

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z430/2016


CATCHWORDS

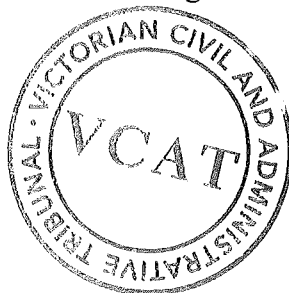
Building Act 1993, s 172 - whether on application for reregistration as a commercial builder (Unlimited) after 18 years, VCAT in review of the respondent's decision, can be satisfied the applicant is of good character and had a satisfactory reason for the extended period of suspension.

APPLICANT	Mr Youssef Elmaaraoui
RESPONDENT	Building Practitioners Board
WHERE HELD	Melbourne
BEFORE	Senior Member I. Proctor
HEARING TYPE	Hearing
DATE OF HEARING	19 December 2016
DATE OF ORDER	3 February 2017
DATE OF WRITTEN REASONS	3 February 2017
CITATION	Elmarraoui v Building Practitioners Board (Review and Regulation) [2017] VCAT 150

ORDERS

- 1 Under section 51(d) of the *Victorian Civil And Administrative Tribunal Act 1998*, the decision under review is set aside and the matter is remitted for reconsideration by the decision-maker with a direction that the decision-maker is to re-register the applicant as a Commercial Builder (Unlimited), subject to the applicant satisfying the decision-maker concerning matters related to reregistration following this decision.
- 2 Liberty to apply.


Ian Proctor
Senior Member



APPEARANCES:

For applicant:	Mr A.C. Blair of Counsel
For respondent:	Ms B.L. Hutchins of Counsel

REASONS

What is this proceeding about?

- 1 Mr Youssef Elmaaraoui has long involvement in the building industry. In December 1995, he was registered as a Commercial Builder (Unlimited). In 1997 he was first registered as a Domestic Builder (Limited – Subfloor Works). According to Mr Elmaaraoui, by 1997 his work did not justify paying the fees to remain registered as a commercial builder. He ceased paying the fees and, under the *Building Act 1983 (the Act)*, his registration was suspended for that reason. Mr Elmaaraoui says he always understood that he would be able to renew his registration.
- 2 In May 2015, the Building Practitioners Board (**the Board**) received Mr Elmaaraoui’s application that his registration be renewed.
- 3 After a protracted process, including the Board seeking further information from Mr Elmaaraoui, by letter and interview, in April 2016 the Board decided not to revoke the suspension, in substance refusing to re-register Mr Elmaaraoui as a Commercial Builder (Unlimited). The Board was not satisfied that Mr Elmaaraoui had the good character required for reinstatement, nor that he had a satisfactory reason for the 18 year gap between the suspension in 1997 and his application for reregistration in May 2015.
- 4 In June 2016, Mr Elmaaraoui sought review of that decision by VCAT, leading to the hearing before me in December 2016. Both parties were legally represented. I heard evidence and submissions and reserved my decision.
- 5 I note the Board has been replaced by the Victorian Building Authority (**the VBA**). Despite that, under transitional legislative provisions, the Board remains the respondent in this proceeding.

The Law

- 6 The purposes of the Act include regulating welding work, building standards and building practitioners (s 1).
- 7 Section 4 of the Act sets out its objectives.

4 Objectives of Act

- (1) The objectives of this Act are—
 - (a) to protect the safety and health of people who use buildings and places of public entertainment;
 - (b) to enhance the amenity of buildings;
 - (c) to promote plumbing practices which protect the safety and health of people and the integrity of water supply and waste water systems;
 - (d) to facilitate the adoption and efficient application of—
 - (i) national building standards; and

