Administrative Decisions Tribunal
New South Wales

Appeal Panel - Internal

CITATION:	**Building Professionals Board v Hans (No.2) (GD) [2008] NSWADTAP 48**
PARTIES:	APPELLANT Building Professionals Board RESPONDENT Anthony Hans
FILE NUMBER:	079025
HEARING DATES:	9 May 2008
SUBMISSIONS CLOSED:	9 May 2008
DATE OF DECISION:	29 July 2008
BEFORE:	Chesterman M - Deputy President; Salier GA - Judicial Member; Hayward P - Non Judicial Member
CATCHWORDS:	Accredited certifier - distribution between professional misconduct and unsatisfactory professional conduct - appropriate penalties - appeal allowed in part
MATTER FOR DECISION:	Principal matter
DECISION UNDER APPEAL:	Building Professionals Board v Hans [2007] NSWADT 83
FILE NUMBER UNDER APPEAL:	063382
DATE OF DECISION UNDER APPEAL:	12/04/2007
LEGISLATION CITED :	Administrative Decisions Tribunal Act 1997 Building Professionals Act 2005 Building Professionals Regulation 2007 Environmental Planning and Assessment Act 1979
CASES CITED:	Allinson v General Council of Medical Education and Registration [1894] 1 QBD 750

Briginshaw v Briginshaw (1938) 60 CLR 336
Building Professionals Board v Boulle [2008] NSWADT 80
Building Professionals Board v Cogo [2008] NSWADT 119
Building Professionals Board v Hans [2007] NSWADT 83
Building Professionals Board v Hans (GD) [2008] NSWADTAP 13
Director, Building Professionals Branch, Department of Planning v Dallas [2006] NSWADT 231
Director General, Department of Infrastructure, Planning & Natural Resources v Boulle [2006] NSWADT 43
Director General, Department of Infrastructure, Planning & Natural Resources v Stapleton (No 2) [2004] NSWADT 70
Minister for Infrastructure and Planning v Conway (No 2) [2004] NSWADT 159

REPRESENTATION:

APPELLANT
D Chin, barrister

RESPONDENT
In person

ORDERS:

1. The appeal is allowed in part
2. The orders made by the Tribunal in its decision dated 12 April 2007 are varied as follows:
(a) Order 1 is set aside and the following order substituted: 'The Respondent is guilty of professional misconduct'
(b) Order 3 is set aside and the following order substituted: 'The Respondent is fined $11,000, payable within three months of the date of these reasons'
3. Any application for costs in these appeal proceedings must be filed and served, with supporting submissions, within 28 days of the date of this decision. The opposing party must file and serve submissions in reply within a further 28 days. Unless reasons are advanced for a hearing to be conducted, the matter will be resolved 'on the papers', pursuant to section 76 of the Administrative Decisions Tribunal Act 1997.

REASONS FOR DECISION

Introduction

1 In this appeal, the Appellant, the Building Professionals Board (hereafter 'the Board') claimed that in the decision under appeal the Tribunal had made orders in disciplinary proceedings against the Respondent, an accredited certifier, that insufficiently reflected the seriousness of the matters that had been established against him.

2 On 27 October 2006, the Board filed a disciplinary application in the Tribunal against the Respondent, Mr Anthony Hans, under section 109Z(2) of the now-repealed *Environmental Planning and Assessment Act* 1979 ('the EPA Act'). Mr Hans was an accredited certifier under Part 4B of this Act.

3 In the decision under appeal, which was delivered on 12 April 2007 (*Building Professionals Board v Hans* [2007] NSWADT 83 – hereafter 'the Tribunal's judgment'), the Tribunal held that Mr Hans had been guilty of unsatisfactory professional conduct as defined in section 109R of the EPA Act. It rejected a submission

by the Board that the conduct that had been proved against Mr Hans was 'of a sufficiently serious nature to justify suspension … or withdrawal' of his accreditation and therefore amounted to professional misconduct as defined in this section.

4 Acting under section 109ZA of the EPA Act, the Tribunal reprimanded Mr Hans, imposed a fine of $2,200.00 upon him and ordered that for a period of one year his accreditation should be subject to a prohibition on issuing complying development certificates for building work or change of use under the Act.

5 The Board filed its Notice of Appeal on 10 May 2007. The Notice claimed the Tribunal had erred in law in a number of respects, maintaining in particular that it should have concluded that Mr Hans had been guilty of professional misconduct.

6 The Notice of Appeal also contained an application under section 113(2)(b) of the *Administrative Decisions Tribunal Act* 1997 ('the ADT Act') for leave for the appeal to extend to the merits. In this part of the Notice, the Board claimed amongst other things that the penalties imposed by the Tribunal did not constitute 'the correct and preferable decision'.

7 At a hearing on 3 September 2007, the Board made a further application, which was for leave to adduce further evidence in the appeal. At this hearing, and at a further hearing on 21 November 2007, we received written and oral submissions from both parties relating to these two applications.

8 In a decision delivered on 12 March 2008 (*Building Professionals Board v Hans (GD)* [2008] NSWADTAP 13 – hereafter 'our earlier decision'), we upheld the Board's two applications.

9 A consequence of our so doing is that our disposal of the appeal is now governed by section 115 of the ADT Act. This states:

> **115 Appeals on the merits**
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> (1) If an appeal under this Part extends to a review of the merits of an appealable decision, the Appeal Panel is to decide what the correct and preferable decision is having regard to the material then before it, including the following:
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> (a) any relevant factual material,
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> (b) any applicable written or unwritten law.
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> (2) The Appeal Panel may exercise all the functions that are conferred or imposed by or under any relevant enactment or this Act on the Tribunal at first instance to make the appealable decision concerned.
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> (3) In determining any such appeal, the Appeal Panel may decide:
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> (a) to affirm the decision, or
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> (b) to vary the decision, or
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> (c) to set aside the decision and make a decision in substitution for the decision it set aside.

10 At a further hearing on 9 May 2008, we formally admitted the further evidence to which the Board's application related. This comprised copies of four letters passing written to or by Mr Hans during 2001 and 2002. We also admitted the following further evidence: (a) copies of eight letters, written to or by Mr Hans during the same two years; (b) a copy of a Summary Paper, *Improving the NSW Planning System*, published

in November 2007 by the Department of Planning; (c) copies of correspondence passing between him and the Board relating to conditions imposed by the Board on his current certificate of accreditation; and (d) certain material relating to Advanced Building Certifiers, which was the firm owned and operated by Mr Hans for the purposes of his activities as an accredited certifier.

11 In our earlier judgment at [8 – 17], we summarised the relevant evidence, drawing significantly on passages in the Tribunal's judgment. Because our task now is to reach 'the correct and preferable decision' on the merits of the case, taking account of all the material before us, we consider it desirable to perform this task again. In so doing, we will incorporate, so far as relevant, the further evidence that we have admitted. We will also refer to some parts of the evidence before the Tribunal that was not included in our earlier summary.

Relevant evidence

12 Paragraphs [1], [2] and [4] of the Tribunal's judgment contained the following succinct outline of the conduct of Mr Hans on which the Tribunal based its decision:

> 1 Mr Anthony Hans is an accredited certifier. Among other things, his certification allows him to issue complying development certificates for building work in relation to particular classes of building. Complying development certificates are certificates, which certify that the development complies with certain standards and regulations. During a two year period from January 2003 to January 2005, Mr Hans issued 25 complying development certificates in circumstances where the developments did not comply with a clause of the Wingecarribee Local Environmental Plan (LEP) 1989. That clause states, in part, that a "development is not a complying development if it is carried out on land that is not serviced by a reticulated sewerage scheme . . .": Clause 6B(3)(i). We will refer to this provision as the "sewerage requirement". The purpose of this clause was presumably to ensure that where there was no reticulated sewerage scheme, on-site effluent loadings were not increased as a result of developments.
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> 2 Mr Hans knew in relation to each of the 25 developments for which complying development certificates were issued, that the land was not serviced by a reticulated sewerage scheme. However, in his view, the sewerage requirement was not applicable because the developments were minor ones involving, for example, a shed, a garage or a swimming pool, and their construction did not have any effect on the water catchment area … .
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> 4 Mr Hans now admits that the complying development certificates were issued in error. However, he came to that view in early January 2007, after seeking legal advice. He says that his interpretation of the sewerage requirement was incorrect but he should not be penalised for this misunderstanding … .

13 At [5 – 7], the Tribunal explained the legal provisions relating to complying development certificates:

> 5 A person wishing to erect a building or carry out other work such as installing a swimming pool, needs consent from a relevant authority before doing so: [EPA Act] section 76A. In particular, if an environmental planning instrument, such as an LEP, provides that specified developments may not be carried out except with development consent, a person must obtain that consent before proceeding with the development: 76A(1). The Wingecarribee LEP provides that development in that shire will be a complying development if it meets certain standards, including the sewerage requirement: 76A(5). If the development is a complying development, an accredited certifier may issue a complying development certificate. If the development does not comply with all the standards, then the person seeking the

consent must apply to the relevant council for development consent: section 76A(2). Council officers will then determine whether or not consent should be given.

