. In addition, the Practitioner admitted that the Occupancy Permit documentation was put together when she was “under pressure”, but there was no pressure on the Practitioner until after the Complaint was made on 6 October 2016. Ultimately, it is not necessary for the Inquiry Board to resolve this issue in light of the admission made by the Practitioner in the Agreed Facts.

135. We are satisfied that the Practitioner’s failure to lodge the Occupancy Permit was a serious instance of professional misconduct by reason of length of time that the Occupancy Permit was outstanding; the repeated attempts by the Director and Mr Kammler to obtain the Occupancy Permit, and by reasons of the distress and frustration that this caused to Mr Kammler⁶⁹.
136. The Director also alleges that the Practitioner’s failure constitutes serious negligence or incompetence. Our Inquiry considered whether the documents comprising the Occupancy Permit were deficient in a number of respects. First, there were no inspection certificates for the roof framing. Second, there was no Structural Construction s. 40 certificate. The Practitioner was asked about the lack of a s. 40 certificate. She said⁷⁰:

Well, for a construction of the kind that’s set out in the drawings, which include engineering drawings, a s 40 certificate was required, wasn’t it?---Not always on jobs. Normally s 40 construction certificates are generally required if the engineers involved in doing inspections and the certifier wants to rely upon the engineer for those inspections. But if the certifier is accepting and doing inspections, then the certifier doesn’t have to accept a s 40. The legislation talks about that they may accept a s 40.

On this particular project, there were drawings that were certified by the engineer, weren’t there?---Yes, there were, yep.

And there were inspections undertaken by the engineer, weren’t there?---Yes, I think I was relying upon all the inspections that I did. The engineer would have been out to view some things, but – I think. But I don’t 100 – I don’t totally recall.

...

All right, so your position then is that a s 40 certificate was not required for this project, is that right?---Well, from what I’ve – what I can see here, I mean, I haven’t looked at my

⁶⁸ Exhibit 2, document 35

⁶⁹ Exhibit 8, Affidavit of Jurgen Kammler 30/10/2017 at [10]; [14]; [21]

⁷⁰ T 15-16, 5/2/2018

file, but from what I can see here, I would have lodged – I would have lodged the paperwork that was relevant and if I - - -

Well there is no s 40 certificate, is there?---Okay, well – well, no, there isn't. I haven't lodged one.

Okay - - -?---Which means I obviously considered I didn't – I didn't need one.

All right?---As I said, a certifier doesn't have to – doesn't have to rely upon engineer – s 40.

So is it your position now that a s 40 certificate was not required for this project?---Well, that's what it appears from the information I've got in front of me.

137. The Inquiry Board requested the Director to address this evidence in closing submissions⁷¹. In essence, it was submitted that a certifying Practitioner may rely on a certificate issued by another building practitioner, or may issue a certificate of their own if satisfied, from their own inspections, that the building work is compliant. We accept the Director's submissions as a correct interpretation of the obligations of a Certifier under the *Building Act*. We reject the Practitioner's evidence that this project did not need a Structural Construction s. 40 certificate.
138. Two early inspections of the building works at 5 Bul Bul Court were undertaken by an engineer, Bede Rodeghiero of Wallbridge and Gilbert in February 2009⁷². Those inspections were not certified as part of the Occupancy Permit documents. On 26 February 2009, the date Mr Rodeghiero submitted an Inspection record to the Practitioner, the Practitioner emailed Mr Rodeghiero telling him he needed to issue a "section 40"⁷³. A Structural Construction s.40 certificate should have been obtained from Mr Rodeghiero when the Practitioner completed the Occupancy Permit.
139. When the Practitioner filed her closing written submissions, she also supplied two additional inspection certificates which she said she had located on her file subsequent to the hearing.

⁷¹ Paragraphs 83 – 88 of the written submissions filed 12 February 2018.

⁷² Exhibit 3, Tab 4(b) Folio 121

⁷³ Exhibit 3, Tab 4(a) folio 67

140. In the circumstances, we are satisfied that when the Practitioner prepared the Occupancy Permit, she failed to include all of the relevant inspection certificates. She failed to include the two inspection certificates for the roof framing and wall framing inspections for interior alterations, and she failed to include the Structural Construction s. 40 certificate for inspections by the engineer.
141. In addition, the property owner supplied “as-built” drawings to the Practitioner which had been modified from the original plans prepared by Draft Link. We are satisfied that the Practitioner should have included the as-built drawings with the Occupancy Permit documentation.
142. By failing to include those documents, the Practitioner filed a non-compliant Occupancy Permit. We consider that the Practitioner prepared the Occupancy Permit negligently and incompetently. In light of the importance of certification documentation to the integrity of building records, we consider that the failure to include those certificates and plans was serious negligence and incompetence.

