NORTHERN TERRITORY BUILDING

PRACTITIONERS BOARD

BETWEEN:

DIRECTOR OF BUILDING CONTROL

AND:

BUILDING ONE PTY LTD and IAN IZOD

Building Practitioners

REASONS FOR DECISION

Sections 34T and 34U

Submissions

1. These reasons should be read in conjunction with our earlier decision in this matter delivered on 3 April 2014 ("previous Reasons for Decision").
2. The inquiry resumed on 7 May 2014 to receive further submissions in relation to the action, if any, to be taken under sections 34T and 34U of the *Building Act* (NT) ("the Act"). The Director, Mr Padovan, appeared in person. The practitioners were represented by their solicitor, Mr Piper.
3. Mr Padovan made these submissions:
   (a) The Director does not seek cancellation or suspension of the practitioners' registration.
   (b) The Director adheres to a submission made earlier in the inquiry that a civil penalty in the range of $500 to $1,000 for each practitioner would be appropriate. The Director informed us that his main objective is not to punish the practitioners but to achieve a more co-operative working relationship.
   (c) The Director believes that suspension is unwarranted; it would also cause unnecessary disruption to the practitioners' clients. A civil penalty within the suggested range, while relatively modest, will send a clear message to the practitioners.
   (d) The Director wants the practitioners to understand that they are "on the same side of the fence" as the Director in working towards the goal of compliant building certification and, therefore, that the practitioners will see the value in providing a prompt explanation when concerns are raised by the Director in the future.

4. These were Mr Piper's submissions:
   (a) The findings of professional misconduct, and the publication attracted by those findings, constitute a significant penalty for the practitioners.
   (b) The practitioners did not ignore the Director's requests for information but had difficulty dealing with them. They point out that they are sometimes operating in an environment of ambiguity or pragmatism in which the correct solution does not always readily appear.
   (c) Mr Piper resiled from his previous submissions about "technical" offences [paragraph 39 previous Reasons for Decision] and informed us that what he intended to convey was that the particular offences were at the lesser end of the scale of gravity.
   (d) There was no disagreement about the appropriateness of the Directors' position on proposed actions under section 34T including the civil penalty range.

Consideration

5. The parties did not challenge the principles stated in *Glynatsis*: see paragraph 45 of the previous Reasons for Decision.
6. It can usefully be noted that, as in this case, *Glynatsis* concerned two practitioners - an individual building contractor and a corporation of which he was sole director. The professional misconduct consisted of failure without reasonable excuse to answer questions asked of them as required by section 33(1)(a) of the Act. The practitioners did not respond to any of 5 letters from the Director during a period of about 3 months requesting information in relation to a complaint. The professional misconduct was admitted. The Inquiry Board observed (at [23]) that this type of professional misconduct was purely regulatory and did not involve any actual risk to members of the public as would have occurred with faulty building work. Those practitioners had no relevant history concerning breaches of the Act or findings of professional misconduct but (at [45]) the Inquiry Board commented on their lack of understanding or appreciation of the Director's position. A civil penalty of $1,500 was imposed on each practitioner.
7. As noted in *Glynatsis* (at [41]) and in this present inquiry, Mr Izod was the subject of a finding of professional misconduct on 22 June 2007 for which a civil penalty of $500 was ordered and an undertaking in accordance with section 34T(c) of the Act. The misconduct was of a relatively minor nature.
8. In fixing a civil penalty in accordance with section 34T we are mindful of the importance of parity but do not approach our task as a mathematical exercise comparing the features of this case with *Glynatsis* or any other case. We have mentioned *Glynatsis* not because the outcome is instructive but because it assists us to get a sense of the relative gravity of the misconduct in this case.

9. Overall, we believe that there are features of this case that warrant regarding the practitioners' professional misconduct at least as seriously as in *Glynatsis*. This observation is based on these reasons:
   (a) Although this is the first such finding against the corporation, as already noted there is a prior finding of professional misconduct against Mr Izod.
   (b) Although there was no complaint from a building owner or another practitioner, as observed in the previous Reasons for Decision (paragraph 42) some of the offences entailed a risk of safety or consumer protection issues.
   (c) As noted in the previous Reasons for Decision (paragraph 43) most of the Director's concerns were outstanding from the time of the initial audit and for about 17 months before the matter was referred to this Inquiry Board.
10. It is not surprising that the Director is troubled not only by the offences committed by the practitioners but also by the time taken by the practitioners to address the Director's concerns. We are aware that the Director is not relying upon section 33(1)(a) of the Act but we believe that the protracted delay in providing a satisfactory response to the Director's audits is a factor to be weighed against the practitioners.
11. It is true that the audits were wide-ranging and involved a large number of projects. The practitioners produced a large volume of material at the inquiry and so we are mindful of the considerable effort required to obtain and organize this material. At the inquiry the Director conceded that some of the issues raised by the audits had elements of ambiguity and pragmatism as Mr Piper had submitted. However, we are satisfied that if it had been apparent that the practitioners were doing their best to present their responses in a timely manner then the Director would have continued to engage in the audit process and would have been considerate of the practitioners' difficulties. Simply stated, the responses came too late to avert this inquiry and the delay has still not been satisfactorily explained.
12. On the other hand, the practitioners have admitted many of the allegations, thereby enabling the inquiry to be conducted more efficiently. They have submitted that they understand and respect the need for the audit process and for non-compliant work to be remedied. They have pointed to improvements in their processes as a result of the Director's audits. Trying to align these positive sentiments with the practitioners' altogether too tardy response to the Director's concerns, we conclude that the practitioners were unable to adequately cope with the requirements of a routinely heavy workload and the added burden of the difficult issues raised by the Director's requirements. This finding serves to provide a mitigating explanation for, but in no way excuses, the delay and in this regard we refer to paragraph 49 of our previous Reasons for Decision.
13. Developing the point at paragraph 9(b) above, the Inquiry Board finds that allegations 4(a) and (b) had the potential for dire consequences, namely in one case a fire risk that had not been properly assessed and in the other case the erection of

