



Civil and Administrative Tribunal

New South Wales

Case Name: Wilmot v Commissioner for Fair Trading

Medium Neutral Citation: [2021] NSWCATOD 43

Hearing Date(s): 19 August 2020, 15 January 2021

Date of Orders: 13 April 2021

Decision Date: 13 April 2021

Jurisdiction: Occupational Division

Before: Dr J Lucy, Senior Member

Decision: (1) The respondent's decision to refuse the applicant's application for a contractor licence is set aside.
(2) In substitution for the respondent's decision, the applicant's application for a contractor licence is to be granted.
(3) The respondent is to effect the grant of the individual endorsed contractor licence to the applicant within 14 days of publication of these reasons.

Catchwords: ADMINISTRATIVE LAW – Home building – Application for contractor licence – Whether applicant satisfied criterion in respondent's policy of having experience in a wide range of building construction work – Whether applicant satisfied criterion in respondent's policy of having been supervised by the holder of a contractor licence when doing that work – Whether applicant satisfied statutory criterion of having experience enabling him to do, or to supervise, the work for which a supervisor certificate is required – Whether applicant is capable of doing or supervising work for which a supervisor certificate is required

Legislation Cited: Administrative Decisions Review Act 1997 (NSW)
Civil and Administrative Tribunal Act 2013 (NSW)

Home Building Act 1989 (NSW)

Cases Cited: Carrigan v NSW Fair Trading [2018] NSWCATOD 60
Edrees v Commissioner for Fair Trading [2021]
NSWCATAD 32
Locking v Department of Finance and Services [2013]
NSWADT 239
NEAT Domestic Trading Pty Ltd v AWB Ltd (2003) 216
CLR 277; [2003] HCA 35
Vitogiannis v Commissioner for Fair Trading,
Department of Customer Service [2020] NSWCATOD
157
Wall v Commissioner for Fair Trading [2017]
NSWCATOD 76
Watts v Commissioner for Fair Trading, Department of
Finance, Services and Innovation [2017] NSWCATOD
60
Whitehouse v Commissioner for Fair Trading [2017]
NSWCATOD 108

Texts Cited: None cited

Category: Principal judgment

Parties: Adam Wilmot (Applicant)
Commissioner of Fair Trading (Respondent)

Representation: Solicitors:
Applicant (Self Represented)
Department of Customer Service Legal (Respondent)

File Number(s): 2020/00141324

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

- 1 Mr Wilmot commenced working as an apprentice bricklayer in 2004. He has worked as a supervisor with a remedial building company since 2014, supervising many projects, some of which were of significant complexity.
- 2 Mr Wilmot applied for, and was refused, a contractor licence. The main reason for the refusal was that he did not have two years' experience in a wide range

of building construction work. That is required under a policy adopted by the respondent.

- 3 I have found that Mr Wilmot has at least two years' experience in a wide range of building construction work and that he satisfies the criteria in the respondent's policy. However, if I am wrong about this, I would depart from the respondent's policy as it would produce an unjust decision in the circumstances of this case. I am satisfied that Mr Wilmot meets the statutory criteria for the grant of a contractor licence, including that he is capable of doing or supervising work for which a supervisor certificate is required.
- 4 Accordingly, I have decided to set aside the respondent's decision and to order that Mr Wilmot be granted a contractor licence.

Background

- 5 Mr Wilmot commenced working in the building industry as an apprentice bricklayer in 2004. In the ensuing ten years, he worked for various brick and blocklaying companies, becoming a foreman or supervisor on jobs ranging from double brick houses to retirement villages with structural double brick footings and city high rise buildings.
- 6 In December 2014, Mr Wilmot gained a position as a supervisor in a remedial building company, Preservation Technologies.
- 7 Between 2017 and 2019, Mr Wilmot obtained a Certificate III in Construction Waterproofing, a Certificate III in Bricklaying/ Blocklaying and a Certificate IV in Building and Construction.
- 8 On 1 February 2020, Mr Wilmot applied for a contractor licence, under the *Home Building Act 1989* (NSW), in the category of general building work. He provided a referee's statement from Ramiro Garcez of Preservation Technologies, the holder of a contractor licence. Mr Garcez testified to Mr Wilmot's experience as site supervisor at a site in Fullerton Street, Woollahra from July 2017 to August 2018 and his experience as site supervisor at a site in Missenden Road, Camperdown from June 2015 to August 2016. Mr Wilmot also provided the names and contact details of two other referees, including Mr Peter Smith.

- 9 On 11 March 2020, the respondent, through NSW Fair Trading, refused Mr Wilmot's application (the Decision). The reason given for the refusal was that Fair Trading was not satisfied that Mr Wilmot had attained two years acceptable relevant industry experience in a wide range of building construction work.
- 10 On 3 April 2020, the applicant sought internal review of the Decision and provided more information in support of his application, including by naming more work sites where he said he had gained relevant experience.
- 11 On 17 April 2020, the internal reviewer affirmed the Decision, for the same reason given by the original decision-maker. The internal reviewer refused to consider the additional work sites provided by the applicant because they had not been verified by a licensed referee.
- 12 Mr Wilmot applied to the Tribunal for a review of the Decision.

