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ADMINISTRATIVE DECISIONS TRIBUNAL OF NEW SOUTH WALES

Building Professionals Board v Cohen (No. 2) [2010] NSWADT 266

Division:	General
Applicant:	Building Professionals Board
Respondent:	Bernard Cohen
File number:	073165, 073166
Hearing dates:	22 June 2010, 21 July 2010
Submissions closed:	6 September 2010
Date of Decision:	8 November 2010
Before:	Judge K P O'Connor, President P O'Carrigan, Non-judicial Member
Catchwords:	Accredited Certifier - Disciplinary Order - Cancellation of Accreditation
Legislation Cited:	*Administrative Decisions Tribunal Act 1997* *Administrative Decisions Tribunal Rules 1998* *Building Professionals Act 2005* *Environmental Planning and Assessment Act 1979*
Cases Cited:	*O'Malley v Director of the Building Professionals Board, Department of Planning* (GD) [2006] NSWADTAP 52 *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70 *Stanoevski v Council of the Law Society of NSW* [2008] NSWCA 93
Applicant Representative:	A Grey, solicitor, Building Professionals Board
Respondent Representative:	B DeBuse of counsel instructed by Marsdens Law Group
ORDERS	1. The respondent's certificate of accreditation is cancelled. 2. The respondent can not re-apply for a certificate

of accreditation for two years.

3. The respondent is disqualified from being an accredited certifier director of, or being otherwise involved in the management of, an accredited body corporate for five years.

4. The respondent pay a fine of $12,000.

REASONS FOR DECISION

1 In our decision delivered 8 March 2010, the Tribunal found the respondent, Bernard Cohen, an accredited certifier, guilty under s 31(1) of the *Building Professionals Act 2005* (BP Act) of professional misconduct. The finding related to his conduct in respect of two developments: a child care centre located at Harrington Park, municipality of Camden, final occupation certificate issued 18 June 2004 (Tribunal file no. 073165); and an office building at Camden, final occupation certificate issued 14 July 2005 (Tribunal file no. 073166). The complaints that give rise to this outcome were made by a senior officer of the Camden Council, in July 2005 and February 2006 respectively.

2 In each case, Mr Cohen made basic errors of judgment in relation to fire safety requirements and disability access requirements at both the construction certificate and occupation certificate stages.

3 On that occasion, we concluded our decision with the following observations:

> 203 In both applications there were fire safety omissions of the same type going to: inadequate separation distances between openings (windows, doors, columns) and the perimeter boundary; required exit doors swinging against the direction of egress; obstruction of exits or exit pathways; inadequate exit signage; and lack of required certification as to fire rating compliance for floor coverings. In addition, in one or other of the applications the omissions went to: lack of automatic shut down of air conditioning; lack of automatic smoke detection and alarm system (the child care centre); and lack of lever handles on doors in exit paths (the office building).
>
> 204 Disability access standards are a relatively new feature of building regulation. The community's expectation is that they be actively enforced and implemented. The omissions proven went to: failure to ensure, in several respects, that toilets were compliant with accessibility standards (the child care centre); lack of related signage (the child care centre); adequate staircase hand rail (the office building); and non-skid stair-edges (the office building).
>
> 205 Most of the omissions occurred at the CC stage, and were repeated at the OC stage. Some, as noted in the course of the reasons, arose at one only of these points.
>
> 206 Mr Cohen's admissions of error were often, in our view, token in nature. Mr Cohen manifested little recognition of the significance of the omissions, and in his affidavit and oral evidence continued to explain his conduct as reasonable in the circumstances. His failure to enforce strictly additional fire safety standards where usual minimum boundary distances were exceeded was, we consider, a striking example of something not seen by him as especially significant. An omission of this kind not only affects the fire safety of the subject premises but arguably makes the

> adjacent properties less safe and less developable hence less valuable. The eccentric measuring technique which he said he routinely used provided a simple illustration of his lack of competence in a fundamental aspect of building standards enforcement.
>
> 207 Further his evidence on disability access standards showed a fundamental misunderstanding of their objectives. It is not professionally competent to decide not to fully implement standards by speculating as to the kind of people that may occupy the building, and assume that they will all be sufficiently able not to have any need for assistance from disability access measures. These were projects of a conventional kind, belonging to the ordinary life of the community. Disability access standards should have been strictly enforced.
>
> 208 As noted, the omissions resulted in rectification notices being issued. The building owners were exposed to cost and inconvenience. As at the date of the Robinson inspections some years later, several of the omissions had not been fully rectified.
>
> 209 In our view the objective gravity of Mr Cohen's conduct requires a finding of professional misconduct in relation to each of the applications. The conduct proven is, in our view, sufficient to warrant suspension or withdrawal of accreditation. It does not follow that the disciplinary order must be one of suspension or withdrawal of accreditation.

4 This decision deals with the issue of what disciplinary orders are appropriate.

5 The main object of disciplinary orders is public protection in a wide sense, and embraces the need for appropriate standards to be maintained among accredited certifiers generally and the maintenance of community confidence in the private certification system.

6 Where a finding of professional misconduct has been entered (as here), a real question arises as to whether the certifier remains fit to continue to practise. Fitness is a broad concept. As Walters J noted in *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70 at 76 in relation to the expression 'fit and proper person', there dealing with the accreditation of a commercial agent:

> '[W]hat is meant by that expression is that the [the person] must show not only that he is possessed of a requisite knowledge of the duties and responsibilities devolving upon him as the holder of the particular licence under the Act, but that he is also possessed of sufficient moral integrity and rectitude of character as to permit him to be safely accredited to the public, without further inquiry, as a person to be entrusted with the sort of work which the licence entails ...'.

