

NORTHERN TERRITORY BUILDING

PRACTITIONERS BOARD

BETWEEN:

DIRECTOR OF BUILDING CONTROL

AND:

BUILDING ONE PTY LTD and IAN IZOD

Building Practitioners

REASONS FOR DECISION

1. Building One Pty Ltd (“the corporation”) has at all times relevant to this inquiry held corporate registration as a building certifier under the *Building Act* (NT) (“the Act”). Mr Izod is registered as a practitioner in the same category and the sole director of Building One Pty Ltd. He is the “registered individual” for the purpose of section 25 of the Act and, as the Director of Building Control (“the Director”) put it, “the only decision-maker related to building certification matters for the corporation and statutory responsibilities under [*the Act*]”. Mr Izod did not suggest otherwise. In using the term “the practitioners” in these reasons, we intend to refer to both the corporation and Mr Izod unless the context clearly indicates otherwise.
2. Section 34G of the Act dictates that this Board must hold an inquiry into a matter that is referred to it by the Director under certain sections of the Act including sections 34F(2)(b) and 34F(3).

The referral

3. Section 34A of the Act provides for the Director to audit a building practitioner’s work or conduct or both. Section 34F deals with action on completion of the audit. It is worthwhile setting out this section in full:

**“Action on completion of audit**

- (1) On completion of the audit, the Director must decide:
  - (a) whether or not there is evidence that a building practitioner the subject of the audit has committed an offence against this Act or the Regulations; and
  - (b) whether or not there is evidence that a building practitioner the subject of the audit is guilty of professional misconduct.

(2) On making a decision under subsection (1), the Director may decide to take one or more of the following actions in relation to the building practitioner:

(a) if there is the evidence referred to in subsection (1)(a) – prosecute the building practitioner for the alleged offence;

(b) if there is the evidence referred to in subsection (1)(b) – refer the matter to the Practitioners Board for inquiry;

(c) develop with the building practitioner a remedial program for the building practitioner.

(3) If, on completion of an audit of a building practitioner:

(a) the Director makes the decision referred to in subsection (2)(c);  
and

(b) the building practitioner does not participate in the development or implementation of the remedial program to the Director's reasonable satisfaction,

the Director may reconsider a decision made on completion of the audit not to prosecute the practitioner for an alleged offence or not to refer a matter relating to the practitioner for inquiry or both and may decide to prosecute or to refer the matter or both.

(4) The Director must, as soon as practicable after making a decision under this section, give the building practitioner written notice of the decision.

(5) The notice must set out the reasons for the decision.”

4. The definition of “professional misconduct” can be found in section 21A of the Act. It means conduct referred to in section 34S.
5. Section 34S describes professional misconduct in terms of a decision by the Inquiry Board:

**“Professional misconduct**

A building practitioner is guilty of professional misconduct if, on completion of an inquiry, the Inquiry Board is satisfied on the balance of probabilities that the practitioner:

(a) has committed an offence against this Act or the Regulations; or

(b) is guilty of a pattern of negligent or incompetent conduct or serious negligence or incompetence in carrying out particular work; or

(c) has authorised or permitted an employee, or another person engaged to do work on the practitioner's behalf, to work as a

building practitioner in a category of building practitioner in which the employee or other person is not registered; or

(d) obtained his or her registration by fraud or misrepresentation; or

(e) has had his or her authority to practise as a building practitioner in a place outside the Territory cancelled or suspended, otherwise than for failure to renew the authority; or

(f) is guilty of conduct referred to section 33(1)(a) or (b) or 34E (1)(a) or (b); or

(g) is otherwise guilty of professional misconduct.”

6. On 10 September 2013 after what was described as a re-audit, the Director referred various matters to the Building Practitioners Board for inquiry under sections 34F(2)(b) and 34F(3).
7. It will eventually be necessary to examine the history of the matters in detail but for the purpose of explaining how the inquiry came about it is sufficient to note that we were informed that on 2 March 2012 the Director conducted an audit and a remedial program was put in place. A further audit was executed on 15 February 2013. As a result of the information discovered during the course of the later audit, the Director formed the view:
  - (a) that the practitioners had not satisfactorily implemented the remedial program; and
  - (b) that there was additional evidence that the practitioners were guilty of professional misconduct.
8. The Director’s letter of 10 September 2013 listed 13 alleged breaches of the Act and the *Building Regulations* (“the Regulations”) which the Director had decided constituted professional misconduct. Some of these alleged breaches contained a lot of detail which is unnecessary to repeat in full. In any event, the Director elected to withdraw some of the allegations (namely allegations 2, 3(b), 7 and 13) during the course of the inquiry. We will only mention the issues that remained alive at the end of the inquiry, endeavouring to reduce the detail to the essentials in order that these reasons can be more easily understood. The item numbers below correspond with those used in the Director’s referral. After introducing the allegations, we will move on to consider the evidence and the parties’ submissions.
9. The Director alleged that “Building One Pty Ltd and Ian Izod as its sole registered director is guilty of professional misconduct pursuant to section 34S(a) of [*the Act*] on the grounds that it has breached the Act and [*the Regulations*] as follows”:

Allegation No 1 – “Section 42(1)(a) in that the permit register was not in the approved form and section 42(1)(b) in that every permit granted was not entered into the permit register.”