Jurisdiction

- 13 The Tribunal has jurisdiction to review the Commissioner's refusal of applicant's application for a contractor licence under s 83B(1) of the *Home Building Act*, s 9 of the *Administrative Decisions Review Act 1997* (NSW) and s 30 of the *Civil and Administrative Tribunal Act 2013* (NSW).

Relevant legislative provisions

- 14 In determining an application for an administrative review of an administratively reviewable decision, the Tribunal is to decide what the correct and preferable decision is having regard to the material before it (*Administrative Decisions Review Act*, s 63(1)).
- 15 A contractor licence authorises the holder to contract to do certain residential building work (*Home Building Act*, s 21) and an endorsed contractor licence authorises its holder to do (and to supervise) the same residential building work, or specialist work, as it authorises its holder to contract to do (*Home Building Act*, s 28(1)).
- 16 The Commissioner for Fair Trading (referred to in the *Home Building Act* as the "Secretary") must refuse an application for a contractor licence in certain circumstances. Relevantly, s 20(1)(a) of the *Home Building Act* provides:

20 Issue of contractor licences

(1) The Secretary must refuse an application for a contractor licence if:

...

(a1) the Secretary is not satisfied as to the matters of which the Secretary is required to be satisfied by sections 33B and 33C, or...

- 17 The Commissioner does not rely upon s 33B of the *Home Building Act* and it is not relevant. The Commissioner contends that Mr Wilmot's application for a licence should be refused on the basis of s 33C(1)(b)(i), read with s 33D(1).
- 18 Section 33C(1)(b)(i) of the *Home Building Act* provides that a contractor licence must not be issued unless the Secretary is satisfied that the applicant, if also applying for an endorsement of the contractor licence to show that it is the equivalent of a supervisor certificate, satisfies the requirements of section 33D for the issue of a supervisor certificate to the applicant. There was no dispute that s 33C(1)(b)(i) applies in the circumstances of this case and that, as a result, s 33D applies.
- 19 Section 33D(1) of the *Home Building Act* provides as follows:

33D Additional requirements for obtaining supervisor and tradesperson certificates

(1) A supervisor or tradesperson certificate must not be issued unless the Secretary is satisfied that the applicant:

- (a) has such qualifications or has passed such examinations or practical tests, or both, as the Secretary determines to be necessary to enable the applicant to do, or to supervise, the work for which the certificate is required, and
- (b) has had experience of such a kind and for such a period as the Secretary considers would enable the applicant to do, or to supervise, the work for which the certificate is required, and
- (c) is capable of doing or supervising work for which the certificate is required.

- 20 The respondent accepts that Mr Wilmot has appropriate qualifications and has passed relevant examinations or tests within s 33D(1)(a). I am satisfied of the criterion set out in s 33D(1)(a).
- 21 The issue in this case is whether the Tribunal could be satisfied that Mr Wilmot "has had experience of such a kind and for such a period as the Secretary considers would enable the applicant to do, or to supervise, the work for which the certificate is required" within s 33D(1)(b) of the *Home Building Act*.

22 The Commissioner relies upon what the Commissioner describes as an “instrument,” a policy document which sets out the kind of experience which the Commissioner considers would enable applicants to do, or to supervise, the work for which a supervisor certificate is required and the period of the experience considered necessary by the Commissioner. For convenience, I will refer to this as the Instrument.

The Instrument

23 The Instrument is expressed to have been made under s 33D of the *Home Building Act*.

24 The respondent contended that Mr Wilmot did not meet the experience requirements in the Instrument. Accordingly, the respondent submitted that the decision to reject the applicant’s application was the correct and preferable decision.

25 The Instrument is entitled “Qualification requirements for an endorsed contractor licence or supervisor certificate for general building work” and is dated 31 March 2017. It is made by the Commissioner for Fair Trading and purports to be the Commissioner’s determination of, relevantly, the possession of experience necessary for an applicant for the issue of a licence to be “the possession of experience specified in Column 2 of Table A opposite the relevant matter in Column 1”.

26 Column 2 of Table A in Schedule 1 to the Instrument requires, relevantly, “At least two years’ relevant industry Experience in a wide range of building construction work, where the majority of that Experience was obtained within 10 years of the date on which the application is made.”

27 The Instrument defined “Experience” as follows:

“**Experience**’ means experience gained by the applicant as:

- a) an employee of; or
- b) a holder of a supervisor certificate and as a nominated supervisor for the contractor licence held by; or
- c) a holder of an endorsed contractor licence contracted to; or
- d) a holder of a supervisor certificate in the capacity of a nominated supervisor for a contractor licence held by an individual, partnership or corporation contracted to; or

the holder of a contractor licence authorising the holder to do the class of residential building work in which the experience was gained (“the Work”), where the applicant, during the relevant period, was:

- supervised and directed in the doing of the Work by the holder of an endorsed contractor licence or supervisor certificate authorising its holder to supervise the Work, and this is verified in the Relevant Application Form; and
- received Remuneration in accordance with law for the Work which the applicant carried out; or

e) a holder of a supervisor certificate in the category of full general building work or an endorsed contractor licence in the category of full general building work, held continuously for a minimum period of 2 years within 10 years from the date the application is made.”