6 Under section 85A(3) of the Act, when an accredited certifier receives an application for a complying development certificate, he or she must consider the application and determine:

> (a) whether or not the proposed development is complying development, and
>
> (b) whether or not the proposed development complies with the relevant development standards, and
>
> (c) if the proposed development is complying development because of the provisions of a local environmental plan, or a local environmental plan in relation to which the council has made a development control plan, that specifies standards and conditions for the complying development, whether or not the proposed development complies with those standards and conditions.

7 Clause 6B(3)(i) of the Wingecarribee LEP provides that:

> Development is not complying development if it is carried out on land that:
>
> (i) is not serviced by a reticulated sewerage scheme, or is unsewered land within a special area of hydrological catchment within the meaning of State Environmental Planning Policy Number 58 – Protecting Sydney's Water Supply.

14 Much of the land falling under the Wingecarribee Local Environment Plan (hereafter 'the LEP') fell also within the hydrological catchment governed by the provisions of State Environmental Planning Policy Number 58 ('SEPP 58'). The aims of SEPP 58, as set out in clause 3, were as follows:

> (a) to ensure that development in the hydrological catchment from which Sydney draws its drinking water supply does not have a detrimental impact on water quality, and
>
> (b) to provide … a concurrence or notification role for the Director-General of the Department of Urban Affairs and Planning in relation to development in the hydrological catchment that is likely to have an impact on water quality, and
>
> (c) to ensure that there is a consistent approach to the assessment and control of development in the hydrological catchment that is likely to have an impact on water quality.

15 SEPP 58 stated in clause 8 that certain categories of development defined in Schedules 1 and 2 were not to be carried out without the consent of the 'consent authority'. This authority was defined in clause 9 to be 'the relevant council'. Clauses 11 and 12 respectively established procedures for concurrence by, or notification to, the Director-General with regard to developments within one or other of the two Schedules. For present purposes, the relevant categories in the Schedules were these:

> In Schedule 1 – Unsewered rural residential development, being the subdivision of land into 4 or more lots intended to be used for rural residential development where the lots are unsewered.

> In Schedule 2 – Unsewered rural residential development, being
>
> (a) the subdivision of land into 4 or more lots intended to be used for rural residential development where the lots are unsewered, or
>
> (b) the erection of a dwelling on an allotment of rural land that is unsewered, except where the subdivision of the land has been the subject of concurrence under clause 11 or notification under clause 12.

16 Mr Hans was accredited as a certifier under the EPA Act early in 2001. Within the ensuing months, he formed the view that a number of aspects of the certification process did not promote the Act's purpose of allowing most development applications to be approved by certifiers. He considered in particular that clause 6B(3)(i) of the Wingecarribee LEP was at odds with the aims of SEPP 58.

17 At some time before 9 April 2001, Mr Hans issued a complying development certificate for the construction of a dwelling on a property owned by Mr and Ms Bargon at Bundanoon, within the area of the Wingecarribee Shire Council (hereafter 'the Council').

18 Mr Hans issued this certificate, and all subsequent certificates of relevance to these proceedings, in the name of his firm Advanced Building Certifiers.

19 In a letter to Mr and Ms Bargon dated 9 April 2001, the Director, Environment and Planning, of the Council referred to their application to install a septic tank on their property. After mentioning various regulations, including the SEPP and the Wingecarribee LEP, he advised that no valid consent for the dwelling had been issued and that development consent by the Council was required. A copy of this letter was sent to Mr Hans.

20 On 10 April 2001, Mr Hans wrote three letters in broadly similar terms, to the General Manager of the Council (Mr D J McGowan), the Department of Local Government and the Ombudsman respectively. He sent copies of these letters to Mr and Ms Bargon.

21 These three letters were headed 'Complaint of unfair treatment by Wingecarribee Shire Council'. Having referred to the Council's letter of 9 April 2001 (a copy of which he enclosed), Mr Hans requested an investigation of 'the motives of the Council' (or, in the case of the letter to the Council, of 'the motives of' a named officer). He stated that he had issued a complying development certificate for the erection of a dwelling, that there were no grounds for assuming that the development posed a risk to the environment or to public health and that Nolan & Associates Pty Ltd, an 'accredited water management expert', had conducted a water cycle management study of the site and had reported that the site met all the statutory requirements. He then claimed that the Council should 'simply process the Septic Tank Application, as there are no ground to suggest any threat to public health or the environment'. He added: 'Is it because the Complying Development Certificate has been issued by an Accredited Private Certifier, and not the Council, that the Septic Tank Application is being obstructed?'

22 On 11 April 2001, Mr and Ms Bargon wrote to Mr McGowan complaining about the stance adopted by the Council in its letter to Mr Hans and asking him to intervene in their favour in resolving the issue.

23 On or soon after 13 April 2001, Mr Hans faxed to the Sydney Catchment Authority ('the SCA') a letter, which after referring to a prior telephone conversation with an officer of the Authority, said: 'It is requested that an effluent disposal system be assessed for your concurrence, as a Complying Development Certificate has already been issued for the erection of a dwelling.' The letter enclosed a water management study prepared by Nolan & Associates Pty Ltd, consultant geologists, relating to the property owned by Mr and Ms Bargon at Bundanoon.

24 By a letter dated 17 April 2001, the Manager, Development Control, of the SCA replied to Mr Hans. The letter stated:

> It is understood that you have issued a Complying Development Certificate for a dwelling on the property. However, the authority considers that this Certificate would not be legal under the Environmental Planning and Assessment Act as the property is unsewered rural land within one of Sydney's hydrological catchments and, as such, development for residential purposes is subject to State Environmental Planning Policy Number 58 – Protecting Sydney's Water Supply. Any development subject to SEPP 58 cannot be processed under the Complying Development provisions of Wingecarribee Council's Local Environment Plan. Nor can the Authority consider any water cycle management proposal that has not been processed under the appropriate provisions of the LEP and the SEPP.
>
> In the circumstances, it is recommended that a development application be lodged with Wingecarribee Council. This application should be accompanied by a copy of the wastewater management study prepared by Nolan & Associates Pty Ltd to assist Council and the Authority in assessing the likely impact of the development against the provisions of SEPP 58.

25 In a letter dated 20 April 2001, Mr Hans advised Mr and Ms Bargon that they should submit a new development application to the Wingecarribee Council and that their septic tank application would be processed together with this new application. Mr Hans expressed his regret at the inconvenience caused to them and enclosed a cheque refunding fees that they had paid to him.

26 In a letter to Mr Hans, also dated 20 April 2001, Mr McGowan, after referring to Mr Hans's letter of 10 April, conveyed his understanding that 'the issues raised in your correspondence have been explained to you and your client and now the matter has been resolved'.

27 In a letter to Mr Hans dated 2 May 2001, an Investigation Officer employed by the Ombudsman, after referring to his letter of 10 April 2001, indicated that the Council had advised that a development application was required for the dwelling on the property in question. The letter went on to say that the subject land was unsewered and within the catchment area, that the writer was aware of the relevant provisions of SEPP and the LEP and that, following a meeting between officers of the Council and the owners of the land, a development application had been lodged and would be assessed by the Council. The letter concluded: 'The actions of the Council accord with its statutory responsibilities and in the circumstances no further action will be taken on your complaint.'

28 It is convenient to record at this stage that this correspondence during 2001 constituted most of the further evidence that we admitted in the appeal proceedings. None of it was tendered to the Tribunal at first instance.

29 On 25 February 2002, Mr Hans wrote a four-page letter to the Policy and Reform Branch, Planning NSW (this is an earlier name for the Department of Planning), making various suggestions for the reform of the certification process. Under the heading 'Complying Development in the Southern Highlands Region (NSW)', he asserted that more than 95% of development works in this region were 'unnecessarily being caught up in the Development Application net' and that many more developments could be approved as complying developments within the Wingecarribee Shire if 'the criteria were modified'.

30 In support of this contention, he wrote as follows under the heading 'SEPP No. 58 – Protecting Sydney's Water Supply':

> The aims of the policy are to assess and control development in the hydrological catchment that is likely to have an impact on water supply. This applies to development that will create or increase the need for on-site effluent management and gives exemptions for ancillary development such as garages, awnings or alterations to buildings that do not require any alteration to an on-site effluent

> system.
>
> Both Wingecarribee and Wollondilly's LEP definitions for Complying Development have broadly excluded all development in the hydrological catchment. This is not consistent with the aims of SEPP No. 58.
>
> There needs to be scope for the accommodation of *Complying Development* within the hydrological catchment, which does not require any alteration to an on-site effluent system, particularly given that the Southern Highlands Region is predominantly within the hydrological catchment. Otherwise the applicants for even the most minor developments such as carports, garden and rural sheds, and small alterations to existing dwellings will be required to obtain *Development Consent* from the Council. Surely this is not the intent of the planning reforms.

31 In a reply to Mr Hans dated 26 April 2002, the Assistant Director, Policy and Reform, of Planning NSW advised that the Department was aiming to increase substantially the number of buildings approved as complying development. The letter then said:

> However, I must stress that even if you believe the restrictions imposed on complying development by Wingecarribee Shire Council and Wollondilly Shire Council are not appropriate, such as not allowing complying development in the hydrological catchment for Sydney's water supply, you do not have the discretion as an accredited certifier to vary these requirements.
>
> An accredited certifier, when assessing an application for development consent must abide by the provisions of Wingecarribee Shire Council's and Wollondilly Shire Council's Local Environment Plans (LEPs) for exempt and complying development. An accredited certifier must refuse to issue a complying development certificate for a development that does not comply with the criteria defining complying development in a Council's LEP. You should not ignore the requirements of an LEP for exempt and complying development even if you are of the opinion that the LEP is not consistent with the aims of the State Environmental Planning Policy Number 58 – Protecting Sydney's Water Supply.

