



Administrative Decisions Tribunal

New South Wales

CITATION: **Building Professionals Board v Cogo [2009] NSWADT 10**

DIVISION: General Division

PARTIES: APPLICANT
Building Professionals Board

RESPONDENT
Mark Cogo

FILE NUMBER: 083012

HEARING DATES: 14 and 15 August 2008

SUBMISSIONS CLOSED: 15 August 2008

DATE OF DECISION: 16 January 2009

BEFORE: O'Connor K - DCJ (President); Friedmann P - Non-Judicial Member

CATCHWORDS: Accredited Certifier – Application for Disciplinary Findings and Orders – Construction and Final Occupation Certificates – Unsatisfactory Professional Conduct – Proposed Orders – Administrative Decisions Tribunal Act 1997, s 86 – Building Professionals Act 2005

LEGISLATION CITED : Administrative Decisions Tribunal Act 1997
Building Professionals Act 2005
Environmental Planning and Assessment Act 1979
Environmental Planning and Assessment Regulation 1994
Environmental Planning and Assessment Regulation 2000

CASES CITED: Auckland City Council v NZ Fire Service [1996] 1 NZLR 330
Building Professionals Board v Cogo [2008] NSWADT 119
Re Arkritidis: Building Appeals Board, Victoria (27 June 2005)
Re Campbell: Building Appeals Board, Victoria (4 December 2003)

REPRESENTATION: APPLICANT
A Grey, legal officer

RESPONDENT
K Lovegrove, solicitor, Lovegrove and Lord

ORDERS: (1) The Respondent is guilty of Unsatisfactory Professional Conduct.

- (2) The Respondent is reprimanded.
 - (3) The Respondent is fined \$11,000.
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REASONS FOR DECISION

1 On 16 January 2008 the Building Professionals Board applied to the Tribunal under the *Building Professionals Act 2005* (the Act) for disciplinary findings and orders to be made against an accredited certifier, Mr Mark Cogo. The material text of the application is appended.

2 At all relevant times, Mr Cogo held under the classification system then used, a certificate of accreditation as an Accredited Certifier and Principal Certifying Authority – Building (Grade 1). He has been accredited since 19 December 2000. From 2000 until recently, he was a Sydney-based director of the national building projects consultancy firm, McKenzie Group Consulting (NSW) Pty Ltd. Under the present scheme he holds accreditation at the A1 level with conditions. He now works out of the Brisbane office of McKenzie's.

3 This case concerns Mr Cogo's conduct as accredited certifier and principal certifying authority (PCA) in relation to a warehouse redevelopment at 56 Anzac Street, Chullora, in particular his issuance of construction and final occupation certificates during 2002. The developer was McRoss Developments Pty Ltd. The redevelopment involved the installation of storage racks to a high level at the eastern and western ends of the warehouse. The warehouse was built in 1974, and the overall complex had two elements – the warehouse and a two storey office building. The goods to be stored were: pharmaceuticals, paper and hair care products. The development consent issued on 18 December 2001. Mr Cogo issued a construction certificate on 16 June 2002. He issued a final occupation certificate on 10 October 2002.

4 The Board's application asserts that Mr Cogo failed to adhere to the professional standards reasonably to be expected of an accredited certifier in three respects: one, he authorised a fire safety solution for the internal space of the warehouse which was inadequate; two, he failed to ensure that the perimeter access was adequate for Fire Brigade vehicles in the event of fire; and three, in deciding not to follow the advice of the New South Wales Fire Brigades (NSWFB) he relied on a report from an independent consultant who, contrary to the relevant rule, was not qualified as an accredited certifier at the appropriate level.

5 The key clause of the Building Code of Australia (BCA) referring to the first matter is EP1.4 in Part 1:

‘An *automatic* fire suppression system must be installed to the degree necessary to control the development and spread of fire appropriate to -

- (a) the size of the *fire compartment*;
- (b) the function and use of the building;
- (c) the *fire hazard*; and
- (d) the height of the building.’

6 The key clause of the BCA referring to the second matter is CP9 which concerns access requirements to and around the building for NSWFB vehicles and personnel:

‘Access must be provided to and around a building, to the degree necessary, for *fire brigade* vehicles and personnel to facilitate fire brigade intervention appropriate to -

- (a) the function or use of the building; and

- (b) the *fire load*; and
- (c) the potential *fire intensity*; and
- (d) the *fire hazard*;
- (e) any active *fire safety systems* installed in the building; and
- (f) the size of any *fire* compartment.’

7 Many of the terms used in EP1.4 and CP9 are defined terms, and are italicised above.

8 The third matter refers to the professional standards governing the work of accredited certifiers which encourage consultation with NSWFB in relation to fire safety matters and require a second, independent report to be obtained from a certifier holding the relevant accreditation if NSWFB advice is not to be adopted. The provisions are set out in the application, see section 10.4 of the BSAP Scheme.

9 The applicable statutory and other provisions are accurately stated in the appended application, and they are not in contest in the proceedings. Mr Cogo lodged a reply on 15 February 2008, admitting some particulars but denying many of the more important particulars.

10 For the hearing the Board relied on the following material: affidavit as to jurisdiction from Mr Matthew Wunsch, Team Leader, Complaints, Building Professionals Board (not contested); affidavit of evidence from Mr Wunsch to which is appended two detailed Exhibits setting out relevant certificates, communications between NSWFB and the respondent, and the history of the investigation and the internal complaint-handling process. The Board filed preliminary submissions and a chronology of events (13, 14 August 2008). Mr Cogo also filed submissions and an expert report (12 and 14 August 2008). The expert report was from Mr Stephen Kip, a fire safety expert, who is principal of Skip Consulting Pty Ltd of Geelong, Victoria.

11 At hearing Mr Cogo withdrew many of his denials, and made admissions, some with qualifications. He admitted the factual history given in the application and the supporting material. He no longer contested that he had infringed professional standards to a degree that justified adverse findings and an adverse order.

Proposed Consent Orders

12 At the outset of the hearing the Board stated that the parties were prepared to consent to the following orders as a form of agreed settlement (see *Administrative Decisions Tribunal Act 1997*, s 86):

- (a) That the Respondent be found guilty of Unsatisfactory Professional Conduct
- (b) That the Respondent be reprimanded
- (c) That the Respondent be fined \$10,000.

13 Section 86 applications have been made in some other accredited certifier cases, and accepted. The ultimate power lies with the Tribunal. See s 86.

14 Because of the significance of the issues raised by this case, evidence was received. The hearing before the Tribunal occupied almost two days. Evidence was given in support of the Board’s case by Mr Christopher Jurgeit, Structural and Fire Safety Manager, NSWFB and Mr Michael Wynn-Jones, Building Regulation Consultant. For Mr Cogo, Mr Kip gave evidence. Mr Cogo had intended to call a further witness, Mr Ray Loveridge of Arup Fire, which had provided the report that Mr Cogo relied upon to approve the alternative solution. The Board did not press for his attendance. Mr Loveridge’s statement was admitted into evidence. Mr Cogo did not give evidence.