Hearing

- 28 The matter came before me for hearing on 19 August 2020.
- 29 Prior to the hearing, the Commissioner filed written submissions. Those submissions considered the evidence which was then before the Commissioner (and the Tribunal). The Commissioner submitted that, based upon the available material, the Tribunal “could not be satisfied as to the necessary 2 year-experience in carrying out and supervising a wide range of residential building construction work.”
- 30 The Commissioner’s representative, Mr Coss, stated on the day of the hearing on 19 August 2020 that one of the Commissioner’s objections to the grant of a licence was the absence of a referee statement from one of the referees on whom Mr Wilmot relied, Mr Peter Smith. The Commissioner generally requires statements from two referees and had only one statement (from Mr Garcez) which did not satisfy the Commissioner that Mr Wilmot met the experience requirements.
- 31 With the consent of the parties, I made directions for Mr Wilmot to file and serve a referee statement from Mr Smith, and remitted the Decision to the Commissioner for reconsideration, pursuant to s 65 of the *Administrative Decisions Review Act*.
- 32 On 26 August 2020, Mr Wilmot filed a reference from Mr Smith and provided it to the Commissioner.
- 33 On 16 September 2020, the Commissioner decided to affirm the Decision.

- 34 The matter then returned to the Tribunal for a directions hearing and was listed again for a hearing before me, by telephone, on 15 January 2021.
- 35 Mr Wilmot represented himself at the hearing and Mr Coss, a solicitor employed in the Department of Customer Service, appeared for the respondent.
- 36 Mr Wilmot's referee, Mr Smith, gave sworn evidence by telephone and was cross examined by Mr Coss.
- 37 Mr Wilmot also gave sworn evidence and was also cross examined by Mr Coss.

Status of the Instrument

- 38 The Instrument is properly characterised as a policy document and is not delegated legislation (*Whitehouse v Commissioner for Fair Trading* [2017] NSWCATOD 108 at [39]; *Carrigan v NSW Fair Trading* [2018] NSWCATOD 60 at [30]-[32]; *Vitogiannis v Commissioner for Fair Trading, Department of Customer Service* [2020] NSWCATOD 157 at [16]).
- 39 The Tribunal may have regard to the Instrument "except to the extent that the policy is contrary to Government policy or to law or the policy produces an unjust decision in the circumstances of the case" (*Administrative Decisions Review Act*, s 64(4); *Whitehouse v Commissioner for Fair Trading* [2017] NSWCATOD 108 at [39]). There is nothing to suggest that the Instrument is contrary to any "Government policy" (defined to mean a policy adopted by the Cabinet, the Premier or any other Minister: *Administrative Decisions Review Act*, s 64(5)).
- 40 It follows that the Tribunal may have regard to the Instrument, except if it produces an unjust decision in the circumstances of the case.

Mr Wilmot's building experience

- 41 Mr Wilmot relies on his experience at sites in the following locations, in relation to which Mr Smith, of Preservation Technologies, has provided a reference:
- (1) An office building at Walker Street, North Sydney (from November 2014 to February 2015);

- (2) A commercial building at Mount Street, North Sydney (from June 2019 to August 2019);
- (3) Mallett Street, Camperdown (from April 2015 to October 2015);
- (4) Missenden Road, Camperdown (from June 2015 to April 2016);
- (5) Hampden Road, Artarmon (from February 2017 to March 2017);
- (6) Kurraba Road, Neutral Bay (from November 2016 to March 2017);
- (7) Elizabeth Street, Surry Hills (from October 2016 to November 2016);
- (8) Lamrock Avenue, Bondi Beach (from August 2017 to May 2018);
- (9) O'Brien Street, Bondi Beach (from January 2019 to February 2019);
- (10) Gow Street, Birchgrove (from September 2019 to December 2019).

42 Mr Wilmot also relies upon his experience for twelve months at Fullerton Street, Woollahra (from July 2017 to August 2018) and at Missenden Road, Camperdown (from May 2015 to August 2016). Mr Remiro Garcez of Preservation Technologies provided a reference in relation to these sites.

43 Mr Wilmot has provided a statutory declaration which includes details and photographs of the work done at Mallett Street, Camperdown, Lamrock Avenue, Bondi Beach and Gow Street, Birchgrove. He has also provided details and photographs of work done at a site at Ramsgate Road, North Bondi over ten months.

Mr Wilmot's Referee, Mr Peter Smith

44 Mr Smith, a civil engineer and licensed builder and a director of Mr Wilmot's employer, Preservation Technologies, provided Mr Wilmot with a reference. The first page of the reference is a short letter affirming that Mr Wilmot has overseen and successfully delivered a wide variety of remedial building projects with reference to an attached project list, incorporating the full range of building trades. Mr Smith expressed the opinion, in that letter, that Mr Wilmot has proved to be a diligent, competent and reliable builder, demonstrating a thorough understanding of the building process.

