



CITATION:	Building Professionals Board v Boule [2009] NSWADT 9
DIVISION:	General Division
PARTIES:	APPLICANT Building Professionals Board RESPONDENT Ivan Boule
FILE NUMBER:	083164
HEARING DATES:	13 August 2008
SUBMISSIONS CLOSED:	13 August 2008
DATE OF DECISION:	16 January 2009
BEFORE:	O'Connor K - DCJ (President); Friedmann P - Non-Judicial Member
CATCHWORDS:	Accredited Certifier – Application for Disciplinary Findings and Orders – Exceeding Authority of Accreditation – False Substitute Certificate – Professional Misconduct – Building Professionals Act 2005
LEGISLATION CITED :	Building Professionals Act 2005 Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000
CASES CITED:	Building Professionals Board v Boule [2008] NSWADT 80 Director General, Department of Infrastructure, Planning and Natural Resources v Boule [2006] NSWADT 43 Law Society of New South Wales v Young (No 3) [2001] NSWADTAP 38 Law Society of New South Wales v Young [1999] NSWADT 78 Veterinary Surgeons Investigating Committee v Howe [2002] NSWADT 191
REPRESENTATION:	APPLICANT A Grey, legal officer RESPONDENT K Lovegrove, solicitor, Lovegrove and Lord

ORDERS:

1. The Tribunal finds the Respondent guilty of professional misconduct.
2. The Tribunal orders that the Respondent's certificate of accreditation be cancelled; and that the Respondent cannot re-apply for a certificate of accreditation for 9 months.
3. These orders are to take effect on 1 February 2009 or on such later date as is permitted by the Applicant.

REASONS FOR DECISION

1 On 21 May 2008 the Building Professionals Board applied to the Tribunal under the *Building Professionals Act 2005* (the Act) for disciplinary findings and orders to be made against Mr Ivan Boulle over his conduct in connection with a development. The material text of the application is appended.

2 At all relevant times Mr Boulle held under the classification system then used, a certificate of accreditation as an Accredited Certifier and Principal Certifying Authority – Building (Grade 3). He has been accredited since 2 March 1999.

3 The conduct in issue occurred in the period July-August 2006. Mr Boulle was the accredited certifier and principal certifying authority (PCA) for a development at 71-75 Sydney Street, Willoughby. The development took the form of a two storey residential care facility. It was a class 9C building under the Building Code of Australia. The developer was Grindley Constructions Pty Ltd.

4 He issued a construction certificate for the development on 25 July 2006, and notified the Council of his appointment as PCA. On 1 August 2006 the Council notified the developer that, in its opinion, the construction certificate was invalid, as Mr Boulle did not hold the required level of accreditation. While his accreditation, Grade 3, covered class 9 buildings of three storeys or less, it was restricted to buildings that did not exceed 2000 square metres in floor area. This building's floor area was 3267 square metres. In his Reply lodged 9 July 2008 Mr Boulle admitted the particulars of this allegation ('exceeding authority of accreditation') but did not admit that it amounted to professional misconduct. He asserted that the floor area was only in excess by 300 square metres (i.e. that it was 2300 square metres not 3672 as asserted by the Board).

5 On 4 August 2006 Mr Boulle wrote to the Council advising that he and the developer wished to 'revoke' the first construction certificate, and substitute a replacement construction certificate which was attached. This certificate bore the name of Mr Orlando Da Silva, a certifier holding the required level of accreditation. The allegations made against Mr Boulle in relation to this conduct are very serious. It is said that he falsely appended Mr Da Silva's name to the certificate, and the signature was a fabrication. Further he later asserted to the Council that he had arranged for Mr Da Silva to replace him as the PCA, and that he had faxed the instrument of appointment to the Council on 25 July 2006. The application alleges that these statements were false. In his Reply lodged 9 July 2008 as to this allegation ('false documents and information'), he denied that Mr Da Silva had no involvement with the development. He denied that Mr Da Silva was not appointed PCA for the development. He admitted that he, Mr Boulle, signed the second construction certificate for the development and that he lodged a notice of appointment with the Council. He said, however, that Mr Da Silva had agreed to be the PCA around 24 July before the first certificate had been lodged.

