CITATION:	*Ricardo Homes Pty Ltd & John Ricardo v NT Building Practitioners Board* [2007] NTMC 011
PARTIES:	RICARDO HOMES PTY LTD 1st Appellant & JOHN RICARDO 2nd Appellant v NT BUILDING PRACTITIONERS BOARD Respondent
TITLE OF COURT:	Local
JURISDICTION:	Appeal from a Decision of the NT Building Practitioners Board
FILE NO(s):	20616151
DELIVERED ON:	22 February 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	11 & 12 December 2006
JUDGMENT OF:	Dr John Lowndes

CATCHWORDS:

APPEAL AGAINST DECISION OF THE NT BUILDING PRACTITIONERS BOARD – NATURE OF THE APPEAL – LEAVE TO ADDUCE ADDITIONAL EVIDENCE – WEIGHT TO BE GIVEN TO THE BOARD'S DECISION – THE CHARACTERISTICS OF A SPECIALIST TRIBUNAL – THE LEGISLATIVE SCHEME – CONSTRUCTION OF THE EQUIVALENT PRACTICAL EXPERIENCE REQUIREMENTS OF THE MINISTER'S DETERMINATION – THE ISSUE OF COMPETENCY.

Building Act ss 4A, 23, 24A, 24C, 36A, 36B, 48A
Clause 24 of the Minister's Determination
Clause 3.3.1.2 of the Board's Internal Policy

Builders Licensing Board v Sperway Constructions (1976) 135 CLR 616 followed
Bradshaw v The Medical Board of Western Australia (1990) 3 WAR 322 followed
SRNA v The Medical Board of Western Australia [2004] WASC 198 followed
Roberman v Medical of Western Australia [2005] WASC 45 followed

Ventura v Sustek (1976) 14 SASR 395 considered
R v Corwen JJ, ex p Edwards [1980] 1 ALLER 1035 applied
Re Monger; Exparte WMC Resources Ltd [2002] WASC 129 applied
N (No 2) v Director General, Attorney-General's Dept [2002] NSWADT 33 applied
Avon v AAT (1997) 67 SASR 7 followed
Thomas v The Medical Board of Western Australia [2005] WASC244 followed
Re Hodge Kiss (1962) SR(NSW) 340 followed
Georgoussis v Medical Board (VIC) [1957] VR 671 followed
Southwell v Specialised Engineering Services Pty Ltd (1990) 70 NTR 6 applied
World Best Holdings Ltd v Sarker [2004] NSWSC considered
FCT v Radilo (1966) 142 ALR 305 considered
Tax Agents' Board of Queensland v Seymour (1990) 94 ALR 635 considered

REPRESENTATION:

Counsel:

Appellants:	Mr Lex Slyvester
Respondent:	Dr N Aughterson

Solicitors:

Appellants:	De Silva Hebron
Respondent:	NT Building Practitioners Board Legal Services

Judgment category classification:	A
Judgment ID number:	[2007] NTMC 011
Number of paragraphs:	180

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

No. 20616151

BETWEEN:

RICARDO HOMES PTY LTD
1st Appellant

AND:

JOHN RICARDO
2nd Appellant

v

NT BUILDING PRACTITIONERS BOARD
Respondent

REASONS FOR DECISION

(Delivered 22 February 2007)

Dr JOHN LOWNDES SM:

THE NATURE OF THE APPEAL

1. These proceedings concern an appeal brought under s 36(2) of the *Building Act* (NT) 1993. The notice of appeal states:

> The appellants appeal against the following decision:
>
> > The respondent's decision to refuse the appellants' application for registration as a Building Contractor Residential (unrestricted) under s 24C of the *Building Act*.
> >
> > The date of order or decision:
> >
> > 17 May 2006

Grounds of appeal:

1. The appellants satisfy the requirements of section 24C of the *Building Act*.

2. As pointed out by the respondent, "the present appeal is from the cumulative decisions of the Board."[1] To put the appeal in context the history of the matter is as follows:

- the application of the second respondent for registration as a "building contractor residential unrestricted" was made pursuant to s 24C(1) of the *Building Act* on 7 January 2006;
- the first appellant's application for registration as a "building contractor residential unrestricted" was made pursuant to s 24A of the Act on 14 February 2006;
- the Board first considered the appellants' applications on 3 May 2006, after having requested additional information from the appellants, which was provided to the Board;
- the Board rejected both applications and advised both appellants accordingly in writing;
- the appeal to the Local Court was filed pursuant to s 36(2) on 16 June 2006;
- on 13 July 2006 the appellants' solicitor wrote to the Board requesting that the appellants be allowed to submit to the Board further documentary evidence in support of their two applications and that the Board reconsider its decision;
- having agreed to accept further evidence, the Board reconsidered the applications on 29 November 2006, but again rejected the applications

[1] See p 2 of the respondent's written submissions.

and informed the appellants accordingly in writing on 6 December 2006.

3. That decision was contained in a letter dated 6 December 2006 from the Board to the second appellant. That correspondence read as follows:

> The Building Practitioners Board recently considered the additional information submitted by De Silva Hebron in relation to your application for registration as a Building Contractor Residential (Unrestricted) under section 24C of the *Building Act*.
>
> On the basis of all information submitted by you, the Board is still not satisfied that you have the qualifications and experience determined by the Minister.
>
> In particular, as you have not been involved in a completed building project in the unrestricted category since Dockside in 1997, the Board was not satisfied that you have had: -
>
> 1. Principal responsibility for three building projects in the unregistered category over the past three years, as required by clause 24.1(a) of the Minister's Determination of 14 December 2005; or
>
> 2. Sufficient practical experience equivalent to that required, as provided by clause 24.1(b) of the Determination.
>
> Due to these matters, the Board could also not be satisfied that you met the requirement for building contractors provided by section 24C(2)(d) of the *Building Act*.
>
> The Board therefore confirms its refusal of your application. Due to section 24C(3)(c) not being satisfied, the Board is also unable to grant registration in relation to the application by Ricardo Homes Pty Ltd.

4. It is clear that the second appellant's application was rejected by reference to the requirements set out in s 24C(2) (c) and (d) of the Act. It is also clear that the application of the first appellant was rejected by virtue of s 24C(3)(c) of the Act.

5. Section 36(2) provides:

> (1) Subsection (2) applies to a person who is entitled to be notified of an appellable decision under section 24FB(2), 34P(2)(a) or (b) or 34VA(3).
>
> (2) The person may, within 30 days after being notified of the decision, appeal to the Local Court against the decision.

6. The Board's decision is an appellable decision: see s 35(b).

7. No point was taken by the respondent that the appeal had not been validly instituted on the basis that the notice of appeal was lodged prior to the final determination of the Board. I have proceeded to determine the appeal on the premise that the appeal complies with the requirements of the Act and is in proper form.

8. Section 36A deals with the nature of such an appeal:

> (1) Subject to subsection (2), the appeal is to be a rehearing of the evidence before the Practitioners Board.
>
> (2) The Local Court may admit evidence that was not before the Practitioners Board only if the court is satisfied that there were special reasons that prevented its presentation before the Board.

9. Section 36A makes it clear that the appeal is by way of rehearing, and is not a hearing de novo. Consistent with an established line of authority, there is the potential for the admission of additional evidence, though the Court does not hear the witnesses again, and simply considers the evidence that was before the Board.[2]

10. Although the present appeal is in the nature of a rehearing, it is nonetheless an appeal, and it is incumbent upon the appellants to satisfy the Court that

[2] See p 9 of the respondent's written submissions, where the following authorities are cited: *Builders Licencing Board v Sperway Constructions* (1976) 135 CLR 616 at 619-620; *Bradshaw v Medical Board of Western Australia* (1990) 3 WAR 322 at 324-325, 338.

the decision of the Board was wrong.[3] The requisite standard of proof is that of "reasonable satisfaction":

> …unless the rules say otherwise, and they seldom do, the standard of proof in disciplinary and other tribunals is 'reasonable satisfaction'.[4]

11. Neither the *Building Act* nor the *Building Regulations* have anything to say about the standard of proof applicable to appeals brought pursuant to s 36A of the Act. Given their silence on the matter, the appellants bear the onus of reasonably satisfying the Court that the Board was wrong in refusing the appellants' applications for registration as "building contractor residential unrestricted".

12. Pursuant to s 36B of the Act, the Court may, in determining the appeal, confirm, vary or set aside the decision and substitute another decision that could have been made. Subsection (3) provides that any decision to vary or set aside the Board's decision is taken to be the decision of the Board.

THE LEGISLATIVE BACKGROUND TO THE APPLICATIONS AND APPEAL

13. Section 24A of the *Building Act* entitles a person[5] to apply to the Building Practitioners Board to be registered as a building practitioner in the category of building contractor.

14. Section 4A(1) establishes categories of "building practitioner". The list includes "building contractor": see 4A (1) (e). Section 4A(2) provides that the *Building Regulations* may prescribe "a sub-category of building practitioner". Accordingly, Regulation 39A prescribes two categories of "building contractor", namely "building contractor residential (restricted)"

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[3] See p 9 of the respondent's written submissions, where the following authorities are cited in support of the proposition: *Bradshaw v Medical Board of Western Australia* (1990) 3 WAR 322 at 328; *SRNA v The Medical Board of Western Australia* [2004] WASCA 198 at [4]; *Roberman v Medical Board of Western Australia* [2005] WASC 45 at [5].

[4] Forbes *Justice in Tribunals* paragraph 12.21, p 157.

[5] It is clear from the wording of the succeeding provisions of the Act that "person" is not limited to natural persons, but includes a corporation: see s 24B and 24C.

and “building contractor (unrestricted)”.

15. The Act and Regulations prescribe the kind of work that may be carried out only by a registered building contractor.

16. According to s 48A(1):

> A person must not commence or continue to carry out prescribed building work unless the person is
>
> (a) a prescribed building contractor; or
>
> (b) being supervised by a prescribed building contractor in accordance with the Regulations.

17. Pursuant to s 168(2), the Regulations may make provision for “the type of building work that building practitioners may carry out.[6]

18. Regulation 41 B of the Regulations, which deals with building contractors for detached houses and attached dwellings and Class 2 buildings of not more than 2 storeys, provides as follows:

> (1) For section 48A (1)(a) and (b) of the Act, the following building contractors are prescribed for building work referred to in sub-regulation (2) :
>
> (a) a building contractor residential (restricted);
>
> (b) a building contractor residential (unrestricted).
>
> (2) Sub-regulation (1) applies in relation to building work that is work for or in connection with the construction of any of the following:
>
> (a) a Class 1a detached house;
>
> (b) a Class 1a attached dwelling or Class 2 building of one or 2 storeys;

[6] See Schedule 1, paragraph 47.

(c) a Class 10 building attached to a Class 1a or Class 2 building referred to in paragraph (a) or (b) if it is constructed at the same time as the Class 1a or Class 2 building;

(d) a retaining wall (whenever constructed) that is not attached to a Class 1a or Class 2 building referred to in paragraph (a) or (b) but on which the integrity of such a building depends

(3) However, sub-regulation (1) does not apply in relation to work for or in connection with the construction of any of the following:

(a) a Class 10 building or verandah attached to a Class 1a or Class 2 building if it is constructed at any time after the Class 1a or Class 2 building was constructed;

(b) a Class 10 building (whenever constructed) that is not attached to a Class 1a or Class 2 building, other than a retaining wall referred to in sub-regulations (2)(d).