32 In a letter dated 29 July 2002, Mr Hans asked the SCA to define the circumstances in which it had to be notified of minor developments. This letter was not tendered to the Tribunal, or to us in the course of the recent hearings.

33 The SCA's letter in reply, dated 23 August 2002, was tendered to the Tribunal by Mr Hans in the course of his examination in chief. It was as follows:

> I refer to your letter of 29 July 2002 and confirm that, depending on their location, minor developments only require concurrence from or notification to the Authority under SEPP 58 if they either create or increase the need for on-site effluent management. Alterations and additions to dwellings which include extra bedrooms or rooms that are designed as potential bedrooms are considered as increasing the need for on-site effluent management.

34 Between 13 January and 19 March 2003, Mr Hans issued seven complying development certificates relating to development on unsewered land which was within both Wingecarribee Shire and Sydney's hydrological catchment. In each case, the certificate indicated that the LEP was the planning instrument under which his decision was made.

35 In a letter to Mr Hans dated 7 April 2003, Mr Greg McCarthy, a Building Surveyor employed by the Council, stated in relation to the earliest of these certificates, which was for 'alterations to existing dwelling', that it would be necessary to lodge a development application with the Council. The letter contained the following paragraph:

> The property is in an unsewered area. Complying development cannot be carried out on land that is not serviced by a reticulated sewerage scheme under Clause 6B of the Wingecarribee Local Environment Plan (copy enclosed).

36 On the same day, Mr McCarthy sent a copy of this letter to the architect engaged on the project.

37 Between June 2003 and June 2004, Mr Hans issued 14 more complying development certificates for developments possessing the same features. With reference to one of these, Mr McCarthy sent a letter to him dated 18 August 2004, containing the same advice. Mr McCarthy also sent this advice to the owner of the relevant property.

38 Between June 2004 and January 2005, Mr Hans issued four more complying development certificates for developments possessing the same features. Each of them prompted Mr McCarthy (or in one instance Ms Evonne Cole, another Building Surveyor employed by the Council) to write to him repeating the advice that he had already received. These letters were dated 24 August 2004, 9 December 2004, 24 December 2004 and 1 February 2005 respectively. In each case, a letter was also sent to the owner or owners of the property concerned.

39 Accordingly, between January 2003 and January 2005, Mr Hans issued 25 complying development certificates for developments which, in the opinion of a building surveyor employed by the Council, required consent by the Council by virtue of clause 6B(3)(i) of the LEP.

40 The developments in question all involved additions and/or alterations to an existing dwelling or (in the majority of cases) ancillary structures or facilities such as a shed, a tennis court or a swimming pool.

41 By a letter dated 4 February 2005, the Council made a formal complaint about this conduct of Mr Hans to the Department of Planning. This letter and an accompanying statutory declaration verifying it were signed by Mr McCarthy. It listed the 25 properties to which the certificates issued by Mr Hans related (one further property listed was subsequently withdrawn).

42 In the course of investigating this complaint, the Board invited Mr Hans to make written representations about it. He did so by a letter dated 16 November 2005. That letter contained the request to the Board to consider the following information in his defence:

> 1. Wingecarribee Shire Council does not have available to the public, the following maps:
>
> a) Sewered and un-sewered areas within the Shire
>
> b) Water catchment areas within the Shire.
>
> 2. Consequently, it is not possible to freely obtain information regarding a) and b) above.
>
> 3. If the Wingecarribee Shire Council made such maps available, such complaints would cease to exist.

43 In a further letter to the Board dated 1 February 2006, Mr Hans enclosed a report relating to the 25 properties by Mr Steven Fischer, a qualified surveyor employed by BCA & Project Solutions Pty Ltd. Mr Fischer expressed the opinion that none of the developments for which Mr Hans had issued complying development certificates increased effluent loadings on the site or had an impact on the existing effluent disposal system.

44 In his evidence to the Tribunal, Mr Hans said that he visited each of the 25 properties before issuing a complying development certificate in order to satisfy himself that the proposed development would have no

detrimental impact on the environment. The Board did not challenge his claim to have done this, nor did it allege that any of the developments did in fact have a detrimental impact.

45 During January 2007, Mr Hans obtained legal advice to the effect that he did not have authority to issue complying development certificates in cases covered by clause 6B(3)(i) of the LEP.

46 By a letter dated 5 March 2007, the Board notified Mr Hans of its intention to impose the following condition on his certificate of accreditation: 'Not to issue complying development certificates'. It invited submissions in response from him within fourteen days.

47 This letter cited section 9 of *Building Professionals Act* 2005 ('the BP Act') as the source of the Board's authority to do this. It alleged that, in addition to the 25 complying development certificates with which these proceedings are concerned, Mr Hans had wrongly issued (a) five such certificates between 5 March 2001 and 27 May 2002; and (b) a further five certificates between 4 July and 10 November 2006. Two of the certificates issued in 2001-02 and all of the certificates issued in 2006 had involved contravention of clause 6B(3)(i) of the LEP.

48 Mr Hans did not take up the Board's invitation to make submissions in response.

49 On 4 April 2007, which was about one week before the Tribunal delivered its decision in these proceedings, the Board resolved to impose the condition foreshadowed in its letter of 5 March. On 19 April 2007, it notified Mr Hans of this decision. The condition took effect on 27 April 2007.

50 In a statement of reasons under section 49 of the ADT Act, sent to Mr Hans following a request by him dated 8 May 2007, the Board referred to the 35 occasions (in total) on which Mr Hans had issued a complying development certificate when he had no legal authority to do so. It referred also to the correspondence on this matter, outlined above, between Mr Hans and Planning NSW and between Mr Hans and the Council. It stated that Mr Hans was 'unwilling or unable to comply with the requirements relating to the issue of complying development certificates'. It concluded with the statement that, pending the Tribunal's decision on the disciplinary application with which these proceedings commenced, it was 'in the public interest' that Mr Hans's accreditation be subject to the condition that he was 'not to issue complying development certificates'.

51 As noted above at [4], the Tribunal imposed a condition to the same effect with respect to the period from 12 April 2007 to 11 April 2008.

52 In issuing a later certificate of accreditation to Mr Hans, covering the period from 8 February 2008 to 7 February 2009, the Board imposed the same condition. Subsequently, the Board rejected a request by Mr Hans for its removal. In a letter to Mr Hans, the Board said that it regarded the continuation of this condition as 'appropriate', despite 'the similar condition' imposed by the Tribunal and 'noting also that the Tribunal's decision is the subject of appeal by the Board'.

53 Mr Hans did not seek review of any of these decisions by the Board.

54 The material tendered by the Board at the appeal hearing included a description of Advanced Building Certifiers' business appearing on its website. This description referred to a number of activities additional to certification: for example, development application lodgement, building regulation consultancy, building inspections and home owners warranty insurance reports.

55 The Board also tendered copies of three complying development certificates (dated respectively 17 May 2007, 13 August 2007 and 21 August 2007), issued on the letterhead of Advanced Building Certifiers by Mr Ross Sampson, an accredited certifier.

56 Mr Hans stated, however, at the appeal hearing that 80% to 90% of the business of Advanced Building Certifiers involved certifications and that he was the person responsible for almost all of the certification

work. He said that the three certificates issued by Mr Sampson were the only certificates that Mr Sampson had issued for the firm during a twelve-month period. This illustrated that Mr Sampson's contribution to the firm's work in this field was very limited.

57 Mr Hans said also that he was 50 years of age, that he was a single father with two young children and that if his certification were taken away from him for any significant period, he would not be able to restart his business at all. The economic consequences for him and his family would therefore be 'catastrophic'.

Mr Hans's understanding of the scope of operation of clause 6B(3)(i) of the LEP

58 In his Reply, filed in the Tribunal on 29 January 2007, Mr Hans stated that by virtue of having recently obtained legal advice, he had come to recognise that he had issued the relevant complying development certificates in error. He said that the reason for his error was that he had 'misinterpreted' clause 6B(3)(i) of the LEP.

59 In his submissions both to the Tribunal and to us, Mr Hans explained this 'misinterpretation' as follows. He had believed, he said, that while clause 6B(3)(i) applied to developments, such as the construction of a dwelling, that might have an adverse effect on the hydrological catchment (in particular, through creating or increasing the need for on-site effluent management), it did not apply to developments that did not have this impact. It would apply, for instance, to the construction of a dwelling, but not of a garage or a shed.

60 Both at first instance and in the appeal proceedings, the genuineness of this alleged belief was the chief issue in dispute.

The Board's submissions on evidence

61 Mr Chin, who appeared for the Board at the substantive hearing of the appeal, argued that it was abundantly clear that Mr Hans well knew that (a) his issuing of the 25 certificates constituted breaches of clause 6B(3)(i) and (b) no other legislative or regulatory provision conferred on him the authority to issue them.

62 In support of this submission, Mr Chin argued that there was nothing ambiguous about this clause. Its meaning was quite clear, which was enough in itself to cast doubt on Mr Hans's claim to have 'misinterpreted' it.