Allegation No 3 – “Section 59(1)(a) and Building Regulation 4(1) in that a building permit was issued for building works that did not comply with the Building Code of Australia as follows:

- (a) permit 590/9810/2 non-compliant with part 3.7.1.7 and diagram 3.7.1.9 in that the eaves of the building were less than 450 mm from the property boundary”.

Allegation No 4 – “Section 59(1)(b) in that a building permit was issued without all relevant planning, or other prescribed consents, reports or approvals as follows:

- (a) NTFRS report was not obtained for 695/4096/U2/1;
- (b) Development consent was not obtained for a second dwelling for 695/4212/3;
- (c) Development consent was not obtained for a reduced front setback for 200/3303/2;
- (d) Palmerston City Council consent not obtained 590/10172/1, 590/10481/1 and 590/10775/1.”

Allegation No 5 – “Section 59(1A) in that an evidence of contract was not provided prior to the issue of [5 building permits]”.

Allegation No 6 – “Section 59(1C) in that building permits were issued relying on section 40 certificates issued by Kilfoyle Plumbing Pty Ltd [4 building permits], Redline Constructions & Plumbing Pty Ltd [2 building permits], NBR Australia P/L [1 building permit], Acame Consulting Civil, Structural & Mechanical Engineers Pty Ltd [5 building permits], Virginia Plumbing Services Pty Ltd [2 building permits], Greg Harwood Plumbing & Gas Fitting Pty Ltd [1 building permit] and Showers Engineering Pty Ltd [1 building permit] when the companies were not registered practitioners.”

Allegation No 8 – “Section 60B in that the building permit was amended without receipt of an application in writing of the owner for 590/10172/1 and 055/6104/3.”

Allegation No 9 – “Section 63(5) in that an inspection certificate has not been issued following inspections for [27 building permits involving 64 inspections altogether]”.

Allegation No 10 – “Section 63(7) in that the inspection certificates and the final inspection certificates were not in the approved form for all of the inspection certificates viewed during the audits”.

Allegation No 11 – “Section 69(1)(c) in that electrical compliance certificate has not been obtained for permit 590/7923/2 prior to issue of the occupancy permit”.

Allegation No 12 – “Section 69A(1)(d) in that the occupancy permit was issued for 695/4096/U2/1 without receipt of the NTFRS final report”.

## The inquiry

10. The inquiry proceeded on 3 and 4 December 2013 and on 5 February 2014. Mr O'Connor appeared as the Director's legal representative on the third day; the practitioners were represented by their lawyer, Mr Piper, throughout the inquiry.
11. The Inquiry Board was constituted in accordance with section 34J of the Act. The Inquiry Board was mindful of the following requirements of section 34K relating to the conduct of the inquiry:
  - "The Inquiry Board is not bound by the rules of evidence but is bound by the rules of natural justice"- sub-section (2);
  - "The inquiry must be conducted with as little formality and technicality, and with as much expedition, as this Act and the Regulations and a proper consideration of the matter being inquired into permits" – sub-section (3).
12. Oral evidence was given by Ms Carol Popple, Manager of Audits & Investigation with Building Advisory Services, and by Mr Izod. The opponent did not require any of this evidence to be given on oath. A large amount of documentary evidence was tendered by both parties and received without objection.
13. Section 34P provides:

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

(a) decide, in accordance with section 34S, whether or not a building practitioner the subject of the inquiry is guilty of professional misconduct; and

(b) if the practitioner is guilty – decide the action to be taken under section 34T and whether or not to take additional action under section 34U.”

## Meaning of “offence”

14. Before considering each of the allegations it is necessary to examine a submission by Mr Piper that certain of the Director's allegations are incapable of supporting a finding of professional misconduct because breaches of the legislative provisions referred to cannot properly be viewed as “an offence” for the purpose of section 34S(a).
15. The submission was developed in this fashion:
  - (a) Regulation 42 is under the heading “**Offences**” and states:

“Subject to a contrary intention, a person who contravenes any of the provisions of these Regulations commits an offence.”