19. Regulation 41C, which deals with building contractors for attached dwellings and Class 2 buildings of more than 2 storeys, provides as follows:

(1) For section 48A(1)(a) and (b) of the Act, a prescribed building contractor for building work referred to in sub-regulation (2) is a building contractor residential (unrestricted).

(2) Sub-regulation (1) applies in relation to building work that is work for or in connection with the construction of a Class 1a attached dwelling or Class 2 building of more than 2 storeys.

20. The Act sets out the requirements for registration of building contractors.

21. Section 24B provides:

(1) Where the Practitioners Board is satisfied, on an application under section 24A by a person, not being a corporation, that the person –

(a) is a fit and proper person to be registered;

(b) has the relevant qualifications and experience determined by the Minister in relation to the category of building contractor; and

(c) has complied with the prescribed conditions, if any,

it must register the person as a building practitioner in the category of building contractor.

(2) Where the Practitioners Board is satisfied on an application under section 24A by a corporation that –

(a) all the directors of the corporation would be fit and proper persons to be registered if the application had been made by them personally;

(b) at least one director or a nominee of the corporation is a building practitioner in the category of building contractor to which the application relates;

(c) the director or nominee referred to in paragraph (b) resides in the Territory; and

(d) the corporation has complied with the prescribed condition, if any

it must register the corporation as a building practitioner in the category of building contractor.

(3) Conditions prescribed for the purposes of subsection (1) (c) or (2)(d) may include a condition requiring a building practitioner to hold a policy of professional indemnity or other insurance of a type of for an amount, or both, determined by the Minister.

22. Section 24C, which is a transitional provision dealing with the registration of building contractors[7], provides as follows

(1) A person who carried out building work before the commencement of this section may, in approved form accompanied by the prescribed fee, apply to

[7] See p 4 paragraph 14 of the respondent's submissions:
The provision is transitional in that potential applicants have been given a limited time frame within which to seek registration pursuant to that section, initially gazetted to be for a period of 6 months commencing 14 December 2005.

the Practitioners Board to be registered as a building practitioner in the category of building contractor.

(2) Where the Practitioners Board is satisfied, on an application under subsection (1) by a person, not being a corporation, that the person –

(a) carried out building work before the commencement of this section;[8]

(b) is a fit and proper person to be registered;

(c) has qualifications and experience determined by the Minister;

(d) is competent to carry out work as a building contractor; and

(e) has complied with the prescribed conditions, if any,

it must grant the registration of the person as a building practitioner in the category of building contractor.

(3) Where the Practitioners Board is satisfied, on an application under subsection (1) by a corporation, that –

(a) the corporation carried out building work before the commencement of this section;

(b) all the directors of the corporation would be fit and proper persons to be registered if the application had been made by them personally;

(c) at least one director or a nominee of the corporation is a building practitioner in the category of building contractor to which the application relates;

(d) the director or nominee referred to in paragraph (c) resides in the Territory; and

(e) the corporation has complied with the prescribed conditions, if any,

[8] The section was inserted by No 65, 2204, s12.

it must register the corporation as a building practitioner in the category of building contractor.

(4) An application under this section must be made within 6 months after the commencement of this section.

(5) Conditions prescribed for the purposes of subsection (2)(e) or (3)(e) may include a condition requiring a building practitioner to hold a policy of professional indemnity or other insurance of a type or for an amount, or both, determined by the Minister.

(6) In this section –

"building work" means building work that, after the commencement of Part 4A, may be carried out only by a prescribed building contractor.

23. The conceptual and practical relationship between ss 24B and 24C is as explained in the respondent's written submissions:

> As indicated in the Minister's Second reading Speech…, while new entrants would need to have specified qualifications, provision would be made for the registration of existing builders who might not have those qualifications.
>
> Section 24B… caters for those applicants who have 'the relevant qualifications and experience determined by the Minister', while s 24C… caters for those applicants who carried out building work before the commencement of this section; and who, implicitly, do not have the formal qualifications that would make them eligible to apply under s 24B.[9]

24. For the purposes of determining the appellants' appeal, I adopt the following submissions made by the respondent:

> In relation to the requirements for registration under s 24C, a distinction is made between applicants who are corporations and applicants who are not corporations: see s 24C(2) and (3). Corporate applicants are dealt with under s 24C(3). In the present case, the success or failure of the application of the first appellant rested on the success or failure of the application of the second appellant. That is because of the provision of s 24C(3)(c) …In other words, if the second appellant, being the nominated person of the first appellant, were unsuccessful it would mean that the

[9] See paragraphs 12 and 13, p 4 of the respondent's submissions.

> first appellant would be unable to establish that at least one nominee of the corporation is a registered building practitioner under the Act. Because the application of the second appellant was ultimately rejected, the application of the first appellant was rejected on the basis of non – compliance with s 24C(3)(c).[10]

25. Counsel for the appellants conceded that the success or failure of the first appellant's application depended upon the outcome of the second appellant's application: if the second applicant's application failed, then the application of the first appellant must also fail.

26. As noted above, s 24C(2)(c) requires that an applicant have the "qualifications and experience determined by the Minister". That brings into play the provisions of s 24G of the Act which provides:

> The Minister may, by notice in the Gazette, determine the qualifications and experience for registration as a building practitioner in the category of building practitioner.[11]

27. In relation to s 24G, and for the purposes of determining this appeal, the Minister made the relevant determination by way of notice published in the NT Gazette of 14 December 2005. Clauses 22 and 24 of that determination prescribe the following qualifications and experience for a building practitioner in the category of building contractor residential (unrestricted):

> One of the following:
>
> (a) at least 3 years' practical experience in the building industry, including, during the 3 years immediately before the date of the application for registration, principal responsibility for 3 building projects that involved carrying out building work –
>
> i. for which a building contractor residential (unrestricted) is a prescribed building contractor for section 48A(1)(a) and (b) of the Act; and

[10] See paragraph 16, p 5 of the respondent's written submissions.
[11] The term "building practitioner" includes a sub-category of building practitioner, and therefore includes a building contractor: see s 4A(3) of the *Building Act*.

ii. in relation to which an occupancy permit has been issued;

(b) practical experience that, in the opinion of the Practitioners Board, is equivalent to the experience referred to in paragraph (a);

(c) accreditation by Contractor Accreditation Limited to carry out building work for which a building contractor residential (unrestricted) is a prescribed building contractor for section 48A(1)(a) and (b) of the Act.

[and] net tangible assets of at least $50,000, as certified by an accountant.

28. Against that legislative backdrop, "the central issue is whether the second appellant should have been registered pursuant to s 24C".[12]

THE APPLICATION TO PUT ADDITIONAL EVIDENCE BEFORE THE COURT

29. The appellants applied to put additional evidence before the Court in accordance with s 36A(2) of the Act. It was sought to adduce short oral evidence from the second appellant, John Ricardo, in relation to a portfolio containing the following material:

1. Photographs and summary of projects completed in France during the mid 1960's;

2. Photographs of completed projects in Darwin between 1995 to 1997;

3. Artists Impression of proposed developments between 1998 to 2002 and

4. Photographs of current proposed development for Leydin Court.

30. The application was opposed by the respondent. After hearing submissions from both parties, I refused the application, and indicated that I would give reasons for decision in due course. My reasons for refusing the application are as follows.

[12] See paragraph 17, p 5 of the respondent's written submissions.

31. Although s 36A(2) allows an appellant to present additional evidence to the Court in prosecution of an appeal, the subsection imposes stringent requirements for the presentation of fresh evidence. An appellant bears the onus of reasonably satisfying the Court that there were "special reasons" that prevented the presentation of that evidence before the Board. An appellant must do more than establish there were reasons that prevented the earlier presentation of the evidence – the reasons need to be *special*.

32. It is clear that s 36A(2) was intended to prevent aggrieved applicants having "two bites at a cherry" [13] or to frustrate an applicant who might endeavour to obtain the determination of his or her case upon a minimum amount of evidence, reserving the right, if they failed, to have the case re-tried upon additional evidence, which was from the outset within their possession or power to possess. [14]

33. There may well be a further rationale behind the strictures placed on the presentation of additional evidence, a rationale suggested by the respondent during the making of submissions.

34. The Northern Territory Building Practitioners Board can be considered to be a specialist board. So much is evident from its composition. Section 12A of the *Building Act*, which deals with membership of the Board, not only requires that at least one member of the Board must be a legal practitioner, but that the members who are not legal practitioners – so called "industry members" - must be *persons the Minister considers have appropriate experience in the building industry or matters connected with the building industry.*[15] Subsection (5) provides that if practicable at least one industry member must be appointed to represent the interests of each category of building practitioner.

[13] See *Ventura v Sustek* (1976) 14 SASR 395 at 407.
[14] See *Ventura v Sustek* (1976) 14 SASR 395 at 401
[15] See s 12A (3) and (4).

35. Although a magistrate of the Local Court is entrusted with the very onerous task of hearing and determining appeals brought under s 36A of the Act, s 6A(2) would appear to tacitly acknowledge that, in the normal course of events, a magistrate would not have the technical knowledge and expertise of the non legal members of the Board. Given those probable inherent deficiencies, the legislature was no doubt cautious in allowing a magistrate the power to consider evidence which had not been presented to the Board and tested by a panel of experts. Having said that, the legislature foresaw that there may be circumstances where it would be plainly wrong or unjust to prevent additional evidence being presented to a magistrate, notwithstanding his or her lack of expertise to consider and evaluate the additional evidence previously untested. Section 36A(2) attempts to strike a balance between two different aspects of the administration of justice: deferring to the opinion of an expert board's opinion, which leans in favour of the respondent,[16] and doing justice in the individual case, which has the potential to favour an appellant.

36. The words "special reasons" are "ordinary words in the English language which may be given their ordinary meaning": see *R v Corwen JJ, ex p Edwards* [1980] 1 ALL ER 1035 at 1037, 1038, per Woolf J. The ordinary meaning of the word "special" is 1. particularly good; exceptional; out of the ordinary. 2. peculiar; specific; not general: see The Concise Oxford Dictionary. In a similar vein, the word "special" is defined by the Collins English Dictionary as meaning: 1. distinguished from, or set apart from, or excelling others of its kind. 2. not usual or commonplace.

37. It is acknowledged that the legislative context in which ordinary words, bearing an ordinary meaning, are used may alter the meaning of those words. Similarly, the underlying objects of the legislation under which such words are used may also have a bearing on their meaning. However, in my opinion, having regard to the underlying objects of the *Building Act* and the

[16] The extent to which this aspect operates in favour of the present respondent is discussed below at pp 29 - 32.

context in which the words “special reasons” appear, there is nothing to suggest that those words should be attributed a meaning other than their ordinary meaning.

38. In considering the additional evidence requirements of s 36A(2), the first line of inquiry is to consider whether there are any reasons why the evidence was not presented to the Board. If so, the second line of inquiry requires the Court to determine whether those reasons qualify as “special reasons”.