Available Disciplinary Orders

7 Section 34 of the BP Act provides:

> **34 Tribunal may make certain disciplinary findings**
>
> (1) If an application is made to the Tribunal under section 31 for a disciplinary finding in relation to an accreditation holder, the Tribunal is to determine whether or not the accreditation holder is guilty of unsatisfactory professional conduct or professional misconduct.
>
> (2) If the Tribunal finds that the accreditation holder is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may take any one or more of the following actions:
>
> (a) caution or reprimand the accreditation holder,
>
> (b) direct that such conditions as it considers appropriate be imposed on the accreditation holder's certificate of accreditation,
>
> (c) order that the accreditation holder complete such educational courses as are specified by the Tribunal,
>
> (d) in the case of an accredited body corporate, order an accredited certifier who is a director or employee of the body corporate to complete such educational courses as are specified by the Tribunal within the time specified by the Tribunal,
>
> (e) order that the accreditation holder report on his, her or its practice as an accredited certifier or building professional at the times, in the manner and to the persons specified by the Tribunal,
>
> (f) order the accreditation holder to pay to the Tribunal a fine of an amount, not exceeding 1,000 penalty units, specified in the order,
>
> (g) order the accreditation holder 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,
>
> (h) suspend the accreditation holder's certificate of accreditation for such period as the Tribunal thinks fit,
>
> (i) cancel the accreditation holder's certificate of accreditation,
>
> (j) disqualify the accreditation holder from being an accredited certifier director of, or otherwise being involved in the management of, an accredited body corporate or a specified

accredited body corporate for such period (including the period of his or her lifetime) as may be specified by the Tribunal,

(k) in the case of an accredited body corporate, disqualify an accredited certifier who is a director of the body corporate from being involved in the management of the body corporate for such period (including the period of his or her lifetime) as may be specified by the Tribunal, but only during any period when the body corporate holds a certificate of corporate accreditation,

(l) order that the accreditation holder cannot re-apply for a certificate of accreditation within such period (including the period of his or her lifetime) as may be specified by the Tribunal.

(3) If the Tribunal finds that the accreditation holder is not guilty of unsatisfactory professional conduct or professional misconduct, it is to dismiss the application.

(4) The Tribunal may not make an order under subsection (2) (f) without the consent of the complainant and the making of any such order does not affect any right of the complainant to bring an action to seek additional compensation.

Board's Application

8 The Board has applied for the following orders:

1. The respondent's certificate of accreditation be cancelled.

2. The respondent can not re-apply for a certificate of accreditation for five years.

3. The respondent is disqualified from being an accredited certifier director of, or being otherwise involved in the management of, an accredited body corporate for five years.

4. The respondent pay to the Tribunal a fine of $25,000.

9 The Board's principal application is for an order, cancellation for a fixed period, the effect of which is to remove Mr Cohen from practice and end his long career as a certifier for that period.

10 The Building Professionals Board (the Board) bears the onus, on the civil standard, of proving the requisite degree of unfitness. The Tribunal must apply the standard with care mindful of the grave consequences of such an order for Mr Cohen. See generally, *Stanoevski v Council of the Law Society of NSW* [2008] NSWCA 93.

11 In an isolated case of failure to adhere to standards of professional competence, even if serious, the first response would be to consider orders that seek to strike a balance between the goal of public protection and rehabilitation of the offender. The public has an interest in retaining the services of specially trained and knowledgeable people, as

certifiers are in relation to building projects. The mid-range orders in the hierarchy of orders in s 34(2) seek to strike a balance of this kind, for example orders that the accreditation holder undertake special courses ((c), (d)), the imposition of conditions on the certificate of accreditation ((b)) or submitting the accreditation holder's practice to a reporting regime as to specified matters ((d)).

12 In our view, Mr Cohen's conduct in relation to the projects under notice in this case, the extent of the failure to rectify the errors revealed, combined with his very poor disciplinary history, the attitude to compliance he displayed at hearing, and the inadequate account he gave of the changes in administrative practices in his firm since 2007 require close attention to be given to orders at the higher end of the range, i.e. fine, suspension, cancellation, disqualification as a director and a bar on re-application. There is a real question as to his present fitness to continue in practice.

The Board's Case

13 In its submissions the Board referred to the following matters:

> (1) The findings of the Tribunal in its decision as to guilt, in particular the following passages:
>
> > 40 It will be seen that in respect of many of the formal admissions, Mr Cohen's explanation in mitigation in some instances is so extensive as to suggest that the true position is that there is no formal admission.
> >
> > 47 In his affidavit sworn 18 July 2008, and in evidence at hearing, Mr Cohen asserted that he regarded as acceptable practice a method of measurement which proceeded on a 45 degree angle from the corner where the glass meets the surround to the side boundary. He included a drawing showing the result in relation to the Director's office window, being 3.6m. On the other hand a straight line measurement, i.e. one following the line of the window wall at 90 degrees direct to the boundary would result in a measurement under 3.0m.
> >
> > 48 In our view, this evidence was extraordinary. Mr Cohen's solicitor, Mr Butterfield, indicated to the Tribunal when Mr Cohen's affidavit was admitted into evidence on 9 February 2009 that it was not now being relied upon in relation to matters that were admitted. Nonetheless, despite his admission on this matter, Mr Cohen continued at hearing to defend his measurement approach as described in his affidavit and indicated that he had used it throughout his 25 years in the field.
> >
> > 49 The only sensible understanding of references to distances in a code such as the BCA is that they refer to minimum separations. Where the two points in issue are

parallel, as here, then the method of measurement would be straight line, or perpendicular. Mr Cohen's method was self-serving and must raise doubts as to all those certifications where he has used his own check measurements to satisfy himself as to compliance.