- (ii) national plumbing standards;
 - (e) to facilitate the cost effective construction and maintenance of buildings and plumbing systems;
 - (f) to facilitate the construction of environmentally and energy efficient buildings;
 - (g) to aid the achievement of an efficient and competitive building and plumbing industry.
- (2) It is the intention of Parliament that in the administration of this Act regard should be had to the objectives set out in subsection (1).
- 8 Once a person is registered as a building practitioner (which includes as a Commercial Builder (Unlimited)) under the Act, he or she is required to pay an annual registration fee and provide the Board with proof of any required insurance (s 172(2)). If the person does not do so, the Board must suspend the registration (s 172(3)).
- 9 If within three years of suspension the person seeks to have the suspension lifted and pays fees and provides proof of required insurance, the Board must revoke the suspension (s 172(4)).
- 10 However, where registration has been suspended for more than three years the Board may decide not to revoke the suspension unless the Board is satisfied that the person:
- a) is of good character; and
 - b) has a satisfactory reason for the extended period of suspension.
- 11 With Mr Elmaaraoui's application for review of the Board's decision now before VCAT, VCAT stands in the shoes of the Board and is required to decide on the basis of the evidence before VCAT, which may be, and in this case is, different from the evidence that was before the Board, whether to affirm (agree with) the Board's decision or make a different decision.

The Board's decision

12 The Board's letter to Mr Elmaaraoui, refusing his application for reinstatement of registration dated 15 April 2016 gives short reasons for the decision.

13 The Board's 'section 49 statement'¹ in this proceeding is more informative:

The Board is concerned that the applicant has been performing commercial building work without having being registered in the appropriate category.

The Board requested further evidence as to the nature of the building work that the applicant had been performing in order to determine whether the work had been performed illegally, or alternatively, that it does in fact constitute a relevant continued connection with the industry during the period of suspension.

¹ Under the *Victorian Civil and Administrative Tribunal Act 1998*.

In subsequent correspondence the practitioner has provided some information as to the nature of his commercial work. However the information provided is incomplete, does not cover all the matters asked on behalf the Board, does not support the statements in the interview and leaves large gaps in the practitioner's work history.

[Concerning the projects identified by Mr Harcourt] there was no information indicating when the projects were completed or the extent of the involvement of the applicant.

...

The practitioner has advised that he is unable to provide the level of detail requested because he has not kept records of his work history as he did not know that these would be required. The Board did not accept this proposition because in July 2015 the applicant obtained a Diploma of Building and Construction (Building) from Australian Industrial Systems Institute. The academic transcript provided by the practitioner indicates that he commenced a course in May 2015 completed it in July 2015 through RPL. It might be assumed that he was required to provide work history to satisfy the RPL process.

...

Decision of the Board

It appears that the applicant lied to the Board in his reinstatement application about his reason for the extended period of suspension i.e. he said that he was too busy with residential projects when in fact he has been doing commercial work.

Further, it appears that the applicant has likely been working outside of his DB-L registration doing commercial work without appropriate registration.

Accordingly, the Board was not satisfied either that the applicant is of good character or that he has had a satisfactory reason for the extended period of suspension.

The evidence

- 14 Mr Elmaaraoui's, 'Application Form for Registration renewal after three Years', dated 24 May 2015, refers to himself as the person applying for reregistration, and refers to his company, Perfection Re-Blocking and Construction Pty Ltd. He described the reason for not paying fees in 1997 and seeking reregistration in 2005 as:

My suspension was due to me not renewing my license – at the time I was too busy running my domestic building projects and didn't have enough resources to carry out commercial work. That is why I did not renew my license. Now I have adequate resources I wish for my license to be renewed.

- 15 Concerning whether he had maintained his knowledge and understanding of legislative and technical changes within specific areas of the building industry, he recorded that in 2014 he completed a Certificate IV in Frontline

Management, Certificate III in Warehousing Operations and a course concerning Construction Induction.

- 16 In the General Declaration section, which largely concerns whether the person has a criminal history, has been declared insolvent/bankrupt, etc, Mr Elmaaraoui declared that in respect of work he had done he had been fined, reprimanded or cautioned.² He answered “no” to:

Have you, within the last 10 years, in Australia or elsewhere, been convicted or have proven against you any offence involving fraud, dishonesty, drug trafficking or violence which was punishable by a term of three months or more (whether or not a penalty of imprisonment was imposed on you)?