45 The second and third pages of the reference comprises the project list. Mr Smith states that Mr Wilmot has worked at ten sites (those listed above in these reasons, numbered 1 to 10) and provides details of the work which Mr Wilmot performed at each site. In response to questions during cross

examination, Mr Smith accepted that Mr Wilmot drafted the part of the reference outlining what he had done at each site. Mr Smith said that, when Mr Wilmot asked him for a reference, he may have asked Mr Wilmot to compile the information on the basis that he would review it and, if it was truthful, that he would put his signature to it. Mr Smith stated that he would not have signed the reference without a thorough review. He also said, when being cross examined, that he did not always recall on specific projects what Mr Wilmot had done.

- 46 Mr Wilmot confirmed, during cross examination, that he had written the project list part of the reference, but that Mr Smith had written the first page. He was asked about all the tasks he said he had performed and was not challenged on his evidence that he had, in fact, performed the tasks specified in the project list.
- 47 I accept that Mr Wilmot did the work as set out in the second and third pages of the reference (comprising the project list). I also accept Mr Smith's evidence that he had reviewed the project list and was satisfied that Mr Wilmot had done the work.

Walker Street, North Sydney (3 months)

- 48 Mr Smith's reference states that this job involved working on a high rise building with two large podium levels which were leading into offices. It involved removing all soil, plants and failed membrane from a deck then screeding with correct falls, adding a two-layer sheet membrane systems and even cutting and customizing the wall cladding system to achieve the correct termination to the membrane. The lower podium level was then tiled. The trade skills and knowledge needed are said to include the ability to read plans and to manage people, demolition, screed and tiling, waterproofing and painting.
- 49 When asked about Mr Wilmot's role on this site in cross examination, Mr Smith said that he was the "onsite presence" or foreman. Mr Smith said that he was one or two levels above Mr Wilmot in the supervisory chain of command. Mr Smith described Mr Wilmot as being there "at the coal face," predominantly supervising the work.

50 Mr Wilmot was also asked about this job in cross examination. He gave evidence that the waterproofing was done by subcontractors and that he “prepped” the surface. He said that he and others cut a groove the whole way around the building so that the membrane could go into it. He ordered the membrane and got it delivered. He described himself as the supervisor on site who “organised the trades to get there” and “ran” the site.

51 I accept that Mr Wilmot’s evidence as to the work he performed. He was not challenged on it.

Mount Street, North Sydney (2 months)

52 The Mount Street, North Sydney job involved removing concrete structural fins from a façade which was affected by concrete spalling. It was a commercial building.

53 Mr Wilmot described this as “quite a technical job” which was undertaken using a scaffold on the roof with a cage hanging off it with motors and another scaffold at ground level. The job required new steel reinforcement being attached to the building, the building of formwork to match the original fin shape then pouring a repair mortar from the top of the formwork whilst on a swing stage. The reference indicated that the skills involved included the ability to read plans, scope and manage people, demolition, concrete repair, form work, steel fixing, concreting scaffolding and painting. Mr Wilmot said, in oral evidence, that he had to organise the trades and ensure safety for pedestrians. In addition, he removed the fin and did the formwork himself.

54 I accept this evidence.

Mallett Street, Camperdown (6 months)

55 This job involved concrete spalling repairs to 80% of the balconies at the property, repairs to steel external fire stairs and walkway and balcony handrails. It also involved removal of render and painting the building in elastomeric paint. Mr Wilmot did the concrete spalling, some cavity flashing and painting. He was the site supervisor. As supervisor, he had to organise the site file with the project manager including all safety forms, order the materials needed to start the job, induct labourers and oversee safety onsite.

Missenden Road, Camperdown (10 months)

- 56 Preservation Technologies removed the rooftop slab over two units which were five levels up, then installed steel and drainage before pumping up concrete to re-lay the slab. A timber deck was then placed on top. Mr Wilmot gave evidence that he did the block work and waterproofing at the end of it. He was the supervisor, and supervised block work and painting and organised the renderer. The skills involved included steel fixing, waterproofing, carpentry, painting and scaffolding.
- 57 Both Mr Garcez and Mr Smith were referees in relation to this job. On the referee form signed by Mr Garcez, the work is described as “structural repairs.”

Hampden Road, Artarmon (2 months)

- 58 This job site was a three-storey apartment block. The job required the removal of the first three courses of brickwork around the bottom of the apartment block whilst propping the brick work above, before installing cavity flashing and re-laying the brick work. Mr Wilmot and his team also added drains around the property by core drilling through the slab into the carpark and plumbing into storm water. Plumbers were responsible for the plumbing work but Mr Wilmot did the brick work.
- 59 Mr Smith indicated that the job was difficult due to the need to jack up the brick work above, and said that a lot of bricklayers could not have done it. I accept this evidence, which was not challenged.