6 Mr Da Silva attended the hearing. He denied that there had been any agreement ahead of 25 July 2006 for him to be the accredited certifier and PCA. At hearing Mr Boulle amended his reply in this regard, and said that a telephone conversation occurred around 1 August when he became aware that there was a problem with his accreditation level. Mr Da Silva said that might have occurred.

7 Mr Boulle did not give any evidence, nor did he call any evidence in support of his version of events or his

calculation as to the floor area of the development.

8 At hearing the Board relied on the following material: affidavit as to jurisdiction from Mr Frank Rupolo, Senior Departmental Investigator, Building Professionals Board (not contested); affidavit of evidence from Mr Rupolo to which is appended a detailed Exhibit setting out relevant certificates, the correspondence between the Council, Mr Boule and the developer, and the history of the investigation. The Board made written submissions and provided an outline of evidence (filed 30 July 2008). Mr Boule made submissions in reply and provided an outline of evidence (filed 13 August 2008).

9 The Act provides relevantly:

‘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. ...

(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.’

10 At the hearing the Tribunal informed the parties that it was satisfied that the charges were proven, and that the conduct, in total, constituted professional misconduct. It invited submissions on what order should be made.

11 Section 34 continues relevantly:

‘(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. ...

(4) The Tribunal may not make an order under subsection (2) (f) [sic] 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.'

12 Mr Lovegrove, on behalf of Mr Boule, said his client acknowledged that he had made a grave error of judgement. Mr Lovegrove said that at the time Mr Boule's marriage was breaking down. He and his wife had three young children. He was also under severe workload pressure, without any capacity easily to share or shift the load with another accredited certifier. Mr Lovegrove tendered a medical report dated 21 February 2008 which referred to the marital difficulties Mr Boule had experienced in the 2005-2006 period, and medication he had been receiving (anti-depressants). The report said that Mr Boule was now well.

13 The Board handed up an extract from the Disciplinary Register maintained by the Board (as at 27 June 2008). There are five previous disciplinary orders:

- Two Cautions, 29 September 2005. Imposed by the accreditation body. Two separate breaches of regulations as to payment of levy.

- Fine \$2,000, Reprimand. Imposed by the Tribunal. 27 June 2006. Conduct occurred June 2000. Construction certificate plans materially inconsistent with Development Consent plans. Found guilty of unsatisfactory professional conduct.

- Reprimand. Imposed by the accreditation body. 1 May 2007. Conduct occurred December 2003. Construction certificate plans materially inconsistent with Development Consent plans.

- Reprimand and \$5,500 Fine. Imposed by Tribunal. 13 March 2008. Conduct occurred January 2002. Construction certificate authorised work which had it been carried out would have resulted in significant reduction in fire protection requirements. Found guilty of professional misconduct.

14 Mr Grey, for the Board, submitted that the conduct, especially when viewed in light of the disciplinary history, warranted a period of cancellation (power (i)). He considered that Mr Boule should be prevented from reapplying for accreditation for a specified period. He said that the Board had been prepared to deal with the matter in the medium term pending Tribunal adjudication by allowing him to continue to work on a restricted basis so as not to disadvantage existing customers.

15 He also referred to the time it had taken Mr Boulle to admit to the matters alleged against him. The Board had notified Mr Boulle of the complaint in September 2006, but it was only by letter dated 25 January 2008 that Mr Boulle had made any admissions.

16 Mr Lovegrove acknowledged his client's adverse disciplinary history. Mr Lovegrove noted that the conduct now under notice belongs to a time when his client had also just faced the stress of the Tribunal proceedings that ended in June 2006, and that the matters that resulted in the orders of May 2007 and March 2008 were on foot at that time.

17 Mr Lovegrove noted that his client was already suffering a punishment over the matters now under notice. He was working on a restricted basis pending resolution of these proceedings. The Board had moved to suspend him pending the Tribunal's decision, but had subsequently agreed to allow him to continue to undertake certifications on behalf of existing clients. Mr Lovegrove referred to his client's straitened financial circumstances, and handed up a bank statement as to his loan (over \$300,000) and his child support commitments. He said he was renting his accommodation. His client, he said, did not wish to trivialise in any way what he has done.