There is no equivalent provision in the Act. By contrast, section 166 also uses the heading “**Offences**” but only describes different types of conduct relating to action taken by an authorised officer.
  - (b) Subsection 38C(1) of the *Interpretation Act* (NT) provides:

### **“Penalties at foot of sections and subsections**

(1) The penalty, pecuniary or otherwise, set out:

- (a) at the foot of a section; or
- (b) at the foot of a subsection,

of an Act indicates that a contravention of the section or of the subsection respectively, is an offence against the Act punishable on a finding of guilt by a penalty not exceeding the penalty so set out.

(1AA) Subsection (1) applies regardless of whether the penalty is expressed as a maximum penalty.

(1A) For subsection (1), a penalty is taken to be at the foot of a section or subsection even if an example or note appears after the penalty.

(2) A penalty set out as provided in subsection (1) which is expressed to apply only to a part of the section or subsection applies according to the tenor of the provision.

(3) In this section "section" includes a rule, regulation or by-law and **subsection** has a corresponding meaning.”

- (c) In the absence of a specific provision in the Act, the above provision defines “offence” for the purpose of the Act.
- (d) In keeping with that definition, it was conceded that sections 42(1)(a), 59(1)(a), 59(1)(b), 69A(1)(c) and 69A(1)(d) all create offences under the Act.
- (e) However, sections 59(1A), 59(1C), 60B, 63(5), and 63(7) do not create offences under the Act because no penalty is set out at the foot of those sections/subsections. In the case of sections 59(1A) and 59(1C), although section 59 sets out penalties, they are at the foot of subsections (1) and (2), not (1A) and (1C).
- (f) The offences in subparagraph (e) above are not crimes but “simple offences” by virtue of section 3 of the *Criminal Code of the Northern Territory of Australia*:

### **“Division of offences**

(1) Offences are of 3 kinds, namely, crimes, simple offences and regulatory offences.

.....

(2) A person charged with a crime cannot, unless otherwise stated, be prosecuted or found guilty except upon indictment.

(3) Unless otherwise stated, a person guilty of a simple offence or a regulatory offence may be found guilty summarily.

(4) An offence not otherwise designated is a simple offence.”

- (g) Therefore, it was argued, there can be no finding of professional misconduct in relation to allegations 5, 6, 8, 9 and 10.

16. Mr O'Connor responded thus:

- (a) Two possible interpretations of "offence" are open to the Inquiry Board:
  - (i) The term means a criminal offence that can be prosecuted before a court; or
  - (ii) The term means a breach of an obligation contained in the Act or the Regulations.
- (b) Each of those interpretations is consistent with one of these definitions of "offence" in the Macquarie Dictionary (3rd edn) – "1. a transgression, a wrong....2. any crime".
- (c) An interpretation that promotes the purpose or object underlying the Act should be preferred to an interpretation that does not achieve that objective: section 62A *Interpretation Act* (NT) and *Mills v Meeking* (1990) 169 CLR 214, 235.
- (d) The objects of the Act are set out in section 3. Relevantly, they include:
  - "(a) to establish, maintain and improve building standards; and
  - .....
  - (hb) to provide for the investigation, audit and disciplining of building practitioners".
- (e) Adopting the first alternative interpretation in subparagraph (a)(i) above would mean that breaches of a significant number of obligations created by the Act could neither be prosecuted before a court nor referred to the Building Practitioners Board for a disciplinary inquiry. Building practitioners could ignore their obligations without attracting any sanction.
- (f) The second alternative interpretation would promote the object or purpose of the Act by empowering the Director and the Building Practitioners Board to examine all possible breaches of the Act or Regulations including those placing obligations upon building practitioners without any liability for a criminal offence.
- (g) Mr O'Connor cited *Brown v Allweather Mechanical Grouting Co Ltd* (1953) 1 All ER 474 (at 476) in support of the second interpretation that "offence" does not have to be a criminal offence:

"I do not think that the mere fact that the word "offence" is used there shows that it is to be regarded as a criminal offence. A failure to do something prescribed by a statute may be described as an offence although Parliament imposes in respect of it, not a criminal sanction, but a mere pecuniary sanction which is recoverable as a civil debt."

- (h) The second interpretation is to be preferred given the scope, purpose and objects of the Act and the consequences that may flow in relation to the regulation of building work and building practitioners in the Northern Territory if the Inquiry Board were to decide in favour of a more restricted interpretation.