15 It will be seen below that ultimately the Tribunal has agreed to the first two of the proposed orders, and varied

the fine upwards by \$1,000. The most contentious aspect of the case, in our view, is whether the conduct identified should be categorised as Professional Misconduct rather than Unsatisfactory Professional Conduct, with the resultant increased possibility that an Order affecting Mr Cogo's accreditation or his right to continue in practice might be appropriate.

Circumstances

16 The application has its origin in complaints by the Commissioner, NSWFB. The first complaint was made in August 2002. This was followed by a voluminous complaint in April 2003: letter dated 17 April 2003: at Exhibit 1, 1-166 of the Board's folder of evidence. The conduct in issue occurred in the period June-October 2002. The circumstances giving rise to the application are set out in detail by Mr Wynn-Jones in his report, see Annexure B20, Exhibit 2 to the affidavit of evidence, pp 270-331; and also in the formal complaint from the Commissioner, NSWFB, Exhibit 1, pp 1-166. The Board's chronology also deals with the main events.

17 In preparation for the development consent application, the developer obtained reports from McKenzie Group Consulting and Ove Arup & Partners ('Arup Fire'). There was a site meeting on 17 September 2001 attended by representatives of both of these firms and officers of the New South Wales Fire Brigade (NSWFB). McKenzie's representative on that occasion was Mr Nathan Halstead. At that time the building's fire prevention system took the form of a sprinkler system and 360 smoke detectors. Mr Cogo was also involved. The site discussions concluded that the existing sprinkler system should be retained and enhanced. Arup Fire produced in October 2001 a Fire Safety Assessment Report that outlined a possible alternative solution involving sprinklers, but referred to a number of problems that would need to be addressed.

18 The original Arup Fire report (October 2001) (prepared by Ray Loveridge, approved by Ian Stork-Moore) proceeded on the basis that the warehouse would have an upgraded sprinkler system together with an automatic smoke detection and alarm system. The report then dealt with such matters as the time it would take for the system to respond to smoke, and the capability of people to evacuate through exits from the warehouse ahead of any fire taking hold. The full report is a document of 23 pages, and it addresses specifically each of the elements of CP9 and EP1.4.

19 That document was submitted to Council as part of the development application, as was a further report prepared in November 2001 from McKenzie's. That report focused on Building Code issues, and raised the possibility of disconnection of the sprinkler system, and other possible alternative solutions.

20 The development consent issued on 18 December 2001 (Bankstown City Council, No 1656/2001). The DC stated:

Council Consents to the land being developed for the following purpose, subject to compliance with the conditions and requirements set out in the attached schedules:

The Description of Development: Internal Warehouse Racking

and

Building Classification under the BCA: Class 7.

21 The Consent imposed a total of twenty four (24) conditions that were to be complied with prior to Occupation. Condition 2 of the Consent notes that 'The development shall take place in accordance with DA 1656/2001 submitted by McRoss Developments, accompanied by Drawing No. 1S-B-1595-205/B prepared by Dexion (Australia) Pty Ltd dated 21 September 2001.....' (copies of parts of these plans are shown on pages 364 and 365 of Exhibit 2 of the affidavit of evidence).

22 Condition 7 of the Consent states that: 'A Fire Engineering Level 2 Alternative Solution Report shall be prepared by a practising fire engineer to address the issues raised in the Mackenzie Group Building Code Report dated 16 November 2001. The report shall be submitted to the principal certifying authority prior to the release of

the construction certificate'. Condition 23 of the Consent notes that 'The use of the building in accordance with this development consent must not be commenced until a final compliance certificate has been issued for the building by Council or the PCA'. Condition 24 of the Consent notes that 'A final compliance certificate shall not be issued until all conditions of this development consent are satisfied'. We understand 'A final compliance certificate' to mean 'a Final Occupation Certificate'.

23 Mr Cogo had now been appointed as the accredited certifier and principal certifying authority (PCA).

24 The post-development consent Arup Fire report (January 2002) (prepared by Ray Loveridge, approved by John Hewitt) dealt in considerable detail with the impact of its new alternative solution. It proposed disconnection of the existing sprinkler system. At the time of preparing the report, Mr Hewitt was not an accredited Fire Safety Engineer (Exhibit 2, p 267).

25 Like the October report, the January report stated (see section 3, Ex 1: 054):

'The building owner has expressed a clear preference for the formulation of a fire safety system that does not comply with the Deemed-to-Satisfy provisions of the Building Code of Australia.'

26 Mr Cogo advised NSWFB of this report, and asked NSWFB to prepare an initial fire safety report under cl 144 of the *Environmental Planning and Assessment Regulation 2000* (EP&A Reg). The building was over 2000 square metres in area. Clause 144 provides:

'144 Referral of certain plans and specifications to New South Wales Fire Brigades

(cf clause 79F of EP&A Regulation 1994)

(1) This clause applies to:

(a) a class 9a building that is proposed to have a total floor area of 2,000 square metres or more, or

(b) a building (other than a class 9a building) that is proposed to have:

(i) a fire compartment with a total floor area of more than 2,000 square metres, or

(ii) a total floor area of more than 6,000 square metres,

where:

(c) the building is the subject of an application for erection, rebuilding, alteration, enlargement or extension, and

(d) the plans and specifications for the erection, rebuilding, alteration, enlargement or extension provide for an alternative solution to meet the performance requirements contained in any one or more of the Category 2 fire safety provisions.

(2) As soon as practicable after receiving an application for a construction certificate for a building to which this clause applies, the certifying authority must forward to the Fire Commissioner:

(a) a copy of the application, and

(b) a copy of the plans and specifications for the building, and

(c) details of the performance requirements that the alternative solution is intended to

meet, and

(d) details of the assessment methods to be used to establish compliance with those performance requirements,

which may be delivered by hand, forwarded by post or transmitted electronically, but may not be sent by facsimile transmission.

(3) The Fire Commissioner must furnish the certifying authority with an initial fire safety report for the building.

(4) An initial fire safety report may recommend conditions to be imposed on the erection, rebuilding, alteration, enlargement or extension of the building to which the report relates.

(5) The certifying authority must not issue a construction certificate for a building to which this clause applies unless:

(a) it has received an initial fire safety report for the building and has taken the report into consideration, or

(b) at least 23 days have elapsed since the plans and specifications were forwarded to the Fire Commissioner but no such report has been received by the certifying authority.

(6) If the certifying authority does not adopt any recommendation in an initial fire safety report:

(a) because the report had not been received when the construction certificate was issued, or

(b) because the certifying authority does not agree with the recommendation,

the certifying authority must cause written notice to be given to the Fire Commissioner of the fact that it has not adopted the recommendation and of the reasons why it has not adopted the recommendation.

(7) If the certifying authority adopts any condition recommended by an initial fire safety report:

(a) it must ensure that the terms of the recommended condition have been included in the plans and specifications for the building work, in the case of a condition whose terms are capable of being so included, or

(b) it must attach to the construction certificate a condition in the same terms as those of the recommended condition, in the case of a condition whose terms are not capable of being so included.

