CITATION:	*Craig Raymond Robins v Northern Territory Building Practitioners Board* [2004] NTMC 007
PARTIES:	CRAIG RAYMOND ROBBINS v NORTHERN TERRITORY BUILDING PRACTITIONERS BOARD
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	Appellant
FILE NO(s):	20303212
DELIVERED ON:	17.3.04
DELIVERED AT:	DARWIN
HEARING DATE(s):	12.11.03
DECISION OF:	D TRIGG SM

CATCHWORDS:

Building Act ss3, 14, 15, 24(1), 35.
Natural justice. Reasonable expectation.

REPRESENTATION:

Counsel:

Appellant:	Mr Tippett QC
Respondent:	Mr Roper

Solicitors:

Appellant:	Paul Maher
Respondent:	Clayton Utz

Judgment category classification:	B
Judgment ID number:	[2004] NTMC 007
Number of paragraphs:	80

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20303212

BETWEEN:

CRAIG RAYMOND ROBBINS
Appellant

AND:

NORTHERN TERRITORY BUILDING PRACTITIONERS BOARD
Respondent

REASONS FOR DECISION

(Delivered 17 March 2004)

Mr Trigg SM:

1. The hearing of this matter proceeded by way of agreed facts and the tendering of a number of documents, followed by legal argument.

2. An appeal book was tendered and became ExP1. In that appeal book were eleven separate documents (although document number seven was deleted after argument). Hereinafter, a reference to "ExP1-1" is a reference to that exhibit and to a particular document numbered within that Exhibit, in the example, document 1. A further supplementary appeal book was tendered and became ExP3. Within that exhibit were four separate documents and I will use the same reference method as I do for ExP1. In addition, a set of agreed facts was tendered and became ExP2. There were seventeen separate paragraphs numbered as separate agreed facts. Throughout these reasons where I use the reference "ExP2-1" I will be referring to the particular numbered paragraph within that exhibit, in this example, paragraph numbered one.

3. It would be convenient if I commence this matter by setting out the relevant chronology. On 19 June 1998 the respondent passed a "determination of qualification of building practitioners": ExP1-1 and ExP2-1. Whilst the agreed fact says that this was "pursuant to s 24(1)(b) of the *Building Act* 1993 (hereinafter referred to as "*the Act*")" I find that it more correctly was pursuant to section 14(1)(a). I will return to consider sections 14 and 24 of *the Act* more fully later in these reasons.

4. This determination (ExP1-1) is dated 19.6.98, and there is nothing within it to suggest other than that it had immediate effect as and from that date.

5. This determination was published in the Northern Territory Government Gazette number G26 of 8 July 1998: ExP2-2, as was required by section 15 of *the Act* (to which I will return later). The said gazettal (ExP1-10) contained in part a schedule specifying the qualifications for a certifying engineer (mechanical) and these were;

> "either –
>
> (a) a degree, diploma, or other educational qualification, required for membership of the Institution of Engineers, Australia; or
>
> (b) a certificate of registration as a mechanical engineer on the National Professional Engineers Register – Section Three (NPER-3)."

Again, there is nothing in the gazettal to suggest other than that the determination dated 26 August 1993 was revoked on 19 June 1998, and the new determination took immediate effect thereafter.

6. It was agreed that "in formulating the Determination the respondent had regard to the Supplemental Royal Charter and Bye-Laws of the Institution of Engineers, Australia as at 23 April 1998": ExP2-4. A copy of the relevant charter and Bye-laws was contained in ExP1-9.

7. On 28 October 2002 the appellant submitted an application for registration as a building practitioner (ExP1-6) to the respondent. It was an agreed fact that the application was for registration as a building practitioner (mechanical engineer): (ExP2-5). However, this is not apparent from ExP1-6. It was further an admitted fact that he made an application for registration as a building practitioner in the category of certifying engineer (mechanical) to the board (ExP2-6). ExP1-6 does on its face relate to such an application. In the application form "experience requirements" were set out and were required to be addressed. ExP1-6 was apparently received on the 29th of October 2002 and a fee of $100 was paid.

8. Accompanying the application and forming part of ExP1-6 were the following documents:

- A certificate from the Northern Territory University certifying that the appellant had satisfied the academic requirements for the award of "Diploma of Engineering (mechanical)" signed and sealed on the 25th day of May 2001.

- A certificate from the Northern Territory University certifying that the appellant had satisfied the academic requirements for the award of "Associate Diploma of Engineering (mechanical)" dated and sealed the 10th day of May 1991.

- A certificate from the Northern Territory University certifying that the appellant had satisfied the academic requirements for the award of "Associate Diploma of Applied Science (Building Technology)" signed and sealed on the 3rd day of May 1996.

- A Diploma certifying that the appellant had completed all the requirements of the "Carrier system design course for packaged air conditioning equipment" dated the 2nd day of June 1994.

- A Diploma certifying that the appellant had completed all the requirements of the "Carrier system design course for applied air conditioning equipment" dated the 24th day of August 1994.

- A statement of attendance issued by the Australian Institute of Refrigeration, Air Conditioning and Heating (Inc.) certifying that the appellant attended a professional development seminar on 4 September 1996 at Darwin entitled "maintenance of building services".