17. Having carefully considered the submissions this is our decision:

- (a) We are generally persuaded by Mr O'Connor's submissions in concluding that the word "offence" as used in section 43S(a) of the Act means a breach of an obligation contained in the Act or the Regulations, regardless of whether or not the breach amounts to a criminal offence.
- (b) Mr Piper's submission that the breaches in paragraph 15(e) above are "simple offences" seemed to acknowledge that they are criminal offences. It is unnecessary for us to deal with that submission because it is beside the point. However it may not be correct – by virtue of its inclusion in the *Criminal Code* it is undoubtedly true that a "simple offence" is of a criminal nature: see also the definition of "simple offence" in section 3 *Justices Act* (NT). But a person cannot be found guilty and punished summarily for any of the breaches in paragraph 15(e) and therefore we doubt that they are "simple offences".
- (c) Section 38C of the *Interpretation Act* (NT) – see paragraph 15(b) above – does not define "offence" but rather indicates how certain offences are punishable. It does not follow that there are no other statutory offences.
- (d) A breach of an Act or Regulation does not have to be any kind of criminal offence to qualify as an "offence" for the purpose of section 43S(a). *Brown* – see paragraph 16(g) above – at least shows that a failure to do something prescribed by a statute may be described as an offence although a criminal sanction is not imposed. We do not think that there is a significant difference between that case where the statute imposed a pecuniary sanction recoverable as a civil debt and the Act where the sanction is a finding of professional misconduct (and, possibly, a civil penalty) for any of the breaches in paragraph 15(e) above.
- (e) Although it does not necessarily follow, we believe that "offence" has the same meaning in subsection 34F(1)(a). The result of this interpretation is that, on completion of an audit, if the Director decides that there is evidence that a building practitioner has committed an offence against the Act or the Regulations:
- Where the Act or Regulations set out a penalty for the offence, the Director may decide to prosecute the building practitioner or refer the matter to the Building Practitioners Board for inquiry (because the offence may constitute professional misconduct) or do both.
  - Where a penalty is not set out, it is open to the Director to refer the matter to the Building Practitioners Board for inquiry (again because the offence may constitute professional misconduct).
- (f) Whether or not the Director decides that there is evidence that a building practitioner has committed an offence against the Act or the Regulations, the Director must also decide whether there is evidence that the building



practitioner is guilty of professional misconduct. It should be noted that section 34S describes other forms of professional misconduct as well as an offence against the Act or Regulations.

- (g) In our opinion the meaning of “offence” that we have adopted gives the Director and an Inquiry Board adequate scope to serve the purposes of the Act by making decisions that take full account of the nature and gravity of the offence and any ameliorating or aggravating circumstances thereby ensuring an appropriate result in the interests of the building practitioner and the public.
- (h) The sections mentioned in paragraph 15(e) above impose requirements clearly designed to ensure that building work is compliant with statutory requirements and proper building standards. Although the legislature evidently considered breaches of certain sections of the Act deserving of a monetary penalty it does not follow that other requirements can be taken lightly. It would be detrimental to the maintenance of appropriate building standards and the protection of consumers of building services if breaches of the Act could be committed without any consequences for building practitioners.
- (i) Our view is consistent with subsection 151(1) of the Act which treats a contravention of the Act or Regulations as an offence:

“(1) Where a corporation contravenes, whether by act or omission, a provision of this Act or the Regulations, each person being a director of the corporation or a person concerned in the management of the corporation is taken to have contravened the same provision unless the person proves that he or she had no knowledge of the commission of the offence and could not, by the exercise of due diligence, have prevented the commission of the offence.”

There is no question that all of the allegations referred to in paragraph 9 above concerned a contravention of the Act or Regulations.

- (j) We therefore propose to treat any breaches of the provisions referred to in paragraph 15(e) above as offences as well as any breaches of the provisions referred to in paragraph 15(d).

### **The allegations**

18. Before considering the specific allegations it is necessary to briefly mention the history of the action taken by the Director with respect to the practitioners and related events.
19. An audit of the practitioners’ work and conduct was completed by Ms Popple on 2 March 2012. Earlier audits, which we do not need to refer to specifically, had raised issues which had not been resolved to the Director’s satisfaction. On 12 April 2012 Ms Popple issued a draft audit report to the practitioners. During a meeting with Ms Popple on 19 April 2012 Mr Izod committed to reviewing his processes and providing documentation as detailed in the draft report. On 30 July 2012 Ms Popple provided the practitioners with a copy of the final audit report and a remedial program developed in accordance with section 34F(2)(c) of the Act. In general terms, the remedial program required the practitioners to review their processes and provide outstanding information relating to various permits and buildings.

