

BUILDING PRACTITIONERS INQUIRY BOARD

Reasons for Decision

Building Practitioner:	Roger Halliwell (the Practitioner)
Referred by:	Director of Building Control
Proceedings:	Referral of Inquiry to the Building Practitioners Board (the Board) in accordance with section 33 (1) (a) of the <i>Building Act</i> .
Inquiry Board:	Mr Patrick McIntyre (Presiding Member) Mr Robert Cox Mr Bede Rodeghiero
Date of Hearing	13 December 2018
Date of Decision:	9 July 2019

Background

1. On 5th November the Director of Building Control (the Director) referred a matter to the Building Practitioners Board (the Inquiry Board) for inquiry under section 33 (1) (a) of the Building Act (the Act).
2. The Director made the referral because the Director suspected that the Practitioner had without reasonable excuse, refused or failed to comply with a reasonable request from the Director to provide information or produce a document made in the course of an investigation.
3. Section 33 (1) (a) of the Act provides as follows:
33 Building practitioners and others must cooperate during investigation
(1) If, in the course of the investigation, a building practitioner:

(a) refuses or fails, without reasonable excuse, to comply with any reasonable request from the Director to answer a question, provide information or produce a document;

...

the Director may refer the matter to the Practitioners Board for inquiry.
4. Section 34S of the Act provides (relevantly) as follows;
34S 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:

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

(g) is otherwise guilty of professional misconduct.

5. This is the decision of the Inquiry Board convened pursuant to s 34J of the Act to hear and determine whether the building practitioner is guilty of professional misconduct pursuant to s 34S (f). This Inquiry Board consists of Mr Patrick McIntyre (Presiding Member), Mr Robert Cox and Mr Bede Rodeghiero.
6. The hearing before the Inquiry Board took place on 13 December 2018; the Director represented by Ms Nicola Leach of the office of the Solicitor for the Northern Territory and the Practitioner representing himself.
7. In response to Directions made at a Directions Conference on 28 November 2018 the Parties had conferred prior to the hearing and had agreed to prepare and execute a document setting out any agreed facts and/or admissions.
8. At the hearing Ms Leach tendered a document executed by herself on behalf of the Director and by the Practitioner headed 'Summary of Agreed Facts' a copy of which is attached as Schedule A.
9. Schedule A discloses the nature and particulars of the allegations supporting the Director's referral of 5 November 2018 and at paragraph 15 thereof contains an admission by the Practitioner that he had 'failed to comply with a reasonable request from the Director to produce documents'.
10. The cooperation of the parties and the preparatory work performed by them enabling the provision of the material comprising Schedule A greatly assisted the Inquiry Board in its work, and the parties are to be congratulated for positively responding to the Directions made on 28 November 2018.
11. The Practitioner conceded at the hearing that he:
 - a) could not offer any reasonable excuse for his admitted failure;
 - b) was pleading guilty to professional misconduct; and
 - c) was able to produce the documents sought by the Director within 6 weeks of 13 December 2018.
12. Given the Practitioner's concessions, the Inquiry Board determined pursuant to s34P that the Practitioner was guilty of professional misconduct and turned to consideration of what action it should take pursuant to s34T Building Act.

Consideration of Disciplinary Action

13. Section 34P of the Act provides as follows:

Decision on inquiry

- (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.

14. Section 34T of the Act provides as follows:

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

15. It is clear that the Practitioner did not give appropriate attention to the request made to him by the Director over a period of in excess of six months. He chose to ignore communications from the Director sent to him by email, by telephone message and by letter. He had deliberately chosen not to commence the task of going through his business records to obtain the relevant documents even as late as the date of the hearing.

16. The Practitioner chose to let this matter run to hearing and to a determination by this Inquiry Board before acting upon the statutory obligation imposed upon him by s33 (1) (a) of the Act.

17. The Practitioner either intentionally or recklessly ignored the request made to him by the Director.

18. The Practitioner's failure has caused delay and inconvenience to the Director in relation to the complaint referred to in paragraphs 3 and 4 in Attachment A.

19. The disciplinary regime established under the Act must be respected by building practitioners if the objects of the Act are to be advanced. Intentional or reckless disregard for the statutory obligations of building practitioners contemplated by that regime cannot be countenanced. Intentional, reckless or negligent delay in meeting those obligations cannot be permitted to attract some benefit for the building practitioners.