- 17 Mr Elmaaraoui completed documentation to enable a National Police Check.
- 18 He attached:
- a) A half page statement concerning his 22 years of experience operating his own business in construction (Perfection Re-Blocking and Construction), describing the project cost is ranging from \$5000-\$75,000 and describing in 18 short dot points the type of work he had performed;
 - b) Evidence of the insurance he held;
 - c) A reference from T.J. Hyland, who appears to be a building consultant. It spoke of him knowing Mr Elmaaraoui for seven years, that he had been undertaking underpinning work for 22 years and did so in a professional manner and enjoys a good reputation in the industry;
 - d) A reference from Mr Adam Sorati, Manager, AS Building Consultants. It spoke of him knowing Mr Elmaaraoui for 10 years and his high-calibre and professional work as Perfection Re-Stumping and Underpinning;
 - e) A reference from Mr Ali Abou-Eid, Director, Taxline Group, who had acted as Mr Elmaaraoui’s accountant and business advisor for 15 years. He described Mr Elmaaraoui as honest, reliable, responsible and of good character, being financially sound and an excellent record keeper concerning his always up-to-date accounts; and
 - f) A reference from Mr Milad El-Halabi JP CMC, managing Director. Milad Homes. He had known Mr Elmaaraoui for 10 years. He had no hesitation in recommending Mr Elmaaraoui for a ‘construction practitioner’s license’, regarding him as ‘keenly involved in the building business through his re-stumping and underpinning business’.

² This was not pursued in this proceeding.

- 19 A National Police Check revealed that in 2008, Mr Elmaaraoui faced a charge of unlawful assault which was without conviction adjourned for a year (a good behaviour bond) and Mr Elmaaraoui was required to pay \$750 to the Court Fund.
- 20 On 4 June 2015, the Board asked Mr Elmaaraoui for details concerning offending dealt with in the Magistrates' Court in February 2008. Mr Elmaaraoui promptly responded describing the event as a 'little family issue' no conviction was recorded against him, the issue was resolved and there has been no recurrence. He described himself as being happily married with children and 'our circumstances could not be any better from what they are now.' His wife provided a one sentence statement that the above was true. It is convenient to add here that evidence was given from the bar table on Mr Elmaaraoui's behalf that the offence with which he was charged with carries a maximum of three months imprisonment.
- 21 In late June 2015, the Board wrote to Mr Elmaaraoui requiring proof that he had obtained a workplace health and safety certificate. It appears that at some point before 21 August 2015, Mr Elmaaraoui provided evidence of his completion of the Diploma of Building and Construction (Building) undertaken, according to the Certificate, between 14 May and 13 July 2015.
- 22 The relevant academic transcript assessed Mr Elmaaraoui as 'RPL(Competent)' in units³ concerning:
- a) Apply building codes and standards to the construction process for low rise and medium rise building projects;
 - b) Select and prepare a construction contract;
 - c) Identify and produce estimated costs for building and construction projects;
 - d) Apply structural principles to residential low rise constructions and medium rise buildings;
 - e) Prepare and evaluate tender documentation;
 - f) Monitor costing systems on medium rise building and construction projects;
 - g) Supervise the planning of on-site medium rise buildings or construction work;
 - h) Manage construction work;
 - i) Apply principles of OHS risk management;
 - j) Manage project quality and project risk;
 - k) Apply site surveys and set-out procedures to medium rise building projects;

³ This list somewhat summarises the actual unit titles.