18 As to his client's prior disciplinary history, Mr Lovegrove submitted that the items of misconduct all belonged to the early fledgling period of a new system. He referred to his client's current difficult work situation working under restrictions. He referred to general character references from Mr David Mulcahy, Team Leader, Health, Building and Regulatory Services, Randwick City Council and from Mr Guiseppe Graziano, Director, Steve Watson & Partners.

19 Mr Lovegrove submitted that an order of cancellation would be unduly severe. There was, he submitted, no financial gain to Mr Boulle from the conduct he had engaged him. He said that it was most likely to be explained as an aberration brought about by the stress he was under at that time. There was no allegation that there was anything substantively defective with the works. He submitted that the restriction of his practice that he was presently suffering was a substantial punishment.

Assessment

20 In last year's decision affecting Mr Boulle, *Building Professionals Board v Boulle* [2008] NSWADT 80, the Tribunal said:

'52 Mr Boulle's disciplinary history is poor. This is the fifth time Mr Boulle's conduct has come to the notice of the disciplinary system. The matters are as follows (using Register numbers): Matter 035 – internal caution by the disciplinary authority; breach of regulations relating to payment of levy; Matter 036 – internal caution: breach of regulations relating to payment of levy; Matter 084: Tribunal reprimand; fine of \$2000 – unsatisfactory professional conduct – issuance of construction certificate in the year 2000 – see *Director General, Department of Infrastructure, Planning and Natural Resources v Boulle* [2006] NSWADT 43; Matter 125 – internal reprimand – issuance of construction certificate in relation to plans not consistent with approved plans – in the year 2003. As to these matters Mr Boulle submitted that they all related to conduct that occurred several years ago, as did the present case.

53 Mr Boulle is aged 36 years. He graduated from TAFE in 1990 with a Health and Building Associate Diploma. He has worked at Canterbury Council and North Sydney Council respectively as a cadet and then as a full health and building surveyor. In 1999 he completed a course in Fire Safety Design at the University of Western Sydney. He was accredited at Grade 3 level in 1999. From 2001 to 2003 he was at Grade 1 level. This is the period during which the subject matter of this case occurred. Mr Boulle noted that he had reverted to Grade 3 accreditation in 2003, and that is the level at which he has remained. He holds the equivalent accreditation under the new system – known as A2.

54 He was asked about what practices he follows to avoid recurrence of the kind of

problems identified by this case. He said that he now uses full check lists before he issues a certificate and always makes his site inspections with the plans in hand. He said that he had not been using full check lists when some of the problems he encountered in the early years of the scheme had occurred. He said that he undertakes continuing education, and attends seminars held by the Board and by the Australian Institute of Building Surveyors.

55 He said, as compared to three or four years ago, he had lost about half his business. He informed the Tribunal that he practises alone from an office in the Kensington area, and that he mainly does certifications for buildings in the Maroubra, Woollahra, Randwick and Waverley council districts. His work was now confined to building projects up to 3 storeys, with a limit of 2000 sq metres. He handled all types of buildings within these parameters, but it was mainly small residential developments. He said Class 1 (Dwellings) were his main work, perhaps 90 per cent, involving about 60 to 80 approvals per year. He only occasionally dealt with a shop or a commercial space.

56 Mr Boulle also alluded to the personal strain and stress these proceedings and the other proceedings against him had imposed. ...

58 Mr Boulle's present accreditation is A2-Accredited Certifier – Building Surveying Grade 2 (as to the new system of ranking, see BPR, Sch 2). The period of accreditation is 1 April 2007 to 31 March 2008, Registration Number BPB0041. The accreditation is subject to a general condition restricting him to issuing certificates based on the deemed-to-satisfy provisions of the BCA, and not permitting him to issue certificates based on alternative solutions. Under this level of accreditation, Mr Boulle may issue complying development, construction and occupation certificates for buildings falling into any of the classes from 1 to 10, as defined by the BCA, with the further limit that the buildings have no more than 3 storeys (or 4 storeys including a car park), and a maximum area of 2000 square metres: see cl 4, BPR and Sch 1, Part 1.'