(8) Compliance with the requirement that the terms of a recommended condition be included in the plans and specifications for building work is sufficiently complied with:

(a) if the plans and specifications are redrawn so as to accord with those terms, or

(b) if those terms are included by way of an annotation (whether by way of insertion, deletion or alteration) marked on the relevant part of those plans and specifications.

(9) In this clause:

initial fire safety report means a written report specifying whether or not the Fire Commissioner is satisfied, on the basis of the documents referred to in subclause (2):

(a) that the alternative solution will meet such of the performance requirements as it is intended to meet, and

(b) that the fire hydrants in the proposed fire hydrant system will be accessible for use by New South Wales Fire Brigades, and

(c) that the couplings in the system will be compatible with those of the fire appliances and equipment used by New South Wales Fire Brigades.’

27 On 25 January 2002 NSWFB replied to Mr Cogo’s request. The letter referred to CP9 and EP1.4, quoted above. The letter expressed the opinion that items (a), (b), (c), (d) and (f) of CP9 were not satisfied. It stated that all four items of EP1.4 were not satisfied. So, in total, nine of the ten items to which CP9 and EP1.4 refer were considered not to be satisfied. The letter set out six particular concerns as to why the proposed alternative solution discarding the use of sprinklers and relying on smoke alarms and smoke detectors was inadequate.

28 The first three points went to the alternative solution’s effectiveness within the building. NSWFB considered that the Arup Fire report failed to address the stability of the unprotected steel structure and the effect of intense fire temperatures. It expressed concern that extended fire compartments and high rack storage heights will result in a rapid spread of fire (vertical and horizontal) throughout the warehouse. It referred to the value of sprinklers in arresting the spread of fire in these circumstances, and the importance of that for safe access by firefighters and the final extinguishment of fire. The letter noted that high rack storage of pharmaceuticals, paper and homecare products is defined as an excessive hazard as per Table E1.5 of the BCA. NSWFB considered that the large fire load would impact on lateral and vertical spread of the fire internally and externally.

29 The final three points went to the matters external to the building itself. The first of these points was that NSWFB vehicle access was restricted to three sides of the building, and this factor would impact on firefighting operations. The second referred to the environmental impact on the community. Were fire to occur in a building storing hazardous materials of the kind intended to be stored there, the letter said that ‘toxic smoke’ would impair the daily operations of the surrounding community, which in turn would contribute to difficulties for the Brigade in attempting to bring the fire under control. The final point referred to NSWFB’s obligation to protect life and property, and said that this is linked to risk management and insurance obligations.

30 NSWFB’s recommendation was that ‘the building ... be sprinkler protected complying with Australian Standard (AS) 2118.1’.

31 Mr Cogo decided to prefer the recommendation of Arup Fire. NSWFB expressed its deep concern, by letter dated 11 March 2002. The letter said:

‘The entire fire engineering assessment relies on only one system to alert occupants in the event of fire. There is no redundancy in a [sic] detection system and if the system was isolated for any reasons, there would be no means to alert the occupants in the case of fire. ...

Whilst it is acknowledged that a properly maintained smoke detection and alarm system does alert occupants in the early stages of fire, this type of system has no ability to control or suppress a fire. The obvious result of a fire in a building without the benefit of a suppression system is the uncontrolled spread of fire with resultant property (stock and building) loss, in many cases to a level of total destruction. Further, should injury occur to an occupant of the building whilst evacuating, the potential for injury (or worse) multiplies and also unnecessarily endangers rescuers.’

32 NSWFB asked Mr Cogo to reconsider his assessment of compliance.

33 It is plain from these exchanges that Mr Cogo was put squarely on notice of the concern of NSWFB, and the depth of that concern.

34 In light of the Fire Brigade criticisms, Mr Cogo proceeded to brief Mr Brendan Bennett, Managing Director, City Plan Services, so as to obtain a peer review of the Arup Fire report. He provided him with the Arup Fire Report, January 2002, the relevant plans and layout drawings. He did not provide him with the NSWFB comments and criticisms. Mr Bennett's assessment was that the alternative solution was sufficient to ensure safe egress of occupants in the event of fire. He also supported the alternative solution in respect of vehicular access.

35 On 16 June 2002, Mr Cogo proceeded to issue the construction certificate based on the Arup Fire January report.

36 On 23 July 2002 his firm requested a Final Fire Safety Report from NSWFB. Cl 52 of the EP&A Reg provides:

'152 Reports of Fire Commissioner: section 109H

(cf clause 79M of EP&A Regulation 1994)

- (1) This clause applies to a building to which clause 144 applies.
- (2) Unless it has already refused such an application, a certifying authority must request the Fire Commissioner to furnish it with a final fire safety report for a building as soon as practicable after receiving an application for an occupation certificate for the building.
- (3) If it refuses the application after making such a request but before receiving a final fire safety report, the certifying authority must cause notice of the refusal to be given to the Fire Commissioner.
- (4) Unless it has received a notice referred to in subclause (3), the Fire Commissioner must furnish the certifying authority with a final fire safety report for the building within 7 days after receiving a request for the report.
- (5) The certifying authority must not issue an occupation certificate for the building unless it has taken into consideration any final fire safety report for the building that has been furnished to it within the 7-day period.
- (6) In this clause:

final fire safety report for a building means a written report specifying whether or not the Fire Commissioner is satisfied:

- (a) that the building complies with the Category 2 fire safety provisions, and
- (b) that the fire hydrants in the fire hydrant system will be accessible for use by New South Wales Fire Brigades, and
- (c) that the couplings in the fire hydrant system will be compatible with those of the fire appliances and equipment used by New South Wales Fire Brigades.'

37 NSWFB undertook an inspection on 29 July 2002. The inspection found a number of non-compliances, including sprinkler system decommissioned, the fire panel not functioning properly, obstructions of exits on northern wall, and related obstruction of hydrants in vicinity. NSWFB issued an emergency order requiring rectification works. Concerns were also raised as to the adequacy of perimeter access arrangements. Mr Jurgeit is the author of the next letter providing the Final Report, 31 July 2002. It adopts and amplifies a number of these

criticisms. NSWFB said in a letter of complaint to the then accreditation body in August 2002 that the tenant had commenced occupancy the previous January. The rectification works required by the emergency order were undertaken promptly, and declared completed by NSWFB by letter to the Council dated 22 August 2002.

38 On being advised that the developer had allowed the building to be occupied ahead of the construction certificate and in the absence of an interim or final occupation certificate, the Council issued a Notice of Proposed Order under s 109L of the *Environmental Planning and Assessment Act 1979* (EP&A Act) requiring the installation of a compliant fire hydrant system and for consolidation of the surfaces around the building's perimeter to ensure that it is suitable for access for fire appliance traffic.

39 On 5 August 2002 Mr Cogo's firm requested the developer to provide information going to 12 matters, for its consideration in relation to issuance of the construction certificate. Eight of the matters directly concerned fire safety issues as they related to the built structure and such matters as egress by occupants. Point two referred to the need for the developer to obtain a Fire Safety Certificate, and listed 11 points to be addressed.

40 The Council and NSWFB inspected the building on 28 August 2002. This inspection gave rise to a letter to the Council, 29 August 2002, expressing NSWFB's 'serious concerns' regarding the building.