- l) Administer the legal obligations of the building construction contract;
 - m) Identify services layout and connection methods to medium rise construction projects;
 - n) Manage environmental management practices and processes in building construction; and
 - o) Manage the application and monitoring of energy conservation and management practices and processes.
- 23 By letter dated 21 August 2015, the Board advised Mr Elmaaraoui that given his license had been suspended for over 15 years the Board had to be satisfied that he had a satisfactory reason for the extended period of suspension and was of good character. With the Board not regarding documentary evidence as sufficient to decide these issues, it required him to attend a face-to-face interview with Board members (**the Panel**) in September 2015.
- 24 Mr Elmaaraoui attended the interview, of which I have transcript. In answer to questions, Mr Elmaaraoui spoke of becoming involved in the building industry in 1993. Apparently, he did early training with the Master Builders Association which became 'grandfathered', such that he held a Commercial Builder (Unlimited) registration. He spoke of being broadly responsible in the construction of three factories, the last being in about 2009 but that he was working under another person's commercial license. He also spoke of school renovations (half a dozen) and 'heaps of work' for the Ministry of Housing. He recalled the 'biggest' contract was for \$121,000.
- 25 The Panel asked questions related to Mr Elmaaraoui's knowledge and experience in commercial construction. Mr Elmaaraoui gave short superficial answers concerning contract management, the building of basements, safety systems and final inspections by building surveyors on commercial sites.
- 26 Mr Elmaaraoui said that while he was a member of the Master Builders Association, the last course he attended with the Association was in 2009 when he intended to obtain his Domestic Builder (Unlimited) registration. He said he did not complete the process as his mother became ill and he travelled overseas with her, before she passed away in 2011.
- 27 Mr Elmaaraoui clarified that he had been studying to obtain his Diploma of Building and Construction for about 18 months.
- 28 In answer to a question about what type of commercial work Mr Elmaaraoui intended to undertake, he started to answer about his plan to employ his sons in the business and to rely on them and then described some experience on a building site. His description is difficult to understand. Mr Elmaaraoui then complained about the re-registration

process, saying he should have just continued to pay the annual fees. The Panel spoke about standards in the building industry being lifted.

- 29 The Panel asked why Mr Elmaaraoui had not described work he was referring to during the interview in his re-registration application. He explained that this was because he was doing that work for a licensed builder. The Panel advised Mr Elmaaraoui would have to provide a detailed work history. They were concerned that the information before them seem to indicate Mr Elmaaraoui had been doing solely sub-floor work for years and now wanted to be registered to perform any type of commercial building work.
- 30 Mr Elmaaraoui complained that on multiple occasions over the years he had contacted the Board staff and was assured that should he wish to return to commercial building, he would simply have to apply for re-registration.
- 31 After more conversation concerning re-registration processes, Mr Elmaaraoui agreed to provide a list of all of the jobs that he had done at commercial sites over the last 10 years.
- 32 The Panel raised the issue, related to Mr Elmaaraoui's character, of whether he had been working unregistered on commercial sites. Mr Elmaaraoui assured them this was not the case and he had been working for others who held commercial licenses. They warned him that if the information he provided showed he was 'working unregistered', he could face consequences and suggested he may choose to get legal advice.
- 33 In a letter dated 4 September 2015, the Board confirmed that Mr Elmaaraoui would provide a detailed work history and that he may wish to seek legal advice.
- 34 In late September, what was by then the VBA received Mr Elmaaraoui's reply. It included:
- a) A recent reference from Mr Ahmad Hamoud, Managing Director, Blue Sky Building and Construction Group concerning Mr Elmaaraoui's work as site supervisor on the conversion of a farmhouse to a cafe over December 2012 to April 2013. The reference said in part:

He has proven himself to be a very competent site supervisor with ability to follow and deliver complex and intricate plans. ... I have found Youseff very responsible, reliable and trustworthy person with a sound understanding of building and construction management practices. I have no hesitation in supporting his application for a low-rise commercial builder license.
 - b) A letter from Mr Philip Harcourt Commercial Builder, describing Mr Elmaaraoui working in commercial construction over the past 10 to 15 years on a number of projects as appointed supervisor/manager. Mr Harcourt listed the construction of a 32 room extension including conference centre to the rooftop of existing complex, construction of

a new chemist shop and warehouse, construction of a retail shopping unit development, construction of a new factory/warehouse and office complex, construction of new 13 x 1 & 2 bedroom apartment complex, and construction of retail shop & 2 unit development.