20. This Inquiry Board is concerned to ensure that the action that it takes pursuant to s 34T of the Act in respect of the Practitioner not send a message of tolerance to other building practitioners for failure to properly cooperate in the disciplinary regime established by the Act.

21. This Inquiry Board considers that the Practitioner's admitted failure constitutes a serious incident of professional misconduct.

22. The Practitioner is entitled to some consideration in his favour for his co-operation with the Director during the preparation of this matter for hearing following the Directions hearing of 28 November 2018 and for his admissions at the hearing.

Decision

23. Accordingly, on the 13 December 2018 this Inquiry Board determined that the appropriate action to be taken pursuant to s34T was as follows:

- a) The Building Practitioner is formally reprimanded and this reprimand is to be recorded on his registration file at Licensing NT;
- b) The Building Practitioner is required to pay to the Territory ten (10) civil penalty units, being a total of \$1550.00 to be paid by instalments as follows;
 - i. 3 penalty units (\$465.00) to be paid by 31 January 2019;
 - ii. 3 penalty units (\$465.00) to be paid by 28 February 2019;
 - iii. 3 penalty units (\$465.00) to be paid by 31 March 2019; and
 - iv. 1 penalty units (\$465.00) to be paid by 30 April 2019.
- c) The Building Practitioner is required to produce to the Director the relevant records and documents required to be produced by the Notice of Investigation and Notice to Produce Documents served on him on 21 April 2018 and referred to in paragraphs 13 and 14 of Attachment A on or before 24 January 2019;
- d) The Building Practitioner is required to immediately give to this Inquiry Board an undertaking to comply with the decision set out in paragraph c. above.

24. It is appropriate to record here that the Practitioner did give the abovementioned undertaking to the Inquiry Board on 13 December 2018 prior to the conclusion of the hearing.

25. This Inquiry Board directs that a copy of this determination be published and distributed to the parties.

Rights of Appeal and Procedure for Commencing an Appeal under Division 4 of the Act

26. Section 35(d) of the Act states that a decision under s. 34P that a building practitioner is or is not guilty of professional misconduct is an appealable decision.

27. Under s. 36 of the Act, an appeal is to be made to the Local Court within 30 days of being notified of the decision.

28. Under s. 36A of the Act, subject to s. 36A (2), the appeal is to be a re-hearing of the evidence, or review of the information, before the Practitioners Board.

29. Section 36A (2) states that the Local Court may admit evidence or information that was not before the Practitioners Board only if the Court is satisfied there were special circumstances that prevented its presentation before the Board.

30. Section 36B states:

- a) in determining the appeal, the Local Court may:
- b) confirm the appealable decision; or
- c) vary the appealable decision; or
- d) set aside the decision and substitute another decision that could have been made instead of the appealable decision.

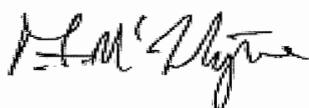
31. The Court may give orders it considers appropriate to give effect to its decision under subsection (1).

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

33. Section 36D states:

- (1) Commencing an appeal does not affect the operation or implementation of the appealable decision.
- (2) However, the Local Court may make an order staying or otherwise affecting the operation or implementation of so much of the appealable decision as the Court considers appropriate to effectively hear and decide the appeal.
- (3) The order:
 - (a) is subject to the conditions specified in the order; and
 - (b) has effect:
 - (i) for the period specified in the order; or
 - (ii) if no period is specified – until the Local Court has decided the appeal.

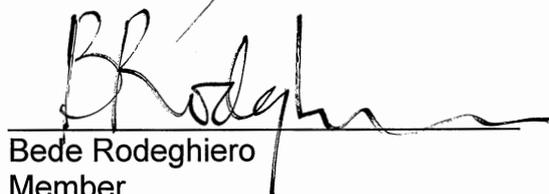
Dated the 9th day of July 2019



Patrick McIntyre
Presiding Member



Robert Cox
Member



Bede Rodeghiero
Member

SUMMARY OF AGREED FACTS

Between

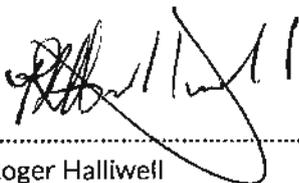
Roger Halliwell (Practitioner) & Jennifer Harlock (Director of Building Control)

