

## BUILDING PRACTITIONERS BOARD

### IN THE MATTER OF AN INQUIRY INTO THE CONDUCT OF

**JIM MOSCHOYIANNIS (Practitioner) CB-U 2246, DB-U 19351.**

## PENALTY DECISION AND REASONS

### Introduction

1. On 9 March 2018 the Board Panel made a written finding that that the Practitioner was guilty of the single allegation against him under s 179(1)(b) of the *Building Act 1993* ("Act").
2. Having made that decision the Board reconvened the hearing on 22 October 2018 to hear any penalty decisions with respect to that decision.
3. Section 179 of the Act states relevantly:
  - (1) On an inquiry into the conduct of a registered building practitioner, the Building Practitioners Board may make any one or more of the decisions mentioned in subsection (2) if it finds that the registered building practitioner—
    - (a) is guilty of unprofessional conduct; or
    - (b) has failed to comply with this Act or the regulations; or.....
  - (2) The following are the decisions which the Board may make—
    - (a) to reprimand the person;
    - (b) to require the person to pay the costs of or incidental to the inquiry;
    - (c) to require the person to give an undertaking -
      - (i) to do a specified thing, including to complete or rectify specified building work; or
      - (ii) not to do a specified thing;
    - (ca) to require the person to complete a specified course of training within a specified period;
    - (d) to impose a fine of not more than 100 penalty units unless—
      - (i) a charge has been filed in the Magistrates' Court in respect of the matter; or
      - (ii) the matter has been dealt with by a court exercising its criminal jurisdiction; or

- (iii) the matter has been dealt with by the issue of an infringement notice;
    - (e) to suspend registration for not more than 3 years;
    - (f) to cancel registration;
    - (g) to disqualify the person from being registered for a specified period of up to 3 years.
  - (3) If satisfied that there is good reason to do so, the Board may at any time revoke a suspension under this section, and must without delay give written notice of that revocation to the registered building practitioner. [emphasis added]
4. Counsel Assisting the Building Practitioners Board made submissions that in this case the appropriate decision for the Board is to reprimand the Practitioner under s 179(2)(a).
5. It was also submitted that the Practitioner be required to pay an amount of costs of and incidentals to the inquiry under s179(2)(b).

### **Decision**

6. It is the Board's decision in relation to the guilty verdict to:
- a) Reprimand the Practitioner; and
  - b) Require the Practitioner to pay the costs incidental to the Inquiry in the sum of \$54,000

### **Reasons for Decision**

#### **Reprimand**

7. It was submitted to the Board that a reprimand without a fine is an appropriate sanction reflecting the conduct of the Practitioner for the reasons set out below. A reprimand is not a trivial penalty.<sup>1</sup>
8. The Board was satisfied based on the evidence presented at the Inquiry that the conduct considered within the single allegation was not a breach that could be characterised as arising from intentional conduct or unprofessional conduct.
9. The liability of the Practitioner was in part derivative, arising from the conduct of the Builder under s 179B. Section 179B deems a building practitioner to be responsible for a failure to comply with the Regulations by a company of which the building practitioner is a director.<sup>2</sup> The Practitioner was a director of the Builder and a registered building practitioner at all relevant times. It was the Practitioner who applied for and was named

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<sup>1</sup> *Peeke v Medical Board of Victoria* [1994] VicSC 7 at p. 6, per Marks J.

<sup>2</sup> If a company or partnership of which a registered building practitioner is a director or partner fails to comply with this Act or the regulations in carrying out building work, that failure is taken to have been the conduct of the registered building practitioner and a failure by the registered building practitioner to comply with this Act and the regulations for the purposes of sections 178, 179 and 179A.

as the Building Practitioner "to be engaged in the building work" on the Building Permit. However, the fact that it was derivative in this sense, does not mean that the Practitioner is any less liable for the act which lies at the heart of the allegation being that:

Between 2 June 2011 and 13 June 2012, the Builder installed Alucobest aluminium composite cladding (**Alucobest**) on the external walls to the apartments comprising part of the Building Work; and

The Alucobest did not comply with the Building Code of Australia (**BCA**) in that it did not meet the performance requirements of the BCA.

10. As was stated in Counsel Assisting's Submissions dated 22 August 2017, the second reading speech of the Minister regarding the relevant amending Bill which introduced section 179B into the Act made the purpose of s 179B clear:

The amendment will also clarify and strengthen the link between the conduct of a building company and the registered building practitioner nominated on the building permit so that the director is responsible for the work and conduct of the company.

A significant proportion of domestic building work in Victoria is carried out by companies. Such companies are required to have at least one director who is a registered building practitioner. However, the actual building work may be carried out by an unregistered building practitioner.

Where breaches of the act or regulations are alleged, it can be difficult for the board to bring an inquiry against a registered building practitioner. In this circumstance the consumer may have no redress against the registered building practitioner who is responsible for the conduct of the company and the board may be unable to impose any disciplinary sanction in respect of breaches of the act.

The amendment 'deems' the director of a company, or partner, to be responsible for the conduct of the company.<sup>3</sup>

11. As Hollingworth J stated in *Rodwell v Building Practitioners Board* [2009] VSC 146, the primary purpose of the disciplinary process under Part 11 of the Act is protective:

The Board has been given broad powers to inquire into the conduct of registered building practitioners, and to make certain findings and exercise certain powers against them. Having regard to the statutory scheme, I am satisfied that the main purpose of such an inquiry is to ensure that registered builders adhere to the high standards expected of them, primarily for the protection of the public and the reputation of the building industry itself. If the Board finds that a builder has failed to comply with a provision of the Act, it may impose one of a number of disciplinary sanctions.<sup>4</sup>[emphasis added].