206 [set out earlier in these reasons]

(2) The serious nature of the items of non-compliance. The submissions grouped the findings into fire hazards/occupant safety and disability non-compliances.

The submissions concluded: 'While many of the fire safety non-compliances are concerning enough in isolation, the cumulative effect of them is a recipe for disaster. This is particularly true of the child care centre.'

(3) The respondent's failure to take remedial action with respect to non-compliant works.

The submissions set out the Board's view of whether further action was required in respect of the items of misconduct relating to the two developments. In the case of the child care centre, its view was that no further work was required in respect of three matters (items 2, 3 and 4) but further work was required in respect of six matters (items 1, 5, 6, 7, 8 and 9). In the case of the office building, its view was that no further work was required in respect of four matters (items 3, 4, 6 and 8), that it may be that no further work was required in respect of one further matter (item 9) but further work was required in respect of four matters (items 1, 2, 5 and 7).

Considerable attention was given at hearing to whether remedial work was required in respect of the ten items.

(4) The categorisation of the overall character of the respondent's conduct as professional misconduct.

(5) The disciplinary history of the respondent and the repetition of similar conduct.

This matter also received close attention at hearing. The Board divided the record of disciplinary determinations into determinations under the new scheme and those made under the old scheme.

In the old scheme period, the respondent was the subject of 4 cautions and 3 reprimands.

In the new scheme period from 1 May 2007 to 23 May 2008 the respondent had been the subject of 15 disciplinary determinations under Part 3 of the BP Act. The Board's folder attached the

statement of decision in each of these matters. In almost all instances the conduct occurred when the old law was in effect, and the complaints were made under the old law.

The Board summarised the disciplinary orders in the new scheme period as follows: 5 cautions; 10 reprimands; an order requiring the respondent to report on his practice to the Board; an order that the respondent enrol in and successfully complete the Advanced Building Regulation short course with the University of Technology, Sydney; 7 fines totalling $14,500.

The contents of the disciplinary register as at 11 March 2010 were attached. The register includes one matter with a date later than 23 May 2008, the date being 18 February 2010.

The submissions referred to one complaint revealing, it was submitted, a similar pattern of conduct in relation to fire safety compliance and disability access compliance (05-29 Kildare Road, Blacktown, eight storey residential building; 400 Old Northern Road, Oran Park, garages and pit facilities for Oran Park Raceway together with a first floor Corporate Area). They also include an extract from a letter from Mr Cohen to the Board disclaiming responsibility for the errors that occurred in a certification process for which he was responsible, laying blame on other individuals involved in the inspection process.

The Board described the respondent as having an attitude that is 'belligerent and unapologetic', and that his approach involves the 'diversion of blame to others', and that he has 'a personal practice with respect to final inspections of either not conducting them or conducting only cursory inspections that result in obvious defects not being detected'.

A number of other matters are also relied upon.

(6) The respondent's failure to make any early admissions and lack of contrition.

(7) The Tribunal's findings with respect to the respondent's ability.

The Board referred to some of the passages already set out in these reasons, and in addition to the following:

> 193 In our view Mr Cohen chose to conduct his responsibilities in a way that allowed him to be the certifier for a volume of certifications that went beyond what was humanly possible were he to have undertaken personally the inspections, therefore he had to delegate. This model exposed him to the possibility of incompetent or dishonest

certification inspections made by those to whom he delegated.

194 Implied in the case made by Mr Cohen, it would seem, is the proposition that he might have picked up the mistakes at the CC stage had he gone and done the inspection. We have no confidence that that would have occurred.

(8) The Tribunal's findings with respect to the respondent's honesty.

The Board referred to various negative findings going to Mr Cohen's integrity and concern for the truth. They appear at [68], [142], [148], [159] and [161] of those reasons.

(9) The need for general deterrence.

The essential submission is that Mr Cohen is not a fit and proper person to retain accreditation given the conduct revealed. Further it is submitted that to provide deterrence to other certifiers and to maintain public confidence in the system, he should be disciplined in a severe way.

(10) The need for specific deterrence.

The submissions addressed the scale of the proposed fine ($25,000) noting that the maximum fine previously ordered by the Tribunal has been $15,000. The submissions expressed concern that if Mr Cohen lost his accreditation he would simply move into an administrative staff position within the company Essential Certifiers and work as a 'rainmaker' or 'finder'. Persons in the company with appropriate accreditations would do the actual certification work. As we understand the submission, a high fine is seen as appropriate in circumstances where there is a likelihood that the offender will remain active in the industry, albeit in a capacity that does not require a licence.

(11) Finally, the submissions dealt with previous decisions of the Tribunal, dividing them into (a) safety cases; and (b) honesty cases.

It referred in particular to three cancellation cases: *Barakat v BPB* [2009] NSWADT 5 (dishonesty, cancellation); *BPB v Duffy* [2008] NSWADT 117 (failure to a serious degree to respond to disciplinary notices, disqualified); *BPB v Boulle (No 3)* [2009] NSWADT 9 (dishonesty, cancellation and disqualification).

The Respondent's Case in Reply

14 On the first day of hearing, the respondent placed before the Tribunal:

(a) a statement as to his background and other matters

(b) two testimonials

(c) current professional indemnity policy

(d) documentation demonstrating improved business practices at Essential Certifiers.

15 The statement referred to: his work background, and qualifications held; the formation in 1995 of the company Essential Certifiers, and the work it has done across the State; a view as to his history of complaints, and comparing them to the scale of work undertaken, seeking to demonstrate their fewness; changes to practice that he has instituted since 1 May 2007; a reply to the criticisms made of his attitude and to his professional understanding of fire safety and disability issues; impact of revocation or suspension of accreditation on business; impact on current staff; effect on community, referring to work he has done without fee for a variety of community organisations, ranging from sports clubs to children's hospitals; and the personal impact of the proceedings on him and his family.