Kurraba Road, Neutral Bay (4 months)

- 60 Preservation Technologies was engaged to replace the cavity flashing around the top floor of an eight-storey building. The trade skills and knowledge needed by Mr Wilmot included managing people, bricklaying, form working, concreting, steel fixing, waterproofing and painting.
- 61 Mr Smith described the work as “big, complex, hazardous work.”

Elizabeth Street, Surry Hills (2 months)

- 62 This was a high-rise apartment building which had water ingress in the underground carpark, being four levels underground. Preservation Technologies was engaged to remedy the water ingress issue. Mr Wilmot’s

evidence, which is accepted, is that he did all the work on this job except the plumbing. Mr Smith gave evidence that Mr Wilmot built stud walls on top of hobs, poured concrete holes and modified drainage. Mr Wilmot's evidence was that he built a timber stud wall, cladded it and coated in so that you could not see the joins. The work involved formwork, carpentry, steel fixing, concreting, waterproofing, plastering and painting.

Lamrock Avenue, Bondi Beach (9 months)

- 63 This site was a three-storey apartment building. Mr Wilmot was site supervisor for the job, which involved replacement of all fascia boards and gutters including down pipes, replacement of windows and failed lintels and rebuilding parts of the roof. Mr Wilmot removed the lintels and brick work, whilst someone else installed new windows after he had put the lintels in. The framed gable of the gable roof had rotted away. Mr Wilmot and another person took the roof a metre back into the property, reinforced it, then reconstructed it with battens, sarking roof tiles and fascia boards. The trade skills and knowledge Mr Wilmot needed for this job included ability to read plans, people management, bricklaying, carpentry, roofing, plumbing, painting, window installation, scaffolding, plastering and rendering. The job also involved asbestos removal.
- 64 In an email to Mr Wilmot dated 16 September 2020, in the context of having commented that other sites did not demonstrate a wide range of work, the Commissioner's representative indicated that "[t]here was a wider range of building and construction work carried out at this site."

O'Brien Street, Bondi Beach (2 months)

- 65 This job involved render and spalling repairs and the application of elastomeric paint to the whole building. Mr Wilmot's role comprised both supervision and performing some of the work.

Gow Street, Birchgrove (3 months)

- 66 This job, for which Mr Wilmot was site supervisor, involved the removal of tiles and handrails to entry walkways, the removal of asbestos and the repair of damaged concrete. A liquid membrane was applied, then the area was tiled. The job also required spalling repairs to be done in the carpark slabs and the

installation of a structural steel roof structure over the walkways. Mr Wilmot supervised the job, removed old handrails and did the waterproofing.

Fullerton Street, Woollahra (12 months)

67 The referee form which lists this site describes it as a façade upgrade. Mr Wilmot's role was as site supervisor which included quality assurance, work health and safety, budget control and overseeing development application requirements. Mr Garcez, a licensed builder, provided a reference in relation to this job. According to Fair Trading's records, when they telephoned him he described this as involving the replacement of windows. He said that all the work was remedial. There is little other information about the work performed.

Ramsgate Road, North Bondi (13 months)

68 Mr Wilmot states, in his statutory declaration, that he was the site supervisor on this job. It involved grinding the coatings off the building, replacing all lintels and window flashings and repairing the whole building using Helifix. It also required the replacement and re-routing of all external plumbing and demolition and replacement of the roof parapet wall.

69 Mr Smith has not provided a reference in relation to this job. I accept Mr Wilmot's evidence that he did the work on this job stated above. I have not needed to take it into account, given the evidence of the other jobs he has supervised and worked upon.

Statutory questions

70 The statutory questions I have to answer, under s 33D of the *Home Building Act*, read with s 33C(1)(b)(i) of that Act, are whether Mr Wilmot:

- (1) has had experience of such a kind and for such a period as the Tribunal (standing in the Commissioner's shoes) considers would enable Mr Wilmot to do, or to supervise, the work for which a supervisor certificate is required, and
- (2) is capable of doing or supervising work for which a supervisor certificate is required.

71 In answering these questions, I may take into account the Instrument, being a policy. The key questions under the Instrument are whether Mr Wilmot has had at least two years' relevant industry experience in a wide range of building construction work; whether he gained that experience as an employee of a

holder of a contractor licence authorising the holder to do the class of residential building work in which the experience was gained; whether the work was “residential building work”; and whether he was supervised in that work by the holder of an endorsed contractor licence.

Employee of a holder of a contractor licence

72 Mr Wilmot’s experience was gained as an employee of the holder of a contractor licence, in accordance with the policy set out in the Instrument. According to the details provided in his licence application, Preservation Technologies held a contractor licence. It is plain that a corporation may hold a contractor licence (see *Home Building Act*, s 22B). Accordingly, Mr Wilmot satisfies this criterion in the Instrument.

Supervision by holder of an endorsed contractor licence

73 It was submitted by Mr Coss, on behalf of the Commissioner, that Mr Wilmot was not supervised by the holder of an endorsed contractor licence, because Mr Smith was “at two removes” from Mr Wilmot. That is, Mr Smith was generally supervising the person who was supervising Mr Wilmot.