41 In this letter the first major points of criticisms related to the requirements for vehicular access and open spaces (C2.3, C2.4 and C2.9). The second group of criticisms deal with a range of matters to do with the state of the building including the concern over the decision of Mr Cogo. The matters included: inappropriate mounting of hydrants on external walls, non-protection of the pipework and supports from the wall for internal fixed hydrants; lack of a facility on-site to boost the pressure for pumping of water ('Hydrant Booster Connection'); the installation of the 'Vesda' smoke detection and alarm system; absence of adequate signage denoting the location of fire hose reels; poor state of a number of the exits, and inadequacy of signage; need to keep under-stairway areas free of matter that might be a fire source; inadequate emergency lighting; problems in relation to signage as to switchboards, and their state; operation of door latch mechanisms. The letter expressed concern that the building was already occupied ahead of the cl 152 inspection, and over the ability of NSWFB to carry out operational firefighting there in a safe and effective manner.

42 The final occupation certificate issued, as previously noted, on 10 October 2002. There was a change of ownership. On 25 March 2003 the Council issued a notice of proposed order to the new owner of the site requiring the building to be 'completely sprinklered'. The Commissioner's full complaint against Mr Cogo was sent to the accreditation body on 17 April 2003. As six of the matters of concern remained outstanding, the Council issued a notice of final order on 1 July 2003 requiring compliance by 30 September 2003. The matters of concern were all remedied to the satisfaction of the Council.

Competence: Building Fire Safety Issues

43 Mr Jurgeit, Structural and Fire Safety Manager, NSWFB, gave evidence. He has belonged to that unit for 9 years, and been its manager for the last 3 years. He has been a member of the NSWFB for 29 years.

44 He acknowledged that a smoke detector and alarm system may respond quicker to the onset of fire than a sprinkler system. A smoke detector system should detect smoke a little quicker than a sprinkler system, of the order of one to two minutes. However, he expressed firmly the opinion that sprinklers and associated water based protections provided greater benefit to fire operations and occupant safety than smoke detection systems. He saw sprinklers as a proactive element in a fire protection design.

45 He referred in his evidence to the difficulty of relying wholly or significantly on the fire resistance levels of the built elements to minimise the spread of fire. He expressed particular concern over the tendency of aerosols to explode, and the dangers that high racks pose if they collapse. He repeated the concerns expressed by the NSWFB at the time over the inadequacies of the building as inspected in July and August 2002, and its disturbance over the fact that it had been prematurely occupied. In cross examination he accepted that it is possible to have an acceptable fire retardant system that does not include sprinklers, depending on the circumstances.

46 Mr Wynn-Jones has substantial relevant qualifications and expertise in fire safety.

47 His report examines the following questions:

1. whether the Arup Fire Report, January 2002, satisfied Condition 7 of the Development Consent.
2. whether a reasonably competent accredited certifier Building Grade 1 would have relied on the Arup Report.
3. whether the works the subject of the construction certificate resulted in reduction of the fire protection and structural capacity of the building; if it is acceptable in this regard merely to require compliance with the BCA; and the same questions in relation to the occupation certificate.
4. whether a reasonably competent accredited certifier of Mr Cogo's status would have issued the construction certificate in circumstances where no Fire Engineering Design Brief had been prepared.
5. whether the works the subject of the construction certificate would have resulted in compliance with the then current BCA.
6. whether a reasonably competent accredited certifier of Mr Cogo's status would have referred the NSWFB material to the independent accredited certifier engaged to provide concurrence to set aside the NSWFB opinion.

48 Mr Wynn-Jones answers each of these questions in the negative for Mr Cogo. We will not deal at length in these reasons with the opinions expressed by Mr Wynn-Jones.

49 Mr Wynn-Jones referred to the importance of methodology in approaching complex fire protection and fire risk management issues of the kind that were apparent in this case. He drew attention to the Fire Engineering Guidelines (FEG) that were in force when Condition 7 of the DC was imposed. The guidelines provide a structure through which the issues that arose in this case might have been more effectively addressed: fire initiation and development; smoke development and management; fire spread and management; fire detection and suppression; occupant avoidance; fire brigade communication and response. He then referred to the next stage: the development of a Fire Engineering Design Brief.

50 Mr Wynn-Jones noted with concern that the authors of key documents on which Mr Cogo relied indicated that this methodology had not been adopted.

51 Mr Wynn-Jones makes a number of criticisms of the quality and persuasiveness of the Arup report of January 2002. The report did not, for example, address the adequacy of the structural steel portal frame in circumstances where it was clear that the steel frame did not have an adequate fire resistance level (FRL). He notes that the author does not address the implications of the volume of the building, one that is more than twice the allowable volume pursuant to Table C2. Volume is critical to the size and severity of a fire. Mr Wynn-Jones criticises a number of the assumptions of the author as to when and to what extent all exits in the western wall will be open, whether there will be a fire control centre (none was in fact installed), the suitability of the Vesda system, and the adequacy of the measures taken in relation to hose reels, hydrants, signage and the like.

52 We agree with the criticisms made by Mr Wynn-Jones, only some of which have been detailed here.

53 Mr Kip also has substantial fire engineering and safety qualifications. He is currently President of the Society of Fire Safety Engineers of Australia. His main point of difference with Mr Wynn-Jones was over the way cl 143(3) of the EP&A Reg should operate in practice, i.e.:

‘(3) In the case of building work that involves the alteration, enlargement or extension of an existing building in circumstances in which no change of building use is proposed, a certifying authority must not issue a construction certificate for the work unless, on completion of the building work, the fire protection and structural capacity of the building will not be reduced, assuming that the building work is carried out in accordance with the plans and specifications to which the construction certificate relates and any conditions to which the construction certificate is subject.’

54 Mr Kip made the valid point that there may be circumstances in which a smoke detector and alarm system does not result in any reduction of safety as compared to an existing sprinkler system. He then goes on to argue that it would be enough to achieve compliance with cl 143(3) were the designer of the system and the accredited certifier each to be satisfied that the measures were in line with the BCA. In our view, this line of argument runs the risk of allowing a merely subjective standard to apply. It is not always enough that two persons of apparent competence agree. They both may be mistaken in a way that peers of standing and competence would regard as showing incompetence.

55 He also noted that the methodology commended by Mr Wynn-Jones was merely recommended, and not mandatory. It belonged to a set of guidelines. Mr Kip is correct to note this. However, we see Mr Wynn-Jones as having had a broader point, being that the use of a methodology of this kind reduces the possibility of a poor decision.

56 Mr Wynn-Jones noted in his evidence that the intent of the accreditation scheme with regard to fire issues was to have a ‘collaborative’ approach – every participant is to have an input into the design. Mr Kip in his evidence noted that there is often conflict between the BCA and the Fire Brigade due to the basic differences in their charters. The BCA is concerned with building standards, whereas the Fire Brigade is concerned with protection of life and property assets. This in effect means that there are times when situations such as the present one might arise.