16 He gave oral evidence, and was cross-examined.

17 The written references were from Mr P Hayward, EastCoast Positioning Pty Ltd, registered surveyor, who has held leading positions in major industry professional associations, and non-judicial member of this Tribunal; and from Mr R Moerman and Mr B Stewart, senior managers, Cape Cod Builders, North Parramatta.

18 Neither reference referred specifically to the Tribunal's decision on the substance of the Board's application.

19 Mr Hayward's reference was a mixed one in that it acknowledged the scale and frequency of Mr Cohen's history of misconduct. It referred to his standing in the industry. It made a case for some understanding to be shown of loose practice by certifiers from Mr Cohen's background, that of a senior inspector in local government.

20 The Moerman/Stewart reference commended Mr Cohen as having provided 'highly professional' services that were 'beyond reproach'. It made no direct reference to the history of findings and orders on the disciplinary register. It expressed the opinion 'nor should he be made the martyr for venturing into areas that many have feared to tread'.

21 As we interpret it, the description of Mr Cohen as a 'martyr' seeks to suggest, without explanation or evidence, that Mr Cohen is being victimised in some way by the bodies responsible for maintenance of standards. Mr Cohen, in choosing to tender such a comment, is in effect adopting the referees' opinions, and their depiction of him as a 'martyr'.

22 He handed up his professional indemnity insurance policy issued 29 September 2009, to show, as we understood it, that he was in good standing in that regard, and compliant with the condition of accreditation in that regard. As explained further below, he presented business practice documents seeking to demonstrate that his firm had improved

its compliance standards. The business practice documents were the subject of intense cross-examination and criticism in closing submissions by Mr Grey for the Board.

23 Mr DeBuse made written and oral submissions at the hearing going to the following matters:

(a) Seriousness of the breaches

He referred to the two cases that the Tribunal had dealt with on this occasion. His submissions in relation to the disabled-access breaches repeated, in our view, the unsatisfactory stance adopted by Mr Cohen in the course of the principal hearing. Mr DeBuse said as to the disabled-access breaches:

> 'These do not appear to have safety consequences but relate to the entitlement of persons with handicaps to receive the same level of convenience and have the dignity respected in the same way as other members of the community'.

The remarks again reveal no real understanding of the central place considerations of disability access have in building and development and the continued use of language of marginalisation (absence of 'safety consequences', 'handicaps', 'convenience').

The submissions then go on to mount a case in reply to the Tribunal's decision as to the breaches. They are argumentative as to the Tribunal's findings of contravention in the substantive decision, and are not appropriate submissions at this stage of disciplinary proceedings of this kind.

(b) The purpose of disciplinary orders in these proceedings

The submissions make brief references to principles found in various accredited certifier discipline decisions of the Tribunal.

(c) Importance and relevance of comparative penalties

These submissions reply to the Board's submissions, and draw attention to other cases where less draconian orders were made in cases involving multiple contraventions.

(d) Prior record

The submissions are along similar lines to Mr Cohen's affidavit. It refers to the number of projects for which Essential Certifiers personnel have been the PCA and compares them to the number of disciplinary findings. The submissions refer specifically to the number where Mr Cohen was the PCA over a ten year period, 3208.

(e) Timing of Offence and Relationship to Penalty

These submissions go to the time that has passed since the matter was first the subject of complaint, and the delay, it is said, in bringing the matter to completion attributed to the disciplinary authorities. It notes case-law in which the Tribunal has acknowledged these factors as a mitigating penalty.

(f) Current Fitness to Practise

The submissions refer to matters of present conduct by Mr Cohen that demonstrate current fitness to practise.

(g) Probity and Candour; Personal Circumstances

The submissions reply to criticisms of Mr Cohen in relation to integrity and truthfulness. They note that none of the disciplinary allegations particularised dishonesty, so there is no finding of that degree in this case. As to personal circumstances, the submissions refer to impact on reputation, career, income and family.

Adjournment of Hearing

24 In evidence on 22 June 2010 Mr Cohen gave evidence, without prior notice to the Board, as to his improved business practices. This was prompted, at least in part, by questions from the Tribunal. He had said in evidence that he now had in place check-lists, pro forma letters and other internal procedures to guard against error. He produced some internal documents to demonstrate his point. The Tribunal queried the extent to which the business documents represented actual practice in the firm, and what the truth was in relation to Mr Cohen's role in bringing these improvements about and what managerial discipline he brought to bear.

25 We also expressed concern over the number of items where the errors for which Mr Cohen had been responsible had not, in the opinion of the Board, been rectified, now around five years after they had first been identified.

26 We also expressed concern based over whether Mr Cohen was competent to certify buildings of the kind with which this case had been concerned, i.e. those falling in the Class 2 to 9 range. (Class 1 covers residential dwellings of a usual kind and Class 10 ancillary structures such as outbuildings and sheds.)

27 Arising out of these concerns, the Tribunal directed that there be a meeting during the adjournment period between representatives of the Board and Mr Cohen to examine a sample of his work files covering the period since 2007, in particular files relating to Class 2 to 9 projects. We also asked for any further information in relation to rectification of the errors the subject of these proceedings.

28 The Board's Supplementary Submissions were prepared following the inspection of sample files. They dealt with several matters: adequacy or otherwise of Mr Cohen's internal check list and other procedures, relying on an expert report from Mr Stuart

Boyce, accredited certifier, Grade 1; extent of failure to rectify errors in respect of the two projects under notice in these proceedings; and some other matters. The 'other matters' were: submissions as to the evidence given by Mr Cohen on 22 June 2010 as to his work practices and workload; and responses to the statistics given by him as to his disciplinary experience and that of others at Essential Certifiers. The Board raised certain further matters that involved a new line of allegations. The Tribunal upheld Mr Cohen's objection, and ruled that it would not consider those matters.