74 The evidence of Mr Smith and Mr Wilmot is that Mr Smith was generally supervising a project manager to whom Mr Wilmot reported. That is, Mr Coss’s submission that Mr Smith was “at two removes” from Mr Wilmot should be accepted. However, Mr Smith also gave evidence, which was not challenged, that from time to time he did supervise Mr Wilmot directly and observe him do the relevant work. I am satisfied that Mr Smith supervised Mr Wilmot in relation to the work directly at times, but more often indirectly, through supervision of Mr Wilmot’s manager.

75 Mr Garcez, who was named as a referee on Mr Wilmot’s application, holds a contractor licence. He provided a written reference and also supervised Mr Wilmot doing work on which Mr Wilmot relied. Mr Garcez was not required for cross examination. It was not suggested in the respondent’s written submissions that Mr Garcez did not directly supervise Mr Wilmot (although the respondent submitted that the work performed by Mr Wilmot under Mr Garcez’s supervision was not, in itself, a wide range of building construction work). I find

that Mr Garcez supervised Mr Wilmot in some of the work which is the subject of evidence before me.

- 76 For these reasons, I find that Mr Wilmot was supervised by the holder of an endorsed contractor licence in relation to the relevant work.

Residential building work

- 77 The Instrument does not expressly require the work the subject of the application to be residential building work. However, it is implicit in the definition of the word “Work” in the Instrument that the work which the Commissioner takes into account, for the purpose of assessing an applicant’s experience, is only residential building work.

- 78 “Residential building work” is defined in cl 2(1) of the Dictionary in Sch 1 to the *Home Building Act* as follows:

“(1) In this Act, residential building work means any work involved in, or involved in co-ordinating or supervising any work involved in—

- (a) the construction of a dwelling, or
- (b) the making of alterations or additions to a dwelling, or
- (c) the repairing, renovation, decoration or protective treatment of a dwelling.”

- 79 Sub-clauses 2(2) and (3) then provide for work which is either included in that definition or excluded from it.

- 80 Some of the work done by Mr Wilmot was not “residential building work.” The work at Walker Street, North Sydney and Mount Street, North Sydney, for example, was work on commercial buildings. However, Mr Wilmot did “residential building work” at Missenden Road, Camperdown, Mallett Street, Camperdown, Hampden Road, Artarmon, Kurraba Road, Neutral Bay, Elizabeth Street, Surry Hills, Lamrock Avenue, Bondi Beach, O’Brien Street, Bondi Beach and Gow Street, Birchgrove. This residential building work, taken together, amounted to more than two years’ experience.

Wide range of building construction work

- 81 The next question is whether Mr Wilmot has two years’ experience in a wide range of building construction work.

82 Mr Coss submitted that Mr Wilmot did not have experience in a wide range of building construction work because his experience was not broad enough. The decision-maker's opinion was that, given that the projects Mr Wilmot has worked on are mainly remedial, he has not actually built a house from start to finish and has not demonstrated that he can co-ordinate or supervise any work involved in the construction of a dwelling. Mr Coss also submitted that there was no certification of the experience Mr Wilmot had obtained at the relevant sites, because his supervisor, Mr Smith, was two steps removed.

83 Mr Coss relied upon *Locking v Department of Finance and Services* [2013] NSWADT 239, in which the Administrative Decisions Tribunal, constituted by Deputy President Hennessy, rejected an Mr Locking's application for a contractor licence. Mr Locking had experience in carpentry and joinery work. Deputy President commented as follows (at [17]-[18]):

“17 This experience in carpentry and joinery work is not the equivalent of ‘a wide range of building construction work’ as required by the Instrument. Carpentry and joinery work is a sub-category of building. It is only one aspect of the work required to be done in order to complete the construction of a residential dwelling.

18 A building contractor has the overall responsibility for a site and must be able to supervise all of the trades required to complete any type of dwelling. Additionally a builder must be able to determine that all trades have complied with all standards and requirements. There are many gaps in Mr Locking's trade supervisory experience and therefore his understanding of certain trades. Those trades include flooring, bricklaying, stonemasonry, wet plastering, painting, decorating, general concreting, tiling, demolishing, fencing, glazing and waterproofing.”

84 Mr Wilmot submitted that he did have experience in a wide range of building construction work. He submitted that this experience included roofing, concreting, brickwork, replacing windows and doors, doing formwork, waterproofing and on small bathroom jobs he said he had done tiling, waterproofing and removal of shower screens. Mr Wilmot also pointed to his carpentry experience as evidenced by the Elizabeth Street, Surry Hills job.

85 Mr Smith was asked at the hearing whether he considered that Mr Wilmot had experience in a wide range of building work. His evidence was that Mr Wilmot had been exposed to a huge range of building work. Mr Smith said that Mr Wilmot had been required to work with and supervise multiple trades including tilers, painters, concreters and renderers on a regular basis. He had also done

a lot of “hands on work” himself in “wildly different settings.” Examples Mr Smith gave whilst giving oral evidence included that Mr Wilmot had built a stud wall, poured concrete holes, framed a roof, done complex brickwork, recast a roof slab, done waterproofing and building of decks, and supervised the trades on many jobs.