21 As the Tribunal noted on that occasion:

'57 This system of accreditation and discipline has been established to protect the public from the harm that might flow from incompetence, lack of diligence or lack of integrity in the performance of the important public responsibilities exercised by certifiers. The orders to be made in the event of an adverse disciplinary finding must serve those objectives. The personal impact of the order on the offender is a minor consideration.'

22 Unlike the previous incidents that have brought Mr Boulle to notice, this case involves an issue of integrity. Mr Boulle's explanation, put to us through Mr Lovegrove rather than directly, was that he was suffering severe trauma in his private life and was under great work pressures.

23 Mr Boulle had the opportunity when the Council issued its notice to the developer on 1 August 2006 to remedy the situation he found himself in (issuing a certificate in excess of his authority). Instead of finding a solution that was lawful, he proceeded to falsify an official document.

24 The evidence as to his mental condition at the time was of a very limited kind, and came from a general practitioner. Accepting that he was on anti-depressants at the time, that is not, in our view, a circumstance pointing to such a deterioration in mental condition sufficient as to explain the lapse of judgement involved in issuing a false certificate. As his curriculum vitae shows, he had once worked as a Council officer, and would have been well aware from a young age of the impropriety involved in issuing a false official certificate.

25 Mr Lovegrove drew our attention to two disciplinary decisions affecting other professions falling under the jurisdiction of the Tribunal where falsification of documents had occurred.

26 In *Law Society of New South Wales v Young* [1999] NSWADT 78, a solicitor had forged letters of administration on two occasions eighteen months apart in respect of separate deceased estates. Rejecting the Law Society's application that she be struck off, the Tribunal imposed a substantial fine, a public reprimand and permitted her to remain in practice subject to conditions. An appeal by the Law Society was dismissed: *Law Society of New South Wales v Young* (No 3) [2001] NSWADTAP 38.

27 In *Veterinary Surgeons Investigating Committee v Howe* [2002] NSWADT 191, a veterinary practitioner of great eminence had engaged in several acts of deception mainly involving the issuance of false certificates required for the grant of export permits in animal genetic material and required by the importing country. The Tribunal ordered that he be deregistered and not be permitted to apply for restoration to the register for two years.

28 Mr Lovegrove submitted that this was a case of less objective seriousness than either of the above cases. We agree. It is clearly far short of the egregious and repeated misconduct that occurred in *Howe*.

29 On the other hand, we note that in *Young* there was substantial medical evidence that gave a context for the solicitor's actions. The Tribunal gave weight to the severe pressure that the solicitor was experiencing at the time of the misconduct because of the demands she faced as a first-time mother bringing up a recently-born child found to have developmental disabilities. The solicitor gave evidence. The Tribunal accepted that she was truly remorseful and contrite. It referred to the impressive testimonials from many eminent lawyers attesting to her general competence.

30 We are short of the kind of material that assisted the solicitor in the *Young* case. We are also faced with a poor disciplinary history.

Conclusion

31 The purpose of disciplinary orders, as the Tribunal noted in the 2008 decision, is protective not punitive. They seek to protect the community by imposing a sanction on the practitioner. The sanction also serves the objectives of general deterrence – it operates as a marker for other practitioners, and specific deterrence – to prevent or discourage a repetition of the conduct by the particular practitioner.

32 The Tribunal in the 2008 decision noted its concerns over Mr Boulle's understanding and appreciation of his circumstances:

'62 We have some reservations about what Mr Boulle told us regarding his existing practice. He gave the Tribunal no corroborating evidence on these matters. He is a sole practitioner. Consequently, he is not in a peer environment that might assist in minimising the possibility of incompetent performance or other serious error. As previously noted, we are concerned over Mr Boulle's lack of responsiveness throughout most of the process giving rise to these proceedings.'