39. While it is not possible to enumerate or define every explanation that might qualify as a special reason that prevented the presentation of the evidence before the Board, it would seem that the fact that the additional evidence sought to be relied was not in existence at the date of the Board’s determination would satisfy the requirements of s 36A(2). Similarly, the fact that the additional evidence, although in existence at the time of the Board’s determination, was not reasonably discoverable through due diligence or could not reasonably be made available to the Board, would appear to qualify as a special reason preventing the presentation of the evidence before the Board. Finally, the fact that the additional evidence was put before the Board, and rejected by it under circumstances where it should have received and considered that evidence, would seem to satisfy the precondition set out in s 36A(2).

40. There may well be certain explanations that fall within the “penumbra” of s 36A(2). It is uncertain whether the fact that the additional evidence was not presented to the Board because of a deliberate, or tactical, decision on the part of an appellant’s legal representatives not to present the evidence, or neglect on their part to make the evidence available to the Board, would qualify as a special reason preventing the presentation of the evidence to the Board. However, it is not necessary to resolve that uncertainty because the

appellants do not rely upon such circumstances in seeking the leave of the Court to present the additional evidence.[17]

41. But what about the explanation proffered by the appellants?

42. The initial reason given for the photographic evidence relating to the overseas projects not having been provided to the Board was that it had been missed and was a regrettable oversight: the matter had been overlooked. However, it was put that the oversight was not due to any neglect on the part of the appellants' legal representatives. It was said that the evidence in question was missed, that is, the evidence escaped the attention of the second appellant. The explanation was further elaborated upon, such that it was claimed that the second appellant had forgotten about the existence of the evidence due to his age at the time of the application and his very long experience in the industry. Once again, it was asserted that the second appellant had simply overlooked the evidence; and that it was "human enough" to excuse the oversight. Finally, the appellants' lawyers had not been alerted to the existence and significance of the material.

43. It was submitted on behalf of the appellants that the "special reasons" provisions should be construed in light of the legislation. As the legislation affected rights, it was submitted that the special leave provision should be read beneficially in favour of the appellants.

44. It was further submitted on behalf of the appellants that the Court would be materially assisted by the additional evidence and that amounted to a "special reason" within the meaning of s 36A(2) of the Act. It was submitted that the evidence should be made available on the grounds of fairness. It was also submitted on behalf of the appellants that the Court should receive the additional evidence and give it appropriate weight.

[17] Indeed, counsel for the appellants was at pains to make the point that the oversight was not due to any neglect on the part of the appellants' lawyers.

45. Finally, it was submitted that late reliance by the Board on "incompetence" as a ground for refusing the second appellant's application, and the denial of natural justice in relation to that issue, constituted "special reasons" in the context of s 36A(2).

46. The appellants do not appear to have provided any explanation in relation to the remaining material in the portfolio sought to be relied upon, that is the photographs of completed projects in Darwin between 1995 and 1997, the artists impression of proposed developments between 1998 and 2002 and photographs of the current proposed development for Leydin Court. I do not believe that the second appellant was claiming to have also forgotten about that evidence and was putting that forward as an explanation for that evidence not having been provided to the Board. However, in the event that I have misunderstood the appellants' application, I propose to treat lapse of memory on the part of the second appellant as the reason for the earlier non-production of the material.

47. Proceeding on the basis that the second appellant had forgotten the photographic evidence existed, I do not consider that that explanation satisfies the leave requirements of s 36A(2). In my opinion, mere forgetfulness cannot amount to a "special reason" that prevented the presentation before the Board of the type of additional evidence now sought to be presented to the Court for its consideration.

48. If mere lapse of memory amounted to sufficient cause to receive additional evidence under s 36A(2), then it would actively encourage the very mischief that the provision was designed to address – "the second bite at the cherry". An applicant could present a minimum amount of evidence to the Board by way of a trial run and, if unsuccessful, could then seek to present further evidence to the Court on the pretext of having forgotten about the existence of that evidence. It would be relatively easy for an appellant to successfully feign forgetfulness – a state of mind which, unlike the suggested acceptable explanations referred to earlier, is not capable of being objectively tested.

49. I reject the submission that the provisions of s 36A(2) should be read liberally to accommodate the explanation given by the appellants.

50. The fundamental problem with the second appellant's explanation is that it is simply not credible.

51. S 36A(2) requires the Court to be *satisfied* that there special reasons that prevented its presentation before the Board (emphasis added). In my opinion, the subsection not only requires the Court to be satisfied that the explanation proffered by an applicant qualifies as a special reason, but that it be reasonably satisfied that the explanation is genuine, and therefore credible.

52. A number of aspects militate against the explanation being genuine.

53. In his affidavit sworn 31 October 2006 (Exhibit 2) the second appellant deposed as to construction work undertaken by him in French Algeria and France.[18] Yet he says he forgot about the existence of the photographic material which appears on pages 2 – 13 of the portfolio and which was sought to be put before the Board. In my opinion, it is most unlikely that he would have forgotten about that material. The appellant obviously recalled the projects he undertook in French Algeria and France. It is difficult to imagine him forgetting about the existence of photographs evidencing those projects. It is hard to imagine that his recall of those projects did not prompt his memory of those photographs. It is not as though the photographs were an insignificant piece of evidence, such as by nature to be easily overlooked. Furthermore, the appellant was given three opportunities to present evidence to the Board. The ample opportunity afforded to the appellant to present his case to the Board was more than enough to refresh his memory about his past experience in the construction industry, including the existence of photographic evidence. There was an over abundance of prompts which would have led the appellant to recall the existence of the photographic

[18] See paragraphs 17-20 of the affidavit.

material, thereby allowing him the opportunity of presenting that evidence to the Board.

54. In his affidavit the appellant deposed as to the completed projects between 1995 and 1997. In particular he makes reference to the project at 4 Gardens Hill Crescent, The Gardens.[19] Again, for the reasons given in relation to the earlier material contained in the portfolio, it is difficult to accept that he forgot about the existence of the photographs relating to that project, which are photographs 15 – 22 in the portfolio. Furthermore, those projects and photographs are of far more recent origin and more capable of recall.

55. The second appellant sought to put before the Court, by way of additional evidence, pictures 23-27 in the portfolio, which depicted proposed developments at Leydin Court and Bayview. Those proposed projects were referred to in the second appellant's affidavit.[20] Again, it is difficult to accept that the second appellant suffered a lapse of memory in relation to that very recent evidence.

56. During the course of submissions I indicated to the appellants' counsel that I had difficulty in accepting the explanation, as things stood, and offered the second appellant the opportunity to give oral evidence or call other oral evidence concerning the explanation. The offer was declined.

57. I reject the further ancillary arguments made by counsel for the appellants in support of the application for leave to present additional evidence. The fact that the Court might be materially assisted by the evidence does not qualify as a "special reason" within the meaning of s 36A(2) of the Act. Similarly, the fact that it might to be fair to permit the evidence to be presented to the Court does not satisfy the requisite test; nor does the argument that the evidence should be considered and given whatever weight the Court considers appropriate.

[19] See paragraph 37 of the affidavit.
[20] See paragraphs 39, 43, 44 and 45 of the affidavit.

58. Finally I reject the submission based on the denial of natural justice. In my opinion the appellants were given more that ample opportunity to address the requirements in s 24C(2)(d) of the Act.

THE EVIDENCE IN SUPPORT OF THE APPELLANTS' APPLICATIONS

59. The following evidence was before the Court in support of the applications of the first and second appellants:

- The affidavit of the second appellant sworn 31 October 2006, including annexures "A" to "M" (Exhibit 2);
- The affidavit of Bruce Bradley, registered architect, affirmed 31 October 2006 (Exhibit 3);
- The affidavit of Colin Browne, registered architect, affirmed 31 October 2006 (Exhibit 4);
- The affidavit of Maurice Kelly, consulting engineer, sworn 1 November 2006 (Exhibit 5).

60. With the consent of the appellants, "Registration Policy for Building Contractor (Transitional)" dated 12.4.06, par 3.3. 1.2 was tendered as Exhibit 6.

THE WEIGHT TO BE GIVEN TO THE BOARD'S DECISION

61. In its written submissions, the respondent submitted that the Court should give considerable weight to the Board's decision, as the Board was a specialist tribunal, and it is established law that an appeal court should not lightly overturn the decision of a specialist tribunal.[21]

62. In its oral submissions, the respondent argued that the Board met the description of a "tribunal", because its decisions seriously affected the

[21] See pp 11- 13, paragraphs 31-35 of the written submissions.

rights of persons, and it was not essential that it carry out its functions in an adversarial context.

63. It was submitted on behalf of the appellants that the Building Practitioners Board was not a specialist tribunal, as it did not possess the characteristics of a tribunal. It was argued that the Board was not a tribunal because it did not perform its functions or exercise its powers with the context of an adversarial process.[22] Furthermore, it was submitted that it did not qualify as a tribunal because it performed a merely executive or administrative function, and was bereft of any judicial or quasi –judicial role. The appellants submitted that, put at its highest, the role of the Board was an investigative one.

64. According to Forbes, the word "tribunal" is not a term of art, and has no ascertainable meaning.[23] However, some assistance is given by Osborn, who defines a "tribunal" as a body "with judicial or quasi-judicial functions set up by statute and existing outside the usual judicial hierarchy".[24]

65. A body exercising quasi-judicial functions has powers which resemble those of a court and engages in activities similar to those undertaken by courts.[25] The hallmark of such bodies is that they are concerned with the adjudication of specific rights and obligations that require the exercise of discretion and decision making.[26] Statutory tribunals are "often almost entirely adjudicatory in function", although they retain some degree of executive provenance.[27]

66. Recent case law emphasises the adjudicative functions performed by tribunals.[28] *Re Monger; Ex Parte WMC Resources Ltd* [2002] WASCA 129 is a prime example of that line of authority.

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[22] See Builders Licensing Board v Sperway Constructions (1976) 135 CLR at 616.
[23] Forbes n 4, paragraph 1.1, p1.
[24] *Concise Law Dictionary* (8th ed, 1993) cited by Forbes, n 4, paragraph 1.1, p1.
[25] http://en.wikepedia.org/wiki.
[26] http://research.lawyers.com/glossary
[27] Stebbings *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge University Press 2007) Excerpt, p 2.
[28] *The Laws of Australia* vol 2.7, paragraph 920, p345.