- 35 By letter dated October 2015, the Board sought further information concerning the material from Mr Mahoud and Mr Harcourt and further details concerning work Mr Elmaaraoui had described at his interview.
- 36 In early November 2005, the VBA received a reply from Mr Elmaaraoui. He provided further information from Mr Mahoud and described working on Ministry of Housing sites for a Mr Steve Burlak in the 1990s, whom he had been unable to contact and regarding which she has kept no records. He noted he has never been advised it was necessary to keep such records, in the context that he understood re-registration simply required an application and the paying of relevant fees.
- 37 By letter dated February 2016, the Board advised it did not yet have sufficient information, was concerned about inconsistencies and gaps in the information and requested further information.
- 38 In a letter received by the VBA in early March 2016, while Mr Elmaaraoui described the situation is getting ridiculous and his patience wearing thin, he provided four short paragraphs of further information spanning December 1999 to December 2015.
- 39 By letter dated 15 April 2016, the Board refused Mr Elmaaraoui's application for reregistration, which led to the proceeding before me.
- 40 With Mr Elmaaraoui legally represented in this proceeding, he provided further evidence by way of an affidavit dated 20 October 2016 from which I quote:

I obtained my CB-U registration in 1993 and then my DB-L Sub floor Work in 1993.

During that period of time, the work that I undertook was mainly with Steve Burlak a friend, for whom I was managing his commercial construction sites. I worked for Steve from 1993 till about 2002. He had some valuable projects running and also was conducting a lot of work for the Ministry of Housing at that time. I had a good personal and professional working relationship with Steve at the time; therefore, I was busy managing his projects and did not make any efforts to win any construction projects on my own. As a result, the work and cash flow that I received at that time was insufficient for me to maintain my commercial Building licence, hence I let my licence lapse in 1997 when it was up for renewal on the 8 February 1997. As result the Building Practitioners Board suspended my licence.

I continued to be subcontracted Steve Burlak on his commercial projects during that period of time, and there was no need for me to obtain my own licence during this period. My experience in

commercial constructions extended to completing the schools and factories and other commercial building at the time.

...

I confirm that I worked with Steve Burlak from around 1993 till about 2002. His business was then taken over by his son who still runs the business under Burlak Constructions Pty Ltd. [Mr Elmaaraoui attached a copy of a company search for Burlak Constructions Pty Ltd showing Steve Burlak as a director of the company during the period in question.]

... During this time, while under Steve Burlak's supervision, I completed major projects such as managing, Melton Primary School, Strathmore Secondary College and residential renovations for the Ministry of Housing (Housing Commission).

I confirm that I was not and I am still not in a position to contact Steve Burlak, as I do not know the whereabouts of Steve, who would now be in his late 80s. The last work that I completed with Steve Burlak was more than 14 years ago, hence I am unable to locate or contact any departments to verify my engagement with Steve Burlak. I also feel uncomfortable contacting the current owners of the company.

Subsequent to 2002, I have worked on many projects under various people's supervision to ensure that I kept my skills up date and continue work in the industry, as my long term goals was to return to the industry. ...

- 41 Mr Elmaaraoui gave oral evidence at the VCAT hearing. He provided the following details concerning the work referred to by Mr Harcourt.
- 42 Concerning the construction of the 32 room extension including a conference centre to the rooftop of an existing complex, precast panel construction with lift shaft, commencing in 2000, with a construction cost of \$3.2 million, Mr Elmaaraoui confirmed he was site supervisor to completion, managing tradespeople and making sure the building progressed in accord with the building permit and building legislation. While the project proceeded over about a year, there were stages where he was not required.
- 43 Concerning the construction of a new chemist and warehouse in Glen Waverley, from late November 2013, with the construction cost of \$435,000, Mr Elmaaraoui was site supervisor to completion of lock-up of construction. He spoke of inspecting work as it was done and referring matters to Mr Harcourt, the licensed commercial builder, if issues arise. Mr Harcourt would need to come on to site because he was the person ultimately responsible for compliance with the contract.
- 44 Concerning the construction of a retail shopping unit development in Brooklyn, a precast panel construction starting in December 2009 with a construction cost of approximately \$600,000, Mr Elmaaraoui spoke of supervising concrete and precast panel construction to completion. He

described supervising the work including ensuring that the correct concrete MPA and steel work was used and him making visual inspections before the building inspectors arrived. He said the inspectors passed all of the work on first inspection. This job went for 10 months on and off.

