



23 May 2018

Ms Lynelle Collins
Director
Building Professionals Board

Dear Ms Collins

It's time we caught up

depa is the union covering local government employees in New South Wales who are environmental, health, building and planning professionals. This includes building surveyors, many of whom are accredited as certifiers with the BPB.

We have had a long history and relationship with the BPB - particularly with then-President Sue Holliday, and then-Director Neil Cocks. We regularly received briefings from the Board at the conclusion of their meetings in that beautiful Oval room in Bridge Street because the Board understood that we were an important stakeholder providing industrial representation for the majority of your accredited certifiers.

But since the departure of Sue and Neil, our relationship has atrophied. I'm writing to revive it.

So while my primary purpose is to re-establish our relationship, the trigger for me doing so is an investigation that has been carried out by the BPB into a site in the Lake Macquarie local government area by an accredited certifier who is an employee of the Council and a member of ours.

That process is continuing with the Council and the certifier responding to the findings of the investigation later this month.

I have attached two emails. The first is our initial approach to the Board on 8 May trying to understand what was going on and the Board's response from the Manager Investigations and the second is a communication between the accredited certifier and a response from the Manager Investigations which contains information about how something which wasn't a complaint came to be investigated. Interestingly, the advice from the Board to the accredited certifier that an investigation had been conducted was signed off by the Manager *Complaint* Investigations, clearly in these circumstances an inaccurate title. (My emphasis.)

It's now clear, although it did take a considerable degree of effort to get this clarity, that there was no complaint made to the Board and that, as Mr Fagan puts it, the BPB can rely upon "intelligence or concerns that come to the Board's attention" and apparently have done so in this case. We find this alarming.

You will see from our initial email approach that at the time the Government decided that Council employees would be accredited as well, we thought it undesirable for an employee to have parallel accountabilities. That is, they would have a primary responsibility to the employer and then, at the same time, an accountability also to the BPB. We were concerned about whether there could be parallel but different types of investigations, with differing penalties or resolution.

These anxieties were resolved in discussions with President Sue Holliday with the assurance that if a complaint is made to a Council at the same time that it is made to the BPB, the BPB would allow the Council to conduct an investigation and the BPB would then be informed by that investigation and the Council's decisions in relation to the investigation - and there would be significant weight attached to these findings and the steps that had already been taken by the employer. And the BPB would, in what was regarded as the unlikely event that a complaint would be made to the BPB are not the Council, refer it to the Council for their investigation and subsequent report back - a bit like the ICAC can refer something back to an authority to investigate and then report again to the ICAC.

But while people have gone, the Board has been reconstituted and relocated, and things have changed in many ways, we found ourselves in a difficult position trying to understand how this investigation came to be an investigation by the BPB in the first place, whether there was a complaint, if there wasn't a complaint, what process had been introduced that we weren't aware of that had resulted in a change to what we understood as the historic arrangement between us, etc.

We have absolutely no idea what "intelligence or concerns that come to the Board's attention" means. We are alarmed it could mean gossip, partiality, subjectivity, vexatious enquiries, vexatious complaints during relationship separations, or collateral damage from an argument between an owner and a builder (and as it appears to be at Lake Macquarie) or whatever. At the very least, the accredited certifier should be informed.

So while reconnecting and re-establishing our relationships is our primary purpose, it does make sense that if the Board is to be conducting investigations based upon information obtained in some other way, and particularly in some unspecified way, that this be conveyed to accredited certifiers who are local government employees so they are aware of this additional and unforeseen process. It's another risk. We would like to talk to you about how to do that.

We'd also like to flesh out what it means, how you expect it would operate, how much information you should provide in these circumstances to certifiers, whether there are constraints on what shouldn't be considered for investigation, etc.

Please feel free to phone me. I think it would be a good idea as well for us to come to your offices at Parramatta and meet you and your Executive Board, or at the very least the President. I would also bring with me a member or two of ours with experience in these areas.

Regards



Ian Robertson
Secretary

Ian Robertson

From: Ian Robertson
Sent: Tuesday, 8 May 2018 9:45 AM
To: 'Sean Fagan'
Cc: [REDACTED]
Subject: RE: Investigations under s.46 of the BP Act

Thank you for the explanation, Sean.

Both the Council and Mr [REDACTED] have been in contact in one way or another with the Board to understand how Mr [REDACTED] comes to be under investigation. Neither have been told whether there is a complaint to the BPB about his performance, there has been no complaint made by the Council, but no one as explained to Mr [REDACTED] or to his employer, why this is happening.

This is the issue of concern for us.