67. In that case the Court was concerned with whether the Director, exercising his statutory duty to decide whether a dispute had been properly referred to him under s 93D(5) of the *Workers Compensation & Rehabilitation Act* 1981(WA), is a "tribunal". In the process of determining that issue Anderson J discussed the meaning of the entity "tribunal":

> The word in its ordinary meaning signifies something more than an official performing this function. The dictionaries tell us that, in its primary sense, 'tribunal' means a place or seat of judgment (Shorter Oxford Dictionary), a body appointed to adjudicate disputes (Butterworths Legal Dictionary)and (according to the Dictionary of English Law) a person or body exercising judicial or quasi-judicial functions outside the regular judicial system, and, in these senses , the word is quite inapt to describe the office of Director in the performance of the essentially administrative task of examining doctor's reports for compliance with the medical requirements of s 93D(6) of the Workers Compensation and Rehabilitation Act and deciding whether or not they comply. To my mind, confirmation that 'tribunal' is intended to have its primary meaning in Order 56 r 11(1)[29] is to be found in the syntactical arrangement of that rule; the word 'tribunal' appears between the words 'inferior court' and 'or of a magistrate or justice'. I would accept the submission made on behalf of the applicants that the arrangement of the words and phrases in the rule strongly suggests that the word 'tribunal' is intended to signify a body of the same genus as 'inferior court', 'magistrate' and 'justices'.
>
> The Director is not a judicial officer. He does not perform any judicial or quasi-judicial function. He has no duty to evaluate the worth of the medical evidence that is presented to him by the worker. He merely sees that it is in the form required by s 93D(6). (If it is not, presumably the worker can get another report). He does not conduct a hearing. The view to which the Director comes is not definitive of any legal rights. He does not resolve adverse claims. The consequence of his decision (right or wrong) that the worker's reference is supported by the requisite medical evidence is only that the conciliation and review process starts. If the dispute goes to review, which it may or may not do, the review officer will make up his or her own mind on the question of the worker's level of disability. The Director has no role to play in that process of review. The 'medical evidence' upon which the review officer acts may or may not include the medical evidence on which the Director acted. There is no duty on the Director to supply the review officer with that evidence. The review officer starts afresh as regards evidence. In my opinion, the applicant's submission that it is going too far to hold that the Director is a

[29] This rule imposed a six month limitation in relation to proceedings to quash the decisions of an inferior court or tribunal. The rule is not intended to cover all order nisi proceedings for certiorari - it does not cover proceedings involving the acts or decisions of bodies which do not satisfy the description of "an inferior court or tribunal…or a magistrate or justices.": see O 56 r 11.

> ‘tribunal’ within the meaning of O 56 r 11(1) when forming a view that a matter has been properly referred to him must be accepted.

68. Although His Honour was construing the meaning of the word “tribunal” in the context of a legislative regime which juxtaposed a “tribunal” with “ an inferior court”, a “magistrate” or “justices” – and hence his conclusion that a “tribunal” was “of the same genus as “inferior court”, “magistrate” and “justices” – his analysis of the characteristics of a tribunal is helpful in determining whether the Building Practitioners Board can be properly treated as a “tribunal”.

69. A similar analysis of the attributes of a “tribunal” was undertaken in *N (No 2) v Director General, Attorney-General’s Dept* [2002] NSWADT 33 (8 March 2002) at [15] to [17] by O’Connor K – DCJ (President):

> It is possible… that a body might be called a ‘Tribunal’ but on closer examination of its statutory framework and mode of operation be found not to be a tribunal in the sense in which the term is normally used; and conversely, a body might not have the name ‘Tribunal’ or ‘Court’ but be found on closer examination to be capable of being so described. For instance, bodies with names such as ‘Board’ or ‘Commission’ often are given quasi-judicial functions; and would for the purposes of the FOI Act, constitute a ‘court’ or ‘tribunal’.
>
> In my view the following are some, at least, of the characteristics that a body called a ‘tribunal’ would be expected to possess. The body would –
>
> - be impartial and detached from the ordinary processes of executive government;
> - have a defined jurisdiction;
> - receive claims or applications;
> - determine claims following a process of examining submissions, receiving evidence and assessing that evidence by reference to standards of proof;
> - use a process of assessment that gives rise to the making of a reasoned decision applying the relevant law;
> - make a final order that is binding.

> The term ‘tribunal’ is used in contradistinction to the term ‘court’ to convey, I consider, that body has functions analogous to a court, but operates in a more informal way than a court and may have special procedures; and members may differ in qualifications and expertise from judges.

70. The question that arises is whether the Building Practitioners Board possesses sufficient of the characteristics usually associated with a “tribunal” to justify it as being properly described as a tribunal.

71. Section 12 of the *Building Act* establishes the Building Practitioners Board Section 12A deals with the membership of the Board:

(1) Subject to this section, the Minister –

(a) must appoint in writing the persons the Minister considers appropriate to be members of the Practitioners Board; and

(b) must appoint in writing –

i. one of those members to be the Chairman of the Board;

ii. another of those members to be the Deputy Chairman of the Board.

(2) Without limiting subsection (1) (a), a member of the Advisory Committee or a member of the Appeals Board may be appointed as a member, but the Director cannot be appointed as a member.

(3) At least one member must be a legal practitioner who is enrolled as a legal practitioner (however described) of the High Court, the Supreme Court, or the Supreme Court of a State or Territory of the Commonwealth and been so enrolled for at least5 years

(4) The members who are not legal practitioners (the ‘industry members’) must be persons the Minister considers have appropriate experience in the building industry or matters connected with the building industry.

(5) If practicable, at least one member must be appointed to represent the interests of each category of building practitioner.

(6) An industry member who is appointed to represent the interests of a category of building practitioner must be –

a) registered in the category of building practitioner the member is appointed to represent; and

b) chosen by the Minister in accordance with section 12B.

(7) An industry member cannot be appointed to represent more than one category of building practitioner, but 2 or more industry members may be appointed to represent the interests of the same category of building practitioner.

(8) In this section -

'category of building practitioner' does not include a sub- of building practitioner.

72. Section 12B of the Act deals with the procedure for choosing members for categories of building practitioner

73. Section 14 addresses the functions and powers of the Board:

(1) The functions of the Practitioners Board are -

(a) to establish and maintain a system of performance reporting on building practitioners to ensure that information on past performance is available and able to be taken into account when assessing the competence of building practitioners;

(b) to register persons as building practitioners;

(c) to monitor the compliance of building practitioners with their registration requirements;

(d) to monitor the competence to practice and professional conduct of building practitioners;

(e) to conduct inquiries into the work and conduct of practitioners and, if necessary, to discipline building practitioners;

(f) to develop and publish codes of practice about work and conduct of building practitioners for reference by building practitioners for use by the Board and the Director in assessing the work conduct of building practitioners

(g) any other functions imposed on the Board by this or another Act or the Minister.

(2) The Practitioners Board has such powers as are conferred on it by or under this 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 powers.

74. Division 1 of Part 111 of the Act deals with the registration of building practitioners, and is referable to the registration function performed by the Board.

75. Section 23 prescribes the procedure for applying for registration as a building practitioner. Section 24 deals with the requirements for registration as a building practitioner. The Board must be satisfied as to the prescribed matters in order to register a person or a corporation as a building practitioner. Section 24A prescribes the procedure for applying for registration as a building contractor. Section 24 B sets out the matters in relation to which the Board must be satisfied in order to register a person or a corporation as a building contractor. As referred to earlier, s 24C deals with the registration of building contractors (transitional). Again, the Board must be satisfied as to the prescribed matters before granting the registration of a person or corporation as a building practitioner in the category of building contractor. Section 24E of the Act deals with applications for renewal of registration. Section 24F sets out the matters in relation to which the Board must be satisfied in order to renew the registration of a person or a corporation as a building practitioner.

76. Section 24FA entitles the Board to rely on certain reports and information for the purpose of satisfying itself as to the preconditions for registration.

77. Section 24FB requires the Board to give written notice of its decisions in relation to registration or renewal of registration as soon as practicable after the making of the decisions. The notice must set out the reasons for the decision and the procedure for commencing an appeal under Division 4 of Part 3 of the Act.

78. It should be noted the Act also establishes a Board known as the Building Appeals Board: see s 17. That Board has the functions and powers set out in s 19 of the Act. None of its functions impinge upon the activities of the Practitioners Board: it exercises it own specialised jurisdiction.

79. Having regard to the legislative scheme for registration and the functions and powers of the Practitioners Board, I consider that the Board possesses sufficient of the usual characteristics of a "tribunal" to enable it to be described and regarded as a "tribunal':

- The Board has been established in such a way as to leave no doubt about its independence and impartiality;
- The Board exercises a defined – and specialised – jurisdiction;
- The Board has as one of its members a legal practitioner, who is no doubt there to assist the Board in determining legal matters that may arise during the course of the Board's exercise of its functions and powers;
- The Board receives and determines applications for registration and renewal of registration;
- The Board receives evidence in support of an application and examines and assesses that evidence by reference to a standard of proof – that of "satisfaction". That standard should be read as "reasonable

satisfaction", being the conventional standard of proof applicable to tribunals. In dealing with the evidence presented to it, the Board does more than merely examine the evidence to see if it conforms to the statutory requirements. It evaluates the evidence, particularly in relation to s 24C applications, when it comes to consider the criteria set out in s 24C(2) (c) – "qualifications and experience determined by the Minister". In that regard, the Board may, as in the present case, have to consider whether an applicant has equivalent practical experience.[30] That involves the exercise of at least a quasi-judicial function. It certainly entails the exercise of a discretion;

- The Board appears to be bound by the principles of natural justice and procedural fairness, which is one of the hallmarks of a tribunal exercising quasi – judicial functions.[31] Indeed, the Board appears to have been extremely fair in giving the appellants ample opportunity to present material to the Board in support of their applications;

- In reaching a conclusion in relation to an application for registration the Board must come to a reasoned decision applying the relevant provisions of the Act;

- The Board's decision is binding subject to a right of appeal granted by s 36A(2) of the Act;

- Although it does not conduct a hearing in the curial sense, or in an adversarial context, the Board conducts a "hearing on the papers". Although lacking formality and technicality, the Board's hearings are analogous to those conducted by some criminal injuries compensation tribunals in Australia. Such tribunals clearly perform quasi-judicial functions;

[30]The equivalency provisions are discussed below, pp 32 - 47.
[31] It was conceded on behalf of the appellants that the Board was bound by those principles. In fact, a complaint was made that the Board had denied the appellants procedural fairness in relation to the issue of "competence" in the context of s 24C (2) (d) of the Act.

- The fact that the Board does not engage in an adversarial process does not derogate from its characterisation as a tribunal;

- The Board's decisions create rights or privileges connected with a grant of registration. Conversely, its decisions may have the effect of denying rights or privileges;

- A decision of the Court under s 36B (1)(b) or (c) is taken to be a decision of the Practitioners Board. This has the effect of elevating the status of a decision of the Board to at least a quasi-judicial level;

- Although the present case does not involve the exercise of such power, the Board has the power to conduct inquiries into work practices and discipline building practitioners. At that level, the Board is clearly exercising a quasi-judicial function.

80. In my opinion, the Board does not perform a purely executive or administrative function. It performs an important regulatory role to which there are attached significant adjudicative functions, and hence quasi-judicial functions.

81. Not only is the Practitioners Board a tribunal, it is a specialist tribunal.[32] Consequently, its decisions should be given considerable weight and not be lightly overturned.[33]

82. The respondent relied upon the following extract from the judgment of Olsson J in *Avon v AAT* (1997) 69 SASR 7 at 36:

> In the present case what is an issue is clearly not an appeal stricto sensu. It is a process in which this court is required to reconsider the decision complained of, in the setting which gave rise to it, on a broad basis, having regard to the nature of the jurisdiction exercised under the Act; and to form it own opinion as to the propriety of what was done. In doing so it will, on the one hand, not be fettered by technical principles relating to the conduct of appeals, but will necessarily bear in mind and give due

[32] See above, p 13.
[33] See paragraph 29, p 10 of the respondent's written submissions.