- 45 Concerning the construction of a new factory/warehouse and office complex in Brooklyn from May 2008, a precast panel construction, with the construction cost of approximately \$470,000, Mr Elmaaraoui helped supervise the project, including hands-on working with concrete as a precast erection. He spoke of ensuring that panels were placed as planned and the work being again on and off due to delays with panels coming to site.
- 46 Concerning the construction of 13 new one and two bedroom apartments in Carlton from January 2006, a precast panel construction with a construction cost of \$1.9 million, Mr Elmaaraoui spoke of helping to supervise concreters and precast panel construction on site.
- 47 Concerning the construction of a retail shop and two unit development in Ascot Vale, starting March 2012, a core fill block construction with construction cost of \$930,600, Mr Elmaaraoui supervised construction to lock-up.
- 48 During cross examination, Mr Elmaaraoui's evidence included:
 - a) As well as working as a subcontractor for commercial builders, Mr Elmaaraoui has undertaken his own domestic building work concerning subfloors;
 - b) He had not asked Mr Harcourt to attend the hearing and give oral evidence because he was not asked to make such a request;
 - c) He agreed that in his original application for re-registration, he answered 'no' to the question concerning being convicted or having proven against him any offence punishable by a term of imprisonment of three months or more, when the police check disclosed the charge heard of the Magistrates' Court. He said he did this because the magistrate told him he was not convicted;
 - d) Concerning his 9 June 2015 letter to the Board describing the circumstances of the offence, he described a 30 minute incident with his wife in which he threw a shoe at her. He had no previous such history and has not and will not do such a thing again. He agreed his June 2015 letter did not show remorse, he was not convicted and he and his wife have moved on;
 - e) Him agreeing he has now provided more information about his work history than he provided to the Board. He spoke of then understanding that he was being asked about 'his commercial work', which he understood did not include commercial work he was performing for another builder; and

f) Him saying that in answer to a question at the Panel interview, he had spoken of him and his business partner going their own ways which was why he was seeking reinstatement of his registration. However, they went their own way about 2002. He described himself as very confused at the Panel interview.

49 During re-examination, Mr Elmaaraoui was asked about an answer he gave at the interview where he spoke of having a business partner who also had a commercial license. Mr Elmaaraoui said Mr Burlak and he were not really business partners, he worked for Mr Burlak.

Decision

50 I have set aside the Board's decision and directed it to proceed to re-register Mr Elmaaraoui as a Commercial Builder (Unlimited).

Good character

51 In *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 139 ALR 84 at 87 Davies J said:

The question of whether a person is or is not of "good character" is primarily an issue of fact. ...

It should also be observed that the term "good character" is not precise in its denotation. In one sense, it refers to the mental and moral qualities which an individual has. In another sense, it refers to the individual's reputation or repute ... Criminal convictions or the absence of them and character references are likely to be an important source of primary information. If there is a criminal conviction, the decision-maker will have regard to the nature of the crime to determine whether or not it reflected adversely upon the character of the applicant. If the conviction was in the past, the decision-maker will turn his attention to whether or not the applicant has shown that he has reformed. If persons speak well of the applicant, the decision-maker will take that into account.

52 The Board had published a Good Character Policy dated 9 September 2015. It is a relevant factor in making the decision in this case.⁴ It says in part:

The concept of "character" is broad. It can encompass a person's private and personal attributes or qualities. It can also encompass a person's reputation in the sense of the relative estimation or esteem in which a person is held in the public realm. The public and private aspects of "character" mean that it is a concept that can have both objective and subjective elements. ...