- A certificate from the Australian Institute of Refrigeration, Air Conditioning and Heating (Inc) certifying that the appellant was admitted as a member of AIRAH on an unspecified date.

- A member profile as of August 24 2000 from AIRAH stating that the appellant had been a member since 30 July 1990 and was paid through to 31 December 2000.

- A memorandum of insurance from Heath Lambert group advising a renewal of a professional indemnity insurance covering the period from 17 April 2002 to 17 April 2003 for an unspecified amount.

- A letter from the appellant setting out his experience and qualifications, and listing four referees.

9. The application first came before the board on 26 November 2002: ExP2-7. The minutes of the meeting of that day (ExP3-1) noted as follows:

> " 4.2 Craig Raymond Robbins - Certified Engineer (mechanical) deferred
>
> Members note Mr Jones had been requested to assess this application. Mr Jones advised members of his concerns with regard to the qualifications currently listed by the board as a requirement for registration as a mechanical engineer. The boards approval was sought to refer a query to the Institute of Engineers Australia on the qualifications now required for membership to the Institute before making a decision on this application. Members agreed.

M: Mr Jones
S: Mr Scott

Action: Mr Jones to refer query to Institute of Engineers Australia. Registrar to advise Mr Robbins that his application was being considered by the Board."

10. On 2 December 2002 the appellant was contacted by Mr Dolkens by e-mail on behalf of the respondent. This correspondence (ExP1-2) stated as follows:

> " Hi Craig
>
> As discussed, attached please find the qualifications and experience criteria currently used by the board.
>
> In my discussions with Randall Jones, he stated that there had been some changes recently to the eligibility criteria applied by the Institution of Engineers, Australia and your application had been deferred to allow him to ascertain what the effect of these might be on the board's criteria. My understanding of the current situation is that your qualifications may entitle you to affiliate membership rather than the full membership that we require.
>
> I got the impression that Randall was very supportive of your application. He is willing to discuss the issue if you want to ring him on 8981 8022."

11. Hence, this correspondence would have alerted the appellant to the possibility that the existing criteria might be reconsidered by the respondent.

12. On 17 December 2002 the appellant e-mailed Mr Dolkens. This e-mail (ExP1-3) was in the following terms:

> " Ron,
>
> Discussions with Randall Jones suggests that the Board has some issues with respect to my application to the Building Practitioners Board. The issue is that I hold a Diploma and not a degree in Engineering.
>
> I have met without question the qualifying criteria and believe that my application should be approved, however if it is suggested

otherwise I would like an opportunity to approach the board to better present my application.

I request an expedient resolution on this matter as further delays will commercially effect my company Engscribe Pty Ltd.

I appreciate the board's consideration on this matter."

13. The application was further considered by the respondent at its meeting of the 17th of December 2002. The minutes of that meeting (ExP3-2) disclose as follows:

> "4.4 Craig Robbins - Certifying mechanical engineer deferred.
>
> Mr Jones advised that Mr Robins is not eligible for full membership of IEAUST and, as such, doesn't meet the requirements for registration as a Certifying Mechanical Engineer. The applicant has been in contact with Mr Jones on several occasions and, given his determination to achieve registration, members agreed to allow Mr Robbins to address the board at its next meeting prior to making a decision.
>
> Mr Jones advised that IEAUST would like to put a proposal to the Board regarding eligibility criteria for registration to the engineering categories. Members felt this would be timely given that the current wording was based on IEAUST membership requirements applicable in 1998.
>
> Action: Mr Jones to ascertain IEAUST eligibility criteria applicable in 1998 when the Board's criteria was prepared.
>
> Registrar to draft letter to Mr Robbins inviting him to the meeting on 24 January 2003."

14. The next meeting of the respondent appears to have been on the 24th day of January 2003, and the appellant was invited to appear before the respondent.

15. The minutes of the meeting of 24 January 2003 (ExP3-3) disclose that the following matters transpired and in the following order:

> "3.4 Qualifications and Experience for Engineers
>
> Members noted correspondence dated 13 January 2003 from the Institution of Engineers, Australia.
>
> Members discussed the wording of the clauses relating to "Qualifications and Experience" requirements for Engineers registered as Building Practitioners.
>
> Mr Scott moved the motion to amend the 3 categories of engineers as follows:
>
> Certifying Engineer (Structural)
>
> Qualifications: Either -
>
> (a) a degree qualification or other education qualification required for professional membership of the Institution of Engineers, Australia (MIEAust); or
>
> (b) a certificate of registration as a structural engineer on the National Professional Engineers. Register - Section Three (NPER-3).
>
> Experience: Remains unchanged.
>
> Certifying Engineer (Hydraulic)
>
> Qualifications: A degree or other educational qualifications required for professional membership of the Institution of Engineers, Australia (MIEAust).
>
> Experience: Remains unchanged.
>
> Certifying Engineer (Mechanical)
>
> Qualifications: Either —
>
> (a) a degree or other educational qualification required for professional membership of the Institution of Engineers, Australia (MIEAust); or

(b) a certificate of registration as a mechanical engineer on the National Professional Engineers Register - Section Three (NPER-3).