Charge 4

143. The fourth charge relates to the Building Permit documents submitted by the Practitioner for the Kammler file 200/4419/005 to BAS on 25 November 2016.
144. The documents submitted were stamped and dated 4 February 2009 and signed by the Practitioner. It was discovered during the course of the Inquiry that some of the drawings submitted were not created until 2011, and therefore could not possibly have been submitted to BAS in 2009.
145. The Practitioner subsequently admitted that she had prepared the bundle from documents on her file shortly before 25 November 2016 in response to the Notice to

Produce issued by the Director as part of the Kammler complaint⁷⁴. The Practitioner's Agreed Statement of Facts⁷⁵ set out a number of admissions including that she stamped, dated and signed documents knowing that she was not in fact doing so on 2 February 2009 and thereby produced documents that were false or misleading.

146. The Practitioner did not offer any explanation of why she had done so in her Agreed Statement of Facts. On questioning, the Practitioner said that the lack of a stamp on the documents was an administrative error. She thought the plans hadn't been signed off properly and so she was just tidying up the paperwork⁷⁶.
147. We do not accept that explanation by the Practitioner. The Practitioner maintained until late in this Inquiry that she had submitted the Building Permit to BAS on 5 February 2009 and that the documents which she submitted to BAS on 25 November 2016 were a copy of that permit. In fact what occurred, is that at some point shortly prior to 25 November 2016, the Practitioner went through her file, put together the Building Permit documentation and at that point, stamped, signed and back-dated the plans that she then had and submitted them. She did not tell the Director she had identified an administrative error in some plans. She did not produce her file, or any other documents to show that she originally had the pre-revision plans on her file which had been stamped. She did not tell the Director that what she was submitting was a replacement copy rather than another copy of the original.
148. We are satisfied that the Practitioner did not ever submit the Building Permit in 2009. Consistent with that fact, is that the departmental records from 2012 onwards showed the particular Building Permit as having Reserved Permit status only⁷⁷. Also consistent

⁷⁴ T 10 – 12 5/2/2018

⁷⁵ Exhibit 25

⁷⁶ T7, T12-13 5/2/2018

⁷⁷ Reserved Permit status applies to Building Permits that have been allocated at the commencement of an engagement. The engagement is given a permit number which remains the same throughout the project. However until the Building Permit is ready to issue, the Permit is reserved. If the project does not proceed, that is recorded on the Building Permits register and it lapses. If the project proceeds, all work on the project is done under the Permit and eventually, an Occupancy Permit for the work is issued and the file is complete.

with that fact is that despite this file being one of the files the subject of an audit and request by the Director to update the permit status, the practitioner never did so, despite repeated requests over a period of 3 years. This strongly suggests that there was no Building Permit on the file.

149. We are satisfied that what the Practitioner did in about November 2016 was to consciously and deliberately submit the Building Permit as if it had been on her file, as a copy of the permit filed in February 2009. She did so knowing that to be false. Moreover, the Practitioner swore an affidavit that although she did not recollect delivering the Building Permit to BAS:

“there is nothing in my file that is unusual or out of place and nothing in my file has anything out of the ordinary to suggest that I changed my standard operating procedures in any way.”⁷⁸

150. The affidavit evidence relied upon by the Practitioner was supplemented with sworn oral evidence in which the Practitioner outlined her standard procedure when preparing documents for lodgement with BAS. Specifically, she gave the following evidence in relation to the Kammler file:

“Did you do the same – follow the same procedure with Mr Kammler’s documents that were going to the Building Board?---Well my best knowledge, I mean that’s the procedure I follow with every job.

Was there anything to indicate that you didn’t follow that procedure?---I’ve got nothing to indicate that I didn’t. I mean we are talking 2009. But I’ve got nothing to tell me that I missed anything otherwise, so”⁷⁹ (emphasis added).

151. In fact, on the Kammler file the Practitioner had one year earlier reconstructed a Building Permit from her file, including stamping, signing and back dating some of the drawings, in the face of a complaint, a Notice to Produce, and an audit. The Practitioner must have known at the time she gave evidence what she had done and so the statement that there was nothing to indicate that she didn’t follow her usual

⁷⁸ Exhibit 10, Practitioner’s affidavit 12/11/2017 at [41]

⁷⁹ T 35 6/12/2017

procedure cannot have been true. The statement that she had “nothing to tell me that I missed anything otherwise” also cannot have been true.