20. At a meeting on 21 September 2012 with the Director and Ms Pople, at Mr Izod's request the practitioners were given an extension of time to comply with the remedial program. The practitioners subsequently failed to comply with the extended program. Several written reminders were issued to them. To determine the progress made by the practitioners in their response to the program a further audit was undertaken on 13 February 2013. A draft audit report was issued on 21 March 2013. A meeting between the Director and Mr Izod occurred on 22 April 2013 and was followed by correspondence relating to many of the issues mentioned in the draft report. The Director's final report issued on 10 September 2013. We were not given a clear explanation of which of the allegations in that report were new issues or unresolved issues left over from the audit report of 30 July 2012. It was readily apparent that many of the allegations were in the latter category.
21. We turn now to the allegations in the report of 10 September 2013 that remain to be considered. They have already been concisely stated in these reasons and do not require repetition or embellishment. We will confine discussion to any significant facts that emerged during the inquiry.

#### Allegation No 1

The permit register was not in the approved form in that it did not contain the column "date of final inspection". The practitioners admitted the allegation and submitted that once the new form of permit register was brought to their attention they commenced using it as from 4 April 2013. They submitted that no consequences flowed from using the previous format. These were described as technical breaches.

#### Allegation No 3(a)

The practitioners admitted the allegation and acknowledged that they should have checked the plan more closely and consulted with the builder. They submitted that there was no inconvenience to anyone; the builder took responsibility and trimmed the eaves. The Director regarded it as a serious issue that concerned the need for an adequate distance between buildings to reduce the risk of fire spreading from one building to another. The practitioners disagreed that such a risk was of any concern – the house was all steel construction.

#### Allegation No 4

(a) The practitioners admitted the allegation and submitted that because a previous NTFRS approval was in place, Mr Izod formed the view that changes to the building would not affect fire safety. The practitioners acknowledged that another report should have been obtained. They classified it as a technical breach but the Director disagreed. The Director submitted that referral to the NTFRS has important implications since it gives the NTFRS the ability to comment on fire safety design.

(b) The practitioners admitted that development consent should have been – but was not – obtained for the second dwelling. They submitted that the development

consent is in the process of being obtained. The Director submitted that this was not just a technical breach. Erecting a second dwelling without any development consent was not consistent with the planning scheme, tended to put stress on essential services and cause detriment to adjoining neighbours. The practitioners submitted that there had been no stretching of services – only one of the houses was occupied and was serviced by bore water.

(c) The practitioners admitted the allegation and submitted that they relied on an architect's representations that consent for a reduced setback was in existence. When they found that the consent had not been obtained, the practitioners obtained it. There was no risk of it not being obtained.

(d) The practitioners admitted the allegation and submitted that Palmerston City Council had given verbal consent to the location of 3 driveways but then changed its attitude. In the end the written approvals were granted without any need to change the location of any of the driveways.

#### Allegation No 5

The practitioners admitted the allegation, submitting that in each case they did not require evidence of contract before the building permit was issued because of a variety of circumstances, a constant element being that the owner was related in some way to the builder. [*Where it is the owner of the land subsection 48B(3)(b) of the Act exempts a prescribed building contractor from the requirement for a building contract.*]

#### Allegation No 6

This allegation was disputed. We will return to it.

#### Allegation No 8

The practitioners admitted this allegation, submitting that the amendments were minor, consisting in one case of the omission of a non-structural feature wall; and in the second case of a different wall product which was equal to or better than the product in the original plan. There was no complaint or detriment suffered.

#### Allegation No 9

This allegation was disputed. We will return to it.

#### Allegation No 10

The practitioners admitted this allegation, submitting that each inspection certificate was dated but acknowledging that, contrary to the approved form, only one date appeared (instead of 2 dates - the date of inspection and the date of signing).

#### Allegation No 11

The practitioners admitted this allegation, acknowledging that the occupancy permit was not accompanied by the electrical compliance certificate but provided evidence that the latter certificate was actually in existence when the occupancy permit issued. The practitioners accepted that this breach was “beyond technical” and had the potential for “real consequences”.

#### Allegation No 12

This allegation was admitted. It involves failure to obtain a NTFRS report before the occupancy permit was issued for the building referred to in allegation 4(a) and the same submission was repeated.

### Disputed allegations

#### Allegation No 6

22. Allegation no 6 concerns subsection 59(1C) of the Act:

“A building certifier must not grant a building permit relying on a certificate under section 40 unless he or she is satisfied that the certificate was issued by a person who is registered as a building practitioner.”