Experience: Remains unchanged.

Moved: Mr John Scott

Seconded: Mr Randall Jones

Carried

ACTION: Registrar amend qualification wording and refer to Randall Jones and John Scott before next meeting.

ACTION: Registrar draft reply to Janice Lake, MIEAust, attaching amendments to qualification requirements.

4. ASSESSMENT OF APPLICATIONS

4.1 Craig Robbins - Certifying Mechanical Engineer - Invited to appear @ 8:30am

Members discussed the application and referred to previous resolution from last meeting.

Mr Robbins entered the meeting at 8:30am.

Members introduced themselves then Mr Platt invited Mr Robbins to speak.

Issues highlighted were:

- His eligibility for membership of IEAust at officer level. He recognised that he would not be eligible for full membership as a professional engineer;

- Holds membership of refrigeration and air-conditioning. Has attended many courses, which are held consistently throughout Australia.

- Did not agree with degree qualification requirement for Mechanical Engineer - thought a diploma with experience in field was sufficient, however, understood the qualification requirements of other engineering categories.

- Personal experience should be recognised.

- Industry supports his application. Referees supplied are his competitors. They were happy to supply a reference, which is a testament of their support to his application.

- 6 years in his own business - small practice commercially needing certifying status.

- Currently writes operational manuals for maintenance.

There was minimal discussion in relation to Mr Robbins upgrading his diploma to a degree. Members noted that Mr Robbins currently dealt with projects up to $100,000 - $200,000 range.

It was identified that he did not have experience with lift systems.

Mr Robbins left the meeting at 8:50am.

Mr Brears and Mr Osborne left the meeting at 9:00am.

Members agreed that Mr Robbins was considerably experienced in his field.

Members discussed the issue of the requirements for professional membership of IEAust.

Members discussed restricted certifications.

The Board were not in favour of approving the application and therefore the motion was moved to refuse Mr Robbins' application due to not meeting the requirements to obtain a professional membership of the Institution of Engineers, Australia (MIEAust).

Moved: Mr Randall Jones

Seconded: Ms Penny Whinney-Houghton

Carried :

ACTION: Chairman contact Mr Robbins and advise outcome.

ACTION: Registrar send letter for refusal." (emphasis added)

16. Therefore, the respondent changed the qualifications relevant to the appellant's application from a "degree, diploma or other educational qualification required for **membership** of the Institute of Engineers, Australia" to a "degree or other educational qualification required for **membership** of the Institute of Engineers, Australia as a **professional engineer eligible to use the post nominals (MIEAust)**". This was on its face a significant change. Firstly the reference to a diploma was removed, and secondly the type of membership which would suffice was qualified.

17. It is an agreed fact (ExP2-13) that "the appellant was not advised either before or during his appearance before the respondent on 24 January 2003 that the respondent had made a determination in accordance with s24(1)(b) of *the Act* that amended the Building Practitioners, (Qualifications) Determination 1998". Again, I think this is in error, and more correctly should refer to s14(1)(a).

18. I consider that the respondent was wrong not to have advised the appellant of the determination that it had just made. I will return to this later in these reasons.

19. On 30 January 2003 the Registrar of the Respondent wrote to the appellant in the following terms (ExP1-5):

> "Dear Mr Robbins,
>
> Application for registration – Certifying Engineer – mechanical.
>
> The Building Practitioner's Board would like to thank you for attendance at the meeting on 24 January 2003.
>
> Due to you not being able to meet the requirements to obtain a professional membership of the institution of Engineers, Australia (MIEAUST), the Board resolved to refuse your application.
>
> Should you require any further information, please do not hesitate to contact me on (08) 8999 8964."

20. Even in that letter, the appellant was not advised of the new determination. As such, he would have reason to be confused by the reason set out in the second last paragraph. The appellant was unhappy with that decision and appealed to the Local Court on 25 February 2003. This appeal was pursuant to section 35 of *the Act*, which is in the following terms:

> "35. Appeal
>
> (1) A person aggrieved by an action of the Practitioners Board under this Part may, within 30 days after being notified of the action, appeal to the Local Court against the action.
>
> (2) An appeal under subsection (1) shall be by way of a review of the evidence before the Practitioners Board and no fresh evidence or fresh information may be given on the appeal unless, in the opinion of the Court, there were special reasons that prevented its presentation to the Practitioners Board at the inquiry under Division 3.
>
> (3) The decision of the Local Court on an appeal under subsection (1) is final and not subject to appeal and the Practitioners Board shall carry out the directions of the Court resulting from its decision.
>
> (4) The Chief Magistrate may make Rules under the *Local Court Act* in relation to appeals under subsection (1), including rules in relation to costs.
>
> (5) Costs imposed by the Local Court in an appeal under subsection (1) are a debt due and payable by the party against whom they are awarded to the party in whose favour they are awarded"

21. In considering this matter it is necessary to look at the legislation more closely. Section 3 of *the Act* sets out the objects of *the Act*. The relevant objects are:

> "(a) to establish, maintain and improve building standards;
>
> (h) to facilitate national uniformity in the training and qualifications of certain building practitioners and the recognition of qualifications on a national basis;"

22. Accordingly, it is part of the objects of the Act to have national uniformity and recognition of qualifications. As such the concerns expressed by Mr Jones at the respondent's meeting of 26 November 2002 were reasonable.