63 Mr Chin also relied on parts of the following letters outlined above: (a) the SCA's letter of 17 April 2001 to Mr Hans; (b) the Ombudsman's letter of 2 May 2001 to him; (c) Mr Hans's letter of 25 February 2002 to Planning NSW; (d) Planning NSW's reply to him dated 26 April 2002; (e) the six letters (dated 7 April 2003, 18 August 2004, 24 August 2004, 9 December 2004, 24 December 2004 and 1 February 2005 respectively) written to him by a building surveyor employed by the Council; and (f) his letter of 16 November 2005 to the Board.

64 With regard to the SCA's letter of 17 April 2001, Mr Chin pointed out that while the development to which it specifically related was the construction of a dwelling on the property owned by Mr and Ms Bargon, it stated expressly that the provisions of the LEP applied equally to 'any water cycle management proposal' – that is, not just to the construction of dwellings.

65 With regard to the two letters in this list that were written by Mr Hans, Mr Chin argued that each of them contained an admission, express or implied, by Mr Hans himself that he understood the true scope of operation of clause 6B(3)(i).

66 In the letter of 25 February 2002 to Planning NSW, the significant passage was a statement made in support of Mr Hans's argument that more scope should be given to accredited certifiers to issue complying development certificates. This was the statement that under the Council's LEP (and that of Wollondilly Shire Council), the definitions of complying development 'broadly excluded all development in the

hydrological catchment', including 'even the most minor developments such as carports, garden and rural sheds, and small alterations to existing dwellings'.

67 In Mr Hans's letter of 16 November 2005 to the Board, Mr Chin pointed to the claim that if the Council made maps showing relevant information freely available, 'such complaints' (meaning complaints that complying development certificates had been wrongly issued) 'would cease to exist'. This statement conveyed the implication, according to Mr Chin, that if Mr Hans had had access to such maps, he would not have issued the 25 certificates because he would have known (a) that they related to land to which clause 6B(3)(i) applied and (b) that this clause precluded the issue of complying development certificates.

68 Mr Chin also placed strong emphasis on three passages in the transcript of Mr Hans's testimony at the hearing at first instance. This hearing took place on 30 March 2007.

69 In the first of these passages (Transcript, page 16, lines 44-47), Mr Hans, answering a question put by the Tribunal, initially explained his interpretation of clause 6B(3)(i) as being that 'if the development was not going to be connected to a reticulated sewerage scheme or it has no effect on the Sydney Water catchment area that that development would not be applicable to that clause'. In agreeing with an observation by the Tribunal that he appeared to be taking a 'purposive' rather than a 'literal' approach to the interpretation of the clause, he said (page 17, lines 11-13): 'I felt that that particular clause was not relevant to the types of development that I issued complying development certificates for.' When the Tribunal then said 'You obviously understood its literal meaning', he replied 'Yes, I understood, yeah, its literal meaning' (page 17, lines 15-16). Having repeated his claim that the clause did not apply in the circumstances that he had identified, he said (page 17, lines 28-30): 'That's what I referred to in my response where I was speaking of a misinterpretation of the Wingecarribee Local Environment Plan …' At this point in the hearing, Mr Hans first mentioned, then tendered, a copy of the SCA's letter to him dated 23 August 2002.

70 In the second passage (page 20, lines 30-35), Mr Hans said, in order to 'reinforce' the fact that he 'didn't wilfully disregard the advice of Planning NSW or that of the Council', that he 'relied on advice from the Sydney Catchment Authority about what sort of effect minor developments would have on the Sydney catchment area'. The advice to which he referred was contained in the Authority's letter of 23 August 2002.

71 The third passage in the transcript (page26, lines 26-54) recorded part of the cross-examination of Mr Hans by Mr Grey, solicitor for the Board. Mr Grey first asked Mr Hans what he understood the word 'concurrence' to mean in the following extract from the SCA's letter (the full text of this letter is at [33] above): 'I refer to your letter of 29 July 2002 and confirm that, depending on their location, minor developments only require concurrence from or notification to the Authority …' Mr Hans replied that he took the SCA to be saying that under SEPP 58, if it received a development application for 'minor works', it was 'not interested in giving any concurrence because those types of developments did not have any impact on the Sydney catchment area'.

72 Mr Hans then agreed with Mr Grey that this remark about 'concurrence' was 'linked up to a development application being lodged with council'. The cross-examination then proceeded as follows (lines 37-54):

> Q. In no way does that link up with an application being lodged with an accredited certifier for the issue of a complying development certificate.
>
> A. Yes. I mean, yeah, the Sydney Catchment Authority was not familiar with any complying development certificates being referred to them. They're only familiar with development applications.
>
> Q. So really this letter doesn't give you the sort of comfort that you've originally explained to us?
>
> A. Yes, it gave me comfort in my mind that minor developments do not have any impact on the Sydney Catchment Authority and, therefore, I felt the objective of

the LEP, clause 6B(i) (*sic*), was met.

73 What all this evidence showed, in Mr Chin's submission, was that from as early as April 2001 Mr Hans had been told by three government authorities – the Council (in six separate letters), Planning NSW and the SCA – that he was required to comply with the clear prohibition in clause 6B(3)(i) of the LEP against issuing complying development certificates for developments falling within the clause. Moreover, in two letters, written respectively to Planning NSW and to the Board, he had indicated expressly or by implication that he understood this requirement. At the Tribunal hearing, he admitted that he 'understood' the 'literal meaning' of the clause. His claim to have derived 'comfort' from the SCA's letter of 23 August 2002 was spurious, for at least three reasons. These were as follows: (a) the position taken by the SCA in its earlier letter to him, dated 17 April 2001; (b) his admission during cross-examination that he realised that the later letter dealt specifically with 'concurrence' by the SCA with a development for which a development application had been lodged with a council; and (c) his further admission that was an entirely different question from that of whether a complying development certificate could lawfully be issued for a development.

74 Relying on these aspects of the evidence, Mr Chin submitted that we should find that in issuing the 25 complying development certificates Mr Hans wilfully and repeatedly disregarded what he knew to be the clear effect of clause 6B(3)(i) of the LEP.

Mr Hans's submissions on evidence

75 Mr Hans, who has represented himself throughout these proceedings, acknowledged, as he had done in his Reply, that his interpretation of clause 6B(3)(i) of the LEP had been erroneous, but maintained that this was due to a misunderstanding on his part.

76 With reference to the SCA's letter to him dated 17 April 2001, he said that because the development with which it dealt specifically was the construction of a dwelling, he believed that the advice contained in it did not apply to minor developments which would not affect the environment. He believed that the letter of 23 August 2002 gave support to this interpretation.

77 With regard to the six letters from the Council raising objections to the certificates that he had issued, he pointed out that each of them was written by a building surveyor employed by the Council, not by the general manager or some other senior officer. He treated their contents as expressions of opinion by the surveyor concerned, not as statements of the Council's official policy.

78 Mr Hans argued that the same description – an expression of opinion by one officer – applied to the passages from Planning NSW's letter to him dated 26 April 2002.

79 Accordingly, Mr Hans submitted, during the relevant period he had not been aware of any authoritative opinion on the interaction between the governing legislation and clause 6B(3)(i) of the LEP. Equally, the Land and Environment Court had not ruled on the matter.

80 Mr Hans also argued that it was significant that although the Council in its six letters to him had claimed that the certificates that he had issued were invalid, it had not at any stage taken proceedings to have them formally revoked. It had done no more than to advise the owners of the relevant properties that a development application was required.

81 Finally, Mr Hans relied on statements in the Department of Planning's Summary Paper, *Improving the NSW Planning System* (November 2007) to the effect that amendments to the EP Act in 1997 did not achieve their aim of increasing the incidence of complying development certificates and reducing the range of circumstances where development applications were required. One of the causes suggested in the Paper was that many councils were reluctant to use complying development processes. Mr Hans suggested that in 1997 the Department of Planning did not foresee that Local Environment Plans such as that of the Wingecarribee Shire Council would effectively undermine these aims.

Our conclusions on evidence

82 In our judgment, there is a clear preponderance of evidence to show that during the relevant period (January 2003 to January 2005), Mr Hans knew what clause 6B(3)(i) of the LEP required him to do when a client was seeking the requisite consent, approval or certification for a development falling within its terms. He knew that the clause, in its 'literal' meaning, excluded such a development from the complying development provisions of the EP Act. He knew also that, even if it was a 'minor' development (such as the construction of a shed) that posed no risk to the Sydney hydrological catchment, there was no express provision in SEPP 58 or in any other legislative or regulatory provision bearing on the matter, that overrode clause 6B(3)(i) or in any other way prevented it from being operative. He knew in addition that the opinions expressed by officers at different levels of three relevant government authorities – the Council, Planning NSW and the SCA – were unanimously to the effect that he was bound to abide by the terms of clause 6B(3)(i), as 'literally' interpreted.

83 We have given careful consideration to Mr Hans's claim that, by virtue of adopting what the Tribunal called a 'purposive' interpretation of the clause, he genuinely believed that it did not apply to any development that manifestly presented no risk at all to the principal aim of SEPP 58 – that is, to the maintenance of water quality in the Sydney catchment area.