29 The respondent led evidence at the resumed hearing on 21 July 2010 from a former employee of Essential Certifiers (in the years 2003-2009), Mr Trenton Jones, who reached the level of a Grade 1 certifier in 2007. Mr Jones gave evidence as to Mr Cohen's attempts to improve management practices in the office, especially from 2005 onwards. Mr Jones was responsible for drafting and standardising a number of internal documents and checklists. We refer further to this evidence later in these reasons. Mr Cohen handed up the latest letter from the Board renewing his accreditation for the period 6 February 2010 to 5 February 2011.

Developments since hearing on 21 July 2010

30 At the close of the hearing on 21 July 2010, we continued to express concern over matters where it seemed adequate compliance had not been achieved due to incomplete or non-rectification of errors and omissions. In response to our concerns regarding rectification, further material was filed. It is referred to in greater detail below.

31 In addition, consequent on an urgent application for an interim order made 26 August 2010 on behalf of Mr Cohen, the Tribunal learnt that the Board has now suspended Mr Cohen's accreditation for 6 months in respect of another complaint. Mr Cohen has applied for review of the Board's order, and the hearing has been listed for 12 November 2010. The application for an interim order staying the Board's order was refused subject to the making of certain modifications to the original order to allow Mr Cohen to dispose of certain completed work.

Consideration

- Seriousness of Contraventions, Attitude to Compliance, Disciplinary History

32 We have dealt in our primary decision with two of the matters mentioned: the number and seriousness of the contraventions that affected the two projects under notice; and the attitude to compliance that he displayed. In our view, the Board's descriptions of him in its submissions were well founded – i.e., 'belligerent and unapologetic', his approach involves the 'diversion of blame to others', and that he has 'a personal practice with respect to final inspections of either not conducting them or conducting only cursory inspections that result in obvious defects not being detected'. In these matters he has exhibited a pattern of non-compliance with statutory requirements. In our view, he has shown a tendency to be influenced by the immediate demands of owners or developers and given little weight to the wider community interest in ensuring that building standards are met, especially for future occupants, visitors and users.

33 We do not have any confidence that Mr Cohen takes seriously the adverse disciplinary outcomes to which he has been subject. In his evidence in these proceedings (affidavit

and oral) and in the submission put by his counsel, he has persisted in treating the disciplinary outcomes as merely a statistical incidence of a busy practice.

34 He has constantly compared the number of projects for which he has been the PCA over a ten year period (about 3000) with the number of adverse disciplinary outcomes he has suffered.

35 The total, according to the Board's material, is 9 cautions, 13 reprimands and 7 fines totalling $14,500. He has also been the subject of a reporting order and an educational order. As noted earlier, since this material was placed before the Tribunal, the Board has in respect of a further matter found him guilty and imposed an order of suspension (now the subject of an application for review to this Tribunal).

36 Some proceedings were concluded with the making of more than one order. Nonetheless the summary position is that 25 disciplinary orders have been made against Mr Cohen in respect of 23 separate proceedings resulting in adverse orders. So, from his point of view, it would seem a 'strike rate' of 1 in 150 is reasonably acceptable. This is a risk management view of a disciplinary complaints system, rather than one, as we see it, that recognises the seriousness of a record with so many adverse disciplinary outcomes.

37 The accredited certifier is not merely a privately-practising professional, but is administering a public office under the law of the State. The certifier makes decisions that once could only be made by a public instrumentality, most typically the local council. The public must be confident that certifiers will rigorously enforce compliance with the minimum standards required by the conditions of a development approval.

38 In our view, as noted in our earlier decision, Mr Cohen has conducted for many years a style of practice in which far more commissions were taken on that could effectively be discharged. As we see it, he was obliged by this choice to take short cuts. We have referred in our earlier decision to his evidence generally as to his work methods. He tended to delegate responsibility, not be involved necessarily with final inspections and have an administrative sign-off approach based on input from others. These practices meant that, if a complaint was made, he could more easily shift blame to his delegates, and deny any personal responsibility.

39 He has referred in his affidavit to his length of involvement with building certification, around 25 years with councils, and now 12 years under the new system. He has referred to his involvement in peak professional bodies and peak consultative bodies. In our view, he sees himself as a leader in the profession of accredited certification, and sees this reflected in the place his firm Essential Certifiers occupies as one of the three biggest certification businesses in the State.

40 In our view, leaders in the profession should be seen as exemplars of good practice. There is a greater risk of a profession engaging in bad practice if people in leadership positions themselves engage in bad practice. Consequently, disciplinary orders may be harsher where the failure is that of a very experienced practitioner, especially one who occupies a leadership role or comports himself/herself in that way. They are more vulnerable to orders that reflect the need for general deterrence than an ordinary member with a small practice or a junior member of a profession in the early stage of a career.

- The extent of failures to rectify the errors revealed

(a) Child Care Centre, Harrington Park

41 We will not set out in detail here the descriptions of the deficiencies, but cross-refer to the relevant paragraphs in our previous decision.

42 ***Item 1***: Fire separation from boundary. See previous decision [41] ff. Response: Nib Walls Solution. Mr Rogers, an officer of the Board, assessed the explanation given by Mr Cohen as to why it achieves compliance. He concluded that there is no evidence that the assembly, i.e. the Hebel panels, the steel frames that they are mounted in, and the method of attachment comply with the BCA. It is not enough simply to present the Hebel installation booklet as evidence of compliance, he asserted. Mr Cohen continued to dispute this question at the hearing on 20 July. The Tribunal gave leave to file additional material.