57 As we see it, both points of view fall to be addressed, and if necessary reconciled, in the ultimate decision.

58 In his submissions, Mr Lovegrove drew attention to three cases that had questioned Fire Brigade positions. The cases are administrative appeals cases, not professional discipline cases.

59 Two were from the Building Appeals Board, Victoria. In those cases, decisions of the Chief Officer, Metropolitan Fire Brigade fell under scrutiny. They formed the background to decisions by the actual respondents to the appeals, local Councils. In both cases the Board’s determination was that the Chief Officer’s views should not be adopted.

60 In *Re Campbell* (4 December 2003) one of the issues concerned the practical interpretation of a requirement that an automatic fire suppression system should be installed ‘to the degree necessary’. We agree that a building professional when called on to determine what is the ‘necessary’ degree must recognise ‘that the role of the fire brigade is seen as integral’ (p 7). Mr Lovegrove drew support from the Board’s observation that it is permissible and proper for fire safety engineering decisions to be based on ‘an holistic approach’ rather than each performance measure being considered ‘in isolation’ (p 8). We have no strong objection to a summary conclusion of that kind.

61 In a situation of the kind the present case presents – storage of highly flammable and explosive goods in volume using high racking – the elements that contribute to the holistic approach will require examination, much in the way that Mr Wynn-Jones did in his report. The ultimate appraisal may be holistic, but that appraisal can not occur without first there being an appraisal of the extent to which relevant site specific and technical factors are addressed. This is the discipline seen in the BCA and in the considerations identified by the NSWFB. It is the hallmark of a professional approach to a task. We acknowledge that there will sometimes be tensions, and it does not constitute unsatisfactory professional conduct merely to disagree with the Fire Brigade, provided the decision is not so poor that a reasonably competent accredited certifier could not have made it.

62 The second Victorian case is *Re Arkritidis* (27 June 2005). The Board upheld an administrative appeal against

the refusal by the Chief Officer of the Metropolitan Fire Brigade to approve a monitored thermal detection system rather than a sprinkler system. The Board considered that the system viewed in context was acceptable as an alternative solution. The Board referred to other features of the building which militated against inward collapse and which facilitated smoke venting.

63 The third case was from New Zealand, *Auckland City Council v NZ Fire Service* [1996] 1 NZLR 330 (H.C., Gallen J). Mr Lovegrove drew attention to observations at 337 relating to the need for a balanced approach in making assessments that bear on the preservation and protection of the life and safety of occupants of premises, and the emphasis given to the need to consider reasonable practicability. We have no difficulty with that proposition.

64 The present case is not a case of a mere difference of professional judgement.

Perimeter Access

65 As has been noted, part of the NSWFB criticisms went to the adequacy of the perimeter access arrangements. There is no material to inform us as to whether these issues had been agitated during the previous life of the building, or addressed by Council. Many of the features that gave rise to criticism by the NSWFB either were known or should have been known to the Council and its relevant responsible officers. On the other hand, we acknowledge that the intensification of the use of the warehouse for storage, and the hazardous nature of the goods intended to be stored (so far as fire potential was concerned) was a factor in the NSWFB raising these matters.

66 Mr Jurgeit noted that the warehouse was a building of approximately 20,000 square metres, and that the southern side perimeter access was restricted. The eastern side was affected by an embankment. The roadway in that part of the site was wider, but it did not have an adequate turning circle for vehicles such as those used by the Fire Brigade. He said that access on the western side was satisfactory, but that on the northern side it was impeded by a car park. He noted other difficult access features of the site such as elevated ramps and proximity to the adjoining development.

Assessment

67 We are satisfied that each of the three allegations is proven. The failure to obtain the report from a properly accredited certifier would not have been a major problem had the report itself been sound. It was perhaps not unreasonable of Mr Cogo to have assumed that the author of such a report from an eminent firm in the field would have held the relevant qualification. Nonetheless he should have checked.

68 The allegations relating to the adequacy of the internal fire protection arrangements and the adequacy of perimeter access are more serious.

69 We note that the Council orders ultimately issued to the owner did not involve any requirements as to improving perimeter access. This suggests to us this failure on the part of Mr Cogo should be regarded less seriously than the omissions relating to internal fire protection.

70 An accredited certifier who operates at a very high level, as Mr Cogo did and still does, must have sufficient breadth and depth of building knowledge and of particular subject matters, such as fire safety, to be able to form a view on the quality of input. We accept that an accredited certifier will normally not be 'as expert as' a consultant who specialises in the area.

71 We note Mr Lovegrove's submission that Mr Cogo went to a firm of high reputation, Arup Partners, to obtain options for an alternative solution. On the other hand, when he faced sustained criticism from NSWFB he did not fully brief Mr Bennett. He gave him only part of the relevant material. This action suggests a degree of partisanship in how Mr Cogo approached his role.

72 One of the features of the material in the present case is the mixed relationship of Mr Cogo's McKenzie Group

to the development project. He was looking to a wing of his own firm to provide input for finding an alternative solution. Based on the material, it would appear that the developer was the driving party in wanting to move away from a sprinkler system. The developer was a client of the firm while at the same time looking to Mr Cogo to perform the independent role in protection of the public interest required of an accredited certifier. Mr Cogo was heavily involved in putting together the site inspections while his own firm was commending a solution that was drawing consistent criticism from NSWFB.

73 In this case, our view is that Mr Cogo was foolhardy not to listen to the NSWFB's concerns. The law accords NSWFB a central role in the process as it relates to fire safety standards in larger commercial and industrial buildings. The law is clear that NSWFB's opinion and judgement is not lightly to be rejected. They 'cannot be set aside without the concurrence of' an independent accredited certifier who is a Grade 1 certifier (BSAP Standard).

74 He did not take care to check that he received a report from an appropriately qualified independent expert. It may be that he might have assumed that a firm of the standing of Arup Partners would ensure that their sign-off engineer held the required qualification. We did not have any evidence on this from Mr Cogo.

75 We are satisfied that the basic case is made out, i.e. that a reasonably competent accredited certifier of Mr Cogo's status would not have authorised work to proceed on the basis of the January report.

76 Moreover we consider that a reasonably competent accredited certifier would not have ignored the NSWFB criticisms to the extent that occurred here. In our view, Mr Cogo failed seriously when he did not refer the comments critical of his preferred approach and that of his firm to Mr Bennett. (Equally we note that the material is silent as to whether Mr Bennett pressed Mr Cogo for any NSWFB comments. Given the statutory requirements, it would, we think, have been apparent that there must be matter of this kind, especially in circumstances where a second opinion is being sought.)

77 Mr Cogo's conduct on this occasion was similar to his conduct in respect of another case that reached the Tribunal (also constituted by the same panel). See *Building Professionals Board v Cogo* [2008] NSWADT 119 (24 April 2008).

78 That case related to a major residential and commercial development where Mr Cogo was the certifying authority. The conduct belonged to the period 2001-2003. Mr Cogo authorised numerous variations from the conditions specified as part of the development consent. Many of them contravened relevant standards, and lead to the disciplinary application against Mr Cogo. The Tribunal found that he had engaged in unsatisfactory professional conduct, and ordered that he be reprimanded and fined \$11,000.

