

Before the Building Practitioners Board

	BPB Complaint No. CB25523
Licensed Building Practitioner:	Andrew Templer (the Respondent)
Licence Number:	BP 127539
Licence(s) Held:	Carpentry; Site 1

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner

Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Location	Tauranga
Hearing Type:	In Person
Hearing Date:	23 November 2021
Decision Date:	30 November 2021

Board Members Present:

Mr C Preston, Chair
Mr M Orange, Deputy Chair, Barrister (Presiding)
Mr D Fabish, LBP, Carpentry and Site AOP 2
Mr R Shao, LBP, Carpentry and Site AOP 1
Ms J Clark, Barrister and Solicitor, Legal Member

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

The Respondent **has not** committed disciplinary offences under sections 317(1)(b) and (d) of the Act. The Respondent **has** committed a disciplinary offence under section 317(1) (da)(ii) of the Act.

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Summary of the Board’s Decision

[1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,500 and ordered to pay costs of \$1,000. The Respondent’s conduct with regard to the allegations of negligence or incompetence and carrying out or supervising building work not in accordance with the building consent were not established, and the Board makes no disciplinary finding in respect of them.

The Charges

[2] The hearing resulted from a Complaint about the conduct of the Respondent and a Board resolution under regulation 10 of the Complaints Regulations¹ to hold a hearing in relation to building work at [Omitted]. The alleged disciplinary offences the Board resolved to investigate were that the Respondent:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s317(1)(b) of the Act), IN THAT, there was inadequate supervision of the foundation work, engineering inspections were not undertaken, minor variations were not sought, and strap bracing was not in the correct position;

¹ The resolution was made following the Board’s consideration of a report prepared by the Registrar in accordance with the Complaints Regulations.

- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s317(1)(d) of the Act), IN THAT, the strap bracing was not in accordance with the Building Consent; and
- (c) failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act), IN THAT, he did not provide a Record of Work for the foundation work which he supervised. In addition, if at a hearing it is determined that he undertook or supervised other restricted building work on site then no Record of Work was provided for that work either.

Function of Disciplinary Action

[3] The common understanding of the purpose of professional discipline is to uphold the integrity of the profession. The focus is not punishment, but the protection of the public, the maintenance of public confidence and the enforcement of high standards of propriety and professional conduct. Those purposes were recently reiterated by the Supreme Court of the United Kingdom in *R v Institute of Chartered Accountants in England and Wales*² and in New Zealand in *Dentice v Valuers Registration Board*³.

[4] Disciplinary action under the Act is not designed to redress issues or disputes between a complainant and a respondent. In *McLanahan and Tan v The New Zealand Registered Architects Board*,⁴ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

[5] In a similar vein, the Board’s investigation and hearing process is not designed to address every issue that is raised in a complaint or by a complainant. The disciplinary scheme under the Act and Complaint’s Regulations focuses on serious conduct that warrants investigation and, if upheld, disciplinary action. Focusing on serious conduct is consistent with decisions made in the New Zealand courts in relation to the conduct of licensed persons⁵:

... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It

² *R v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, 19 January 2011.

³ [1992] 1 NZLR 720 at p 724

⁴ [2016] HZHC 2276 at para 164

⁵ *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (A) at 200

includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse.

- [6] Finally, the Board can only inquire into “the conduct of a licensed building practitioner” with respect to the grounds for discipline set out in section 317 of the Act. Those grounds do not include contractual breaches other than when the conduct reaches the high threshold for consideration under section 317(1)(i) of the Act, which deals with disrepute.
- [7] The above commentary on the limitations of the disciplinary process is important to note as, on the basis of it, the Board’s inquiries, and this decision, focus on and deal with the serious conduct complained about.