152. The Practitioner was caught out by the fact she used documents that post-dated the original permit date. She only made admissions as to what she did when faced with overwhelming evidence of the truth.
153. We are satisfied that the documents submitted by the Practitioner were false and misleading. We are satisfied that the Practitioner acted intentionally and dishonestly in submitting those documents. Accordingly, we find that the practitioner is guilty of professional misconduct pursuant to s. 34S(f).
154. We consider that the misconduct made out for charge 4 is particularly serious. The building certification system relies on permits and certificates prepared by Building Practitioners. Each certificate of inspection is a declaration that building work complies with the *Building Act* or the *Building Code of Australia*. The Director of Building Control relies on such certification as reassurance that building work has been undertaken properly and competently, and is safe. Property owners rely on such certification when making decisions to purchase properties. It is vital to the integrity of the building certification system that certifying practitioners act honestly in relation to certification of building work. If dishonesty is allowed to creep into that system, the whole system will fail.
155. The dishonesty that occurred here has to be seen in its broader context. First, it occurred in the face of a complaint from a property owner to the Director. The false documents were prepared in response to a request from the Director for the Practitioner to produce her file. They were submitted as an attempt to cover up a serious and long standing omission in the Practitioner’s carriage and management of the building records for that project. Despite being specifically warned that the Notice to

Produce documents was not directed to tidying the matter up but producing the file⁸⁰, the Practitioner still did not produce the file and instead, prepared the false documentation.

156. In addition, the particular documents were the subject of a previous audit and numerous follow up requests from the Director. They were to be the subject of the audit which the Practitioner prevented from going ahead. The Practitioner created false documents in respect of a file which she knew was to be the subject of an audit and in doing so, undermined the audit functions under the *Building Act* as well.
157. The Practitioner's conduct reflects a serious error of judgment. The proper response from the Practitioner would have been to admit to the Director that she had been dilatory in preparing Building Permit documentation for the project, and to set about making amends. Instead she embarked on a course of deceitful conduct in relation to the permit which was then compounded by her defence and denials in respect of the charges which this Inquiry had to determine.
158. In the circumstances, the Inquiry Board considers that the professional misconduct which we have found to have occurred is in a most serious category.
159. The Inquiry Board must now consider what action to take under s 34T and 34U of the *Building Act*. We invite the parties to provide submissions in respect of those matters. In that regard, we draw the attention of the parties to the Reasons for Decision of the Inquiry Board in *Director of Building Control v Izod (No 2)*⁸¹. In that matter, the Inquiry Board considered that the misconduct in question very nearly resulted in the suspension of the practitioner's registration. While each matter must be considered on its merits and other matters can only provide limited assistance on the question of an

⁸⁰ Exhibit 2, document 50.

⁸¹ BPB 21 May 2014

appropriate action, it appears to us that this matter displays features that make it objectively more serious than *Izod*. In particular:

- (a) the audit has still not taken place, in circumstances where we have found that the Practitioner deferred the audit intentionally;
- (b) the audit related to matters which had been outstanding for over 3 years when the audit was initiated, and the outstanding matters were themselves recommendations from an audit;
- (c) the remaining documents requested in the Notice to Produce in respect of Mr Kammler's complaint have still not been produced;
- (d) the Building Permit for Mr Kammler was outstanding for almost 8 years;
- (e) during the period of almost 8 years that the Building Permit was outstanding there were multiple requests from the department for the Building Permit to be lodged (or re-lodged);
- (f) the Occupancy Permit was outstanding for almost two years;
- (g) during the period the Occupancy Permit was outstanding, the Practitioner's client made repeated requests for the Occupancy Permit to be provided to him;
- (h) the Practitioner's client complained to the department and despite intervention the Practitioner still did not prepare the Occupancy Permit;
- (i) the Practitioner's conduct caused distress and frustration to her client for almost two years;

(j) the Practitioner created a false and misleading document which she lodged with BAS to form part of the record of building works at 5 Bul Bul Court Ludmilla;

(k) the Practitioner gave false evidence on affidavit and at hearing in respect of the preparation of the Building Permit and its lodgement with BAS.

160. In the circumstances, the Inquiry Board must turn its mind to the possibility of action under s 34T(e) or (f), namely suspension or cancellation of the Practitioner's registration. We request that the submissions of the parties address this possibility.

161. We request that the parties provide us with a draft timetable for submissions on actions under s 34T and s 34U within 7 days of publication of this decision.



Duncan McConnell
Presiding Member
Building Practitioners Inquiry Board

20 April 2018