79 This complaint which belongs, broadly, to the same period of time, involves similar conduct, and suggests to the Tribunal that at that time he did not clearly understand his duties as an accredited certifier.

Disciplinary Finding

80 The conduct identified involves two matters which, we consider, constitute unsatisfactory professional conduct, with the main issue (the failure to provide a better system than one based on smoke detection and alarm) lying towards the professional misconduct end of the spectrum. The Tribunal has discussed in other cases the way unsatisfactory professional conduct is differentiated from professional misconduct in the Act. Section 19 provides:

'professional misconduct, in relation to an accreditation holder, means conduct that is unsatisfactory professional conduct of a sufficiently serious nature to justify suspension or cancellation of the accreditation holder's certificate of accreditation.'

81 We are prepared to accept the proposed consent order in this case. This is in part because Mr Cogo has 'had this matter over his head' over the past several years. As the Tribunal noted in the earlier case involving Mr Cogo, a contemporary failure of the degree seen in this case might well attract a finding of professional misconduct. He has continued to practise since 2002. The misconduct identified in this case occurred at an early stage of the new scheme involving a newly created role of an unusual kind as compared to the previous certification arrangements.

82 We find that Mr Cogo engaged in unsatisfactory professional conduct.

Disciplinary Order

83 Mr Cogo is now based at the Brisbane office of McKenzie Group. He is a member of a number of professional associations, including the Society of Fire Safety. He holds Grade 1 accreditation as a certifier and as a PCA in New South Wales. He has relevant academic degrees, including a Graduate Certificate in Performance Based Building & Fire Code (Victoria University). He started out at the age of 22 in the building surveying section of the City of Melbourne, and moved three years later to the private sector. He has been with McKenzie Group for 13 years. He has worked on a number of major projects.

84 In addition to the previous Tribunal matter he has been the subject of a decision at accreditation body level (State Assessment Committee matter 03/03). This case resulted in a caution being administered on the grounds that Mr Cogo did not act in good faith, had withheld the NSWFB's report at the time he sought the opinion of another certifier, and, to use the words of the decision, had gone 'shopping' for another certifier when concurrence was refused by the first independent certifier to whom he referred the matter. The conduct in issue occurred in late 2002. Sprinkler protection was, like the present matter, an issue, as were travel distances to exits. The development was a car park to accommodate 66 vehicles and with a low ceiling height. Many of the behaviours noted by the accreditation body's officers in that case are very similar to those under notice in this case.

85 The two Tribunal cases and the SAC case point to a degree of professional immaturity on the part of Mr Cogo in and around 2001 and 2002 and a tendency to see the applicant for a certificate as a client whose interests are to be served rather than a person whose application is to be assessed professionally and neutrally consistent with the public function of the office of accredited certifier.

86 In our view this is not a lesser case than the previous matter that came before the Tribunal. We are disposed to vary the consent order in one respect, to increase the fine to \$11,000 in line with the previous case. We acknowledge that Mr Cogo's admissions and his preparedness to submit to consent orders has produced some saving. On the other hand we note that the issues of professional judgement remained in contest through the various stages of the internal consideration of the case by the Board and concessions were not made until very close to the hearing.

87 This case is different from the previous case in the extent to which it involves fundamental concerns to do with the protection and safety of individuals – workers, visitors to the premises and firefighters.

Order

- (1) The Respondent is guilty of Unsatisfactory Professional Conduct.
- (2) The Respondent is reprimanded.
- (3) The Respondent is fined \$11,000.

APPENDIX

APPLICATION:

DISCIPLINARY FINDING/S SOUGHT

The applicant seeks the following finding/s:

1. Pursuant to ss. 31(2) and 31(3) of the *Building Professionals Act 2005* ("the *BP Act*") the Building Professionals Board ("the Applicant") makes application for a disciplinary finding against Mr Mark Cogo ("the Respondent"), being a finding of professional misconduct or in the alternative, unsatisfactory professional

conduct, in respect of the matters set out below.

1. General description of conduct:

1.1 The Respondent was at all material times accredited as an Accredited Certifier and Principal Certifying Authority pursuant to s. 109T of the *Environmental Planning and Assessment Act 1979* (the *EP&A Act*”).

The Respondent was first issued with a certificate of accreditation as an Accredited Certifier and Principal Certifying Authority – Building (Grade 2) on 19 December 2000 by the Building Surveyors and Allied Professionals Board Inc (“BSAP”), a professional association authorised by the then Minister for Planning (“the Minister”) as an accreditation body pursuant to s. 109S of the *EP&A Act*, under the BSAP Scheme.

Mr Neil Cocks, Director of the then Building Professionals Branch of the Department of Planning had been appointed by the Minister under cl.199(3)(a) of the *Environmental Planning and Assessment Regulation 2000* (“the *EP&A Regulation*) to administer the BSAP Scheme.

The Respondent’s accreditation was renewed from time to time and on 9 March 2007 his accreditation was changed to A1 with conditions.

1.2 On 16 June 2002, the Respondent issued Construction Certificate No 02/498-1 (“the Construction Certificate”) in respect of a warehouse development at 56 Anzac Street, Chullora NSW (“the development”). The Construction Certificate provided for, amongst other things, the disconnection of the existing fire suppression system in the warehouse, being a sprinkler system, and the installation of a smoke detection and alarm system.

On 10 October 2002, the Respondent issued Final Occupation Certificate No.02/498-1OC (“the Final Occupation Certificate”) with respect to the development.

1.2 A complaint was made pursuant to s.109V of the *EP&A Act* by Mr Christopher Ernst Jurgeit, New South Wales Fire Brigades to the Department of Planning on 17 April 2003 against the Respondent in relation to the failure to address performance requirements EP1.4 and CP9 of the Building Code of Australia (“BCA”) in relation to the development, in that the building and the solutions developed posed a threat to fire fighters and occupant safety (“the complaint”).

1.3 The complaint has been investigated pursuant to section 109W of the *EP&A Act* by officers of the Department of Planning and the investigation continued by the Board under the *BP Act*.

1.4 The authority of Mr Cocks expired with the commencement of the *BP Act* on 1 March 2007. Pursuant to cl. 3(1), sch. 2 of the *BP Act*, the Applicant is required to deal with the complaint as a complaint under Part 3 of the *BP Act*.

1.5 By issuing the Construction Certificate, by issuing the Final Occupation Certificate, and by not adequately addressing BCA performance requirements EP1.4 and CP9, the Respondent has engaged in conduct:

- a) Occurring in connection with the exercise of an accredited certifier’s functions as a certifying authority that fell short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier; and/or
- b) By which he contravened the *EP&A Act*; and/or
- c) Amounting to a contravention of the BSAP Code of Professional Conduct specifically guiding principles no. 1, 2, 4 and 8.

2. Particulars

(1) Relevant legislation

Clause 109F of the *EP&A Act* provided at the relevant time:

“109F Restriction on issue of construction certificates

(1) A construction certificate must not be issued with respect to the plans and specifications for any building work or subdivision work unless the certifying authority is satisfied that:

(a) the requirements of the regulations referred to in section 81A

(5) have been complied with, and

...”