Inquiry Process

- [8] The investigation and hearing procedure under the Act and Complaints Regulations is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. Rather the Board sets the charges, and it decides what evidence is required at a hearing to assist it in its investigations. In this respect, the Board reviews the available evidence when considering the Registrar’s Report and determines the witnesses that it believes will assist at a hearing. The hearing itself is not a review of all of the available evidence. Rather it is an opportunity for the Board to seek clarification and explore certain aspects of the charges in greater depth.
- [9] Whilst a complainant may not be required to give evidence at a hearing, they are welcome to attend and, if a complainant does attend, the Board provides them with an opportunity to participate in the proceedings.

Evidence

- [10] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁶. Under section 322 of the Act, the Board has relaxed rules of evidence that allow it to receive evidence that may not be admissible in a court of law.
- [11] The procedure the Board uses is inquisitorial, not adversarial. The Board examines the documentary evidence available to it prior to the hearing. The hearing is an opportunity for the Board, as the inquirer and decision-maker, to call and question witnesses to further investigate aspects of the evidence and to take further evidence from key witnesses. The hearing is not a review of all of the available evidence.
- [12] In addition to the documentary evidence before the Board, it heard evidence at the hearing from:

[Omitted], Complainant

Andrew Templer, Respondent

⁶ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

[Omitted], Builder

[Omitted], Licensed Building Practitioner, [Omitted]

- [13] The Respondent's company, Templer Construction Limited, was contracted by the Complainant to project manage and carry out the construction of a steel framed shed to include two bedrooms, kitchen, lounge, dining room and a utility room with a shower/toilet/laundry.
- [14] The Respondent engaged a concrete subcontractor, [Omitted], to do the reinforcing and boxing for the floor. The Respondent, as the Licensed Building Practitioner, supervised this work and assisted with the concrete pour. He stated that, other than the floor inspection, he did not book, and was not involved in, any other Council inspections.
- [15] Once the foundations were complete, the Respondent engaged [Omitted] to construct the steel-framed shed. [Omitted] is a licensed building practitioner ([Omitted]).

Issue One - Foundations

- [16] The Complainant outlined issues with the foundation work including the building footprint being around the wrong way, (photograph 2.1.79 and Page 101 of the Board's files,) boxing being 800mm too long on one side (photograph at 2.1.76 and page 98 of the Board's file), and incorrect positioning of a shower box within a wall (photograph 2.1.80 and Page 102 of the Board's file).
- [17] [Omitted] stated that he had accepted the footprint and boxing errors at the time and had immediately fixed them. The Respondent stated that the shower box issue was a minor set out error and was easily fixed. The Respondent gave evidence that the foundation and concrete floor slab inspections were passed by the Building Consent Authority on 7 September 2018. The Complainant agreed that the Council inspection was passed. (Document 8.1.3 and Page 347 of the Board's file)

Issue Two – Engineer inspections

- [18] It was the Complainant's position that the Respondent failed to organise required Engineer structural inspections of the steel framing and insisted on proceeding with the wall and roof cladding. (Document 8.1.6.2 and Page 364 of the Board's file). The Complainant advised the Respondent not to proceed with the cladding on 5 December 2018 (Document 8.1.6.2 and Page 362 of the Board's file).
- [19] The Respondent gave evidence that the Engineer's structural inspection was not a requirement of the building consent and only arose in early December. [Omitted] agreed with this. On 4 December 2018, the Council advised that it required "construction monitoring/inspections for the primary structure carried out by the CPEng engineer..." (Document 2.1.54 and Page 76 of the Board's file).

[20] The Complainant requested the Respondent to use his Engineer – HFC Industrial Limited – and the Respondent advised that HFC did not want to come from Auckland to do this. The Complainant subsequently engaged [Omitted], [Omitted] to complete the required inspections. At this stage the parties’ relationship was breaking down and there are contractual disputes between them. The Respondent gave evidence that he had no further involvement with the project from this point. [Omitted] stated that he left the site at the same time.