23. Some of the section 40 certificates that we considered were in the approved form; other certificates consisted of a stamped endorsement of building plans. The latter method is commonly used by plumbers. We noticed minor discrepancies between the Director’s allegations and the content of the documents. Section 40 certificates bearing the name “Acame Consulting Civil, Structural & Mechanical Engineers” in the panel “Company Name” did not include “Pty Ltd” in the name as the Director alleged. Likewise with “Showers Engineering” in the approved form and “Harwood Plumbing & Gasfitting” in a stamped endorsement.
24. The practitioners submitted that although each of the section 40 certificates used the name of a corporation not registered as a building practitioner, it was actually signed on behalf of the corporation (and therefore “issued”) by a person known to Mr Izod as a registered practitioner. Notwithstanding his insistence that the practitioners have complied with subsection 59(1C), Mr Izod did inform the Inquiry Board that he has tightened up his practice as a result of this experience. He also asserted that Building Advisory Services had a role to play in educating building practitioners if certificates were signed under unregistered names.
25. The Director submitted that because the name of a corporation appeared on the section 40 certificates in question, each of those certificates was “issued” by the corporation and it was incumbent on the practitioners to be satisfied that the corporation was a registered building practitioner. The registration status of a corporation can be easily checked by reference to the Building Practitioners Board website.
26. We agree with the Director’s submission. Although each of the section 40 certificates was signed by a registered practitioner, that person did not sign on their own behalf but on behalf of a corporation which was not a registered practitioner. The certificates were therefore issued by an unregistered practitioner.

27. The breaches of section 59(1C) are minor but cannot be disregarded. A certifier must be sure that each entity in a section 40 certificate is correctly named and a registered building practitioner. Where the name of a corporation is entered in the certificate it indicates that the certificate is being given on behalf of the corporation. We do have some sympathy for the practitioners and other users of the approved form because it might appear that there is a mandatory requirement to insert a company name. The use of the plural "We" in the certificate confirms that impression. To dispel any doubt it would be helpful if the certificate expressly informed users that the panel "Company Name" only needs to be used if the certificate is being issued on behalf of a corporation.

#### Allegation No 9

28. Allegation no 9 concerns subsection 63(5) of the Act:

"A building certifier or the Director must, after inspecting building work under this section and on being satisfied that the building work has, in all material respects, been carried out in accordance with the Regulations, issue an inspection certificate to the person who carried out the building work or who is in charge of carrying out the building work."

29. The practitioners submitted that Mr Izod has adopted the practice of making a contemporaneous note of each inspection on a running folder and producing the certificates when required by the owner. They submitted that this practice is a sufficient compliance with subsection 63(5) which does not require the certifier to issue the inspection certificate immediately. It is a sound practice because until the certificate is issued there is a permanent record of the inspection which can be referred to if necessary.
30. The Director submitted that subsection 63(5) should be read in the context of subsection 63(1) which refers to "inspection stages" and subsection 63(6) which refers to "an inspection certificate after the final inspection stage". It follows that the obligation in subsection 63(5) is to issue an inspection certificate for each inspection stage. If the building owner has to change certifiers, the new certifier can rely with greater assurance upon a certificate signed by the predecessor in relation to a previous inspection rather than upon a notation in a file.
31. We note that the subsection requires a certificate to be issued "after inspecting building work under this section and on being satisfied that the building work has, in all material respects, been carried out in accordance with the Regulations". The question raised in this case invites close attention to the meaning of the composite phrase "after inspecting....and on being satisfied". It is at least clear that the subsection allows time for the certifier to become satisfied about issues of compliance, if that state of satisfaction is not reached during the course of the inspection. But how much time does the subsection allow for the certifier to become satisfied about compliance and issue the certificate?
32. Other sections of the Act are illuminating. Section 62 refers to the certifier's role as an inspector:

**"Notification during building work**

(1) The person who is carrying out or is in charge of carrying out building work under a building permit must notify the building certifier who granted the permit or the Director when building work that is required in accordance with subsection (2) to be inspected is completed.

(2) The Regulations may prescribe inspection stages on the completion of which a person carrying out or in charge of the carrying out of the building work must notify the Director or the relevant building certifier.

(3) After completing building work to an inspection stage, the person referred to in subsection (1) must not carry out any building work under the building permit that is dependent on the inspection until:

(a) the building work completed to the inspection stage is inspected in accordance with section 63: and

(b) the building certifier or Director has advised the person that the building work may proceed.”

31. Regulation 15A prescribes the inspection stages:

**“Inspection stages for notification during building work**

(1) For section 62(2) of the Act, the inspection stages for residential building work are those stages named and described in the table below that are relevant to the work.