84 We cannot accept this claim, principally for two reasons. The first is that it is at odds with statements by Mr Hans himself, notably in his letter of 25 February 2002 to Planning NSW. The second is that any person with Mr Hans's experience of the operation of planning laws would know that there is no general practice of interpreting them 'purposively' in order to avoid having to comply with their explicit requirements. If in relation to a particular provision such a practice is followed, it will generally be the case that the government authorities overseeing or otherwise concerned with the operation of the provision do not object to the continuance of the practice. In the present case, the authorities made it clear that they treated literal compliance as the required course of action for an accredited certifier.

85 We suspect that Mr Hans hoped, optimistically, that at some point in time his practice of issuing complying development certificates in contravention of the express terms of clause 6B(3)(i) would be officially sanctioned. This view of his sentiments at the time is, however, entirely compatible with our finding on the issue of prime significance in this case. This finding is that he knew that the clause, according to its natural meaning, precluded the issuing of these certificates and that there was no other provision or legal principle establishing the ground of exemption on which he purported to rely.

86 This finding by us differs from the Tribunal's finding at [25], which was as follows:

> 25 In our view, Mr Hans did not "misinterpret" the sewerage requirement in the sense that he thought it meant something different from what it said. Rather, he disagreed with the need for the requirement. He genuinely believed that his conduct was justified because it accorded with his view of the objects of the legislation. That conclusion is supported by the fact that Mr Hans did not question the Department or Council's advice or offer an alternative interpretation … Mr Hans believed that he was entitled to ignore the sewerage requirement because he disagreed with it …

87 A possible explanation for our making a different finding is that the further evidence which in our earlier judgment we permitted the Board to adduce reinforced its arguments regarding Mr Hans's state of mind. This is illustrated by the Tribunal's apparent acceptance, at [20], of a claim by Mr Hans that 'there were conflicting views as to what was intended by the sewerage requirement'. When the further evidence admitted in the appeal is considered in conjunction with the evidence that was before the Tribunal, it becomes apparent that this claim was not tenable.

The approach to be adopted in determining the disciplinary consequences of Mr Hans's conduct

88 It is well recognised that in disciplinary proceedings such as these, the Tribunal is required to give separate consideration to two distinct questions.

89 Firstly, it must decide whether or not the conduct alleged and proved against the respondent constitutes a disciplinary 'offence' (or, indeed, two or more instances of such an offence) under the relevant legislation, determining also, where necessary, how any offence found is to be characterised. The two categories of disciplinary offence that may be found in these proceedings are unsatisfactory professional conduct and professional misconduct.

90 Secondly, having regard to the conclusions reached on these matters, the Tribunal must decide what order or orders, if any, should be made against the respondent by way of disciplinary 'penalty'.

Relevant legislation

91 The Tribunal stated at [3] that its decision that Mr Hans was guilty of unsatisfactory professional conduct, not professional misconduct, and its decision on the penalties to be imposed were both made under section 109ZA of the now-repealed EP Act because Part 4B of this Act (in which this section was located) were applicable to the present provisions.

92 Mr Chin submitted, however, that the Tribunal's decision on penalties should in fact be made under section 34 of the BP Act, even though the applicable definitions of unsatisfactory professional conduct and professional misconduct are those that were contained in section 109R of the EP Act. He based this argument on transitional provisions in the BP Act (Schedule 2, clause 3(1)) and in the *Building Professionals Regulation* 2007 (clauses 4(2) and 4(3)).

93 Mr Hans did not question this analysis, which appears to us to be correct.

94 Under section 109R of the EP Act, unsatisfactory professional conduct by an accredited certifier was defined to include conduct (acts or omissions) as follows:

> (a) occurring in connection with the exercise of an accredited certifier's functions as a certifying authority that falls 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; or
>
> (b) by which an accredited certifier exercises his or her functions as a certifying authority in a partial manner; or
>
> (c) by which an accredited certifier wilfully disregards matters to which he or she is required to have regard in exercising his or her functions as a certifying authority; or
>
> (d) by which an accredited certifier fails to comply with:
>
> > (i) any relevant code of conduct established by the accreditation body by which he or she is accredited; or
> >
> > (ii) any other Act or law prescribed by the regulations; or
>
> (e) by which an accredited certifier contravenes this Act, whether or not he or she is prosecuted or convicted for the contravention.

95 Professional misconduct, in relation to an accredited certifier, was defined in section 109R to mean 'conduct that is unsatisfactory professional conduct of a sufficiently serious nature to justify suspension of the accredited certifier's accreditation as an accredited certifier or withdrawal of the accredited certifier's accreditation'.

96 Under section 34 of the BP Act, if the Tribunal finds that an accredited certifier is guilty of unsatisfactory professional conduct or professional misconduct, it may make any one or more of the following decisions:

> (a) caution or reprimand the accredited certifier,
>
> (b) direct that such conditions as it considers appropriate be imposed on the accredited certifier's certificate of accreditation,
>
> (c) order that the accredited certifier complete such educational courses as are specified by the Tribunal,
>
> (d) order that the accredited certifier report on his or her practice as an accredited certifier at the times, in the manner and to the persons specified by the Tribunal,
>
> (e) order the accredited certifier to pay to the Board a fine of an amount, not exceeding 1,000 penalty units, specified in the order,
>
> (f) order the accredited certifier to pay to the complainant such amount (not exceeding $20,000) as the Tribunal considers appropriate by way of compensation for any damage suffered by the complainant as a result of the unsatisfactory professional conduct or professional misconduct,
>
> (g) suspend the accredited certifier's certificate of accreditation for such period as the Tribunal thinks fit,
>
> (h) cancel the accredited certifier's certificate of accreditation,
>
> (i) order that the accredited certifier cannot re-apply for a certificate of accreditation within such period (within the period of his or her lifetime) as may be specified by the Tribunal.

Relevant case law

97 While Mr Hans's submissions did not refer to any case law, the Board's submissions cited six Tribunal decisions given in disciplinary proceedings against accredited certifiers and drew our attention to particular aspects of them.

98 The earliest of these cases was *Director General, Department of Infrastructure, Planning & Natural Resources v Stapleton (No 2)* [2004] NSWADT 70. At [64 – 67], the Tribunal gave the following explanation of the approach taken by section 109R of the EP Act in defining unsatisfactory professional conduct and professional misconduct:

> 64 The primary definition of unsatisfactory professional conduct found in para (a) is that it 'includes conduct (whether consisting of an act or omission):
>
> > (a) occurring in connection with the exercise of an accredited certifier's functions as a certifying authority that falls 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.'
>
> 65 It will be seen that this text avoids the traditional formulation of the standard for professional misconduct, i.e. conduct that would attract the disapprobation of one's peers: see for example *Allinson v General Council of Medical Education and*

> *Registration* [1894] 1 QBD 750 at 763: "in his conduct the Practitioner in pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency".
>
> 66 While it might be appropriate to have a standard connected to the expectations of one's peers in good standing for matters of technical competence, the issue raised by this allegation goes to issues of integrity and probity in the practice of accredited certification. These are matters plainly of concern to the community of New South Wales as a whole. Accordingly, in our view the perception that should be brought to bear in determining whether there is an appearance of bias is that of a reasonable member of the general public with a general appreciation of the function and role of accredited certification.
>
> 67 This approach is consistent with the objective of professional discipline, i.e. protection of the public. In the context of development applications, the 'public' is a wide conception. It includes the local community directly affected by a development, and the wider community which has an interest in the general amenity of the community as well as the maintenance of consistent standards across the community …

99 In *Minister for Infrastructure and Planning v Conway (No 2)* [2004] NSWADT 159, the Tribunal found an accredited certifier guilty of professional misconduct on the ground that he had issued certificates where conditions relating to fire safety had not been met. At [66] and [69] the Tribunal attached significance to the fact that this conduct exposed members of the public to significantly lower standards of fire safety than were required by the legislation.

100 In *Director General, Department of Infrastructure, Planning & Natural Resources v Boulle* [2006] NSWADT 43, the Tribunal indicated that in making a finding of unsatisfactory professional conduct against an accredited certifier it was influenced by the fact that only one instance of the relevant conduct had been established. It said at [50] that 'for a single instance of unprofessional conduct to amount to professional misconduct, it would have to possess a high degree of objective seriousness, involving, for example, conduct of a grave kind giving rise to significant harm to the interests of particular members of the public or involving significant harm to the public interest, viewed generally'.

101 The case of *Director, Building Professionals Branch, Department of Planning v Dallas* [2006] NSWADT 231 was akin to the present case in that it involved the issue of complying development certificates in circumstances where the law did not permit this. The Tribunal found that the respondent, an accredited certifier, had issued nine such certificates out of 'inadvertence' (see its judgment at [18]). It pointed out at [36] that she did this during 2001 and 2002, which were 'early' years in the 'history of this new method' of relying on private certification and amounted to a 'relatively short time span'. It maintained however that 'the public depends on the integrity and competence of this new system of certification to assure it that the rules down laid by councils and other planning authorities are observed'. It held that the respondent had been guilty of unsatisfactory professional conduct and ordered that she be reprimanded and be fined the sum of $15,000.00.

102 In *Director, Building Professionals Branch, Department of Planning v Dwyer* [2007] NSWADT 53, the Tribunal, at [29], noted the relevance of 'a degree of contrition and acknowledgment of error' when determining 'the extent of any restriction that should be placed on the regulated person in the future practice of the regulated occupation'.