43 As a result, several filings occurred, ending 6 September 2010. They are made up as follows: Statement provided to Mr Cohen from Mr Glen Mitchell, Director/ Fire Engineer (Accredited) Holmes Fire & Safety as to whether compliance with the BCA is achieved in respect of openings in an external wall for the child care centre (dated 4 August 2010); submissions dated 11 August 2010 from Mr Grey, questioning the adequacy of the instructions and understanding reflected in the Mitchell opinion, and comments in reply by Mr Matthew Wunsch, Team Leader, Compliance at the Board, dated 13 August 2010 accompanied by further submissions from Mr Grey on the weight and adequacy of the Mitchell opinion; submissions in reply dated 31 August 2010 from Marsdens Lawyers for Mr Cohen incorporating the response of Mr Mitchell to the criticisms by Mr Wunsch and Mr Grey; submissions in reply to that material from Mr Grey, 6 September 2010.

44 We have taken account of the further material. Our conclusion is that the response to item 1 remains seriously deficient. The Holmes report provides an opinion without any site visit. It relies on the advice of Essential Certifiers as to the state of the site. These are the same as the shortcomings to which we referred in our main decision when considering the Shestopal opinion in connection with one of the omissions affecting the Camden office building (item 1, see previous decision [131] ff). The Holmes report is flawed as a result.

45 Ultimately, the only way to be assured that the retro-fitted blade walls are fully compliant with the BCA would be for these assemblies to be formally tested by an appropriate laboratory under a recognised methodology. Alternatively, the offending window opening could be narrowed in width – in one instance by 400mm and in another by 800mm – so that fire protection is achieved. This would be to the detriment of users because of the disturbance and cost, and would diminish daylight to the interior. Equally the particular window openings could be given active protection in the form of fire shutters or drenchers, at considerable cost.

46 It is not the Tribunal's role in a decision of the present kind to be selecting a compliant solution. If Mr Cohen had used an acceptable measuring technique, there would be no need to explore a non-standard solution. We are concerned that still no adequate solution has been found.

47 ***Item 5***: Directional sign. See previous decision [92] ff. We agree with the Board's submission that Mr Cohen is non-responsive to this ruling, and does not recognise a problem requiring change.

48 ***Item 6***: Natural ventilation to the cot room. See previous decision [102] ff. Mr Cohen's attitude remains unchanged.

49 ***Item 7***: See previous decision [111] ff. Certification for floor coverings: Despite assurances to the Tribunal at hearing on 22 June 2010 that this was held, none produced.

50 ***Items 8 & 9***: See previous decision [114] ff. No automatic shut down for air conditioning. Despite assurance to Tribunal at hearing on 22 June 2010, no documentation produced to show that this omission has been rectified. There is no evidence that the deemed alternative solution to which the Robinson report refers (pp 53-54) has been implemented by carrying out of the work or lodgment of certification to that effect with the Council. (Whilst there is a sign-off from the Council with respect to the office building, see further below, there is none in relation to the child care centre.)

(b) Office Building, Camden

51 ***Item 2***: See previous decision [149] ff. Bollard or other protection of required exit. Mr Cohen is non-responsive to ruling, and has continued to press the view that a removable bollard provides a satisfactory solution.

52 ***Item 5***: See previous decision [162] ff. Second handrail: In progress at time of hearing. As the Board commented, it is remarkable that this simple adjustment was not done many years ago, and then not done quickly after the Tribunal's previous decision.

53 ***Items 7, 8 and 9***: See previous decision [168] ff. Certification of floor coverings: now satisfied. Further, as to these items, the Council Fire Safety officer by letter dated 16 August 2010 has advised the owners that all outstanding works have been completed; and that the Fire Safety Order issued in 2005 has now been fully complied with.

- The practice reforms

54 Mr Jones explained the way he sought to ensure that the firm's checklist procedures were updated following issuance of the annual amendments to the BCA, and any legislative changes. He expressed the opinion that Mr Cohen was a fair and considerate employer who insisted that staff attended industry briefings and conferences, and participated in in-house forums.

55 In our view, he did not give convincing explanations in relation to a number of apparent deficiencies in forms in use and internal practices. In relation to Class 2-9 matters he could not explain instances of sign-offs being done on behalf of Grade 1 certifiers when it is a direct personal obligation; incorrect titles on pro forma documents and certificates; and incorrect internal references in these documents to the BCA as in force at the relevant date. In our view, Mr Jones' evidence showed that there had been some attempt to improve internal practices from 2005 onwards, but it fell short of the rigour and precision to be expected, especially in relation to the documents connected with the certification of major commercial and residential buildings (Class 2 to 9).

56 We accept the opinion of Mr Boyce that the checklist Mr Cohen produced at hearing in respect of commercial developments was not a generic document as Mr Cohen asserted, but was in fact a report in relation to a specific development. He said it was an example of a document in current use. We accept that it was not up to date, referring to the BCA 2006 rather than the BCA 2010, operative since 1 May 2010. Consequently it included references to clauses in the BCA which have been deleted. It treated as applicable to NSW a clause that is not applicable to NSW. The document does not contain references to a number of clauses that are relevant in the BCA 2010.

57 As to the six files inspected involving class 2 to 9 developments, we accept Mr Boyce's assessments as follows:

- None of the files had a copy of the checklist on it; typically there was a short document headed 'construction certificate - commercial' (called CC-C in these reasons)

- The CC-C did not reference all BCA sections and clauses and was therefore inadequate as a checklist

- A cursory inspection of some of the drawings on the files revealed BCA non-compliances (itemised), but they were not reflected in the file CC-C

- Certificates relating to fire safety installations contained references to inappropriate Australian Standards and should not have been relied upon

- There were instances of 'back up' certificates not being held on file in relation to fire safety measures.