	<b>Inspection Stage</b>	<b>Description</b>
1.	pre-pour	before pouring the footings, ground floor slab or other in situ concrete building element
2.	frame	before covering the framework for floors, walls, roof or other building element
3.	block wall	before pouring any reinforced masonry or block walls
4.	fire separation	before covering walls, floors or ceilings, for the purpose of checking that fire resistance levels comply with the Building Code ( see note)
5.	wet area	before covering waterproofing in wet areas
6	Final	After completing the building work but before issuing an occupancy permit in relation to the work”

33. It should be noted that the first 5 inspection stages require an inspection before work is covered in moving on to the next stage. If the next stage proceeds without an inspection, it may become necessary for a certifier or the Director to exercise the powers in subsection 63(4) of “demolishing, opening, cutting into and testing the building work.” However, subsection 63(3) does not require an inspection certificate before work on the next stage is commenced. The requirement is for an inspection

and advice from the certifier or the Director that work may proceed. That said, the purposes served by an inspection will not be properly fulfilled unless the advice is backed up by an inspection certificate.

34. In our view subsection 63(5) requires an inspection certificate for each inspection stage and a final inspection certificate. This conclusion is borne out by subsection 69A(1)(b) which provides that:

“(1) A building certifier must not grant an occupancy permit unless the application for the permit is accompanied by:

..... (b) a copy of each inspection certificate issued following inspections conducted under section 63(1)”.

35. For present purposes we regard “on” as being synonymous with “upon”. It was decided in *Folkard v The Metropolitan Railway Company* (1873) LR 8 CP 470 at 471 that a requirement for leave to be given by the judge “upon the trial” meant within a reasonable time afterwards. It is an old decision but it has been applied many times by Australian courts. In the absence of a specific time limit, we believe that it is the intendment of the Act that each inspection certificate must be issued within a reasonable time after the certifier is satisfied about all relevant compliance issues. In the usual case, for the purpose of subsection 69A(1)(b), the inspection certificates should be ready when the time comes to make an application for an occupancy permit. However, the purposes of the Act would not always be served if a certifier waited until that application was made. There might be reasons associated with a substantial possibility of extraordinary delay in making the application or other circumstances which would create a pressing need for the certifier to issue the certificate without continuing to wait for the application for an occupancy permit. What is reasonable in the circumstances will depend on a commonsense evaluation of the particular case.
36. We were not informed whether and, if so, when any occupancy permits had issued for any of the various works referred to in allegation 9 nor, in the absence of an application for an occupancy permit, whether there were any particular circumstances which might have justified an expectation that the inspection certificates should have been issued. There is force in the Director’s submission that an inspection certificate should be issued promptly thereby ensuring that it can be produced in the event that the certifier is overtaken by some sort of incapacitating misfortune. Moreover, the audit reports express a more definite view of the Director that an inspection certificate should be issued within 7 days after an inspection. While these may be regarded as desirable objectives and good practice we do not consider that they are imposed as requirements of the Act.
37. In the circumstances, we are unable to be satisfied that the practitioners have committed offences as alleged. It is possible that the practitioners failed to issue inspection certificates in a timely fashion and in so doing fell short of the appropriate professional standards but the inquiry did not proceed along those lines and we hasten to emphasize that there is no finding or implication to that effect.

## Professional misconduct

38. We are conscious that in making a decision in accordance with section 34S of the Act an Inquiry Board must be “comfortably satisfied” that a building practitioner is guilty of professional misconduct bearing in mind the potential consequences for that person’s professional reputation: *Briginshaw v Briginshaw* (1938) 60 CLR 336.
39. The magnitude of possible breaches of the Act or Regulations can be variable but a certifier’s cause is not well served by describing breaches as “technical”. Certifiers have a crucial role to play in ensuring that building standards are upheld and all relevant legislation is complied with. Their role demands careful attention to matters of detail. It is not open to them to grant dispensation to themselves or other building practitioners on the grounds that a requirement is merely “technical”.
40. In our view all of the Director’s allegations except allegation 9 have been sustained. We are satisfied that the practitioners committed offences against the sections of the Act and the Regulations referred to in each allegation. We do not regard any of the offences as trivial; they all constitute professional misconduct as described in section 34S(a).
41. Whilst not trivial, the offences in allegations 1, 6, 8, and 10 are minor and should have been easily resolved by a prompt and co-operative response to the Director’s audit process. As the Director informed us on 3 December 2013 (T5.149):

“In short, in relation to the sequence of events, if the building practitioner had adequately addressed the recommendations of the audit reports and put in place a process to prevent any recurrence, then the Director of Building Control did not intend to refer this matter to the Building Practitioners Board.”