33 On this occasion too, we have the sense that Mr Boulle has not fully come to terms with the difficulties that have now led to him being the subject of adverse disciplinary outcomes on five occasions. Two were regulatory breaches (payment of levies). Three have concerned competence issues. This case is mainly about integrity but there is a competence element (the misidentification of the size of the building for the purpose of his accreditation). Professional standards can be divided broadly into ones relating to competence, diligence or integrity. It will be seen that Mr Boulle has now offended in all three areas.

34 We accept that Mr Boulle had a stressful personal environment at the time of the misconduct in this case. We note that Mr Mulcahy in his reference refers to the impact of these circumstances on Mr Boulle, and Mr Boulle's caring and positive qualities as a father. On the other hand, Mr Boulle should, we think, have been very mindful by July 2006 of the need to maintain high standards in practising as an accredited certifier. He had only recently been the subject of disciplinary proceedings in the Tribunal.

35 Further, this is not a case of a failure of professional standards in the early period of operation of the scheme.

In any case the observations that the Tribunal has made in the past indicating that some allowance should be made for errors in that period went to issues to do with adherence to and awareness of the relevant building standards, not to matters of integrity.

36 The effect of an order of cancellation with a specified bar on any application for reaccreditation is to remove Mr Boulle entirely from the ranks of accredited certifiers, and require him to go through the full application procedure before the Board. In our view the point has been reached where these steps should be taken. Mr Boulle's accreditation should be cancelled, and he should not be permitted to reapply for a period of 9 months.

37 In reaching this conclusion, we have taken into account that Mr Boulle has been a full-time practitioner for most of the last ten years. He has been the subject of adverse orders on three occasions involving competence issues. His level of accreditation has been reduced. We are inclined to the view that Mr Boulle is competent to practise at his present level of accreditation.

38 However, we consider that an infraction of the kind that occurred in this case should ordinarily be met with an order of cancellation. The central function of an accredited certifier, as the title of the office conveys, is to issue official certificates. It is essential to the community's confidence in the accredited certifier system that the certificates be genuine. These certificates allow for building works to proceed lawfully, and are a usual precondition for other types of protection such as building insurance. A professional practitioner who falsifies professional certificates can ordinarily expect to be severely disciplined, usually by being removed from the profession at least for a time.

39 Mr Boulle did not, in our view, present a strong enough case to justify a departure from this view, in contrast to the situation in the solicitor's case, *Young*.

40 In this instance we have taken note of the fact that Mr Boulle has practised on a reduced basis for almost 12 months. This is in the nature of a part suspension. He has been unable to take new clients. We have taken that into account in setting the non-reapplication period at 9 months.

Order

1. The Tribunal finds the Respondent guilty of professional misconduct.
2. The Tribunal orders that the Respondent's certificate of accreditation be cancelled; and that the Respondent cannot re-apply for a certificate of accreditation for 9 months.
3. These orders are to take effect on 1 February 2009 or on such later date as is permitted by the Applicant.

APPENDIX

GENERAL DESCRIPTION OF CONDUCT

A. A complaint was made pursuant to s.109V of the Environmental Planning and Assessment Act 1979 (*the EP&A Act*) by Mr John Owen, General Manager, Willoughby City Council, to the Department of Planning on 13 September 2006 against Mr Ivan Boulle (*the Respondent*) in relation to the issue by him of a construction certificate for a development at 71-75 Sydney Street, Willoughby (*the development*) and in relation to his acting as the principal certifying authority (*PCA*) for the development.

B. The Respondent was at all material times accredited as an accredited certifier and principal certifying authority pursuant to s.109T of the EP & A Act.

The Respondent was accredited under the Building Surveyors & Allied Professions Accreditation Scheme (*the BSAP Scheme*) and the Minister appointed the Director-General of the Department of Planning and other Departmental Officers, including Neil Cocks, Director, Building Professionals Branch (*the Minister's appointees*) under Clause 199(3)(a) of the Environmental Planning and Assessment Regulation 2000 to administer the BSAP

Scheme.