Clause 109H(1)(c) of the *EP&A Act* provided at the relevant time:

“109H Restriction on issue of occupation certificates

(1) A final occupation certificate must not be issued to authorise a person to commence occupation or use of a new building unless the certifying authority is satisfied:

...

(c) that the building is suitable for occupation or use in accordance with its classification under the *Building Code of Australia*, and

...”

Section 81A(5) of the *EP&A Act* provided at the relevant time:

“...

(5) Regulations may provide for the issue of certificates

The regulations may make provision concerning the issue of certificates for the erection of buildings and the subdivision of land.

...”

Clause 143(3) of the *EP&A Regulation* provided at the relevant time:

“143 Fire protection and structural capacity

...

(3) In the case of building work that involves the alteration, enlargement or extension of an existing building in circumstances in which no change of building use is proposed, a certifying authority must not issue a construction certificate for the work unless it is satisfied that, on completion of the building work, the fire protection and structural capacity of the building will not be reduced, assuming that the building work is carried out in accordance with the plans and specifications to which the construction certificate relates and any conditions to which the construction certificate is subject.

...”

Clauses 145(1)(a) and (b) of the *EP&A Regulation* provided at the relevant time:

“145 Compliance with development consent and Building Code of Australia

(cf clause 79G of EP&A Regulation 1994)

(1) A certifying authority must not issue a construction certificate for building work unless it is satisfied of the following matters:

(a) that the design and construction of the building (as depicted in the plans and specifications and as described in any other information furnished to the certifying authority under clause 140) are not inconsistent with the development consent,

(b) that the proposed building (not being a temporary building) will comply with the relevant requirements of the *Building Code of Australia* (as in force at the time the application for the construction certificate was made).

...”

Clause 168 of the *EP&A Regulation* provided at the relevant time:

“168 Fire safety schedules

(cf clause 80C of EP&A Regulation 1994)

(1) When:

(a) granting a development consent for a change of building use (other than a complying development certificate) in circumstances in which no building work is proposed by the applicant for the consent and no building work is required by the consent authority, or

(b) issuing a complying development certificate for the erection of a building or for a change of building use, or

(c) issuing a construction certificate for proposed building work, or

(d) giving a fire safety order in relation to building premises,

the person doing so must issue a schedule (a *fire safety schedule*) specifying the fire safety measures (both current and proposed) that should be implemented in the building premises.

(2) In the case of a fire safety order in respect of which a further order is made under section 121R of the Act, the fire safety schedule is to be issued when the further order is given.

(3) A fire safety schedule:

(a) must deal with the whole of the building, not merely the part of the building to which the development consent, complying development certificate, construction certificate or fire safety order relates, and

(b) must include:

(i) such of the fire safety measures currently implemented in the building premises, and

(ii) such of the fire safety measures proposed or required to be implemented in the building premises,

as are statutory fire safety measures, and

(c) must distinguish between:

(i) the fire safety measures currently implemented in the building premises, and

(ii) the fire safety measures proposed or required to be implemented in the building premises, and

(d) must identify each measure that is a critical fire safety measure and the intervals (being intervals of less than 12 months) at which supplementary fire safety statements must be given to the council in respect of each such measure, and

(e) must specify the minimum standard of performance for each fire safety measure included in the schedule.

(4) A copy of the fire safety schedule must be attached to (and is taken to form part of) the relevant development consent, complying development certificate, construction certificate or fire safety order and for the purposes of an appeal forms part of the development consent or construction certificate.

(5) An earlier fire safety schedule is superseded by a later fire safety schedule, and ceases to have effect when the later fire safety schedule is issued.”

(2) Other relevant matters

The BSAP Code of Conduct relevantly provides:

“1. At all times safeguard the interests of the public and the accredited certifiers/PCAs clients and employers provided always that such interests are not in contravention of the code;

2. Do not breach public trust in the profession to which they belong or the specific trust of their clients and employers. Observance of accepted norms of honesty and integrity must underlie all their professional decisions and actions;

...

4. Strive continually to improve their technical services and to keep their knowledge up to date. They must bring due care and diligence to bear upon the discharge of their duties to clients and employers;

...

8. Refrain from any conduct or action in their professional role which may tarnish the image of the profession to which they belong or unjustifiably detract from the name of Board;

...”

Subsection 10.4 of the BSAP Scheme sets out that the Accredited Certifier must rely on one of the following where an alternative solution relating to fire safety is proposed:

1. A compliance certificate from an Accredited Certifier – Fire Safety Engineering; or
2. One or a combination of the forms of Evidence of Suitability as set out in Pt A2 of BCA96 Volume 1 or Pt 1.2 of BCA96 Volume 2 as appropriate from an Accredited Certifier – Fire Safety Engineering.

Subsection 10.4 of the BSAP Scheme also provides:

“The Accredited Certifier – Building (Grade 1) must have regard to the following matters when issuing certificates where an alternative solution for *fire safety* is involved:

...

Requirements imposed by the NSW Fire Brigade must be considered and cannot be set aside without the concurrence of an independent accredited certifier who is an Accredited Certifier – Building (Grade 1).”

(3) Particulars of conduct – General and Background Summary

- (a) The Respondent received an application for a construction certificate for approval which provided for, amongst other things, the disconnection of an existing fire suppression system in the building being a sprinkler system and the installation of a smoke detection and alarm system.
- (b) In accordance with cl.144 of the *EP&A Regulation* the Respondent sought an initial Fire Safety Assessment Report on the proposed construction certificate from the NSW Fire Brigades Risk Management Directorate (“the Fire Brigades”).
- (c) The Fire Brigades advised the Respondent they considered the Performance Requirements EP1.4 and CP9 of the Building Code of Australia had not been adequately addressed, and as a result, the building and the solutions developed posed a potential risk to fire fighter and occupant safety.
- (d) The BCA Performance Requirement CP9 relates to access requirements to and around a building for Fire Brigade vehicles and personnel. BCA Performance Requirement EP1.4 provides:

An automatic fire suppression system must be installed to the degree necessary to control the development and spread of fire appropriate to -

- (a) the size of the fire compartment; and
 - (b) the function and use of the building; and
 - (c) the fire hazard; and
 - (d) the height of the building.
- (e) Subsection 10.4 of the BSAP Scheme sets out that the Accredited Certifier must rely on one of the following where an alternative solution relating to fire safety is proposed:
1. A compliance certificate from an Accredited Certifier – Fire Safety Engineering; or
 2. One or a combination of the forms of Evidence of Suitability as set out in Pt A2 of BCA96 Volume 1 or Pt 1.2 of BCA96 Volume 2 as appropriate from an Accredited Certifier – Fire Safety Engineering.

(f) The Respondent relied on a Fire Safety Assessment Report, being a report prepared by Arup Fire dated January 2002 (“the Arup report”) which was prepared and reviewed by a person who was not an Accredited Certifier – Fire Safety Engineering.

(g) Subsection 10.4 of the BSAP Scheme also provides:

The Accredited Certifier – Building (Grade 1) must have regard to the following matters when issuing certificates where an alternative solution for *fire safety* is involved:

...