1. The Practitioner was registered as a Building Contractor Residential (Restricted) on 9 August 2006, and renewed his registration five (5) times. The Practitioner's registration expired on 10 August 2018. (Document 3).
2. The Practitioner acted as the sole Director and nominee of Hallwood Builders Pty Ltd between 15 June 2006 and 30 October 2017.
3. On 30 November 2017, Building Advisory Services ("BAS") received a complaint against Hallwood Builders Pty Ltd and the Practitioner ("the complaint") from property owner David Parish. (Documents 1A and 1B).
4. The Director of Building Control ("Director") did not dismiss this complaint, and notified the Practitioner of the complaint by post on 19 January 2018 and by email on 22 January 2018. The Director invited the Practitioner to respond to the complaint by 9 February 2018. (Documents 11A and 11B).
5. Between 5 March 2018 and 27 March 2018, BAS called the Practitioner on one (1) occasion and emailed the Practitioner on four (4) occasions to request a response to the complaint and provide the Practitioner with extensions of time in which to provide a response. (Documents 4, 5, 6, 8 and 10).
6. Of the emails, telephone call and letter referred to in paragraphs 4 and 5 above, the Practitioner responded twice; On 23 March 2018 and 27 March 2018, the Practitioner responded by email and requested short extensions of time to respond to the issues. (Document 7, paragraph 1 and Document 9, paragraph 1).
7. On 27 March 2018, BAS advised the Practitioner, via e-mail, that an additional extension of time to 3 April 2018 had been approved. The Practitioner was advised that no further extensions of time beyond that date would be granted and that, if a response was not received by that time, a recommendation would be made to the Director that the matter be formally investigated under section 30 of the *Building Act* ("Act"). (Document 10).
8. On 4 April 2018, the Director sent a letter by post to the Practitioner and formally notified him that:
 - (a) An investigation into the complaint had been commenced pursuant to section 30 of the Act (*Notification of Investigation*).
 - (b) The Director requested that the Practitioner produce documents relevant to the investigation in accordance with the attached section 32(1) *Notice to Produce Documents - Investigation*.
 - (c) The *Notice to Produce Documents - Investigation* required that the Practitioner produce "all documents and correspondence including, but not limited to, any electronic records, building contracts, photographs, fidelity certificate, invoice for progress payments and dates progress payments were received" held by him in relation to building permit 590/11773/1.
 - (d) The Practitioner was required to respond to the complaint and the *Notice to Produce Documents - Investigation* within 21 days of the letter, being 25 April 2018.

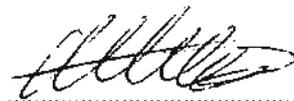
(Document 11A)

9. On 4 April 2018, the Director sent the materials referred to in paragraph 8(a) – (d) above to the Practitioner electronically, by way of 3 emails. (**Document 12**).
10. On 5 April 2018, the Director sent two additional emails to The Practitioner noting that one of the three emails of 4 April 2018 had not been delivered, and providing the attachments which had failed to be delivered to him across two further emails instead. (**Document 12**).
11. On 16 April 2018, the Director sent an additional email to The Practitioner noting that Attachment 2 (Table of Issues) had not been attached to the Notification of Investigation sent to him by email on 4 April 2018 and 5 April 2018, and attaching a copy of this document. (**Document 13**).
12. The Practitioner did not collect the registered mail sent to him on 4 April 2018 and did not respond to the emails sent to him on 4, 5 and 16 April 2018 as referred to in paragraphs 8 – 11 above.
13. On 21 April 2018, on behalf of the Director, the Practitioner was personally served with the *Notification of Investigation and Notice to Produce Documents* by the Top End Bailiff Service. (**Document 14**).
14. On 8 May 2018, BAS sent an email to the Practitioner noting that the *Notification of Investigation* (and attachments) were not formally served on him until 21 April 2018, and requesting that he respond by 11 May 2018. (**Document 15**).
15. As at 10 December 2018, the Practitioner had not provided any further response to the Director regarding the complaint, and the Practitioner had failed to comply with a reasonable request from the Director to produce documents as set out in the *Notice to Produce Documents – Investigation*.

Dated: 13 December 2018



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Roger Halliwell
Practitioner



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Nicola Leach
for the Director of Building Control