C. The complaint has been investigated pursuant to section 109W of the EP & A Act by officers of the Department of Planning on behalf of the Minister's appointees.

D. During the course of the investigation the Respondent provided misleading information to the Department's investigating officers concerning the purported issue of a construction certificate by Mr Orlando Da Silva, another accredited certifier, and the appointment of Mr Da Silva as the PCA for the development.

E. The authority of the Minister's appointees expired with the commencement of the Building Professionals Act 2005 (*the BP Act*) on 1 March 2007. Pursuant to Clause 3(1), Schedule 2 of the BP Act, the Building Professionals Board (*the Applicant*) is required to continue to deal with the complaint as a complaint under Part 3 of the BP Act.

F. During the course of the investigation of the complaint additional matters were identified that could have been the subject of a complaint. These matters were also investigated.

G. By issuing the construction certificates in respect to the development referred to in A and D above, acting in the capacity as PCA for the development and by providing misleading information the Respondent has engaged in conduct;

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

(b) by which he contravened the Act; and/or

(c) by which he failed to comply with the code of conduct contained in the BSAP Scheme.

PARTICULARS OF ALLEGATIONS

(1) Relevant provisions

Section 109R of the Environmental Planning and Assessment Act 1979 (the EP&A Act) defines:

"unsatisfactory professional conduct" as:

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, 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.

“professional misconduct” as:

in relation to an accredited certifier, means 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 the withdrawal of the accredited certifier’s accreditation.

Section 109ZH EP&A Act provides:

False representations

(1) A person who:

(a) issues a Part 4A certificate or complying development certificate that he or she is not authorised by or under this Act to issue, or

(b) makes any statement that is false or misleading in a material particular in, or in connection with, a Part 4A certificate or complying development certificate,

is guilty of an offence against this Act.

Maximum penalty: 300 penalty units.

(2) An accredited certifier who falsely represents that he or she is a certifying authority or principal certifying authority in relation to any development is guilty of an offence against this Act.

Maximum penalty: 300 penalty units.

Section 81A(2)(b1)(i) EP&A Act provides:

(2) The erection of a building in accordance with a development consent must not be commenced until:

(b1) the principal certifying authority has, no later than 2 days before the building work commences:

(i) notified the consent authority and the council (if the council is not the consent authority) of his or her appointment,

Clause 103 of the Environmental Planning and Assessment Regulation 2000 provides:

103 Notice under section 81A of the Act of appointment of principal certifying authority

A notice given under or for the purposes of section 81A (2) (b1) (i) or (4) (b1) (i) of the Act must contain the following information:

(a) (Repealed)

(b) a description of the work to be carried out,

- (c) the address of the land on which the work is to be carried out,*
 - (d) the registered number and date of issue of the relevant development consent,*
 - (e) the name and address of the principal certifying authority, and of the person by whom the principal certifying authority was appointed,*
 - (f) if the principal certifying authority is an accredited certifier:*
 - (i) his or her accreditation number, and*
 - (ii) the name of the accreditation body by which he or she is accredited, and*
 - (iii) a statement signed by the accredited certifier to the effect that he or she consents to being appointed as principal certifying authority, and*
 - (iv) a telephone number on which he or she may be contacted for business purposes,*
- and, if the consent authority so requires, must be in the form approved by that authority.*

The Code of Professional Conduct under the Building Surveyors and Allied Professions Board Accreditation Scheme (*"the BSAP Code of Conduct"*) provides:

The guiding principles of the Code are to ensure that accredited certifiers and PCAs:

- 1. at all time safeguard the interests of the public and the accredited certifiers/PCAs clients and employers provided always that such interests are not in contravention of the code.*
- 2. do not breach public trust in the profession to which they belong or the specific trust of their clients and employers. Observance of accepted norms of honesty and integrity must underlie all their professional decisions and actions.*
- 5. do not undertake professional work that they are not competent to perform.*
- 8. refrain from any conduct or action in their professional role which may tarnish the image of the profession to which they belong or unjustifiably detract from the name of the Board.*

(2) Particulars of Conduct

Exceeding authority of accreditation

1. At all material times the Respondent was accredited as:

Accredited certifier-Building (Grade 3) / Principal Certifying Authority-Building (Grade 3) under the Building Surveyors and Allied Professions Board Accreditation Scheme.