- 86 Mr Smith accepted that Preservation Technologies was involved in doing remedial work, rather than constructing a residential dwelling from start to finish. However, his evidence was that the remedial work often demanded a much more skilful and careful application than new building work. When asked how the skills involved at the Missenden Road site would differ from a new build, Mr Smith replied that it was far easier to pour a slab in a new build than to pour a slab in an occupied, functioning building. The skills were broadly the same, but in an occupied building it was far more awkward and the conditions were more challenging.
- 87 Mr Coss suggested to Mr Smith that Preservation Technologies was “simply repairing buildings built by other people.” Mr Smith explained that, although that was the case, repairing often required a reconstruction of significant work. He gave the example of replacing a steel lintel above a window aperture which was “twenty-fold more difficult” in a remedial building situation.
- 88 I accept Mr Smith’s evidence as to the type of work which Mr Wilmot has done, and as to the added difficulty and complexity of remedial building work and the skills required to do that work.
- 89 I find that Mr Wilmot has experience in a wide range of building construction work. He has experience in bricklaying, carpentry, waterproofing, concreting, plastering, painting, rendering, roofing, formwork, demolition, tiling, steel fixing, window installation and scaffolding. He has also had a significant amount of experience supervising tradespersons across a wide range of trades. Some of his experience is doing or supervising structural work. I am satisfied that he has had at least two years’ experience in a wide range of building construction work.
- 90 I do not accept Mr Coss’s submission that the circumstance that the work Mr Wilmot has done for Preservation Technologies is remedial means that he

does not have the broad experience required. The term “residential building work” is defined to include “the making of alterations or additions to a dwelling” and “the repairing, renovation, decoration or protective treatment of a dwelling.” That is, altering, adding to, repairing and renovating a dwelling is just as much residential building work as is constructing a dwelling.

91 A similar issue arose in *Vitogiannis v Commissioner for Fair Trading, Department of Customer Service* [2020] NSWCATOD 157, as to whether an applicant could acquire a wide range of building experience doing mainly remedial work. Senior Member Dinnen said at [45]:

“45 The Instrument requires the Applicant to have undertaken a ‘wide range of building construction work’. The Respondent’s submissions are to the effect that a “wide range” should include new buildings and structural works, or at the very least, extensions or renovations to current dwellings which are significant enough to warrant development approvals and/or home warranty insurance, and demonstrably change the aerial view of a dwelling. I disagree. The requirements in the Instrument are deliberately broad, and I agree with the Applicant’s submission that the Instrument does not specify what weighting and value to be ascribed to ‘structural experience’ as opposed to refurbishment or renovation work for residential dwellings, or how that would be calculated. I also agree with the Applicant’s submission that the process and methodology of construction may be more complex for an existing building, renovation or refurbishment than in simply erecting a new building.

92 I agree with that analysis.

93 The circumstance that Mr Smith was “at two removes” from Mr Wilmot does not mean that I am unable to reach a state of satisfaction that Mr Wilmot has the necessary experience. On the contrary, Mr Smith appeared to have a good understanding of Mr Wilmot’s ability and the work of which he was capable. He had observed Mr Wilmot working on various sites. I had the benefit of Mr Wilmot’s oral evidence and that of Mr Smith. I also have had regard to various references (described further below), which all attest to Mr Wilmot’s skill, competence and experience.

94 I am satisfied that Mr Wilmot performed the work as claimed and has the experience required by the Instrument.

Does Mr Wilmot fulfil the requirements of the Instrument?

95 For the above reasons, I am satisfied that Mr Wilmot has fulfilled the requirements of the Instrument.

- 96 Irrespective of whether he did fulfil those requirements, however, I find that Mr Wilmot has had experience of such a kind and for such a period as would enable him to do, or to supervise, the work for which a supervisor certificate is required. I have formed that view based upon the totality of the evidence, including the references Mr Wilmot provided, which are described below. If I am wrong about the supervision requirements of the Instrument having been met, or about other criteria of the Instrument having been met, I would depart from that policy in the circumstances of this case.
- 97 As Senior Member Isenberg observed in *Edrees v Commissioner for Fair Trading* [2021] NSWCATAD 32 at [56], the statutory test “requires an analysis of the relevant experience on a case by case basis.” Similarly, as Senior Member Dinner commented in *Wall v Commissioner for Fair Trading* [2017] NSWCATOD 76 at [33], the Instrument “may provide some guidance to those applicants wishing to apply to the Commissioner for a licence, but cannot be considered reflective of the eligibility requirements under the Act.”
- 98 The Instrument is a policy which cannot displace the words of the statute. There is a potential inconsistency between the Instrument and the *Home Building Act*, insofar as the Instrument detracts attention from the questions of whether an applicant’s experience would enable the applicant to do, or to supervise, the work for which a supervisor certificate is required. For example, the policy of completely disregarding any experience gained on commercial buildings appears unreasonable, given that such experience may enable a person to do, or to supervise, the work for which a supervisor certificate is required. The work may be identical in nature to work done in a residential dwelling.
- 99 I accept that there may be particular kinds of experience which can only be gained in a dwelling (or by doing residential building work). If this is the case, the respondent has not identified what it is. Mr Coss did submit that Mr Wilmot had not had experience laying a slab, constructing brickwork from the beginning, or constructing the initial walls. It does not appear that this work would be unique to residential building work. In any event, I am satisfied that he has the necessary experience to do all of these things.