23. Section 14 of *the Act* sets out the functions and powers of the respondent. These are as follows:

> "14. Functions and powers of Practitioners Board
>
> (1) The functions of the Practitioners Board are –
>
> (a) to determine the qualifications to be held by building practitioners and the courses of instruction, and the examinations, to be undertaken by building practitioners from time to time;
>
> (b) to register persons as building practitioners; and
>
> (c) such other functions as are imposed on it by or under this or any other Act or as directed by the Minister.
>
> (2) The Practitioners Board has such powers as are conferred on it by or under this or any other Act and, subject to this Act, may do all things necessary or convenient to be done for or in connection with or incidental to the performance of its functions and the exercise of its powers."

24. Accordingly, it is a proper and necessary part of the functions of the respondent to determine the qualifications to be held by Building Practitioners "from time to time". Clearly, by the use of the words "from time to time" it is envisaged that the qualifications required may well change over time. They are clearly not intended to be set in stone.

25. The determination made on 19 June 1998 (ExP1-1) and the determination on 24 January 2003 (ExP3-3) both appear to be clearly within the powers and functions of the respondent. It is clearly envisaged by section 14(1)(a) of *the Act* that the respondent has the power to amend or vary the requirements as they see fit provided it is a proper performance of their powers and functions.

26. In the instant case, there is nothing to suggest that the respondent had cause to reconsider it's determination of 19 June 1998 until after it had received the application from the appellant herein. There appears to be nothing sinister in that.

27. Section 24(1) of *the Act* is in the following terms:

> "Where the Practitioners Board is satisfied, on an application under section 23, that a person, not being a corporation –
>
> (a) is of good character and a fit and proper person to be so registered;
>
> (b) holds the relevant qualifications determined by the Board in relation to the particular category of building practitioners specified in the application; and
>
> (c) has complied with the prescribed conditions, if any,
>
> it shall register the person as a building practitioner in the category of building practitioner specified in the application."

28. It is agreed (ExP2-15) that at all material times, the appellant satisfied the requirements of sections 24(1)(a) and 24(1)(c) of *the Act*.

29. Mr Tippett QC argues that at the time the appellant made his application, he did so based on the existing determination as published in the gazette, and he goes on to argue that based on that criteria the appellant was entitled to the registration that he sought.

30. Assuming this to be correct, is there a principle of law that would create some form of estoppel to prevent an organisation such as the respondent from changing a criteria after an application was lodged and before it was determined. In other words, was it incumbent upon the respondent to hear and determine the appellant's application based upon the determination of 19 June 1998 and no other? From the cases set out at paragraphs 78 to 80 (*Minister for Immigration Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1;

Minister for Immigration and Ethnic Affairs v Polat (1995) 37 ALD 394) of Mr Roper's written submission I find that no estoppel applies in this case.

31. The determination of 24 January 2003 was published in Gazette number G11 of 19 March 2003 (ExP1-11). This date is after the decision herein was made, and even after the appeal herein was instituted.

32. The determination made at the meeting of 24 January 2003 (supra) was further considered at a subsequent meeting of 25 February 2003. The minutes of this meeting (ExP3-4) disclose that the following (deleting irrelevant parts) occurred:

> "3.3 Qualifications and Experience for Engineers-Draft Amendments
>
> Mr Jones informed members that a meeting was held with Janice Lake (IEA) and the Registrar to discuss amendments resolved at the last Building Practitioners Board meeting. Further suggested changes were identified.
>
> Mr Randall Jones moved the motion to amend 3 categories of engineers as follows (further changes marked in *italic*):
>
> 5. Certifying Engineer (Mechanical) <u>Qualification</u>
>
> Either-
>
> (a) a degree or other educational qualification, required for membership of the Institution of Engineers, Australia as a professional engineer eligible to use the post nominals MIEAust; or
>
> (b) a certificate of registration as a mechanical engineer on the National Professional Engineers Register-NPER.
>
> <u>Experience</u>
>
> **Note**: The following experience requirement does not apply to an applicant who holds a certificate of registration……"

33. This determination amended the determination which had been made at the meeting of 24 January 2003 (being the determination upon which the respondent decided to refuse the appellant's application). I do not know if this has also been gazetted.

34. It is agreed (ExP2-16) that "the appellant at all material times held the necessary academic qualifications required for membership of the Institute of Engineers Australia at the Engineering Officer (Associate) level, pursuant to Bye-Law 11 of the Institute's Bye-Laws".

35. It is further agreed (ExP2-17) that "the appellant is not eligible for professional membership of the Institution within the meaning of Bye-Law 7 of the Institution's by-laws, or to use the post nominals MIEAust".

36. On the evidence I find that the change in wording between the determinations of 19 June 1998 and 24 January 2003 does effect the appellant's position. However, there are some gaps in the evidence before me. Clearly, the respondent had regard to "correspondence dated 13 January 2003 from the Institution of Engineers, Australia" before deciding to make it's determination on 24 January 2003, but that correspondence is not in evidence. Further, there is nothing in evidence before me of any change in the "Supplemental Royal Charter and Bye-laws 1998" as at 24 January 2003.