Issue three – minor variations not sought

[21] The specified cladding in the building consent documents was Custom Orb and at the Complainant’s request, this was later changed to Plumbdek. As Custom Orb is a thermal break system and Plumbdek is a cavity system, this change in cladding necessitated changes in the flashings and a cavity. The Respondent gave evidence that for a minor variation to the building consent, such as he considered this was, he would have done it before the cladding inspection. However, the Respondent’s involvement with the project ended before this point. The cladding was not installed.

Issue four – strap bracing not in the correct position and not in accordance with the building consent

[22] [Omitted] of [Omitted] stated, in an email, that the roof braces were not aligned correctly in accordance with the consent drawings. (Document 2.1.85 and Page 107 of the Board’s files).

[23] The Respondent was no longer involved in the project at this stage. The Respondent’s and the Complainant’s evidence agreed on this point. [Omitted]’s commented that the issue as identified by [Omitted] was fixed by him the next day.

Issue five – Record of work

[24] The Respondent did have and acknowledged that he had the responsibility to provide the record of work for the foundation and concrete slab.

[25] He completed the supervision of this restricted building work by 7 September 2018, when the foundations and concrete slab passed the Council inspection. From this point on, the Respondent did not have responsibility for any further restricted building work. In any event, from late 2018 to early 2019, it was clear that the Respondent was not returning to the project at all.

[26] The Respondent had previously indicated in his response to the investigator that he would have provided the required record of work had he been paid. (Document 2.2.1 and Page 122 of the Board’s files).

[27] The Complainant gave evidence that she had repeatedly requested the record of work by email, registered letter and personally delivered letter.

Board’s Conclusion and Reasoning

[28] The Board has decided that the Respondent **has not**:

- (a) carried out or supervised building work or building inspection work in a negligent or incompetent manner (s 317(1)(b) of the Act); and
- (b) carried out or supervised building work or building inspection work that does not comply with a building consent (s 317(1)(d) of the Act).

[29] The Board has also decided that the Respondent **has** failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out (other than as an owner-builder) or supervise, or has carried out (other than as an owner-builder) or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) (s 317(1)(da)(ii) of the Act) and **should** be disciplined.

[30] The reasons for the Board's decisions follow.

Negligence and/or Incompetence

[31] Negligence is the departure by a licensed building practitioner whilst carrying out or supervising building work from an accepted standard of conduct. It is judged against those of the same class of licence as the person whose conduct is being inquired into. This is described as the Bolam⁷ test of negligence which has been adopted by the New Zealand Courts⁸.

[32] Incompetence is a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard. Beattie put it as "a demonstrated lack of the reasonably expected ability or skill level". In *Ali v Kumar and Others*,⁹ it was stated as "an inability to do the job".

[33] The New Zealand Courts have stated that an assessment of negligence and/or incompetence in a disciplinary context is a two-stage test¹⁰. The first is for the Board to consider whether the practitioner has departed from the acceptable standard of conduct of a professional. The second is to consider whether the departure is significant enough to warrant a disciplinary sanction.

[34] When considering what an acceptable standard is, the Board must have reference to the conduct of other competent and responsible practitioners and the Board's own assessment of what is appropriate conduct, bearing in mind the purpose of the Act¹¹. The test is an objective one, and in this respect, it has been noted that the purpose of discipline is the protection of the public by the maintenance of professional

⁷ Bolam v Friern Hospital Management Committee [1957] 1 WLR 582

⁸ Martin v Director of Proceedings [2010] NZAR 333 (HC), F v Medical Practitioners Disciplinary Tribunal [2005] 3 NZLR 774 (CA)

⁹ Ali v Kumar and Others [2017] NZDC 23582 at [30]

¹⁰ Martin v Director of Proceedings [2010] NZAR 333 (HC), F v Medical Practitioners Disciplinary Tribunal [2005] 3 NZLR 774 (CA)

¹¹ Martin v Director of Proceedings [2010] NZAR 333 at p.33

standards and that this could not be met if, in every case, the Board was required to take into account subjective considerations relating to the practitioner¹².