- 100 Even if there is work which is unique to residential work, that does not mean that work done on a commercial site has no value in terms of an applicant's experience. It may simply mean that a person with experience working on commercial sites would need to demonstrate some residential experience as well. Mr Wilmot has plainly done so.
- 101 There are other aspects of the Instrument which appear to improperly constrain the Commissioner's discretion, if applied inflexibly. These include the requirement that certain information be included on an approved referee's statement form (see *Watts v Commissioner for Fair Trading, Department of Finance, Services and Innovation* [2017] NSWCATOD 60 at [50]; *Wall v Commissioner for Fair Trading* [2017] NSWCATOD 76 at [35]-[36]).
- 102 Whilst the Instrument may provide a guide as to the experience which would allow the Commissioner or the Tribunal to reach the state of satisfaction required for s 33D(1)(b) of the Act, the focus should always be upon whether the applicant meets the statutory requirements. To apply the policy inflexibly would, of course, be an error of law (see, for example, *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277; [2003] HCA 35, Gleeson CJ at [24]).

Is Mr Wilmot capable of doing or supervising work for which a supervisor certificate is required?

- 103 The Instrument is directed to satisfaction of s 33D(1)(b) of the *Home Building Act*. It does not purport to apply to s 33D(1)(c) which requires the Secretary (or the Tribunal, standing in the Secretary's shoes) to be satisfied that the applicant "is capable of doing or supervising work for which the [supervisor] certificate is required."
- 104 Mr Smith gave evidence that Mr Wilmot has "good skills" not just in his own trade but "across the building scope." He said that Mr Wilmot manages others well and shows good leadership. Mr Smith's opinion was that Mr Wilmot is "hardworking, reliable and diligent." He said that he had had similar applications for other employees (asking him to be a referee in support of an application for a contractor licence) and that Mr Wilmot was the first one that he had been prepared to support.

- 105 Mr Garcez provided a written reference in which he described Mr Wilmot as Preservation Technologies' "number one pick" for large and complex projects. He stated that for the past five years Mr Wilmot had "successfully delivered projects covering all aspects of the building and construction industry, except for marine and civil works." He wrote that Mr Wilmot was currently being mentored to become a project manager.
- 106 Mr Liam Doyle, engineering consultant, has inspected and reported on in excess of one thousand residential strata dwellings. He has acted as superintendent on numerous jobs in which Mr Wilmot was supervisor. His opinion is that Mr Wilmot "performed to an exceptional level and met the contractual timeframes and budget requirements on all of these projects."
- 107 Mr Jonathan McCray, senior engineer, has acted as engineer, specifier and contract superintendent for building works undertaken by Mr Wilmot since 2018, including at Gow Street, Balmain. He found Mr Wilmot to be "a competent and capable builder" with a "good understanding of BCA requirements." Mr McCray also considers Mr Wilmot to be an effective supervisor of Preservation Technologies' junior staff members as well as subcontractors of different trades.
- 108 Mr Rodi Bircan, engineer, provided a reference for Mr Wilmot, having worked with him on project where deficiencies in the original design of the building resulted in consequential building defects. Mr Wilmot was site supervisor on those projects and, in Mr Bircan's words, "required to oversee and implement the correct constructional practises [sic] in order to remediate these deficiencies." Mr Bircan's opinion is that Mr Wilmot "is proficient in the correct implementation of common building practices in accordance with the relevant Australian Standard and BCA requirements."
- 109 I accept the evidence given by Mr Wilmot's referees. With the exception of Mr Smith, they were not required for cross examination and their evidence was not challenged. Whilst some of the referees are not licensed contractors, I nevertheless consider that their opinions as engineers carry significant weight, in combination with the evidence from licensed contractors.

110 Having regard to these references, and to the evidence as a whole, I am satisfied that Mr Wilmot is capable of doing and supervising work for which a supervisor certificate is required.

Conclusion

111 For the reasons given above, I consider that the correct and preferable decision is to grant Mr Wilmot's application for a contractor licence. The respondent's decision should be set aside.

Orders

112 I make the following orders:

- (1) The respondent's decision to refuse the applicant's application for a contractor licence is set aside.
- (2) In substitution for the respondent's decision, the applicant's application for a contractor licence is to be granted.
- (3) The respondent is to effect the grant of the individual endorsed contractor licence to the applicant within 14 days of publication of these reasons.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

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