> regard to the fact that the decision appealed against is that of a specialist tribunal, which ought not, lightly, be overturned. On the other hand, it is clearly the intention of the statute that this court is to exercise an independent judgment in assessing whether or not the court appealed from fell into error in relation to the merits of the proceedings. It must formulate its own conclusion and should not hesitate to give effect to it, if it believes that there are suasive reasons for dissenting from what was done by AAC.

83. Reliance was also placed upon the observations made by Hasluck J in *Thomas v The Medical Board of Western Australia* [2005] WASC 244 to the effect that "the decided cases show that the appellant must persuade the Court that the decision appealed from was in error", and that "an appellate court should be slow to overturn a specialist Tribunal's findings on penalty unless the Tribunal's discretion has clearly miscarried."

84. Similarly, the respondent relied upon the statement made by Owen J in *Re Hodgekiss* (1962) 62 SR (NSW) 340 at 343:

> The Statutory Committee is a tribunal of practising solicitors of standing…Such a tribunal is eminently fitted to decide whether the conduct of a solicitor in any given set of circumstances amounts to professional misconduct and to determine what is the proper penalty in any particular case. While an appeal from its decision to the Court is in the nature of a rehearing, the Court should great weight to and be slow to differ from the Committees' opinion that particular acts or omissions by a solicitor do or do not amount to professional misconduct…

85. However, the respondent drew the Court's attention to this further statement made by his Honour at 343:

> [The Court must] make up its mind what facts are proved by the evidence and what inference should be drawn from those facts…To do otherwise would be to disregard the legislative direction that the appeal shall be in the nature of a rehearing.

86. Finally, the respondent relied upon what was observed by Kennedy J in *Bradshaw v Medical Board of Western Australia* (1990) 3 WAR 322 at 326; 328. With reference to the decision in *Georgoussis v Medical Board* (Vic) [1957] VR 671 at 679, his Honour stated:

> …no doubt the court must know what application was made to the Board and what the Board's decision was, in order that the court may perform its own function and frame its own order. And where medical questions are involved, the court, if it in fact has the Board's opinion placed before it, will usually attach great weight to that opinion, as it is to the Board's views on credibility if the evidence given before the Board happens to be used upon the appeal.
>
> The last point is of some importance, it having been long accepted that a judge on a rehearing should not put out of mind anything done by the Board…
>
> But this should not be seen as derogating from the primary duty of the appellate judge to make up his own mind what facts are proved by the evidence and what inferences should be drawn from those facts, always giving due weight to the opinion of the Medical Board.

87. Rowland J echoed those views at 335 of the decision:

> [the appeal judge] would start off wanting to give great weight to the views of members of the Board, composed as they are of members of the profession who have been appointed to the Board for the simple reason that they are members of the profession, unless the facts or views are such that he is unable to accept either the facts as found or the views as expressed. To do otherwise is to avoid the whole purpose of having a specialist tribunal appointed for that purpose. That is not to suggest that he could not, or should not, overturn their decision if, after having considered the whole of the evidence, he believed that the decision was wrong.

88. In light of the authorities to which I have been referred, I am of the opinion that the Court should be slow to overturn the decision of the Board; however, the weight that should be given to that decision should not be allowed to derogate from the primary duty of the Court, which is to make up its own mind as to the correctness of the decision made by the Board.

89. However, if I have erred in characterising the Practitioners Board as a specialist tribunal, that does not mean that the Court should not have accorded any weight to the Board's decision. The Court would have had the discretion to attach such weight to the decision as it considered proper. [34] In deciding what weight it would be proper to accord to the decision reached by the Board, the

[34] See *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6 at 8. See also *Southern Motors Pty Ltd v AGC Ltd* [1980] VR 187.

fact that the Board is a specialist board consisting of hand-picked experts in the building industry would be a very relevant consideration. The Board is not a generalist licensing body operating in a variety of areas.[35] It is a specialist board, operating in a specific area of licensing law, whose undoubted expertise should be recognised and respected when determining what weight should be accorded to the decision, which is the subject of this appeal.

90. The upshot is that even if I had concluded that the Board was not a specialist tribunal, but merely a specialist body performing administrative functions, I would still have attributed substantial weight to its decision. However, in doing so, I would not have lost sight of the primary function of the Court, which is to reconsider the decision of the Board and to exercise an independent judgment in assessing whether or not the Board erred in reaching the decision it did.[36]

THE ISSUE OF EQUIVALENCY

- **The Submissions**

91. Considerable attention was given to the question of equivalency by both parties, as the second appellant's application was rejected on the grounds that he did not have qualifications and experience determined by the Minister: see s 24C(2)(c) of the Act.

92. In its written submissions, the respondent submitted that "the question of equivalency must be considered in the context of clause 24.1(a), which refers to recent relevant experience."[37]

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[35] In the second reading speech to the Bill to amend the *Building Amendment Act in 2005* the nature and composition of the Board was described by the Minister in the following terms:

> The Board is comprised of members appointed by the Minister having experience in the building industry or matters connected with the building industry. The purpose of the Board is to ensure that the qualifications and performance of building practitioners is commensurate with their responsibility under the *Building Act* to the Northern Territory community and government. The introduction of the *Building Act* 1993 changed the government's role from one of operational administration of building control to one of supporting private sector professionals in their achievement of appropriate building standards.

[36] See *Avon v AAT* (1997) 69 SASR 7.

[37] See paragraph 36, p 13 of the written submissions.

93. As referred to earlier,[38] clause 24.1(a) requires at least 3 year's practical experience in the building industry, including, during the 3 years immediately prior to the date of the application for registration, principal responsibility for 3 building projects involving the carrying out of building work for which a building contractor residential (unrestricted) is a prescribed building contractor and in relation to which a an occupancy permit was issued.

94. The equivalency requirements are set out in clause 24.1(b) of the Ministers Determination:

> practical experience that, in the opinion of the Practitioners Board, is equivalent to the experience referred to in paragraph (a).

95. The respondent stresses that the appellants' application is for registration in the unrestricted category, which would enable a registered building contractor to take principal responsibility for residential buildings of any height.[39] The respondent submits that this is an aspect that must influence the interpretation of clause 24.1(b).

96. In arguing a particular interpretation of clause 24.1(b), the respondent relies upon the ordinary meaning of the words "equivalent to", as appear in the clause.[40] According to the Concise Oxford Dictionary the words mean "equal in value, amount or importance.[41]

97. In *FCT v Radilo* (1996) 142 ALR 305 at 311 Lee J discussed the meaning of the word "equivalent" in a section of the Income Tax Assessment Act 1936.

[38] See above, p 11.
[39] See paragraph 36, pp 13-14 of the written submissions.
[40] See paragraph 37, p 14 of the written submissions.
[41] See paragraph 37, p 14 of the written submissions.

The phrase being construed was "the payment of the dividend may reasonably be regarded as equivalent to the payment of interest on a loan." His Honour said:

> For an occurrence to be said to be equivalent to another it must have equality in value of significance; or correspondence in import, characteristic or meaning; or have identical effect or be virtually the same thing: see the *Oxford English Dictionary* (2nd ed Clarendon Press, 1989) Vol 5, 'equivalent'. In our opinion, Parliament has applied the word 'equivalent' in ss46C and 46D in this sense in that there is a requirement that the circumstances under which the dividend is paid on a share in a company must correspond with the circumstances in which interest is payable on a sum borrowed.

98. In the same case, Sackville and Lehane JJ discussed the meaning of "equivalence" at 316:

> The *Macquarie Dictionary* defined 'equivalent' as follows: '1.equal in value, measure, force, effect, significance, etc 2. corresponding in position, function, etc.'
>
> As Fox J observed in *Linhart v Elms* (1988) 81 ALR 557 a case involving the Extradition (Foreign States) Act 1966 (Cth), it not easy to judge equivalence except by reference to some standard or purpose…

99. In *Tax`Agents' Board of Queensland v Seymour* (1990) 94 ALR 635 Pincus J said that the word "equivalent" appearing in Regulation 58CA(1) of the Income Tax Regulations.[42] His Honour found that the word "equivalent" in sub-paragraph (c) of the Regulations did not connote precise equivalence to the qualification in sub-paragraph (a).

100. In *World Best Holdings Ltd v Sarker* [2004] NSWSC 1164 Patten AJ considered the meaning of the words "equivalent experience" in the context of a legislative provision that provided for unconscionable conduct matters to be heard by a retired judge of the Supreme Court or the Federal Court, or a lawyer of "equivalent experience or qualifications". In that case issue was

[42] The regulation required that an applicant have (a) been engaged in relevant employment on a full time basis for not less than a total of 12 months in the preceding 5 years; (b) otherwise been engaged in relevant employment to an extent that the Board regards as equivalent to that referred to in sub-paragraph (a); or (c) been engaged in such other employment and for such time as the Board regards as equivalent to being engaged in relevant employment as referred to in sub-paragraph (a).

taken with the appointment of a member of the Administrative Appeals Tribunal of NSW. It was claimed that the member was not qualified to hold such an appointment, in particular he did not have equivalent experience or qualifications.

101. His Honour held that although the provision did not require precise equivalence, it required "considerably more than mere qualification for appointment as a judge of the Supreme Court or of the Federal Court".[43] His Honour went on to say:

> …I cannot escape the conclusion that Parliament intended, by the clause, that the man or woman hearing unconscionable conduct claims would have judicial experience of a high order. No other person, in my view, could be said to have the experience and qualifications of a judge of the Supreme Court or the Federal Court. The expression 'equivalent experience or qualifications' would encompass many other classes of former judicial officers, including, for example, retired justices of the High Court and retired judges of other Australian superior courts.