[35] The Board notes that the purposes of the Act are:

3 Purposes

This Act has the following purposes:

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
 - (i) *people who use buildings can do so safely and without endangering their health; and*
 - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
 - (iii) *people who use a building can escape from the building if it is on fire; and*
 - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

[36] Turning to seriousness in *Collie v Nursing Council of New Zealand*,¹³ the Court's noted, as regards the threshold for disciplinary matters, that:

[21] Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness.

[37] The Board finds that the foundation issues were minor in nature and were, at the time, readily addressed. On that basis, the Board, which includes persons with extensive experience and expertise in the building industry, considered the Respondent has not departed from what the Board considers to be an accepted standard of conduct and that the conduct was not sufficiently serious enough to warrant a disciplinary outcome.

¹² *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71

¹³ [2001] NZAR 74

Extent of Responsibility of the Respondent

- [38] The Complainant alleged offences by the Respondent in relation to the Engineer inspections, minor variations to the building consent and strap bracing not being in the correct position or in accordance with the building consent.
- [39] Based on the evidence before it, the Board finds that these matters were not the responsibility of the Respondent. He did not carry out or supervise these items of building work, and therefore, there is no relevant conduct warranting a disciplinary outcome. Also, the requirement for engineer inspections arose late in the build. It was not part of the original building consent inspection schedule.
- [40] The Respondent should note, for future reference, that minor variations must be sought prior to the proposed changes being made, not after they have been completed. This ensures that proposed change will actually be accepted by the Building Consent Authority as a minor variation as opposed to being considered a variation which requires a far more formal process and a cessation of all work until the amendment is granted.

Record of Work

- [41] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work¹⁴.
- [42] Failing to provide a record of work is a ground for discipline under section 317(1) (da)(ii) of the Act. In order to find that ground for discipline proven, the Board need only consider whether the Respondent had “good reason” for not providing a record of work on “completion” of the restricted building work.
- [43] The Board discussed issues with regard to records of work in its decision C2-01170¹⁵ and gave guidelines to the profession as to who must provide a record of work, what a record of work is for, when it is to be provided, the level of detail that must be provided, who a record of work must be provided to and what might constitute a good reason for not providing a record of work.
- [44] The starting point with a record of work is that it is a mandatory statutory requirement whenever restricted building work under a building consent is carried out or supervised by a licensed building practitioner (other than as an owner-builder). Each and every licensed building practitioner who carries out restricted building work must provide a record of work.
- [45] The statutory provisions do not stipulate a timeframe for the licenced person to provide a record of work. The provisions in section 88(1) simply states “on completion of the restricted building work ...”. As was noted by Justice Muir in

¹⁴ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

¹⁵ *Licensed Building Practitioners Board Case Decision C2-01170* 15 December 2015

*Ministry of Business Innovation and Employment v Bell*¹⁶ “... the only relevant precondition to the obligations of a licenced building practitioner under s 88 is that he/she has completed their work”.

- [46] As to when completion will have occurred is a question of fact in each case.
- [47] In most situations issues with the provision of a record of work do not arise. The work progresses, and records of work are provided in a timely fashion. On the evidence before the Board, the completion date of the Respondent’s work was at the earliest 7 September 2018, when the Council inspected the foundation and concrete slab. In any event, by early 2019, it was clear that the Respondent was not returning to the site. When the Territorial Authority’s file was obtained on 16 September 2020 it did not contain a record of work from the Respondent. On this basis, the Board finds that the record of work was not provided on completion as required, and the disciplinary offence has been committed.
- [48] Section 317(1) (da)(ii) of the Act provides for a defence of the licenced building practitioner having a “good reason” for failing to provide a record of work. If they can, on the balance of probabilities, prove to the Board that one exists, then it is open to the Board to find that a disciplinary offence has not been committed. Each case will be decided by the Board on its own merits, but the threshold for a good reason is high.
- [49] The Respondent’s reason for not providing the record of work was that he had not been paid. This is not an acceptable reason.
- [50] The Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [51] On that basis, the Board finds that no “good reason” has been established.