- Requirements imposed by the NSW Fire Brigade must be considered and cannot be set aside without the concurrence of an independent accredited certifier who is an Accredited Certifier – Building (Grade 1).”

(h) In accordance with subs.10.4 of the BSAP Scheme, the Respondent obtained a peer review of the Fire Safety Assessment Report from an Accredited Certifier Grade 1, Mr Brendan Bennett. The peer review report supported the proposed alternative solution but the Respondent did not provide to the peer reviewer the report of the Fire Brigades and did not refer to the Respondent’s intention to set aside the Fire Brigade’s recommendations.

A The Construction Certificate

3.1 The following acts and/or omissions occurred in the issuing of Construction Certificate No 02/498-1 by the Respondent in respect of the development on 16 June 2002:

3.1.1 The fire safety schedule issued by the Respondent with the Construction Certificate did not comply with cl. 168 of the *EPA Regulation* as the existing and proposed fire safety measures were not distinguished.

3.1.2 The Construction Certificate provided for the disconnection of the existing fire suppression system, being a sprinkler system, and the installation of an automatic smoke detection and alarm system. This had the effect of lowering the fire protection of the building, in breach of cl. 143(3) of the *EPA Regulation*, as follows:

(i) the pre-existing sprinkler system provided protection, containment, suppression, fire protection for structural elements and facilitated fire brigade intervention whilst a smoke detection system only provided detection and alarm to facilitate earlier fire brigade prevention;

(ii) the other fire safety measures provided for in the Construction Certificate did not compensate for the removal of the sprinkler system.

3.1.3 The Construction Certificate was inconsistent with development consent No. 1656/2001 dated 18 December 2001, in breach of cl.145(1)(a) of the *EP&A Regulation*, in that:

(i) Condition 7 of the development consent required that a Fire Engineering Level 2 Alternative Solution Report be prepared by a practising fire engineer to address the issues raised in the McKenzie Group Building Code Report dated 16 November 2001, such report to be submitted to principal certifying authority prior to the release of the Construction Certificate;

(ii) The Arup report did not satisfy the requirements of Condition 7 of the development consent.

3.1.4 The Construction Certificate was issued in respect to work that would have resulted in a reduction of the fire protection and structural capacity of the building within the meaning of cl. 143(3) of the *EPA Regulation 2000*. The disconnection and removal of the sprinkler system would have:

- (i) adversely impacted on the structural strength and load-bearing capacity of the building;
- (ii) reduced the measures protecting persons using the building;
- (iii) hindered egress from the building in the event of a fire;
- (iv) allowed the spread of fire from the building to other buildings nearby.

3.1.5 The Respondent did not comply with s. 109F(1)(a) of the *EP&A Act*.

(i) Section 109F(1)(a) of the *EP&A Act* provides:

“(1) A construction certificate must not be issued with respect to the plans and specifications for any building work or subdivision work unless the certifying authority is satisfied that:

(a) the requirements of the regulations referred to in section 81A (5) have been complied with.”

...

(ii) Section 81A(5) of the *EP&A Act* provides for regulations to be made concerning the issue of a construction certificate.

(iii) By issuing the Construction Certificate, in breach of cl.143(3) and cl.145(1)(a) of the *EP&A Regulation*, the Respondent contravened s. 109F(1)(a) of the *EP&A Act*.

3.2 By issuing the Construction Certificate, the Respondent has engaged in conduct:

(a) Occurring in connection with the exercise of an accredited certifier’s functions as a certifying authority that fell short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier; and

(b) By which he contravened the *EP&A Act*; and

(c) Amounting to a contravention of the BSAP Code of Professional Conduct specifically guiding principles no. 1, 2, 4 and 8.

B The Final Occupation Certificate

3.3 The Respondent issued the Final Occupation Certificate when the development was not suitable for occupation or use in accordance with its classification under the BCA, in breach of s. 109H(1)(c) of the *EP&A Act*, because:

3.3.1 there was no fire control centre installed in ‘the building’ to allow the Fire Brigade to fight the fire and undertake ‘search and rescue’ operations.

3.3.2 there was no evidence that a building occupant warning system had been provided in ‘the building’ and that a detection system in accordance with Specification E2.2a of the BCA was provided in the warehouse.

3.3.3 a fire safety policy in accordance with AS 3745 was not included as a ‘critical fire safety measure’ in the

fire safety schedule attached to the construction certificate nor was it developed and implemented.

3.4 By issuing the Final Occupation, the Respondent has engaged in conduct:

- (a) Occurring in connection with the exercise of an accredited certifier's functions as a certifying authority that fell short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier; and
- (b) By which he contravened the *EP&A Act*; and
- (c) Amounting to a contravention of the BSAP Code of Professional Conduct specifically guiding principles no. 1, 2, 4 and 8.

C BCA Performance Requirements EP1.4 and CP9

3.5 The Respondent approved the Construction Certificate and the Final Occupation Certificate in respect to the development which did not adequately address BCA Performance Requirements EP1.4 and CP9.

3.5.1 The quality and rigour of the assessment of the construction certificate and the final occupation certificate was unsatisfactory given that:

- (a) the Arup report, relied upon by the applicant, failed to adequately address performance requirements EP1.4 and CP9;
- (b) there was no Fire Engineering Design Brief as part of the preparation of the alternative solution report and the Respondent did not participate in, or require the conduct of, a Fire Engineering Design Brief in respect to the preparation of the alternative solution for the development;
- (c) the Arup report was prepared by John Hewitt who was not an accredited certifier Fire Safety Engineering at the time as was required by subs.10.4 of the BSAP Scheme. Accordingly, the Arup report relied upon by the respondent did not constitute the required evidence to satisfy part 10.4 of the BSAP Scheme;
- (d) the Respondent did not have sufficient regard to the accuracy of the assumptions made in the report by Mr John Hewitt of Arup upon which the alternative solution was based;
- (d) the Respondent failed to inform Mr Brendan Bennett, who gave a peer review report, that the Arup report had been referred to the Fire Brigades pursuant to cl.144 of the *EP&A Regulation* and that Fire Brigades had given a fire safety report;
- (e) The Respondent did not provide Mr Brendan Bennett with a copy of the initial fire safety report from the Fire Brigades, setting out the recommendations of the Fire Brigades in respect to the development, when seeking peer review of the alternative solution prepared by Mr John Hewitt of Arup;
- (f) a smoke detection system does not suppress or contain fire as required by EP1.4.

3.6 By not adequately addressing BCA EP1.4 and CP9 the Respondent has engaged in conduct:

- (a) Occurring in connection with the exercise of an accredited certifier's functions as a certifying authority that fell short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited

certifier;

(b) Amounting to a contravention of the BSAP Code of Professional Conduct specifically guiding principles no. 1, 2, 4 and 8.

DISCIPLINARY ORDERS SOUGHT

The applicant seeks the following orders if one or more of the disciplinary findings are made:

That the Tribunal makes a finding that the Respondent has been guilty of professional misconduct or in the alternative, unsatisfactory professional conduct, and makes a decision under s. 34 of the *BP Act*.

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