102. The respondent submitted that clause 24.1 of the Minister's Determination should be read in the context of the following statement made by the Minister, Dr Burns, during parliamentary debates:

> We have also indicated that we would have a generous grandfather aspect to this Bill. In other words, if people are operating as principal builders within the Northern Territory building scene and they have a demonstrated history of completion of works and competence in building, we are not looking at putting obstacles in front of them.[44]

103. The respondent submitted that the extrinsic material indicated the need for recent experience or activity within the construction industry.[45]

104. It was submitted by the respondent that as clause 24.1(a) imposed a specific requirement of current or recent activity within the industry "it would be a

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[43] See p 9 of the unreported judgment.
[44] See paragraph 38, p 14 of the respondent's written submissions. The respondent submitted that clause 24.1 should also be read in light of the following statement by the Minister , in the second reading speech:
"Existing builders who demonstrate competency to do building work will be registered and, subject to ongoing satisfactory performance, will qualify for re-registration".
[45] See paragraph 38, p 14 of the respondent's written submissions.

departure from that objective if clause 24.1(b) were treated as disjointed and as having no relationship to clause (b)".[46]

105. The respondent placed heavy reliance on the Board's documented policy in relation to the matter of "equivalency" (Exhibit 6):

> Clearly the Board, through its policy [which, in relation to the equivalency requirement, retains the nexus with recent activity] considers that recent experience is important as a prerequisite to registration.[47]

106. Clause 3.3.1.2 of the policy document, which deals with "Matters for Consideration in Evaluating Equivalence, reads as follows:

> In developing these Guidelines the Board has taken into account a number of matters which have emerged from an examination of the legislation, regulations, determinations, the content of numerous applications and the Board's collective experience in the building industry.
>
> In the Board's view the matters that should be considered in determining equivalency include but are not limited to:
>
> - An assumption that applicants are currently or have recently been active in the residential building industry. It is more likely than not that the applicants rely on some income from construction of residences as a portion of their livelihood rather than an occasional investment activity.
>
> - The residential building industry relates to the construction of–
>
> Class 1 – a single dwelling being a detached house not located above or below another dwelling or another class of building other than a private garage or one or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, townhouse or villa unit not located above or below another dwelling or another class of building other than a private garage;
>
> Class 2 - a building containing 2 or more sole- occupancy units each being a separate dwelling (to any height for Unrestricted and to two storeys for Restricted);
>
> Class 10 - a non-habitable building being a private garage, carport, shed or the like attached to a Class 1a of Class 2 building if it is

[46] See paragraph 38, p14 of the respondent's written submissions.
[47] See paragraph 38, p 14 of the respondent's written submissions.

constructed at the same time as the Class 1a or Class 2 building is constructed;

and does not include commercial buildings of any class. However the Board recognises that the nature and type of construction techniques used in some other construction eg hotels, commercial accommodation and offices, are similar or equivalent in complexity to those used in residential buildings and that experience in this class of building may be acceptable as equivalent.

- Principal responsibility for a building project can not be determined solely by the issuing of a Certificate of Occupancy to a particular person although in many cases this is a useful indicator. The Board's view is that an applicant must demonstrate that they have experience in co-ordinating, supervising and managing the onsite activities of a complete residential project and have, as either the principal of the contracted entity or as an employee thereof, accepted full or substantial responsibility for delivering the project on time, within an approved budget or contract price and to be acceptable industry standard. The Board does not generally accept that 'principal responsibility' can be shared for a specific project but is prepared to examine evidence which suggests otherwise.

- Where an applicant is claiming experience for projects where a Certificate of Occupancy was not required eg outside prescribed building areas, the Board will require independent verification by a senior representative of the client or project manager that the applicant was principally responsible for the work and that the work had been carried out to a standard equivalent to that required by a Certificate of Occupancy.

- An application may be considered by the Board when an applicant demonstrates principal responsibility for at least one residential project in the past 3 years combined with principal responsibility for equivalent commercial projects undertaken on a regular basis prior to the 3 year period.

- Where an applicant for unrestricted registration has not demonstrated principal responsibility for a multi-storey project within the past 3 years the Board may take into account residential (or equivalent) multi-storey experience prior to the 3 year period provided the applicant has demonstrated principal responsibility of at least 3 substantial restricted projects in the past three years or has been continuously involved in the building industry in the NT for a substantial period of time which includes residential building work.

- Where an applicant has applied for unrestricted registration without substantive evidence of work in this category as defined above, the Board may, at its sole discretion, invite the applicant to amend

his/her application to a restricted registration where the evidence submitted clearly supports this approach.

- The Board may take into account any other matter the Board considers, at its sole discretion, to be relevant to the applicant's claim for equivalency.

107. As pointed out by the respondent, Clause 3.3.1.2 of the policy "specifically addresses the issue of equivalency by providing 'guidelines' to assist with the determination of whether an applicant's qualifications and experience is equivalent in the opinion of the Board".[48] Further, the respondent made the following submission:

> "The guidelines note the requirement in the Minister's determination that the applicant has recent experience as outlined in that determination. The guidelines then set out various factors that might be taken into account by the Board, one of which is 'an assumption that applicants are currently or have recently been active in the residential building industry' [s 3.3.1. 2, 1st dot point]. The issue of recent activity is evident throughout this part of the Policy.
>
> It is submitted that it is in that context that the experience of the second appellant and, in particular, the matters noted at paragraph 24, above, should be assessed."[49]

108. The submissions made in paragraph 24, pp 7-8 of the respondent's written submissions are set out in full:

> (i) As noted in the Minister's Second Reading… the intention in introducing the new Part 3 of the Act was to provide consumer protection by ensuring that residential builders are "qualified, experienced and competent". As a prerequisite to registration as a building contractor, there is a clear emphasis in the regulations and the Minister's Determination of 14 December 2005 …on recent, active involvement in the relevant category of residential construction. Also important is the requirement in the Determination of 'principal responsibility' for relevant building projects. In the Second Reading Speech to the Bill, the Minister stated:
>
> "Government concern is for the person building a new home or extending an existing one. Most people rarely embark on such projects and are not familiar with the nature of the work which involves a considerable

[48] See paragraph 40, p 16 of the respondent's written submissions.
[49] See paragraphs 40 -41, p 16 of the respondent's written submissions.

> investment. By requiring the builder, as the supervisor of the project, to be registered, reasonable consumer protection can be achieved."
>
> It is also there stated: "sub-contractors will not be required to be registered as they will be under the supervision of the principal residential contractor when building houses."
>
> (ii) There is no evidence of any relevant experience in the 3 years preceding the application. The most recent work was in 1997.
>
> (iii) There is evidence of experience in relation to only 2 buildings of more than 2 storeys, which buildings are specific to the unrestricted category for which the appellants applied. One of those buildings was of 4 storeys and completed in 1997, while the other was of 3 storeys and completed in 1995.
>
> (iv) Accordingly, relative to the requirements of the legislation, the second appellant was involved in only 2 buildings which are exclusive domain of a building contractor residential (unrestricted) and both were well outside the specified 3 year period.
>
> (v) If registration under the restricted category were allowed, it would mean that the second appellant could take principal responsibility for the construction of residential apartment buildings of any height.

109. The respondent also relied upon the purpose of the registration scheme as explained on page 3 of the policy document:

> …the purpose of the registration scheme is to impose certain minimum standards for the qualifications and experience of building contractors in two particular sub-categories within the residential market. The purpose of the transitional registration scheme in particular is to ensure that the building contractor has been actively building to an acceptable standard prior to the introduction of registration. This in turn, is intended to assist in maintaining building quality standards, reducing the incidence of poor quality work, increasing standards of work safety and amenity, prohibiting misleading conduct and providing a scheme for the protection of consumers of services provided by building contractors in the residential market.[50]

110. It was further submitted that the theme of recent activity was carried forth in s 24D and s 24F of the Act.[51] The former provision restricts registration to a two year period, which is renewable provided the criteria set out in s 24F is

[50] See paragraph 40, pp 15-16 of the respondent's written submissions.
[51] See paragraph 38, p 14 of the respondent's written submissions.

satisfied. One of those criteria is satisfactory performance within the industry by reference to "performance reporting".

111. At paragraph 39, p 15 of its written submissions, the respondent submitted that "practical experience should not only be recent but be relevant to the nature of the application as being in the unrestricted category". It was put to the Court that this requirement was evident from the following matters:

> (i) The only difference in the wording between clauses 23 [restricted category] and 24 [unrestricted category] is the words 'restricted' and 'unrestricted' in 23.1(a)(i) and 24(a)(i). By separating the provisions it must have been intended that they operate differently. In other words, it must have been intended that the experience required for unrestricted registration is quite different to that required for restricted registration. In particular, that the experience should be in relation to residential construction of 3 storeys or more.
>
> (ii) If equivalency in s 24.1(b) were ambulatory, so that 'equivalent' experience could be exclusively experience in the restricted category, it would rob the intended distinction between restricted and unrestricted registration of any real meaning. In that event, there would be no need for the separate categories.
>
> (iii) It is submitted that there is a clear distinction between the categories. That is particularly so given that the Northern Territory is prone to cyclones. The potential consequences of a multi-storey building not being of a requisite standard are considerably more serious than in relation to a low rise building.
>
> (iv) Again, it was clearly the opinion of the Board that the experience of the Board[52] was not relevantly equivalent in the context of the industry's expectations.

112. The respondent submitted that the internal policy developed by the Board (Exhibit 6) should be treated as a set of guidelines in relation to the issue of equivalent practical experience – as a reflection of what the Board considers to be equivalent practical experience. It was submitted that Exhibit 6 should be treated in a similar way to the "Guide to Permitted Advertising" published by the Western Australian Medical Board, which was discussed in

[52] "Board" should be read as "second appellant".

Bradshaw v Medical Board of Western Australia)1990) 3 WAR 322 at 336-337; 341.

113. The appellants submitted that a far broader interpretation should be placed on the clause 24 (1) (b) of the Minister's Determination, and should not be subjected to the narrow construction urged by the respondent.

114. In particular, it was submitted that "practical experience" as referred to in clause 24(1)(b) did not need to be temporal or geographical. Nor was it confined to the construction of buildings of 2 or more storeys. The appellants submitted that the sub clause contemplated different levels of past experience.

115. The appellants contended that clause 24(1)(b) meant something different to 24 (1) (a), and that was supported by the internal policy developed by the Board in relation to the issue of equivalency. It was stressed that Clause 24(1)(b) cannot mean the same as clause 24(1)(a), otherwise (1)(b) would have no work to do. Clause 24(1)(b) establishes an alternative to the requirements set out in 24(1)(a), and the former must be construed in that light.

116. Although the appellants were prepared to rely upon the internal policy document as support for a broader construction of clause 24(1)(b), it was submitted that the internal policy document did not have statutory force; nor was it the product of delegated legislation. It was submitted that the policy document could not be used as an aid for interpreting the Minister's Determination or the Act. As it was not a creature of statute, it should not be slavishly followed by the Court in reconsidering the appellants' applications. It was also submitted that, in the absence of evidence which showed that the internal policy document had been publicly and widely distributed, it should not be accorded the degree of authority that the "Guide to Permitted Advertising" was given in *Bradshaw v Medical Board of*

Western Australia (supra).[53] The appellants conceded that the Court could have regard to the policy, but not to the exclusion of the Court's common sense and ordinary experience.

- **The Meaning of Clause 24(1) (b) of the Minister's Determination**

117. In order for clause 24.1(b) to do any work it must mean something other than what is contained in clause 24.1(a): that is stating the obvious. The requirements contained in subclause 1(b) are alternative requirements to those prescribed in subclause 1(a). The question that arises is what relationship do those alternative requirements bear to the primary requirements?

118. The starting point is the words "equivalent to", as appears in clause 24.1(b). In my view the word is to be attributed its ordinary meaning, connoting equality in value, effect or significance. There is nothing about the context in which the word appears that would indicate that the words should be given any other meaning. Nor is there anything in the purpose or object underlying the Determination and/or the *Building Act* (including s 24C(2)) that would suggest a different meaning.