Could you please take advantage of the opportunity of having depa, the accredited employee and the person responsible for all of the accredited employees at Late Macquarie involved in this email, and explain how the matter or the certifier were brought to your attention and why this investigation is occurring/

Regards

Ian Robertson
Secretary
depa

Ph: 9712 5255
www.depa.net.au

From: Sean Fagan [mailto:sean.fagan@bpb.nsw.gov.au]
Sent: Tuesday, 8 May 2018 9:38 AM
To: Ian Robertson <ian@depa.net.au>
Subject: Investigations under s.46 of the BP Act

Ian Robertson
Secretary
depa

Dear Mr Robertson

Investigations under s.46 of the BP Act

I refer to your email dated 4 May 2018 (copy below).

The Board is not able to comment on an investigation to anyone other than the certifier, unless that certifier has provided written confirmation to the Board that they are represented by another nominated person or body for the purposes of the investigation and a submission.

I therefore provide you with general comments in regard to the matters raised in your email:

- Under s.46 of Part 4 of the *Building Professionals Act 2005* (BP Act) the Board may at any time investigate the work and activities of an accredited certifier.

- Per s.46(1)(b) of Part 4 such an investigation can be made in regard to an accredited certifier carrying out certification work on behalf of a council.
- An investigation by the Board of a complaint is instead dealt with in Part 3 of the BP Act.
- The Board's Complaints Investigations unit/team who investigate complaints under Part 3 are also responsible for carrying out investigations under Part 4. Per s.46(5), the process for consideration of the results of the s.46 investigation adopts the complaints process under Part 3. The title of 'Manager Complaints Investigations' and the team were changed mid last week to align with the nomenclature on the current organisational chart.
- The BP Act does not authorise the Board to inform the employer of a certifier (including a council officer) that the certifier is the subject of an investigation.
- At the completion of an investigation, per s.46(3) of the BP Act the Board must send a copy of the report to the accreditation holder with a notice that states that they may make written submissions to the Board within 28 days.

Regards,

Sean Fagan

Manager Investigations, Building Professionals Board, Building Services

NSW Fair Trading | Department of Finance, Services and Innovation

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Please consider the environment before printing this email

From: Ian Robertson [<mailto:ian@depa.net.au>]

Sent: Friday, 4 May 2018 12:38 PM

To: Jonathan Lynch <Jonathan.Lynch@bpb.nsw.gov.au>

Cc: Sean Fagan <sean.fagan@bpb.nsw.gov.au>; Frank Rupolo <Frank.Rupolo@bpb.nsw.gov.au>; bpb-investigations <bpb-investigations@bpb.nsw.gov.au>

Subject: Investigation No. 1-03/18

Good afternoon Jonathan, and everyone else.

I have addressed this email to Jonathan because I've known him for a long time even though I'm not sure that is still there and, while in the old days I had instant and immediate access to the CEO, Chair/President and/or whomever else was relevant, our contact is rare and communication is imprecise.

But, I have had approaches from Lake Macquarie City Council about an investigation you are currently conducting into an employee of [REDACTED] who is accredited as A1 with the BPB. The Council is concerned, as you are aware, because there has been no complaint made to the Council about the job in question, nor the activities of the accredited certifier. And their contact with the BPB, as well as the accredited certifier's contact, has not established how, or if, a complaint has been made.

It's clear, seeing the letter dated 2 May to Mr [REDACTED] is signed off by the Manager Complaint Investigations, that there must've been a complaint. I think it follows logically, doesn't it?

The reason that depa is concerned is that when the Government mooted the idea of accrediting individual Council employees (we preferred accrediting the Council and then you lot leaving it to the Council to work out the appropriate allocation of resources etc.) as a union active in the industry and representing these individuals we were concerned that it would establish parallel accountabilities. First and foremost, the accountability of the employee to their employer and second, and with a significance at that stage not yet revealed, the accountability of the employee by virtue of the individual accreditation to the BPB.

At the time, and I remember it well because we had attended a meeting of the Board in one of those fabulous oval rooms in the Bridge Street building, that the Chair/President Sue Holliday assured us that if there were complaints to both the Council and the BPB, then the BPB would allow the Council to investigate it in the first instance and then would consider a report from the Council, what action if any had been taken etc, in determining the Board's response.

This is a bit like the capacity of the ICAC to refer a complaint to a government authority to conduct an investigation and then report back to them.

But, that was a long time ago and I'm uncertain whether the new regime at the BPB continues that commitment.

As neither the Council, nor the accredited certifier, have any idea how this matter comes to be investigated, and are met with a noncommittal responses from the BPB, I am writing to clarify this.

If I'm writing an email to the wrong people, please let me know and I can correct that, or you could forward it on to the right people for me, if you wouldn't mind.

If you think it needs a formal letter, and to someone in particular, I am more than happy to provide one.

The issue for us is of course that there appears to be an investigation being conducted without a complaint to either the Council or to the BPB.

In those circumstances there must be some mechanism or motivation by the BPB to investigate this accredited certifier and the Council, the certifier and depa is looking for an explanation.

On the face of it, it may well be that you simply don't like the idea that he is 70...

While there are some legislatively established retirement ages for judicial officers and others we are unaware of there being a concern about age with accredited certifiers.