The Respondent's accreditation was subject to, inter alia, the limitation:

The Accredited Certifier/Principal Certifying Authority-Building (Grade 3) can issue Construction Certificates, Compliance Certificates, Complying Development Certificates, and Occupation Certificates for developments involving the following buildings:

- Class 2 to 9 Buildings with a floor area not exceeding 2,000 sq m or which have a rise*

in storeys of not more than 3 storeys and which comply with the DTS provisions of the BCA.

2. On 25 July 2006 the Respondent issued construction certificate No. 06/013/2 (*"the construction certificate"*) in respect of a development at No. 71-75 Sydney Road, Willoughby (*"the development"*).

3. The development involved the construction of a two storey aged care facility which was:

- classified as a Class 9C building under the Building Code of Australia,
- had a floor area exceeding 2000 sq m.

4. By lodgement of a document titled *"Notice of Commencement of Building or Subdivision work and Appointment of Principal Certifying Authority"* dated 25 July 2006 the Respondent notified the Willoughby City Council (*"the Council"*) that he had been appointed as the principal certifying authority (*"PCA"*) for the development.

5. By issuing the construction certificate and by being appointed as the PCA for the development the Respondent exceeded the authority of his accreditation and engaged in conduct:

- (a) occurring in connection with the exercise of an accredited certifier's functions as a certifying authority that fell short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier; and/or
- (b) by which he contravened the EP & A Act, and/or
- (c) by which he has failed to comply with the BSAP Code of Conduct.

False documents and information

6. By letter dated 12 September 2006 the Council lodged a complaint with the Department of Planning (*"the Department"*) in respect to the conduct of the Respondent, as referred to at paragraphs 1 to 5 above.

7. The Council further complained that although another construction certificate for the development (*"the second construction certificate"*) had been issued by Mr Orlando Da Silva, an appropriately authorised accredited certifier, the Respondent remained as the PCA for the development.

A copy of the second construction certificate, ostensibly signed by Mr Da Silva, was enclosed with the Council's letter of complaint.

Also enclosed with Council's letter of complaint was a copy of a letter dated 4 August 2006 from the Respondent to the Council in which the Respondent stated:

"Further to your letter dated 1 August 2006 issued to Grindley Constructions Pty Ltd, we wish to revoke the Construction Certificate issued originally and replaced with the attached Construction Certificate approval and Notice of Commencement as discussed."

8. By letter dated 28 September 2006 the Department provided the Respondent with a copy of the Council's complaint.

9. By letter dated 1 November 2006 addressed to the Department, the Respondent stated in relation to the item of complaint referred to in paragraph 7 above:

"It is alleged that Council was not advised of the change of PCA which is not correct. A copy was faxed to Council (copy attached)."

Attached to the Respondent's letter was a copy of a document titled "*Notice of Commencement of Building or Subdivision work and Appointment of Principal Certifying Authority*" dated 25 July 2006, which indicated that Orlando Da Silva was appointed as the PCA for the development.

10. Mr Orlando in fact:

- had no involvement with the development,
- did not issue the second construction certificate, and
- was not appointed as the PCA for the development.

11. Without the authority or knowledge of Mr Da Silva, the Respondent:

- signed the second construction certificate in the name of Mr Da Silva, and
- lodged the Notice referred to in paragraph 9 with the Council.

12. The Respondent falsely represented to the Council and the Department that the second construction certificate had been duly issued by Mr Da Silva and that Mr Da Silva had been appointed as the replacement PCA for the development.

13. By the actions referred to in paragraphs 7, 9, 11 and 12 above, the Respondent has engaged in conduct:

- (a) occurring in connection with the exercise of an accredited certifier's functions as a certifying authority that fell short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier; and/or
- (b) by which he contravened the EP & A Act, and/or
- (c) by which he has failed to comply with the BSAP Code of Conduct.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.