37. I therefore don't know if the new determination was based upon any existing or proposed change (or what) to the requirements of the Institution of Engineers, Australia. In any event, there is no challenge to the determination itself. It is not suggested that it was improper in any way. Rather, it is argued that it should not apply to the appellant's application.

38. In support of his argument Mr Tippett QC relies on s 15 of *the Act* which states;

> "A determination made in pursuance of section 14(1)(a) shall be published in the *Gazette* by the Practitioners Board and in such other manner, if any, as is approved by the Minister."

39. Mr Tippet QC argues that the requirement to publish the determination in the Gazette is mandatory and accordingly submits "that the only relevant qualifications determined by the Board that can be applied to an application under s23 are those that have been published in accordance with the provisions of s15". There is nothing in *the Act* itself which states that any determination made under section 14 has no effect until it is published under section 15.

40. I agree that the use of the word "shall" in section 15 may lead to the conclusion that the requirement is intended to be mandatory. However, the word may also be directory. In *Stroud's Judicial Dictionary* (4th edition) at page 2515 it is noted:

> "Whenever a statute declares that a thing "shall" be done, the natural and proper meaning is that a peremptory mandate is enjoined. But where the thing has reference to-
>
> (a) the time or formality of completing any public act, not being a step in a litigation, or accusation; or
>
> (b) the time or formality of creating an executed contract whereof the benefit has been, or but for their own act might be, received by individuals or private companies or private corporations,
>
> the enactment will generally be regarded as merely directory, unless there be words making the thing done void if not done in accordance with the prescribed requirements."

41. In the case of *Grunwick Processing Laboratories Ltd and Others v Advisory, Conciliation and Arbitration Service and Another* (1978) AC 655 Lord Diplock said at page 690:

> "First, as to the mandatory nature of the requirement upon Acas to "ascertain the opinions of workers to whom the issue relates"- whatever precisely that requirement may involve. It is introduced by

> the word "shall". Prima facie this expression appearing in a statute is used as a term of art to impose a duty to do what is prescribed, not a discretion to do it or not according to whether it is reasonably practicable to do it, nor a discretion to do something like it instead. This is particularly so where, as in section 14(1), the imposition of the duty upon Acas is followed by an express grant of a discretion which does not derogate from the duty itself but is limited to determining the means by which the duty is to be carried out. This serves to point the contrast between what are matters of substance in a statute and what are matters of machinery. A court is less reluctant to treat "shall" as being directory rather than mandatory in a provision in which all that is involved is a mere matter of machinery for carrying out the undoubted purposes of the Act." (emphasis added)

In the instant case, section 15 does appear to be a machinery provision. The objects of *the Act* are set out in section 3 which I have set out in part supra. In addition, the preamble to the Act states that it is "an Act to provide for the establishing of technical standards for buildings, the registration of building practitioners and certifiers, the regulation of building matters, the granting of building and occupancy permits and the establishing of a building appeal process, and for related purposes". I therefore find that section 15 is a matter of machinery for carrying out the purposes of the Act and bringing determinations to the attention of those who might be interested. There is no time limit stipulated in section 15. Lord Keith went on to say at page 703 of that case:

> "So I think the word "shall" must be construed here in its literal sense of positively requiring Acas to do what is enjoined. This is in accordance with the policy of the Act, namely that of promoting the improvement of industrial relations and encouraging the extension of collective bargaining. For the purposes of that policy the ascertainment of the opinions of affected workers must clearly be of the highest importance, and in my opinion the statute has picked that out as the one specific exercise which must be performed before Acas applies its mind to the question whether union recognition should be recommended."

In the instant case I find that one of the policies of the Act is to facilitate national uniformity in the qualifications of certain building practitioners.

Further, it is to ensure that only suitably qualified persons are registered. This is clearly necessary to protect the public and to place an appropriate value upon a registration.

42. I find that making a determination under section 14(1)(a) of *the Act* is not akin to making a regulation, rule or bye-law. The power to make regulations is contained in section 168 of the Act. If a determination under section 14(1)(a) was a "rule or bye-law" then section 63(7) of the *Interpretation Act* would have applied. It was not suggested that it did have application in this case.

43. It would seem good practice in the instant case that members (or would-be members) know what the requirements of the respondent are. It may also be important for members of the public to be able to ascertain what was required before a particular person could hold him or herself out as having a particular qualification.

44. In cases where the thing to be gazetted is something akin to Regulations which create obligations and offences then there is good reason for holding that the requirement to advertise in the gazette is peremptory. Further, given that ignorance of law is no excuse (*s.30(1)* of the *Criminal Code*), unless knowledge of the law is itself an element of the offence, it has rightly been held that they can only take effect prospectively after notification. As Barwick CJ noted in *Watson and Another v Lee and Another* (1979) 26 ALR 461:

> "The Acts Interpretation Act 1901 (Cth) s 48(1)(b) in providing that regulations shall take effect from the date of their notification "or where another date is specified in the regulations, from the date specified", is to be construed as meaning the regulation will operate on or from the day it is notified or from such other day, being a subsequent day, as the regulation may specify; to bind a citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny."