In the absence of any proper explanation, we can only wonder. We note that the Anti-Discrimination Act would appear to take a dim view of some kind of investigation based upon age.

Please explain.

Ian Robertson
Secretary
depa

Ph: 9712 5255
www.depa.net.au

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From: Sean Fagan [<mailto:sean.fagan@bpb.nsw.gov.au>]
Sent: Monday, 21 May 2018 11:16 AM
To: [REDACTED]
Subject: Investigation No. I-03/18

Dear [REDACTED]

RE: Investigation No. I-03/18

I refer to your email to the Board earlier today (copy below) concerning the abovementioned matter.

In regard to questions raised in your email the following comments are provided:

- Under s46 of the *Building Professionals Act 2005* (BP Act) the Board may at any time investigate the work and activities of an accredited certifier.
- Per s.46(1)(b) such an investigation can be made in regard to an accredited certifier carrying out certification work on behalf of a council.
- The Board's decision to commence an investigation under s.46 of the BP Act of an accredited certifier's can be the result of intelligence or concerns that come to the Board's attention.
- The BP Act does not require the Board to notify the certifier that an investigation under s.46 has commenced, nor as to why the investigation has commenced. However, the Board decided to inform you by letter dated 7 March 2018 of its decision to commence the investigation and that it would be focused on your certification work in regard to a specific development.
- The current investigation under s.46 of the BP Act was not the result of a complaint. The Board is not investigating a complaint.
- Council officers are individually accredited under the BP Act, hence the Board notified you.
- The BP Act does not authorise the Board to inform the employer of a certifier (including a council officer) that the certifier is the subject of an investigation under the Act.
- It is evident that after the Board notified you in writing that it had commenced an investigation, you immediately informed your manager. The Board agrees it was entirely appropriate and prudent for you as a council officer to do so.
- At the completion of an investigation, per s.46(3) of the BP Act the Board must send a copy of the report to the accreditation holder with a notice that states that they may make written submissions to the Board.
- It is a matter for the certifier as to what documents and other supporting information they include in their submission to the Board for its consideration in response to an investigation report. For example, any council report in regard to the related matters and the outcome, or a supporting letter from a council manager addressing concerns that may be the result of council procedures.

The Board's investigation has now been completed i.e. on 2 May 2018 the Board issued to you the report per s.46(3) of the BP Act on the results of the investigation. The report was accompanied by a letter to you detailing the process going forward and the relevant statutory provisions of the BP Act.

You have been invited to make written submissions in respect of the Report within 28 days. In accordance with section 46(4) of the BP Act the Board must take into account any submissions received from you.

Regards,

Sean Fagan

Manager Investigations, Building Professionals Board, Building Services

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**Fair
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Please consider the environment before printing this email

From: [REDACTED] **Sent:** Monday, 21 May 2018 8:59 AM
To: bpb-investigations <bpb-investigations@bpb.nsw.gov.au>
Cc: Frank Rupolo <Frank.Rupolo@bpb.nsw.gov.au>; Sean Fagan <sean.fagan@bpb.nsw.gov.au>;
ian@depa.net.au
Subject: RE: ** INVESTIGATION REPORT ENCLOSED ** Investigation No. I-03/18

Messrs Fagan and Rupolo,

Thank you Sean for the explanation of those parts of the Act that are relevant here.

I am not so concerned about whether this investigation is happening under Part 3 or Part 4 of the Act but that it has happened at all, without my employer being made aware or becoming involved and without advice to myself.

I am particularly concerned that the Board started an investigation on 7 March into my work and activities because "of the Board's concerns about certification work in relation to a new dwelling at 51 Minmi Road, Edgeworth" but the Board has not advised me as to how they came to be concerned about that particular dwelling and my work in relation to it.

How did my work in relation to this particular dwelling come to the attention of the BPB?

Is the BPB in the process of investigating any other of my certification work?

Was there a complaint made to the Board? If so, by whom and why have I not been provided with a copy of that complaint?

Why has my employer, the Council, not been provided with a copy of that complaint?

I note the comments made by Mr Ian Robertson from depa and the historic understanding that the BPB, if there were to be an investigation of a Council employee, would, in the first instance, rely upon an investigation into any complaint conducted by the Council as part of the BPB's consideration. This is also my understanding.

Would you please explain this to me in a way that will provide a clear understanding to both myself and other accredited certifiers who are Council employees?

From: bpb-investigations [<mailto:bpb-investigations@bpb.nsw.gov.au>]
Sent: Wednesday, 2 May 2018 12:38 PM
To: [REDACTED]
Subject: ** INVESTIGATION REPORT ENCLOSED ** Investigation No. I-03/18

Dear [REDACTED]

RE: INVESTIGATION NO. I-03/18

Please refer to the **attached** correspondence issued by the Board to you today.

You are requested to confirm receipt of this email.

Kind Regards,

Cassandra Hodge

Assistant Business Support Officer, Building Professionals Board, Building Services
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