Disciplinary Orders

58 In our view, Mr Cohen should not continue in practice as an accredited certifier. The Board's case was a particularly strong one, and Mr Cohen's case in reply weak.

59 The question which taxed us is whether the order should take the form of a suspension of his accreditation for a fixed period or cancellation of accreditation with no right to re-apply for a fixed period.

60 We gave some consideration in the course of the hearing to a lesser approach, i.e. removal of the Class 2 to 9 authority, with a restriction to Class 1 and 10 work. But, as Mr Grey for the Board pointed out, many of the disciplinary determinations in his history are ones relating to Class 1 and 10 structures. Moreover, the range of orders open to the Tribunal do not contemplate a radical variation of the current accreditation. We do not see the power to impose conditions as one that could, reasonably, be used to alter radically the scope of an accreditation.

61 The choice between suspension and cancellation turns, in our view, on a judgement as to what trust can be placed in Mr Cohen resuming from suspension and behaving

responsibly; that is, in a way that respects the role that is called to play in the community as the holder of a public office and brings to the role the level of assiduousness, concern for detail and current knowledge of building standards that is required. Mr Cohen has had ample opportunity to demonstrate a rigorous commitment to full and detailed application of building codes in the certification process. We have no confidence that Mr Cohen will come back from a period of suspension with an outlook that embraces the public interest in competent certification, and stands back from the immediate demands of developers and their clients.

62 Our view is that, for the reasons given above, Mr Cohen is not presently fit to practise as an accredited certifier. His accreditation should, therefore be cancelled. He should not be permitted to re-apply for two years. He will then need to demonstrate that he is fit to resume practice, and meet the other requirements for accreditation.

63 The Board asked for an order pursuant to s 34(2)(j) that Mr Cohen be disqualified from being an accredited certifier director of, or being otherwise involved in the management of, an accredited body corporate for five years.

64 It noted in its submissions that Essential Certifiers Pty Ltd is not an 'accredited body corporate' under the scheme. The company provides the business environment from which individually-accredited certifiers operate. The Board informed the Tribunal that the orders would only affect Mr Cohen if Essential Certifiers Pty Ltd became an accredited body corporate.

65 As we understand the matter, its application was protective to deal with a situation where that company became an accredited body corporate or Mr Cohen sought to be involved in another accredited body corporate. In our view, such an order is appropriate in the circumstances.

66 The Board spoke of the possibility that Mr Cohen may stay involved in the business of Essential Certifiers as a 'rainmaker' or 'finder'. We are not inclined to take that matter into account. It is an issue for the lawmakers as to whether steps should be taken to prevent a struck-off person from continuing to be involved in the accredited certification industry in circumstances where the company for which he ostensibly works is not itself accredited. Similarly it is a policy matter as to whether a person who has been deregistered may work as an employee (as distinct from a manager) for an accredited certifier or an accredited body corporate. Provisions of this kind are familiar in the discipline of the legal profession.

67 The final matter raised by the Board was the imposition of a fine. In our decision thus far in this matter, we have given considerable attention to factors that lay beyond the immediate scope of the allegations made against Mr Cohen in respect of the two projects, such as Mr Cohen's disciplinary history and his attitude to compliance.

68 In our view any fine would ordinarily take as its reference point the particulars of the immediate case. The immediate case is a serious one but not markedly different in the scale or nature of the omissions than some of the other serious cases we have dealt with. We do not think a fine as high as that suggested by the Board need be imposed. We also take note that our primary order itself involves a very significant impact on Mr Cohen's financial circumstances.

69 We accept that a fine operates as a marker of rebuke for conduct which provides a level of general deterrence. It informs other accredited certifiers as to how serious the conduct under notice is viewed.

70 In this case, we consider that a fine of $12,000 is sufficient.

Jurisdictional Objection

71 On the first day of the disciplinary orders hearing, 22 June 2010, the respondent through his counsel, Mr DeBuse, made a jurisdictional objection to the proceedings continuing, based on the length of time that passed between the final consideration of the disciplinary investigation by the responsible committee under the pre-2007 accreditation system, and the decision of the Board to refer the matters to the Tribunal after the new BP Act came into force.

72 The objection, in accordance with the Tribunal's practice note governing proceedings, should have been raised in reply to the Board's affidavit as to jurisdiction but was not. The result is that the Tribunal proceeded to dispose of the substantive application ahead of this issue being raised. The only explanation for the lateness in raising the objection appears to be a change in legal representation from Mr Butterfield to Mr DeBuse. Nonetheless the Tribunal must deal with a jurisdictional objection whenever it arises.

73 The objection was rejected. We gave short oral reasons at the time. We will expand on them here.

74 The foundation of the objection is the following events. One, the State Assessment Committee (SAC), an internal body of the then accreditation body, decided on 21 July 2006 to recommend that disciplinary action be taken in the Tribunal against Mr Cohen over the child care centre complaint (file no. 073165 in these proceedings). SAC made a similar recommendation on 15 December 2006 in relation to the office building complaint (file no. 073166). Two, to quote the affidavits as to jurisdiction, '[a]s at 1 March 2007 that recommendation had not been considered by the Minister's appointees'. The date, 1 March 2007, is the date when the new BP Act came fully into effect, and when the Building Professionals Board commenced full operation. Three, the Board decided to refer the complaint to the Tribunal on 1 May 2007. The application were filed 28 days later, which it is conceded is compliant if the Board was entitled to delay its decision to refer until 1 May 2007.

75 Mr DeBuse referred to the unexplained long delays between the date of the internal recommendation to refer and the lodgment of proceedings in the Tribunal (in the first complaint, 10 months, and in the second, 5 months).