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<sup>3</sup> See par 39 of the Submissions dated 22 August 2017 and Parliament of Victoria, Hansard 26 June, 2008 pp 2626-2627.

<sup>4</sup> [2009] VSC 146 at [35]

12. In considering what decision is appropriate to achieve this protective purpose the Board should consider both specific and general deterrence. The protective purpose necessarily includes a punitive element. As was said by the President of the Court of Appeal in *Quinn v Law Institute of Victoria*:

The available sanctions are, by their nature, punitive, and the objectives of specific and general deterrence – which serve the protection of the public – depend upon the sanctions having punitive effect.

Critically for present purposes, however, the Tribunal's protective function is paramount. Thus, where there is a choice of sanctions, it is to be expected that the Tribunal will choose that sanction which maximises the protection of the public.<sup>5</sup>

13. In this case it was submitted the purpose of specific or general deterrence is not advanced by the imposition of a fine in addition to a reprimand. In terms of specific deterrence, it was submitted that it was unlikely the Practitioner will offend again. In terms of general deterrence and the protection of the public it is submitted that the imposition of a reprimand coupled with the reasoning of the Board that rejected the defences put forward by the Practitioner achieves that purpose.

14. In this case there was no suggestion that the Builder failed to comply with the Building Permit. Indeed, a central element of the Practitioner's defence was that this was the limit of the Builder's obligation; that the Builder was entitled to rely on the Building Permit and could not be in breach of the Regulations if it so complied. The Board rejected that argument. A reprimand appropriately signals that and effects general deterrence.

15. The second element of the Builder's defence was that the use of ACP in the subject building did comply with the BCA. The Board has also rejected that argument, and a reprimand appropriately signals that and effects general deterrence.

16. Further, the Practitioner is not the only practitioner subject to an inquiry in relation to the use of ACP in the construction of the Lacrosse building. As opened by Counsel Assisting, important obligations to ensure compliance lie with the relevant building surveyor and with the fire engineer. The Builder has concurrent and independent obligations to those Practitioners. Building work must be carried out in accordance with the DTS provisions of the BCA unless subject to an Alternative Solution.

17. Still further, and in respect of the punitive nature of any sanction, any award of costs that might be made by the Board can be taken into account by the Board in its consideration of whether to impose a fine. That is, that the payment of costs by the Practitioner, while it is not for a punitive purpose, is still considered to be an imposition on the Practitioner.<sup>6</sup>

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<sup>5</sup> *Quinn v Law Institute of Victoria Limited* [2007] VSCA 122 (14 June 2007) per Maxwell P at [30]-[31].

<sup>6</sup> *Burgess v McGarvie (Legal Service Commissioner)* [2013] VSCA 142 at [67].

18. For these reasons, the Board agreed with the submissions made by Counsel assisting and determined that that the imposition of a reprimand is an appropriate sanction without the further imposition of a fine.

### **Costs**

19. It was also submitted that the Practitioner should be required to pay an amount of costs of the Board under s179(2)(b) of the Act.

20. The decision as to whether to award costs, and in what amount, is entirely within the discretion of the Board.

21. It was submitted that the Board should order that the Practitioner pay the costs of the Board for the following reasons:

21.1. The Practitioner fully contested the Allegation at the Inquiry; and

21.2. The Practitioner was wholly unsuccessful in each of the arguments put to the Board. Each of those arguments was submitted as a complete defence to the allegation.

22. The award of costs is not intended to be punitive.<sup>7</sup> It is compensatory of the Board. The Practitioner was entitled to fully contest the allegation and put the Board to its proof. He should not be punished for doing so. It was also recognised that the Practitioner's conduct of the hearing was reasonable.

### **The Quantum of Costs**

23. The costs that have been incurred by the Board in the conduct of the Inquiry are approximately \$270,000.

24. The Board was satisfied that there were good reasons for costs in that sum being incurred including: the complexity of the matter; the involvement of senior and junior counsel (on both sides); the preliminary hearings; the voluminous brief; substantial preparation for hearing including numerous expert and lay witnesses; the number of hearing days and lengthy and complex legal submissions.

25. The Board has a broad discretion in relation to costs. However, it was submitted that there is not a basis for the award of indemnity costs in this matter. By analogy, courts when exercising their discretion in relation to the award of indemnity costs will do so rarely and usually only in circumstances where the conduct of the party has been such as to put another party to unnecessary expense. It was not submitted that the Practitioner, in defending the allegation, has acted in a manner that would attract the imposition of indemnity costs.

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<sup>7</sup> Ibid.

26. However, the Practitioner has been wholly unsuccessful in his defence of the allegation. At the outset, there were numerous matters that were required to be proved by the Board.
27. The Board after weighing these matters up decided that the Practitioner be required to pay an amount of \$54,000 which it considers as both reasonable and proportionate in the circumstances.

**Mr G Hoare**  
**Chairperson, Draftsperson Representative of the Building Practitioners Board**

**Mr J Conte**  
**Builder Representative of the Building Practitioners Board**

**Mr G Geary**  
**Building Surveyor Representative of the Building Practitioners Board**

**2 November 2018**