119. However, consistent with the view taken in *Tax Agents' Board of Queensland v Seymour* (supra) and *World Best Holdings Ltd v Sarker* (supra), I do not consider that clause 24.1(b) requires precise equivalence with the requirements in clause 24.1(a) of the Determination. In other words, the practical experience required by clause 24.1(b) does not have to be precisely equal in value, effect or significance to the practical experience required in clause 24.1(a) of the Determination. The provision does not require the Board or the Court to determine, with scientific accuracy,

[53] The appellants originally complained that the Board had not given them notice of the internal policy until October 2006, and for that reason the policy document should be given little weight. However, the evidence showed that the appellants were put on notice of the policy document in August 2006, prior to furnishing the Board with further material in support of their applications.

whether an applicant has practical experience equivalent to the practical experience described in clause 24.1(a).

120. These relatively mundane conclusions do not fully illuminate what is meant by “practical experience that, in the opinion of the Practitioner’s Board, is equivalent to the experience referred to in paragraph (a)”. The question that remains is what kind of practical experience is considered by the Board to be equal (though not precisely equal) in value, effect or significance to the practical experience referred to in 24.1(a).

121. At first glance, clause 24.1(b) appears to give the Board a completely unfettered discretion in deciding what amounts to equivalent practical experience. However, on a closer examination of the Determination that simply cannot be the case.

122. In my opinion, the Board cannot arbitrarily determine what amounts to equivalent practical experience. It must judge equivalence by reference to some standard, to borrow, in part, the words used by Sackville and Lehane JJ in *FCT v Radilo* (supra).The relevant standard is established by clause 24.1(a) of the Determination. In order to determine equivalence to a particular standard one must have regard to the nature and quality of that standard.

123. I agree with the submission made by the respondent that clause 24.1(a) of the Minister’s Determination imposes a specific requirement of current or recent activity within the industry and in relation to the construction of particular types of buildings. The need for recent experience or activity within a particular sphere of the construction industry is clear on the face of the provision. One does not have to have recourse to extrinsic material in order to discern that requirement; but if one goes to the extrinsic material, then that material clearly affirms the requirement.

124. I agree with the respondent’s submission that clause 24.1(b) should not be read as being disjointed from clause 24.1(a) and as having no relationship to

24.1 (b). Indeed, the use of the words "equivalent to" in clause 24.1(b) require there to be a nexus with 24.1 (a). In my view, in order to satisfy the equivalency requirement the alternative practical experience sought to be relied upon by an applicant under clause 24.1(b) must have a nexus with recent experience or activity within the construction industry, and must also be relevant to the nature of the application under consideration. If the application is for registration in the unrestricted category, as is the case here, then the practical experience must be relevant to that application. Any other construction of clause 24.1(b) would operate against the objective of clause 24.1(a), which is to require evidence of current or recent activity within a particular area of the construction industry as a precondition for registration in the unrestricted category under the transitional provisions. Any other construction would seriously undermine the integrity and effect of the primary requirement contained in clause 24.1(a), and thereby diminish the primacy of that provision.

125. In coming to that conclusion, I agree with the respondent's submission regarding the separation of clauses 23 and 24 of the Minister's Determination and the difference in wording between the two clauses.[54] In my opinion, it was clearly intended that the two clauses should operate differently, that is to say that the experience required for registration as a building contractor in the unrestricted category is quite different to that for registration in the restricted category. The effect of the differential treatment of the clauses is that where equivalent practical experience is relied upon that experience must be relevant to the category in respect of which the application is made. To adopt the words of the respondent, the practical experience must be "relevantly equivalent".

126. In construing clause 24.1(b) as I have, I also agree with the respondent's submission that if the requirement for equivalent practical experience were ambulatory, so that such experience could be exclusively experience in the

[54] See above, p 40.

restricted category of building contractor, it would deprive the intended distinction between restricted registration and unrestricted registration of any real meaning. In that event, there would be no need for the separate categories and separate schemes of registration.

127. As pointed out by the respondent, demonstration of recent activity in the industry is a theme that runs through the Act. The need for recent experience is evident in ss 24D and 24F of the Act.[55] The construction that I have imposed on clause 24.1(b) is entirely consistent with the statutory scheme and fits neatly into the statutory fabric.

128. A question that arises is how should the Court deal with the Board's internal policy document entitled "Registration Policy for Building Contractor (Transitional)", in particular clause 3.3.1.2 of the document which, as noted by the respondent, "specifically addresses the issue of equivalency by providing 'guidelines' to assist with the determination of whether an applicant's qualifications and experience is equivalent in the opinion of the Board".

129. It must be borne in mind that the Board's internal policy has no statutory force, and it cannot be used as an aid in interpreting either the Act or the Minister's Determination. So what role does the policy play in applications before the Board and on appeals to this Court?

130. When considering applications pursuant to s 24C of the Act the Board may be called upon to consider the provisions of clause 24.1(b), as in the present case. In such cases the Board needs to form an opinion as to what is equivalent practical experience, that is practical experience that is equivalent to the experience referred to in clause 24.1(a). Having formed that opinion, the Board needs to then consider whether the applicant possesses such practical experience.

[55] See above, pp 39 – 40.

131. Clause 3.3.1.2 of the policy document is a reflection of what the Board considers to be equivalent practical experience. As pointed out by the respondent, the clause provides a set of guidelines to assist with the determination of whether an applicant has equivalent practical experience. Where the guidelines are applied in consideration of an application, as appears to have been the case here, the contents of clause 3.3.1.2 become an integral part of the Board's opinion as to whether an applicant has practical experience equivalent to the experience referred to in clause 24.1(a) of the Determination. That is the real significance of the policy document.

132. In the present appeal the appellants' bear the onus of satisfying the Court that the Board's decision was wrong, and they may be able to do by showing that the Board's policy guidelines are inconsistent with the regulatory statutory scheme or, in applying those guidelines, the Board took into account irrelevant considerations.

133. I make the following observations regarding the guidelines set out in clause 3.3.1.2:

- The guidelines were developed "taking into account a number of matters which have emerged from an examination of the legislation, regulations, determinations, the content of numerous applications and the Board's collective experience in the building industry";

- The guidelines are not intended to be an exhaustive list of factors or considerations relevant to the determination of what amounts to equivalent practical experience;

- The guidelines provide that the Board may take into account any other matter it considers to be relevant to the issue of equivalency;

- The guidelines are not inflexible and leave scope for the exercise of discretion in relation to the consideration of other matters;

- The guidelines are consistent with the clear emphasis placed by the Act and the Minister's Determination on recent and relevant activity in the industry;

- The guidelines are the product of the collective expertise of the Board and, within the statutory framework, reflect good common sense.

134. Therefore, I am of the opinion that clause 3.3.1.2, which reflects the Board's general view of what amounts to equivalent practical experience in the context of clause 24.1(b), is soundly based.

THE ISSUE OF COMPETENCY

135. As stated earlier,[56] the Board refused the second appellant's application on a secondary ground, namely that the Board was not satisfied that he met the requirement for building contractors provided by s24C(2)(d) of the Act. According to that requirement an applicant must be competent to carry out work as a building contractor. In its decision, the Board stated that due to it being unable to be satisfied in relation to s 24C(2)(c) it could not be satisfied that the second appellant was competent to carry out work as a building contractor. The Board linked incompetence to lack of equivalent practical experience.

136. As I indicated at close of submissions, I do not intend to determine this aspect of the Board's decision, without hearing further submissions from the appellants and the respondent. However, I propose to make some provisional observations regarding the relationship between the requirements set out in s 24C(2) (c) and (d).

137. It is clear from the wording of s 24C(2) that each of the requirements set out therein are cumulative. In order to be granted registration as a building practitioner in the category of building contractor all of the requirements

[56] See above, p 3.

have to be met.

138. The requirement in s 24C(2)(a) is purely factual. It simply requires evidence of building work having been carried out prior to the commencement of the section. The requirement in subsection 2(e) is of a similar ilk. The requirements set out in subsections (2) (b) (c) and (d) are of a normative nature, requiring the Board to undertake an evaluation of an applicant's character or disposition, qualifications and experience and competency based on factual matters.

139. A question that arises in the present appeal is whether it is open to the Board to fail to be satisfied as to an applicant's competency solely on the basis that he or she does not satisfy the requirements of s 24C(2) (c).

140. I can envisage a situation where the requirements set out in s 24C(2) (c) and (d) would need to be considered separately by the Board. By way of example, an applicant may satisfy the requirements of clause 24.1(a) or 24.1(b) of the Minister's Determination, and yet during the course of that activity in the building industry may have performed building work in a less than satisfactory manner, thereby raising the issue of competency. Section 14(1) of the Act is very much to the point. Subsection (a) provides that one of the functions of the Board is "to establish and maintain a system of performance reporting on building practitioners to ensure that information on past performance is available and able to be taken into account when assessing the competence of building practitioners". Subsection (d) provides that another function of the Board is "to monitor the competence to practice and professional conduct of building practitioners". Yet another function of the Board is "to conduct inquiries into the work and conduct of building practitioners and, if necessary, to discipline building practitioners".

141. This example clearly shows that qualifications and experience, on the one hand, and competency, on the other hand, are quite different aspects, and can operate independently of each other.

142. However, what is the relationship between (a) qualifications and experience and (b) competency, when the Board is unable to be satisfied that an applicant does not have the requisite qualifications and experience? Does it automatically follow that the Board cannot be satisfied as to the applicant's competency? Can lack of competency be inferred from the absence of the requisite qualifications and experience?

143. "Competence" is not defined in the *Building Act*. The word "competence" connotes the ability or skill of an individual to engage in a particular activity and, in the context of the *Building Act*, relates to the ability or skill of a person to carry out work in a particular category. Competence also entails an element of knowledge, and in the present context, would involve knowledge of relevant working practices dictated by the prescribed category.

144. Competence needs to be established as at the date of the application. Competence is not a static human attribute. It is susceptible to change: it may increase or decrease over time. An applicant may have been incompetent in the past, but has since become competent. Conversely, an applicant may have demonstrated competence in the past, but may no longer be competent or able to demonstrate current competence.

145. Competence is usually assessed on the basis of past performance. If an applicant lacks the relevant qualifications and experience, then it might be very difficult to assess the applicant's current level of competence. Where the applicant has some qualifications and experience, but they fall short of the prescribed standard, those qualifications and experience may not be sufficient, or may be too remote in time, to persuade the Board that he or she is competent, or sufficiently competent, as at the date of the application.

146. It will be readily appreciated that an applicant, who failed to satisfy the Board that he or she possesses the requisite qualifications and experience, would be confronted with the extremely difficult – and one might add

futile[57] - task of persuading the Board that he or she is nonetheless competent to carry out building work in a particular category.

147. However, for the reasons given above, I do not, at this stage, have to determine whether the Board was correct in not being satisfied about the competence of the second appellant on the basis of his failure to meet the requirements of s 24C(2) (c).

THE APPLICATION OF THE STATUTORY CRITERIA TO THE EVIDENCE

148. In my opinion, the Board was correct in concluding that the second appellant had failed to meet the requirements set out in s 24C(2) (c) of the Act.

149. On the evidence before the Board the second applicant failed to satisfy the requirements of clause 24.1(a) of the Minister's Determination. Furthermore the Board was correct in forming the opinion that the second appellant's qualifications and experience, as deposed to in his affidavit sworn 31 October 2006, were not equivalent to the experience referred to in clause 24.1(a).