an unauthorized building. It would be obvious to a responsible building certifier that these omissions are unacceptable.

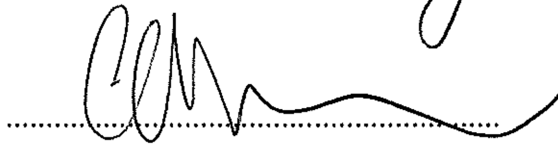
14. In the end – and influenced to a significant degree by the Director's submission – we have decided that it would not be appropriate to order the suspension or cancellation of the practitioners' registration. In coming to this decision we emphasize that, as we explained to the parties at the inquiry, while we respect the parties' submissions, we do not consider ourselves bound to apply them. We must make our decision mindful of our paramount duty to deliver a fair and just result in accordance with the Act.
15. In discharging our duty, we have given careful consideration to the possibility of suspending the practitioners' registration. For the reasons given in paragraph 9 above, we do regard this as a case in which suspension properly comes up for consideration. The nature and number of the offences and the delay in addressing them makes suspension of registration an appropriate option. In our opinion, an order for suspension would not necessarily depend on a finding of consequential loss, but in this case if it were clear that any other party had suffered loss by reason of the practitioners' professional misconduct then we would have been more inclined to order suspension. But on the evidence, and even as regards allegations 4(a) and (b), it appears that the omissions either have been or are in the course of being rectified and that there is no allegation of loss.
16. We are therefore minded to adopt the parties' submission that a civil penalty will meet the requirements of section 34T. In fixing a penalty, there is no reason to distinguish between the relative culpability of Mr Izod or the corporation. The same findings of professional misconduct are equally applicable to both practitioners. There have been no submissions about the financial impact of a civil penalty upon both practitioners.
17. We would like our decision to stand for the maintenance of high professional standards which, in terms of the Act, preclude misconduct of this kind and which also demand a higher level of co-operation with the Director. On the other side of the scale we weigh the difficulties encountered by the practitioners in the audit process, the corrective action that has been taken (somewhat belatedly) and the practitioners' expressed intention to operate more reliably in the future.
18. All of the offences were exposed during the course of the audit process and we agree with the parties' submission that there should be one overall penalty taking account of the totality of the practitioners' professional misconduct. The number of cases in the Northern Territory is too small to yield a reliable range of penalties. For each practitioner we will impose the minimum penalty that we believe is reasonably necessary to serve the objective of protecting the public interest as mentioned in the preceding paragraph. In so doing, we are also mindful of the need to maintain public confidence in the Act as a mechanism which is being properly applied to deliver that

objective. Because Mr Izod has a previous offence, the deterrent effect will be emphasized by a higher penalty for him than for the corporation.

Orders

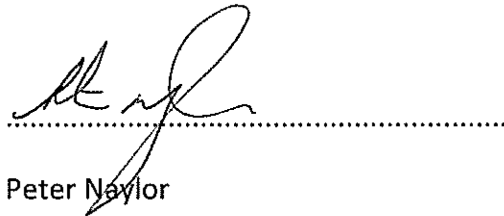
19. Taking into account the maximum penalty ($5,760 – see paragraph 54 of the previous Reasons for Decision) as well as the various factors mentioned above, the corporation is ordered to pay a civil penalty of $1,250 and Mr Izod is ordered to pay a civil penalty of $1,750. A period of 14 days is allowed for payment of these penalties and the practitioners are given liberty to apply if additional time to pay is required.
20. The Director did not apply for costs so there will be no order for payment of costs.
21. The Inquiry Board does not make any direction for an audit of the practitioners' work or conduct.
22. Notice of this decision must be given to the parties in accordance with section 34P of the Act.

Dated 21 May 2014



John Stewart

Chair



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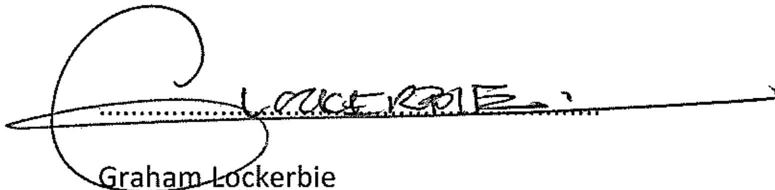

Graham Lockerbie