103 In *Building Professionals Board v Cogo* [2008] NSWADT 119, the respondent, an accredited certifier, issued in November 2001 a construction certificate for a substantial mixed commercial/residential development. The ground of the Board's disciplinary application against him was that the design and

construction of the building, as depicted in the plans attached to the certificate, were inconsistent in numerous respects with the development consent. At [58], the Tribunal observed that 'no harm of any great significance' resulted from this conduct of the respondent, that there were 'only two public complaints, both basically about car parking' and that the complaints against him 'were expressed in terms of non-adherence to the development consent'. At [81], it stated that in appropriate circumstances a finding of professional misconduct might be made 'where the breach or breaches relate to matters not involving a public safety element'. At [85], it indicated that 'had the conduct under notice occurred in recent times', it would have been inclined to make a finding of professional misconduct. But it then pointed out (in line with observations quoted above from *Director, Building Professionals Branch, Department of Planning v Dallas*) that the respondent's conduct occurred during the period when 'the new "profession" was finding its feet'. Taking this into account, it held at [88] that this conduct amounted only to unsatisfactory professional conduct.

104 We have derived useful guidance from a recent Tribunal decision that was not cited by the parties. In *Building Professionals Board v Boulle* [2008] NSWADT 80, the respondent, an accredited certifier, issued a construction certificate for a building which, if acted upon, would have improperly reduced the fire protection and structural capacity of the building and also led to contraventions of (a) regulations under the EP Act and (b) the Building Code of Australia. The respondent admitted these defects. The Tribunal concluded that his conduct fell within the categories of unsatisfactory professional conduct described in paragraphs (a), (d) and (e) of the definition in section 109R of the EP Act (see [94] above).

105 The Tribunal went on to consider whether the respondent had in fact been guilty of professional misconduct. At [41], it stated that in assessing which of the two disciplinary offences had been committed, 'one should focus on the objective gravity of the conduct at the time it occurred'. At [42], it observed that the respondent had acted 'professionally' once the defects in his certificate had been drawn to the attention by the principal certifying authority, with the consequence that the occurrence of any actual harm was avoided. But it stated at [43] that these considerations 'should not be given great weight in assessing where conduct falls on the unsatisfactory conduct/professional conduct continuum', but were instead relevant to penalty.

106 At [44], the Tribunal stated that 'there were a number of important oversights' in this case, including the following: inadequate checking of the plans; insufficient regard for fire safety; a 'fundamental misclassification of where the building sat within the hierarchy of' the Building Code of Australia; and the production of a fire safety schedule that was 'rudimentary in the extreme'.

107 At [45], the Tribunal made a finding of professional misconduct, based on its view that the respondent's conduct 'could justify (reasonably) at least suspension of' his accreditation. But it then stated at [46]: 'It does not follow that an order of suspension must be made.'

108 In the ensuing paragraphs ([47 – 63]), the Tribunal reviewed a number of matters relevant to penalty. These included the following: (a) that the Board did not seek suspension or deregistration; (b) that the respondent had been co-operative in the later stages of the proceedings against him; (c) that he had been reprimanded or cautioned under the EP Act on five previous occasions, all relating to matters occurring some years ago; and (d) that the conduct with which the proceedings were concerned had occurred about six years ago; (e) that in the intervening period he had taken steps to avoid recurrence of the problems caused by this conduct and had 'practised adequately'; and (f) that a finding of professional misconduct was 'itself a significant adverse outcome'.

109 Principally on account of these last two considerations, the Tribunal rejected the Board's submission that the respondent's accreditation, which was already restricted, should be subject to a further restriction. It decided at [64] that the appropriate penalties were a reprimand and a fine of $5,500.00.

The Tribunal's rulings in the present case

110 The Tribunal rejected (at [18]) the Board's assertion that Mr Hans 'contravened' the EP Act, thereby

engaging in unsatisfactory professional misconduct within the category described in paragraph (e) of the definition in section 109R of the EP Act (see [94] above).

111 At [26], the Tribunal held that Mr Hans engaged in unsatisfactory professional misconduct within each of the other two categories (paragraph (a) and (c)). His conduct, it said, 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'. It was also conduct 'by which an accredited certifier wilfully disregards matters to which he or she is required to have regard in exercising his or her functions as a certifying authority'.

112 The Tribunal concluded, however, that this conduct did not amount to professional misconduct. Its reason, briefly stated at [27], was that 'Mr Hans believed that he was doing the right thing in terms of the objectives of the legislation and he did not act fraudulently or dishonestly'.

113 In determining what orders to make by way of penalty, the Tribunal took into account the fact that during 2006 he had wrongly issued five complying development certificates, additional to the 25 certificates on which the disciplinary application was based. It observed at [30] that 'the lack of any environmental impact' as a result of his conduct and 'the favourable feedback from clients' (this being a matter which Mr Hans had mentioned in his evidence) were 'relevant to penalty'. It went on then to state that 'the public needs to be protected from accredited certifiers like Mr Hans who, until receiving legal advice, believed that he could decide which legal requirements to apply and which were unnecessary'.

114 It was on these grounds that the Tribunal reprimanded Mr Hans, imposed a fine of $2,200.00 upon him and ordered that for a period of one year his accreditation should be subject to a prohibition on issuing complying development certificates for building work or change of use.

The Board's submissions on conduct

115 In this and the next section of our reasons, we outline the submissions advanced by the parties on the two questions defined above at [89 – 90].

116 In written submissions filed on behalf of the Board before the hearing, it was argued that the Tribunal had erred in ruling that Mr Hans's conduct did not constitute unsatisfactory professional conduct as defined in paragraph (e) of the definition contained in section 109R of the EP Act. The Board submitted that he had indeed 'contravened' the EP Act within the meaning of this paragraph.

117 We have decided, however, that we need not rule on this particular point. Accordingly we will not set out the Board's detailed submissions. Our reasons are (a) that we do not think that a determination one way or the other on this point has any major significance for the more important decisions that we must make; (b) the question of what constitutes a 'contravention' under paragraph (e) is far from straightforward; and (c) this matter was not mentioned at all by Mr Chin in oral submissions at the hearing.

118 The principal focus of Mr Chin's submissions was the claim that in issuing 25 complying development certificates in breach of clause 6B(3)(i) of the LEP, Mr Hans 'wilfully disregarded' an important matter to which he was 'required to have regard', and for this reason engaged in unsatisfactory professional conduct within the meaning of another paragraph – paragraph (c) – of the definition in section 109R.

119 Mr Chin pointed out that section 76A(5) of the EP Act made it clear that the question whether a particular development was 'complying development' was to be determined by an 'environmental planning instrument', such as the LEP in this case. Under section 85A(1), either the relevant council or an accredited certifier was authorised to issue a complying development certificate. In deciding whether or not to do this, the first of three matters that the council or certifier were required by section 85A(3) to determine, having 'considered' the application, was the following: 'whether or not the proposed development is complying development'.

120 These provisions, Mr Chin argued, made it absolutely clear that Mr Hans, when dealing with each of the 25 applications for complying development certificates, was required, in discharging his responsibilities as an accredited certifier, to consider whether the development in question was 'complying development' within the terms of the LEP. But in addressing this task, he wilfully and repeatedly disregarded the relevant clause within the LEP, even though he knew it to be a matter, indeed a matter of major importance, to which he was 'required to have regard'.

121 Furthermore, Mr Chin argued, Mr Hans, in maintaining that his conduct was justifiable under SEPP 58 in cases where there would be no risk of damage to the hydrological catchment, was simply indulging his own personal opinion as to how the system of certification should operate. He was also acting out of self-interest. Mr Chin contended that if accredited certifiers were permitted to justify conduct of this nature simply by claiming that it served some 'higher purpose', the public would be exposed to damaging breaches of the legislation, distinctly more damaging than the breaches that had occurred in this case.

122 The submissions on behalf of the Board referred to four other aspects of the evidence.

123 Firstly, Mr Hans, in his letter of 16 November 2005 to the Board, sought to explain and excuse his conduct in wrongfully issuing the 25 complying development certificates by alleging a failure on the Council's part to make maps showing unsewered areas and catchment areas available to the general public. In so doing, Mr Chin argued, Mr Hans displayed a lack of candour and a refusal to accept responsibility for his actions. As the Tribunal pointed out in its judgment at [22], Mr Hans knew in each case, because he visited each site, that the land in question was unsewered.

124 Secondly, Mr Hans wrongfully issued five complying development certificates during 2006, when he knew that his prior conduct of this nature was under investigation by the Board and could well form the basis, as indeed it ultimately did, of disciplinary proceedings against him.

125 Thirdly, Mr Hans alleged, both before the Tribunal and in the appeal, that the reason why he issued the certificates contrary to the terms of the LEP was that he 'misinterpreted' the legislation. In Mr Chin's submission, this showed that even at these late stages of the proceedings, Mr Hans displayed no contrition and no apparent understanding of, or willingness to accept responsibility for, the wrongfulness of his conduct.

126 Fourthly, the material from the website of Advanced Building Certifiers showed that its operations extended beyond certification. This evidence, coupled with the copies of complying development certificates issued by Mr Sampson (see [55] above), demonstrated that cancellation or suspension of Mr Hans's accreditation would not harm the firm as severely as Mr Hans claimed.