In the same case Stephen and Aicken JJ held:

> "Failure to comply with notification requirements leads to invalidity because notification is a critical step in the statutory process of delegated law-making, and because of the paramount right of affected members of the public to know the terms of the law."

45. However, in the instant case the respondent was not creating law. It was not creating penal provisions. In my view, section 15 of *the Act* must be looked at in the context of the legislation, and what it is attempting to achieve.

46. I do not know much about the respondent. It may well be that the makeup of the respondent has changed since the earlier determination on 19 June 1998. It may not have changed at all. Nor do I know the frequency of applications for registration generally, or for certifying engineers (mechanical) in particular. This may have been the only one since 1998 or they might be a frequent occurrence.

47. The respondent has a very broad range of powers and functions including the discipline of building practitioners under s 26 of *the Act*.

48. It therefore appears that the respondent has as part of its functions the regulation of the building practitioners who are registered by it. It would be a necessary part of that to ensure that only persons who were sufficiently qualified to practice in a particular field were registered in that field. No doubt, from time to time, situations would arise that were not contemplated or fully covered. For example a person may have qualifications from overseas and an issue may arise as to their acceptability in Australia. Also the quality of the institutions from which qualifications were obtained might be an issue. In that regard I am reminded of a litigant who wished to be referred to as "Doctor", having obtained a "doctorate" by simply sending money to a mailing address and receiving a certificate in return.

49. It would, in my opinion, be too narrow to interpret the Act in such a way that an applicant had to be considered based on the criteria at the time the application was filed. This could defeat the purpose of the Act. In saying

that, it would follow that any amendment to the requirements would be done for a proper reason under the Act and not for any ulterior or improper motive. No such motive is suggested here.

50. There is nothing in the wording in section 15 to suggest that any determination made under section 14 only becomes effective after the date of gazettal.

51. In those circumstances, I find that there was nothing to preclude the respondent from amending the determination of 19 June 1998 after the appellant's application was filed. Further, having done so, I find that it was then entitled to apply the new determination to the appellant's application. If this were not the case then the objects of the Act might be defeated. Pursuant to section 62A of the *Interpretation Act (NT):*

> "In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object."

52. If the interpretation pressed by Mr Tippett QC were correct, then a person might be able to slip through and obtain a registration to which he or she should not be entitled. Having obtained the registration the person might then seek to transfer it interstate where an application at first instance might have been unsuccessful if considered on its merits. An example of this type of situation can be seen in a decision of the AAT in the case of *Charles v Board of Professional Engineers of Australia* (1999) AATA 948. In that case the applicant had been involved in the heating, ventilation, air conditioning and refrigeration industry for thirty three years. Apart from one year spent in Western Australia, all his work had taken place in Queensland. He had never worked in the Northern Territory, although he has submitted a tender for work here. On 24 March 1998 the applicant became registered as a certifying engineer (mechanical) in the N.T. under *the Act*. He then sought to be registered in Queensland as a Registered Professional Engineer in the

Division of Mechanical Engineering. In cross examination the applicant said that after he applied to the N.T. he sought registration in Victoria as a building practitioner (Engineer, Mechanical) as well. He said that the purpose of applying was to gain registration in as many states as possible so that his application to Queensland may have been assisted. His application for registration in Victoria was rejected. The AAT affirmed the decision of the Board to refuse the applicant's application.

53. In the circumstances of this case however, I do consider that the appellant has reason to feel somewhat aggrieved by what has occurred.

54. Firstly he has made an application in good faith and paid $100 to lodge that application with the respondent. In doing so, he was relying upon the determination of the 19th day of June 1998 as published in the gazette. There is nothing to suggest that he had any reason to suspect that there might be any change pending. Indeed it appears that no change was contemplated before 26 November 2002.

55. Secondly, the respondent changed the determination immediately before it considered the appellant's application on 24 January 2003, and yet despite inviting the appellant to address it, the respondent did not see fit to advise the appellant of the new determination that it had just made.

56. On its face I consider this to be a denial of natural justice.

57. In the case of *Haoucher v Minister of State For Immigration and Ethnic Affairs* (1989-90) 169 CLR 648 the facts were that in 1983 the Minister gave Parliament details of the policy that would guide the making of deportation decisions under s 12 of the *Migration Act*. The policy noted that a deportee had a right of appeal to the AAT and stated that a recommendation by the AAT would be overturned by the Minister only in exceptional circumstances and only when strong evidence could be produced to justify his decision. In the instant case the Minister's decision to deport was reviewed by the AAT

which recommended that that the order for deportation be revoked. Without seeking any representations from the deportee the Minister rejected the recommendations. The majority of the High Court (Deane, Toohey and McHugh JJ) held that the deportee was entitled to know the matters which constituted "exceptional circumstances" and "strong evidence" so as to take his case out of the general policy, and the Minister's failure to provide the deportee with that information and allow him an opportunity to make representations was a denial of procedural fairness. In particular, Deane J said at pages 651-2:

> "The notion of a "legitimate expectation" which gives rise to a prima facie entitlement to procedural fairness or natural justice in the exercise of statutory power or authority is well established in the law in this country (see eg, *Fai Insurances Ltd v Winneke* (1982) 151 CLR 342 at 348, 351, 361-2, 369, 376, 390-1). The notion is not however, without its difficulty. For one thing, the word "legitimate" is prone to carry with it a suggestion of entitlement to the substance of the expectation whereas the true entitlement is to the observance of procedural fairness before the substance of the expectation is denied (see eg, *Salemi v MacKellar* (no2) (1997) 137 CLR 396 at 452; *Kioa v West* (1985) 159 CLR 550 at 563). IN that regard, there is much to be said for preferring the phrase "reasonable expectation" which has often been used in judgments in this court…….
>
> Regardless of whether one can identify a right in the strict sense or a legitimate expectation, the requirements of procedural fairness must be observed in any case where, by reference to "the particular statutory framework" (see *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 504), it is proper to discern a legislative intent that the donee of governmental executive power or authority should be bound by them. There is a strong presumption of such a legislative intent in any case where a statute confers on one person a power or authority adversely to affect the rights, interest status or legitimate expectations of a real or artificial person or entity in an individual capacity (as distinct from merely as a member of a section of the general public). The rationale of that strong presumption is to be found not so much in sophisticated principle as in ordinary notions of what is fair and just. In that regard, it is important to bear in mind that the recognition of an obligation to observe procedural fairness does not call into play a body of rigid procedural rules which must be observed regardless of circumstances. Where the obligation exists, its precise content varies

> to reflect the common law's perception of what is necessary for procedural fairness in the circumstances of the particular case."

58. I find that the respondent in exercising its powers under section 24 of *the Act* was required to afford the appellant with procedural fairness. I further find that by not informing the appellant of its determination either before or during his attendance on 24 January 2003, it failed to do so.

59. It appears from the minutes of 24 January 2003 (ExP3-3) (the accuracy of which is not challenged) that the appellant was directed to the fact that he did not hold a degree, and the fact that he would not have been eligible for full membership as a professional engineer of IEAust. But this would only be relevant if the appellant had been made aware of the new determination, which he wasn't. The appellant wasn't informed of the new determination and therefore was given no opportunity to address it or to re-assess his position. In my view, at the very least, he should have been given a copy of the new determination and then given a reasonable opportunity to consider it before addressing the respondent.

60. The question then arises as to what, if anything, should flow from this breach. I have now heard full argument from the parties, and both sides have now had a full opportunity to address the determination of 24 January 2003. I would not (if I had been the respondent on 24 January 2003) have decided to commence the new determination other than immediately. Accordingly, I would have applied it to the appellant. I therefore see no point in remitting the matter back to the respondent (assuming that I have the power to do so).

61. I find that even if procedural fairness had been afforded to the appellant on 24 January 2003 the result and decision would still have been the same.

62. However, given that the qualification requirements were changed after he applied it might have been appropriate for the respondent to have considered refunding the $100 fee in the circumstances.

63. In the appeal this court is not being asked to set aside the determination made on the 24th day of January 2003. Rather, the court is being asked by the appellant to reconsider his application but only having regard to the 1998 determination. I decline to do so. I consider that to do this would be detrimental to the objects and purposes of the Act as a whole. I find that the determination of 24 January 2003 was valid and effective immediately after it was "carried", and it remained valid and effective until it was amended on 25 February 2003. I therefore find that the respondent was correct in applying the new determination of 24 January 2003 to the application of the appellant. If they had not done so they would have been in error (unless on 24 January 2003 the respondent had determined that the new determination was to commence on some later date, which it did not do).

64. Given the admitted fact (ExP2-17 set out supra) I find that based upon the determination of 24 January 2003 the respondent was right to refuse the application as he did not satisfy the qualification requirement (a), and there was no evidence from which it could be found that he satisfied qualification requirement (b) either.

65. In the event that I am wrong on this, and if the respondent (and myself on appeal) were obliged to consider the application based on the 1998 determination only (which I find neither the respondent nor I are) would he have been entitled to registration?

66. I consider that the requirements (a) or (b) (in ExP1-10) were intended to be roughly analogous. We are dealing with the qualifications for a certifying engineer (mechanical). That must be kept in mind. In (b) there is a clear reference to "mechanical engineer", but in (a) there is not. If (a) were to be read as allowing any form of membership of the Institution to be enough, irrespective of whether it had anything to do with mechanical engineering or not, then this could lead to an absurdity.

67. In the case of *Charles v Board of Professional Engineers of Queensland* (supra) The AAT said in paragraph 3 of its decision:

> "The issue is whether Mr Charles should be registered in Queensland as a Registered Professional Engineer in the Division of Mechanical Engineering under the ….Act. In determining that issue, we must consider first whether the occupation for which Mr Charles seeks registration is an equivalent occupation with that for which he is registered in the Northern Territory……If the occupations are not equivalent; we must then consider whether conditions may be imposed on registration in Queensland to achieve equivalence between the two occupations." (emphasis added)

In my view, the matter highlighted is also a relevant approach herein. Namely, whether the occupation for which the appellant seeks registration is equivalent to the particular entitlement to membership that he may have with the Institute of Engineers, Australia.