150. In arriving at its opinion that the second appellant lacked equivalent practical experience, the Board did not err in applying the criteria set out in clause 3.3.1.2 of its internal policy document. I find no fault with the Board's approach.

151. As indicated earlier, the Board is a specialist tribunal[58] and considerable weight should be given to its decision, including its reasoning process. But even if the Board were not a specialist tribunal, then substantial weight should still be given to the Board's decision.[59] With its collective experience in the Building industry, the Board is well qualified to delineate the matters that should be considered in evaluating equivalence. I find no

[57] That is because the requirements set out in s 24C(2) are cumulative.
[58] See above, p 29.
[59] See above, p 32.

suasive reasons for departing from the Board's decision. In the Court's opinion, the second appellant lacks practical experience equivalent to the experience prescribed by clause 24.1(a) of the Determination.

152. What tells against the second appellant is that he lacks recent and sufficiently intensive involvement in the building industry.

153. As pointed out by the respondent,[60] the most recent relevant building work was back in 1997. Again as referred to by the respondent,[61] the second appellant was only able to provide evidence of experience in relation to 2 buildings of more than 2 storeys – the type of constructions covered by the unrestricted category for which the appellants had applied. One of those buildings, which was completed in 1997, consisted of 4 storeys. The other, which was completed in 1995, was 3 storeys in height.

154. I adopt the submission made by the respondent:

> Accordingly, relative to the requirements of the legislation, the second appellant was involved in only 2 buildings which are the exclusive domain of a building contractor residential (unrestricted) and both were well outside the specified 3 year period.[62]

155. As stated above,[63] the equivalency provision requires there to be some temporal relationship between clauses 24.1(a) and (b) – the practical experience must be recent. As to what is recent or not is a matter of fact and degree to be determined in the context of the activity under consideration. I have no doubt whatsoever that the last building work undertaken by the second appellant back in 1997 could not qualify as being recent activity or involvement in the building industry. In my view, almost a decade's absence from intensive involvement in the Northern Territory construction industry is far too long an absence.

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[60] See paragraph 24, p 8 of the respondent's written submissions.
[61] See paragraph 24, p 8 of the respondent's written submissions.
[62] See paragraph 24, p 8 of the respondent's written submissions.
[63] See above, pp 43 – 44.

156. In his affidavit sworn 31 October 2006 the second appellant describes his qualifications and experience, which he claims to be sufficient to satisfy the registration requirements of s 24C of the Act.

157. The second appellant claims that he is an established builder and developer with over 25 years experience in the building industry in the Northern Territory. It is a matter of examining that claimed experience to see whether in qualitative terms it satisfies the requirements of clause 24.1(b) of the Minister's Determination.

158. At paragraphs 17 to 18 of his affidavit, the second appellant refers to his experience in the construction industry in Algeria and the various skills he developed during the 1950's. Although I accept what he says about his formative years in the building industry, his experience in Algeria is very distant in time, and certainly could not satisfy the requirements of clause 24.1(b), which places a clear emphasis on recent activity in the residential building industry. There is the added problem of adjudging the relevance of that early overseas experience to the current standards of the construction industry in the Northern Territory.

159. At paragraph 20 of his affidavit, the second appellant refers to his experience in the building industry in France. Again the experience relied upon is remote in time. It also lacks specificity, thereby making it difficult to assess the relevance of that experience to contemporary building standards in the Northern Territory.

160. At paragraphs 21 to 38 of his affidavit, the second appellant describes his experience in the construction industry in the Northern Territory. Although the second appellant was actively involved in the Northern building industry in the 1980's and during the first three quarters of the 1990's, his last completed project was in 1997, as commented upon above.

161. In paragraph 39 the second appellant deposes as to a proposed unit development at Leydin Court, Darwin, which was under contemplation as

long ago as 1997. However, the project was shelved owing to then prevailing market conditions. The second appellant says that in relation to that project he had arranged for architectural and design detail drawings to be prepared, and had obtained Town Planning approval for same. To my mind, the work undertaken by the second appellant in relation to this proposed project was merely preparatory, and not sufficiently reflective of the normal numerous activities undertaken by a building contractor in either the restricted or unrestricted category nor of the considerable responsibilities assumed by a building contractor in either of those two categories.

162. The proposed project outlined in paragraph 41 of the second appellant's affidavit falls within the same category as the proposed Leydin Court development. Having been aborted, the second appellant's involvement in the project is not truly indicative of the duties and responsibilities of a registered building contractor in the Northern Territory.

163. During 1998 and 2002 the second appellant effectively absented himself from the construction industry due to a lull in the property market.[64] The work carried out on his investment properties can in no way be equated with the duties and responsibilities of a registered building contractor.

164. The second appellant's involvement in the proposed, but aborted, project at Bayview Boulevard Bayview, referred to in paragraph 43 of his affidavit, was again only preparatory and cannot be equated with what is expected of a registered building contractor in the Northern Territory.

165. At paragraph 45 of his affidavit the second appellant deposes as to a current and substantial project that he is contemplating at Leydin Court. Once again, this project is in its infancy, and has not progressed beyond the preparatory stages due to the second appellant not being able to obtain a building permit because that is contingent upon him obtaining a builder's licence.

[64] See paragraph 42 of the second appellant's affidavit.

166. At paragraph 46 of his affidavit, the second appellant refers to his reputation in the Northern Territory construction industry and experience in building, labour work, project management and development as well as his working knowledge of construction methods, project management, work health and safety requirements, building contract documentation and progress payments. They are clearly matters that have to be taken into account when considering whether the second appellant possesses equivalent practical experience. However, those claims of experience and expertise need to be examined and tested in the context of the equivalency requirements, which place a clear emphasis on recent activity within the industry. The problem that besets the second appellant is that he has not been sufficiently involved in the industry since his last relevant project, which was in 1997. Simply put, he has no recent relevant experience; nor has he demonstrated his claimed expertise in recent times.

167. As to his claimed competent reputation within the industry, the second appellant does not identify the basis upon which that reputation is built. If it based on his work up until 1997, then it is a past- not current – reputation, and hardly relevant in satisfying the equivalency requirements However, if it is built, in part, on what the second appellant has been doing since 1997, then one would have to seriously question the claim, because since 1997 the second appellant has been relatively inactive within the building industry; and usually competent reputation within a particular industry is based on active and visible involvement in that industry.

168. The matters set out in paragraphs 47 to 50 of the second appellant's affidavit are, of course, relevant considerations. But notwithstanding the contents of those paragraphs the second appellant has failed to show that he has equivalent practical experience, which must be of a recent and relevant nature.

169. The second appellant relied on the affidavit of Bruce Baldey sworn 31 October 2006 (Exhibit 3). The affidavit presents as a form of testimonial,

recommending the registration of the second appellant as a building contractor in the Northern Territory. Although Mr Baldey's opinion that the second applicant is worthy of registration needs to be taken into taken in considering whether the requirements for registration have been met, the Court needs to carefully examine the facts upon which that opinion is based.

170. Mr Baldey's opinion appears to be based on his professional relationship with the second appellant since 1990 and the construction work that the second appellant undertook for the Defence Housing Authority. Mr Baldey says that since the 1990's he has provided design services to the second appellant on a number of medium rise apartment projects, and he is currently documenting for him the proposed development at Leydin Court.

171. Mr Baldey's affidavit does not detail the second appellant's practical experience. It confines itself to a general description of the projects he has undertaken and apparent satisfaction with the quality of his work. The favourable opinion expressed by Mr Baldey also rests on those aspects. Neither the affidavit nor Mr Baldey's opinion makes reference to any recent, active involvement, on the part of the second appellant, in the building industry. The affidavit and the accompanying opinion needs to be weighed in light of those matters.

172. It is ultimately for the Court to consider whether in its opinion the second appellant has equivalent practical experience. Notwithstanding the opinion expressed by Mr Baldey – to which due regard has been paid - the Court has reached an opposite opinion. The second appellant does not have equivalent practical experience to warrant him being registered as a building contractor in the unrestricted category.

173. The second appellant also relied upon the affidavit of Colin Browne sworn 31 October 2006 (Exhibit 4). The contents of that affidavit are in a similar vein to the previous affidavit. Again notwithstanding the very favourable opinion expressed by Mr Browne, the Court believes that the second

appellant does not have equivalent practical experience to enable him to be registered as a building contractor in the unrestricted category.

174. Finally, the second appellant relied upon the affidavit of Maurice Kelly sworn 1 November 2006 (Exhibit 5). Of the three professionals who have supported the second appellant's application, Mr Kelly has known the second appellant the longest. Their professional relationship goes back to 1978. Of the three professionals he has had the greatest involvement with the second appellant: in particular see paragraph 5 of Mr Kelly's affidavit. Although the opinion of Mr Kelly should be given substantial weight it, like the other two supporting affidavits, has little to say about Mr Ricardo's involvement in the building industry over the last decade. Despite the glowing reference given by Mr Kelly, the Court has formed the opinion that the second appellant lacks equivalent practical experience.

175. I should add that even if the opinions of Mr Baldey, Mr Browne and Mr Kelly were viewed collectively, their combined effect would still not be sufficient to persuade this Court that the Board erred in refusing the appellants' applications on the grounds that the second appellant lacked equivalent practical experience.

176. The appellants bear the onus of satisfying the Court that the decision of the Board was wrong, and that the second appellant satisfied the requirements of S24 C(2) (c) of the *Building Act*. Having examined and evaluated the whole of the evidence before the Court I do not consider that the appellants have discharged that burden. The evidence is not sufficiently cogent to establish that the second appellant has equivalent practical experience to justify the registration of the appellants as building contractors in the unrestricted category.

177. As dealt with earlier,[65] the appellants applied for leave to adduce additional evidence at the hearing of this appeal. Leave was refused for the reasons

[65] See above, p 12.

given earlier. In dealing with that application, I had the opportunity of perusing the photographic evidence and other material upon which the appellants sought to rely. I must say that even if I had allowed the additional evidence to go before the Court for my consideration, that body of evidence, in my opinion, would not have advanced the appellants' case, in light of the construction I have placed on the equivalency provisions of clause 24.1(b) of the Minister's Determination.

DETERMINATION

178. I confirm the decision of the Board refusing to grant the appellants' applications for registration as a building contractor in the unrestricted category on the ground that the second appellant failed to satisfy the Board that he had the qualifications and experience as required by s 24C(2) (c) of the *Building Act*.

179. I consider it unnecessary to determine whether the Board erred in refusing the applications on the secondary ground that the second appellant lacked competence as required by s 24C(2)(d), unless the parties consider that I should deal with the matter in order to discharge my appellate function or the appellants wish me to determine the matter. If I proceed to determine the remaining issue I will, as indicated at the close of submissions, hear further submissions in relation to the issue of competence, including submissions in relation to my provisional observations concerning the interaction between s24C(2) (c) and (d) of the Act.

180. I will hear on the parties on the question of costs in due course.

Dated this 22nd day of February 2007.

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Dr John Allan Lowndes
STIPENDIARY MAGISTRATE