42. The offences in allegations 3(a), 4, 5, 11 and 12 are more serious in that they entailed a risk of substantial harm involving safety or consumer protection issues. Fortunately, no actual harm was demonstrated and there is no evidence of a complaint of any kind. Nevertheless, the protection built into the Act and Regulations is there for good reason and must be upheld by certifiers.
43. We find that the concerns expressed in the Director’s allegations 1, 4(a), 4(b), 5, 6, 9, 10 and 12 concerning particular matters or systematic failures were raised in the initial audit report of 12 April 2012. The remaining allegations appear to be new. It is deplorable that so many of the Director’s concerns were left unsatisfied for so long, especially where an explanation or corrective action may have resolved the matter. For example, the concerns in allegations 1 and 10 merely required changes in the practitioners’ forms; obviously simple changes yet the practitioners did not see fit to make them by the time of the next audit some 10 months later. The reasons why the practitioners took so long to address these matters has not been satisfactorily explained to the Inquiry Board.
44. The Inquiry Board must therefore decide the action to be taken under section 34T and whether or not to take additional action under section 34U: see paragraph 13 above.

## Penalty



45. The objects of disciplinary proceedings were well explained in paragraphs 16 to 21 of the decision of a differently constituted Inquiry Board in *Director of Building Control and ACT Builders (NT) Pty Ltd and Glynatsis* (4 April 2013) and we respectfully adopt those remarks.
46. Section 34T provides:

**“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:

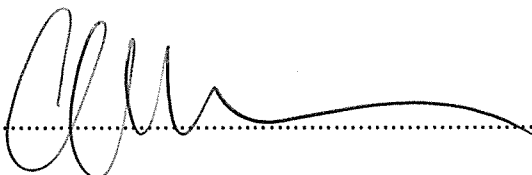
- (a) reprimand the practitioner;
- (b) require the practitioner to pay all or a specified part of the reasonable costs of the Director in the inquiry;
- (c) require the practitioner to give an undertaking to do, or not to do, a specified thing:
  - (i) at any time or during any period; or
  - (ii) at a specified time or during a specified period;
- (d) require the practitioner to pay to the Territory a civil penalty not exceeding 40 penalty units;
- (e) suspend the practitioner's registration for a specified period (not exceeding 3 years);
- (f) cancel the practitioner's registration.”

47. Section 34U provides that the Inquiry Board may direct the Director to audit a building practitioner's work or conduct or both.
48. The practitioners submitted that their response to the audit and their preparation for this inquiry have involved a substantial effort and in so doing the practitioners have become acutely aware of the importance of the matters raised by the Director. That may be true, but it is a pity that the practitioners did not make an earlier effort to comply with the concerns raised in the audits and the remedial program.
49. It was incredible that the audit process picked up so many problems that invited attention. Even more so, that the practitioners failed to rectify so many of them until they were confronted by this inquiry. The number and nature of the offences suggest to us that the practitioners failed to take the Director's concerns and their own obligations seriously enough. This is an inappropriate mindset for a certifier standing as a guard against non-compliance which, if not detected, can have serious implications for all concerned.
50. We agree with the Director's submission that, because 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.

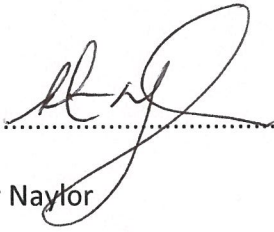
51. The Director submitted that in this case it would appropriate to require the practitioners to provide a written undertaking to comply with their obligations under the Act. Such an undertaking would serve a useful purpose regardless of whether the Inquiry Board were to decide that breaches of some sections of the Act did not constitute "offences" within the meaning of subsection 34S(a). Another suggested form of undertaking would require the practitioners to comply within a reasonable time with any reasonable requests from the Director as a result of statutory audits or any reasonable requests for the provision of information or documents. The practitioners indicated that they would be prepared to enter into an undertaking and submitted that it would be a sufficient penalty.
52. Mr Izod has 30 years experience certifying buildings, the last 20 of which have been as a private building certifier. He estimates that he has done more than 9,900 certification jobs as a private building certifier. He asserts that he is a person upon whom the Director is entitled to rely. He respects and understands the need for the audit process. He regularly attends meetings conducted by the Director and is committed to improving his processes. The truth of these submissions was not challenged by the Director.
53. We were informed that Mr Izod has one prior adverse finding of professional misconduct by an Inquiry Board on 22 June 2007. A fine of \$500 was imposed as well as a requirement for an undertaking to demonstrate a diary response system.
54. The Director informed us that a penalty unit is \$144.00. The Director is not seeking any order for costs.
55. We can see potential difficulties in a broad undertaking of the kind envisaged by the Director. The utility of the undertaking is questionable given that it raises questions of reasonableness and potential arguments about the meaning of professional misconduct which may be left to another Inquiry Board to determine. We consider it safer to remind the practitioners of their obligations under the Act and Regulations, recognizing that further misconduct may lead to more serious penalties than on this occasion.
56. We require further submissions before determining what, if any, further action should be taken and will resume the inquiry for that purpose.

Dated *3 April* 2014



John Stewart

Chair



Peter Naylor



Graham Lockerbie