Penalty, Costs and Publication

- [52] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [53] The Board heard evidence during the hearing relevant to penalty, costs and publication and has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

¹⁶ [2018] NZHC 1662 at para 50

Penalty

[54] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*¹⁷ commented on the role of “punishment” in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

[55] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*,¹⁸ the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act, they do have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.

[56] Record of work matters are at the lower end of the disciplinary scale. The Board’s normal starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour. There are no aggravating nor mitigating factors present. As such, the Board sees no reason to depart from the starting point. The fine is set at \$1,500.

Costs

[57] Under section 318(4) the Board may require the Respondent “to pay the costs and expenses of, and incidental to, the inquiry by the Board.”

[58] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹⁹.

[59] In *Collie v Nursing Council of New Zealand*,²⁰ where the order for costs in the tribunal was 50% of actual costs and expenses, the High Court noted that:

But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.

¹⁷ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁸ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

¹⁹ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

²⁰ [2001] NZAR 74

[60] In *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*,²¹ the High Court noted:

[46] All cases referred to in Cooray were medical cases and the Judge was careful to note that the 50 per cent was the general approach that the Medical Council took. We do not accept that if there was any such approach, it is necessarily to be taken in proceedings involving other disciplinary bodies. Much will depend upon the time involved, actual expenses incurred, attitude of the practitioner bearing in mind that whilst the cost of a disciplinary action by a professional body must be something of a burden imposed upon its members, those members should not be expected to bear too large a measure where a practitioner is shown to be guilty of serious misconduct.

[47] Costs orders made in proceedings involving law practitioners are not to be determined by any mathematical approach. In some cases 50 per cent will be too high, in others insufficient.

[61] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate and complex. The current matter was moderate in complexity. Adjustments based on the High Court decisions above are then made.

[62] A full hearing was held, but only the failure to provide a record of work charge was upheld. The Board has determined, on that basis, that the amount of costs should be reduced. As such, based on the above, the Board's costs order is that the Respondent is to pay the sum of \$1,000 toward the costs of and incidental to the Board's inquiry.

Publication

[63] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act²². The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.

[64] As a general principle, such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.

²¹ CIV-2011-485-000227 8 August 2011

²² Refer sections 298, 299 and 301 of the Act

- [65] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990²³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction²⁴. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive²⁵. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*²⁶.
- [66] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest²⁷. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [67] Based on the above, the Board Will Not order further publication.

Section 318 Order

- [68] For the reasons set out above, the Board directs that:

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to \$1,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, in addition to the note in the Register and the Respondent being named in this decision.

- [69] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

Submissions on Penalty, Costs and Publication

- [70] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until close of business on **Wednesday 2 March 2022**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this decision will become final. If submissions are received, then the Board will meet and

²³ Section 14 of the Act

²⁴ Refer sections 200 and 202 of the Criminal Procedure Act

²⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

²⁶ *ibid*

²⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

consider those submissions prior to coming to a final decision on penalty, costs and publication.

- [71] In calling for submissions on penalty, costs and mitigation, the Board is not inviting the Respondent to offer new evidence or to express an opinion on the findings set out in this decision. If the Respondent disagrees with the Board's findings of fact and/or its decision that the Respondent has committed a disciplinary offence, the Respondent can appeal the Board's decision.

Right of Appeal

- [72] The right to appeal Board decisions is provided for in section 330(2) of the Actⁱⁱ.

Signed and dated this 8th day of February 2022.



Mr M Orange
Presiding

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*

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- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
 - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
 - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.”*

ii Section 330 Right of appeal

- (2) *A person may appeal to a District Court against any decision of the Board—*
 - (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*