127 Mr Chin's primary submissions concluded with the contention that in view of all these matters, we should set aside the Tribunal's decisions that Mr Hans had committed unsatisfactory professional conduct and should accordingly be reprimanded and fined. In substitution, we should (a) make a finding of professional misconduct, (b) cancel his certificate of accreditation and (c) order that he may not re-apply for a certificate of accreditation within a period of three years.

Mr Hans's submissions on conduct

128 In arguing that a finding of professional misconduct should not be made against him, Mr Hans emphasised that, as the Board conceded, his actions had caused no harm to the Sydney hydrological catchment or to the environment generally.

129 He also argued that these actions had not harmed any individuals. He was asked by a member of the Appeal Panel at the hearing whether, and if so to what extent, any of his clients had suffered through being told by the Council that his certification for them was invalid. He replied that in each case he offered to refund the fees that he had charged if the client submitted a development application to the Council. He believed, however, that since his clients shared his view that the development that he had certified would

cause no relevant harm, they went ahead with it. He was not aware of any instance of the Council formally revoking his certificate and he believed that it was highly unlikely that the Council would have succeeded in having any of the relevant structures removed. He conceded however that he had exposed his clients to the risk of revocation by the Council of the complying development certificates that they had obtained from him.

130 Mr Hans also pointed out that, as soon as he had obtained legal advice in January 2007 making it clear to him that he had misinterpreted the requirements of the relevant legislation, he acknowledged his past errors.

131 Mr Hans relied also on the evidence outlined above at [57] in submitting that if we made a finding of professional misconduct and acceded to the Board's request for his certificate to be suspended or cancelled, this would have a 'catastrophic' impact upon him.

132 He pointed out also that he had been a building surveyor for 25 years and an accredited certifier for seven years, without any complaints being made against him by any client or any other member of the public.

133 For all these reasons, Mr Hans submitted, the orders sought by the Board were unduly harsh and should not be made.

The disciplinary 'offences' and their relationship to disciplinary penalties

134 At [89 – 90] above, we outlined the two-stage process in which we must engage in arriving at the 'correct and preferable decision' on the material before us. These are, firstly, to determine whether Mr Hans was guilty of professional misconduct, unsatisfactory professional conduct or neither of these disciplinary 'offences' and secondly, to decide what order or orders, if any, should be made against him by way of disciplinary 'penalty'.

135 In resolving the first of these questions, the relevant factual matters are confined to those which the Board has both alleged in its disciplinary application and proved to our 'comfortable satisfaction'.

136 The most important implication of this proposition is that in determining this question we can and should take into account Mr Hans's conduct in wrongly issuing 25 complying development certificates during the period from January 2003 to January 2005, but not his wrongful issuing of any other certificates. The fact that he engaged in this behaviour on five occasions during 2001-02 and on a further five occasions during 2006 must be ignored in this context. These matters were not alleged in the Board's disciplinary application.

137 On the other hand, when addressing the second question, relating to penalty, it is open to us to take into account a wider range of factual matters than those alleged in the application. It is at this stage that we must consider such issues as the following (this list is not exhaustive): whether, and if so when, Mr Hans genuinely reached the stage of understanding why the conduct proved against him was wrongful; whether he is appropriately regretful of this conduct; what degree of likelihood (if any) is there that he will re-offend; and what measures are necessary, by way of both specific and general deterrence, to protect members of the public from the damage potentially inflicted by the failure of accredited certifiers to fulfil their professional duties carefully and with integrity.

138 Because in determining the second question additional material will or may become relevant, an apparent paradox within the Tribunal's judgment in *Building Professionals Board v Boulle* [2008] NSWADT 80 is explicable. In that case, which is described above at [104 – 105], the Tribunal held that the conduct pleaded and proved against the respondent certifier was professional misconduct – that is, that it was 'unsatisfactory professional conduct of a sufficiently serious nature to justify suspension of the accredited certifier's accreditation as an accredited certifier or withdrawal of the accredited certifier's accreditation'. In the course of arriving at this assessment, it observed that it 'should focus on the objective

gravity of the conduct at the time it occurred'. But the Tribunal then said that 'it does not follow that an order of suspension must be made.' The orders that it made by way of penalty did not in fact include suspension or cancellation of the respondent's accreditation. It ordered only that he be reprimanded and fined.

139 As we see the matter, the principles underlying a Tribunal decision displaying this pattern of findings on the two questions now being discussed must be these. When the conduct pleaded and proved against an accredited certifier *presumptively* warrants suspension or cancellation of his or her accreditation, a finding of professional misconduct should be made, but it is open to the Tribunal to conclude, after taking into account additional material such as we have just described, that neither of these two penalties, which are at the most severe end of the scale set out in the legislation, should in the particular circumstances be imposed. Conversely, when the conduct pleaded and proved does not *presumptively* warrant suspension or cancellation, a finding of unsatisfactory professional conduct should be made, but it is still open to the Tribunal to conclude, after taking into account additional material of relevance, that one or other of the two most severe penalties should be imposed.

140 The foundation for these principles is the co-existence of (a) definitions of professional misconduct and unsatisfactory professional conduct in section 149R of the EP Act in which the sole feature distinguishing the former 'offence' from the latter is that the conduct in question is 'sufficiently serious' to justify suspension or cancellation of accreditation and (b) the provisions in section 34 of the BP Act making these two most severe penalties available to the Tribunal not only when it has made a finding of professional misconduct but also when its finding is the lesser one of unsatisfactory professional conduct.

141 It may be noted in passing that, as was pointed out in the Board's written submissions, the Tribunal, in listing at [28] what it understood to be the penalties that it might impose on Mr Hans on the basis of its finding of unsatisfactory professional conduct against him, omitted to include what we have called the two most severe penalties. These two penalties were in fact available under the provision that the Tribunal believed to be applicable – section 109ZA of the EP Act – just as they are under section 34 of the BP Act.

142 By virtue of this reasoning, we would formulate as follows the first question to be resolved: should the conduct pleaded and proved against Mr Hans be characterised as (a) unsatisfactory professional conduct (as defined in section 109R of the EP Act) of a sufficiently serious nature to justify, presumptively, suspension or cancellation of his accreditation – in which event we should make a finding of professional misconduct – *or* (b) unsatisfactory professional conduct which was not of a sufficiently serious nature to justify such a conclusion presumptively – in which event our finding should be that of unsatisfactory professional conduct – *or* (c) conduct not amounting at all to unsatisfactory professional conduct as defined in section 109R.

Our characterisation of Mr Hans's conduct

143 In our opinion, the first of these three conclusions is required by the facts before us. We believe this to be a case of professional misconduct. Our reasons are as follows.

144 In view of our important finding (at [82] above) regarding Mr Hans's understanding of the scope of operation of clause 6B(3)(i) of the LEP, we agree with Mr Chin's submission that in issuing the 25 complying development certificates on which the Board's application is based, Mr Hans 'wilfully disregarded' an important matter to which he was 'required to have regard' in discharging his responsibilities as an accredited certifier. He therefore engaged in unsatisfactory professional conduct within the meaning of paragraph (c) of the definition in section 109R.

145 We find also that this was conduct by Mr Hans 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'. He therefore engaged in unsatisfactory professional conduct within the meaning of paragraph (a) of this definition. In explanation of this conclusion, we would make two observations as follows.

146 Firstly, in the face of repeated warnings from relevant authorities, such as the Council and the

Department of Planning, to the effect that he was acting in breach of relevant legislation, Mr Hans, in continuing to do so, displayed a lack of reasonable competence. His immediate change of opinion after obtaining legal advice in January 2007 prompts the observation that a 'reasonably competent' certifier would have taken this simple step at a much earlier stage. Clients of an accredited certifier, along with other members of the public can surely expect that reasonably competent certifiers, when confronted with warnings from relevant authorities that they are acting outside their powers, will consult appropriately qualified professional people in order to ascertain the correct position. This expectation on the part of Mr Hans's clients is all the more legitimate in the present case for the fact that, for reasons outlined above at [129], his failure to do so put them in an invidious position. In each instance they were faced with a choice between (a) suffering the inconvenience of lodging a development application once the Council had notified them that his certificate was invalid and (b) taking the risk of proceeding with a development for which they lacked legal authorisation.

147 Secondly, we view Mr Hans's behaviour as falling short of the requisite standard of integrity. Members of the public are entitled, in our judgment, to treat a complying development certificate issued by an accredited certifier as founded on, at the very least, a reasonable belief on his or her part that no legal impediment to its issue could have existed. Mr Hans wilfully took no account of the fact that, to put it at its lowest, there were good reasons for believing that a major impediment did exist. He continued to represent implicitly to his clients and to others dealing with him that, in effect, he entertained no doubt as to the validity of the certificates that he was issuing. We accept Mr Chin's submissions that Mr Hans was indulging his own personal opinion as to how the system of certification should operate and, indeed, that he was also acting out of self-interest. For these reasons, Mr Hans displayed, in our opinion, a lack of integrity.

148 As already indicated, we have concluded that the unsatisfactory professional conduct in which Mr Hans engaged was of a sufficiently serious nature to justify, presumptively, suspension or cancellation of his accreditation, and therefore amounted to professional misconduct.