76 He submitted that it is not proper for a decision-maker to delay in this way, and places the ultimate application beyond the jurisdiction of the Tribunal.

77 The proceedings are original proceedings. Rule 14(3) of the *Administrative Decisions Tribunal Rules 1998* (ADT Rules) provides:

> Unless the enactment under which the application is made provides otherwise, the application must be made to the Tribunal within 28 days from the day on which the applicant became entitled under the enactment to make the application.

78 There is a power to extend time. See *Administrative Decisions Tribunal Act 1997* (ADT Act), s 44; also ADT Rules, rule 43.

79 Mr DeBuse's argument as to delay depended in part on the proposition that the time 'when the applicant became entitled under the enactment to make the application' was when the internal SAC recommendation was made. The Tribunal has dealt with a similar objection in other cases. It is clear that SAC was an internal element of the then accreditation body's structure. On its face, SAC made a decision involving a 'recommendation'. The recommendation was to the ultimate body with authority to commit a matter to the Tribunal. As a matter of law, the Tribunal has previously ruled that the time when the applicant in this class of proceedings becomes entitled to make the application, for the purposes of cl 14(3), is when the accreditation body itself makes the relevant decision. See *O'Malley v Director of the Building Professionals Board, Department of Planning* (GD) [2006] NSWADTAP 52. That case occurred under the old scheme. The Appeal Panel observed there:

> 27 In this instance the accreditation body did not make up its mind to apply until 16 months after receiving the investigation report. Such a delay in making up its mind may well be explained, at least in some cases, by ongoing deliberation and the consideration of representations by the parties. It may be explained by administrative pressures affecting the accreditation body. In our view the application was filed in time.
>
> 28 This conclusion does, however, we think, draw attention to a problem with the statutory scheme. There should, we think, be some consideration given to placing time limits on how long the accreditation body can spend pondering on a report before it applies to the Tribunal.

80 Mr DeBuse's main argument was based on the following transitional provisions, which appear in Sch 2 of the BP Act:

> **3 Pending disciplinary proceedings against accredited certifiers and existing disciplinary findings**
>
> (1) A complaint against an accredited certifier being dealt with by an accreditation body immediately before the repeal of Division 3 of Part 4B of the *Environmental Planning and Assessment Act 1979* is, subject to the regulations, to continue to be dealt with by the Board as a complaint under Part 3 of this Act.
>
> (2) Any investigation under Division 1B of Part 6 of the *Environmental Planning and Assessment Act 1979* that was not completed at the repeal of that Division may be continued by the Board under Part 4 of this Act.

81 Clause 3(1) gives the ordinary authority for old scheme complaints to 'continue to be dealt with' under the new law. Mr DeBuse's submissions gave emphasis to cl 3(2). He argued that as the investigation had been completed under the old system, the Board had no power to 'continue' it under the new law.

82 In our view, the provision is simply dealing with uncompleted investigations. It is silent as to the later steps in the process. The Board in this case, as we understand the narrative given in the affidavits as to jurisdiction, simply got to both complaints at its 1 May meeting. There is no evidence of any further investigation as between the close-off dates at the SAC and the consideration by the Board of its response to the SAC recommendation.

83 Mr DeBuse also referred to provisions in force in and around 2006 under the old law, the *Environmental Planning and Assessment Act 1979*, relevantly:

> **109Y Investigation into complaint to be conducted expeditiously**
>
> An investigation by an accreditation body is to be conducted as expeditiously as possible.
>
> **109Z Decision after investigation of complaint**
>
> (1) After an accreditation body has completed an investigation into a complaint against an accredited certifier, the complaint is to be dealt with in accordance with this section.
>
> (2) The accreditation body may apply to the Tribunal for a disciplinary finding against an accredited certifier with respect to any complaint against the accredited certifier.
>
> (3) Subject to subsection (4), the accreditation body must institute proceedings in the Tribunal with respect to the complaint against the accredited certifier if satisfied that there is a reasonable likelihood that the accredited certifier will be found guilty by the Tribunal of unsatisfactory professional conduct or professional misconduct.
>
> (4) [Deals with internal disposals made by the Board if satisfied only likely to be held to be unsatisfactory professional conduct.]
>
> (5) The accreditation body is to dismiss the complaint against the accredited certifier if satisfied that there is no reasonable likelihood that the accredited certifier will be found guilty by the Tribunal of either unsatisfactory professional conduct or professional misconduct.

84 He contended that these provisions pointed to expeditious disposal at all stages, and did not contemplate the sorts of delay between internal recommendation and final

decision to refer that occurred in this case. This issue is, in our view, also addressed by the comments in *O'Malley's case* previously cited. Section 109Y spoke to expedition in the investigation. The scheme is silent as to expedition at the next point.

85 We accept that a long or oppressive delay in the interval between closure of an investigation and a disciplinary body's decision to refer might give rise to an abuse of process. This is not a case of that degree.

Costs

86 Section 35 of the BP Act provides:

> **35 Tribunal may award costs**
>
> The Tribunal may award costs under section 88 of the *Administrative Decisions Tribunal Act 1997* in respect of proceedings commenced by an application made under this Part.

87 The parties are given 21 days from the date of publication of this decision to make any application under s 35, and directions will then be given.

ORDERS

1. The respondent's certificate of accreditation is cancelled.

2. The respondent can not re-apply for a certificate of accreditation for two years.

3. The respondent is disqualified from being an accredited certifier director of, or being otherwise involved in the management of, an accredited body corporate for five years.

4. The respondent pay a fine of $12,000.

I HEREBY CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE ADMINISTRATIVE DECISIONS TRIBUNAL.

~~REGISTRAR~~/ASSOCIATE

ADMINISTRATIVE DECISIONS TRIBUNAL