68. There is no evidence to suggest that the appellant had a certificate under (b). Therefore, his only entitlement (if he has one) must fall under (a).

69. Pursuant to Bye-Law 1.1 (ExP1-9) ""member" means a person enrolled in accordance with Bye-law 2.1". Bye-law 2.1 states that "the members of The Institution shall be the persons whose names are from time to time enrolled in the Register of The Institution". Bye-law 2.2 goes on to state that "a person may be designated in the Register as being of the grade of Honorary Fellow, Fellow, Senior Member, Member, Companion, Graduate, Technologist Fellow, Technologist Member, Graduate Technologist, Office Fellow, Office Member, Graduate Officer, Affiliate or Student of The Institution".

70. Accordingly, there are some fourteen different ways that a "member" might be designated in the Register. Bye-laws 4 to 14 then go on to set out the various requirements for a person to be designated in the Register under each of those titles. It is clear that in each case the Council retains a discretion, and an applicant is not entitled to be registered under a particular

designation as of right. It is also clear, in my view, that the various designations are listed in order of importance, from highest to lowest.

71. The lowest designation is that of "student". Bye-law 13.1 makes it clear that to be a member at this level the person must be a "bona fide student in a course leading to an examination qualification approved by the Council as satisfying its requirements". Clearly (although such a person would fall within the definition of a member of the Institution of Engineers, Australia) such a person with such a membership only could not be presently qualified to be a certifying engineer (mechanical). I would reject any argument to the contrary. Accordingly, not all entitlements to membership of the Institute are conclusive. That being so (and since requirement (a) is not helpful in setting a minimum required level) there must have been a discretion in the respondent to assess each applicant on his or her merits.

72. I therefore reject the argument of Mr Tippett QC (paragraph 21 of his outline of argument) that because the appellant was entitled to a membership of the Institute, then this resulted "in a requirement by law that he be registered as a building practitioner in the category of certifying engineer (mechanical)." Such an approach would lead to the respondent being no more than a clerical body with no expertise or discretion to apply. The respondent has obligations to consider each application in order to best achieve the aims and objects of *the Act*. As such the respondent must satisfy itself that a person holds the relevant qualifications in relation to the particular category applied for. That is what section 24(1)(b) of *the Act* is aimed at.

73. Clearly, in my view, the respondent (if it were applying the 1998 determination in this case) would want to know what level of membership the appellant was entitled to, and whether this was compatible with the registration being sought. It would be a nonsense to suggest that a person

who was a student member of the Institute, and had yet to graduate, would be entitled by law to a registration as a certifying engineer of any sort.

74. It is an agreed fact that the appellant held the necessary academic qualifications required for membership of the Institute at the "engineering officer (associate) level, pursuant to Bye-law 11":ExP2-16. Bye-law 11 deals with qualifications of "engineering officer members" and has within that Bye-law three membership grades, namely "graduate officer, officer member or officer fellow". Neither counsel has taken me to where I might find how or when a person might be an "associate". The agreed fact appears to be based upon ExP1-7, which is the document that Mr Tippett QC objected to and which was removed from the tender. That document is therefore not before me. From ExP1-9 I am unable to see how the admission (ExP2-16) was properly made, but I must proceed on the basis that it was.

75. It may be that the Bye-laws have been changed and the admission is based on this. But, if so, these are not before me. In accordance with Bye-law 11 (ExP1-9) the Council may resolve that a person be designated in the Register as an engineering officer

> "if that person has produced evidence to the satisfaction of the Council:
>
> 11.1 that the person is not eligible for designation as a Corporate Member, Graduate or any of the Engineering Technologist grades; and
>
> 11.2 that the person has completed a course, or otherwise demonstrated relevant competencies, in engineering acceptable to the Council for recognition as an Engineering Officer."

76. It would appear that engineering officer is a lower level of membership than an engineering technologist member. I take this to be the case from an analysis of the various requirements for each designation, and from the exclusory words in 11.1. It appears that the Council is to assess each application for membership by putting a person into the highest category to

which he or she might be entitled. Once satisfied that a person is not entitled to membership at a certain level, then the Council is to decide if they are eligible for the next level. If not then they move on until they find the appropriate level.

77. As noted earlier, there are some fourteen different levels of designation, and within those there may be sub-categories as well. Officer member is ranked 11 out of 14, and is therefore towards the lower end of the possible designations.

78. I accept the submission of Mr Roper that Bye-law 7 would appear to be the minimum level of membership with the Institute that would equate to the registration level sought. I would also have rejected the application in this case if I were confined to the determination of 19 June 1998.

79. I therefore find that the Appeal is unsuccessful and must be dismissed. The decision of the respondent made on 24 January 2003 to refuse the application is confirmed. However, I would order in the unusual circumstances of this case that the appellant's fee of $100 be refunded to him. Further, given that I do not know when the appellant became aware of the new determination it may well be appropriate for the respondent to pay some of his costs in this matter. As noted earlier, the determination was not published in the gazette until after this appeal was instituted.

80. I will hear the parties on the question of costs and any additional or ancillary orders sought.

Dated this 17th day of March 2004.

_____

D TRIGG
STIPENDIARY MAGISTRATE