149 In so ruling, we take account of the matters just outlined. We place significant weight on the fact that Mr Hans persisted for such a long period of time – the period of two years between January 2003 and January 2005 – in wrongly issuing complying development certificates and that he issued so many certificates – no less than 25. This was not an isolated instance of inappropriate behaviour such as the Tribunal held to be unsatisfactory professional conduct only in *Director General, Department of Infrastructure, Planning & Natural Resources v Boulle* [2006] NSWADT 43 (see [100] above).

150 Mr Hans cannot argue in mitigation, as the respondent certifier was permitted to do in *Director, Building Professionals Branch, Department of Planning v Dallas* [2006] NSWADT 231 (see [101] above), that his behaviour was 'inadvertent' only and that it occurred during the 'early' years in the 'history of this new method' of relying on private certification. The relevant conduct of Mr Hans involved wilful disregard of his obligations, not mere inadvertence, and it occurred between 2003 and 2005, which cannot in this context be described as the 'early years'. It will be recalled that *Dallas* was also a case involving the wrongful issue of complying development certificates.

151 We have taken into account Mr Hans's contention, which the Board did not contest, that the small-scale developments for which he issued certificates created no risk of harm to the hydrological catchment or to the environment generally. In *Building Professionals Board v Cogo* [2008] NSWADT 119 (see [103] above), the Tribunal treated the absence of any harm resulting from the improper certification granted by the respondent as one of the significant factors inducing it to make a finding of unsatisfactory professional conduct only. But like *Dallas*, *Cogo* was a case in which the Tribunal also took account of the fact that the relevant conduct occurred during the period when 'the new "profession" was finding its feet'. It stated that 'had the conduct under notice occurred in recent times', it would have been inclined to make a finding of professional misconduct.

152 As we have already said, however, Mr Hans's repeated practice of issuing complying development certificates in disregard of his lack of legal authorisation to do so was potentially detrimental to the interests

of his clients, for reasons that he was well placed to comprehend. After he had received the first letter from the Council's building surveyor (dated 7 April 2003) stating the Council's position on the matter, and possibly even earlier, he knew what would follow if he continued to issue certificates relating to developments within clause 6B(3)(i) of the LEP. Following the Council's rejection of a certificate issued by him, his client would have to choose between suffering the further delay and inconvenience of lodging a development application and taking the risk of proceeding with a development without legal authorisation. Yet Mr Hans continued to issue certificates. It may well be, as he alleged, that all or most of his clients chose the latter alternative and did not in fact encounter opposition from the Council. But the fact remains that, apparently without forewarning them, he placed them in this undesirable situation.

153 At a more general level, we regard as important and appropriate the Tribunal's observations, quoted above at [98], in *Director General, Department of Infrastructure, Planning & Natural Resources v Stapleton (No 2)* [2004] NSWADT 70 at [65 – 66]. We endorse in particular the Tribunal's comment that 'issues of integrity and probity in the practice of accredited certification … are matters plainly of concern to the community of New South Wales as a whole'.

154 Focusing on the 'objective gravity' of Mr Hans's conduct 'at the time it occurred' (to quote from *Building Professionals Board v Boulle* [2008] NSWADT 80 at [41]), we have concluded that it was sufficiently serious to justify, presumptively, suspension or cancellation of his accreditation. It therefore amounted to professional misconduct.

The appropriate penalty or penalties

155 As was said in the Tribunal's judgment at [28], 'the purpose of disciplinary proceedings is protection of the public, not to punish the person concerned, in a criminal sense'. This is a well-recognised principle. But it is also well recognised that deterrence, specific and general, is an objective of both punishment in criminal proceedings and the imposition of penalties in disciplinary proceedings. From the point of view of the respondent practitioner, such penalties may well 'feel like' punishment. But it does not follow that they should not be imposed in the interests of protecting the public.

156 As the Tribunal pointed out in *Stapleton* at [67], the 'public', in the context of disciplinary proceedings against accredited certifiers, is a 'wide conception', including 'the local community directly affected by a development' and the 'wider community which has an interest in the general amenity of the community as well as the maintenance of consistent standards across the community'. We would add, for reasons just discussed, that 'the public' should be taken to include the present and future clients of accredited certifiers.

157 We are obliged at this stage to take account of matters additional to those that have been pleaded and proved against Mr Hans.

158 At [137], we formulated two of these considerations as follows: 'whether, and if so when, Mr Hans genuinely reached the stage of understanding why the conduct proved against him was wrongful' and 'whether he is appropriately regretful of this conduct'.

159 In relation to these questions, Mr Hans submitted that, since the time when he obtained legal advice in January 2007, he has fully understood why his issuing of complying development certificates in breach of clause 6B(3)(i) of the LEP was wrongful and has regretted having acted in this way. But we agree with Mr Chin that Mr Hans's continued assertion that he 'misinterpreted' the legislation betrays a reluctance to come to terms with what we have held to be wilful behaviour in disregarding the express words of the clause and ignoring the official pronouncements as to how it affected his activities as an accredited certifier. By claiming in his submissions to us that until he obtained legal advice he considered himself entitled to act as he did because there was at the time no 'authoritative' interpretation of the clause, and by ascribing his actions to 'misinterpretation', he has endeavoured, it would seem, to depict the clause as one whose scope of operation has been difficult to determine. But this is not at all the case. The applicability of the clause to the developments which Mr Hans purported to certify is quite evident from its wording.

160 In this connection, we agree with Mr Chin that Mr Hans's attempt to justify his wrongful issuing of certificates by claiming that the Council did not provide adequate maps showed that at this earlier stage also he did not want to come to terms with the matters raised by the complaint against him. It was a lame and unconvincing excuse, for which (to his credit) he expressed regret during the appeal hearing.

161 In our opinion, the fact that Mr Hans, during 2006, issued five more complying development certificates in breach of clause 6B(3)(i) does not, in itself, count heavily against him. It simply shows that during this period he did not change his attitude regarding his authority to do so. The more significant aspect of his behaviour at this time was, for reasons already explained, his delay in seeking legal advice.

162 However, his issuing of these certificates (as well as his wrongful issuing of five certificates in 2001-02) did provide the basis for events which we must take into account, namely, the Board's decisions, on 27 April 2007 and 8 February 2008 respectively, to impose and to renew a condition on his certificate of accreditation prohibiting him from issuing complying development certificates for periods of one year. These disciplinary measures form part of his disciplinary history.

163 We take into consideration, as we must, the impact that any order that we make is likely to have on Mr Hans's economic circumstances and those of his family and his firm. But even if these consequences were serious, and were such as to 'feel like' punishment, this would not be enough to debar us from imposing the penalty or penalties that we believed to be appropriate.

164 While noting the competing evidence and submissions put forward by the Board, we accept Mr Hans's evidence (outlined above at [56]) that certifications have represented the bulk of the work conducted by Advanced Building Certifiers and that he has been the person responsible for them. It follows that the restriction imposed on his accreditation by the Tribunal, prohibiting him from issuing complying development certificates between April 2007 and April 2008, has had a serious impact upon the firm's business. The same must be said of the restriction that the Board subsequently imposed. This restriction has effect until February 2009.

165 We also take into account the strain imposed on Mr Hans by these proceedings, which for reasons outlined above have been unusually prolonged.

166 In the light of all these matters, we have determined that, despite our conclusion that the matters pleaded and proved against Mr Hans in these proceedings warranted a finding of professional misconduct by him, the public interest considerations that must guide our decision on penalty do not call for his accreditation to be cancelled or suspended, or indeed for any further restriction to be placed on his accreditation. When the restriction currently in force expires in February 2009, he will have been prohibited from issuing complying developing certificates for some 22 months. It is to be hoped that his future conduct in this regard will not necessitate any further restriction of this nature.

167 We consider, however, that in addition to the reprimand ordered by the Tribunal, he should be required to pay a significantly larger fine than the fine of 20 penalty units ($2,200) imposed by the Tribunal.

168 The maximum fine permitted by section 34 of the BP Act is 1,000 penalty units ($110,000). In our judgment, the appropriate fine in the present circumstances is 100 penalty units ($11,000).

The question of costs

169 Neither party raised the question of the costs of this appeal. Section 35 of the BP Act stipulates that costs in Tribunal proceedings under the Act may only be awarded under section 88 of the ADT Act. This section stipulates that there must be 'special circumstances warranting an award of costs'.

170 Our preliminary view on this question of costs is that there would appear to be no 'special circumstances'. We recognise, however, that there may be grounds for an award of which we are not aware.

171 Accordingly, our orders make provision for the parties to apply for the costs of the appeal.

Orders

172 We make the following orders:

1. The appeal is allowed in part

2. The orders made by the Tribunal in its decision dated 12 April 2007 are varied as follows:

(a) Order 1 is set aside and the following order substituted: 'The Respondent is guilty of professional misconduct'

(b) Order 3 is set aside and the following order substituted: 'The Respondent is fined $11,000, payable within three months of the date of these reasons'

3. Any application for costs in these appeal proceedings must be filed and served, with supporting submissions, within 28 days of the date of this decision. The opposing party must file and serve submissions in reply within a further 28 days. Unless reasons are advanced for a hearing to be conducted, the matter will be resolved 'on the papers', pursuant to section 76 of the *Administrative Decisions Tribunal Act* 1997.