For each category and class of registration there are knowledge and skill requirements relevant to the acts of the person registered in that category or class may perform. However for the system of registration and regulation set out in the Act to work effectively,

⁴ See discussion in Jason Pizer QC and Emrys Nekvapil, *Pizers Annotated VCAT Act* (Thomson Reuters, 5th Edition, 2015) 197.

registered building practitioners must also act in a manner that engenders the trust and confidence of consumers and other registered practitioners, and/or members of the building industry and the community generally. "Good character" includes the following characteristics:

- a. demonstrating honesty and fairness in financial and professional dealings on behalf of oneself, clients;
- b. exercising good judgement on behalf of clients;
- c. demonstrating a high degree of organisation and clarity including the ability to comply with deadlines and time constraints;
- d. demonstrating respect for and compliance with the law including all applicable state, local, and federal laws, regulations, statutes, technical and professional codes and standards;
- e. avoiding acts which exhibit disregard for the rights and welfare of others;
- f. acting diligently and reliably in fulfilling one's obligations to clients, courts, tribunal's and others;
- g. dealing forthrightly, honestly and with candour with registration and regulatory authorities;
- h. active participation in and respect for the disciplinary process including compliance with orders and penalties imposed by a disciplinary panel including fulfilling all and any undertaking given; and
- i. demonstrating remorse and when found have committed a disciplinary offence and prompt action to remedy the impact of that offence.

53 I am satisfied Mr Elmaaraoui is of good character. He has given evidence of living a family life in Melbourne while employed in the building industry since 1993. His referees speak very well of him. Nothing in the evidence he gave before me is me reason to doubt his good character, noting his past dealing with the Magistrates' Court in 2008.

54 That said, it is evident from the chronology above that obtaining relevant information from Mr Elmaaraoui has been somewhat like pulling teeth. The information he provided with an after his initial application for re-registration was skeletal. His presentation to the interview panel was unsophisticated. Not surprisingly, the Panel asked him to provide further information. Again in an unsophisticated manner, he did so.

55 I accept from Mr Elmaaraoui's perspective, this was all a surprise and rather aggravating. He had been under the impression that all he needed to do was re-apply and pay the relevant fees and obtain the relevant insurance. More than once he said he would be better off to pay the annual fees over the years. However, Mr Elmaaraoui did respond promptly to the Board's requests as his request for re-registration was considered, attended the

interview and when he learned of the Board's refusal, promptly applied to VCAT and has cooperated in the VCAT process.

- 56 I understand why the Panel became suspicious of Mr Elmaaraoui, given the superficial nature of the information he provided at interview; in particular was he undertaking commercial building work while unregistered? However, with the evidence now before VCAT, I do not share that suspicion.
- 57 Given Mr Elmaaraoui's referees, I see no basis to doubt that he deals well with those on the building site and is diligent in his work. I note that in this proceeding, the Board did not call any of the referees for cross examination.
- 58 I do not criticise Mr Elmaaraoui for his lack of detailed records about his past experience and work in the building industry. He apparently saw no need to keep such records. He did not understand there was any such requirement, including for reregistration.
- 59 Apart from the one offence dealt with in 2008, I do not understand him to have any criminal history. I accept Mr Elmaaraoui's explanation that he did not understand that he should have answered the question about criminal history in the reregistration application form, 'yes' rather than 'no'. His evidence on this is corroborated by him agreeing to the Board conducting a National Police Check.
- 60 In reaching this decision, I have not regarded it as necessary to commence from a presumption that Mr Elmaaraoui is of good character as was submitted on his behalf; see *Al Algam V Minister for Immigration and Citizenship* [2012] AATA 455 at [36]. The Board made no submission on this issue raised on behalf of the applicant on the day of the hearing. I proceeded on the evidence before me.

Satisfactory reason

- 61 I am satisfied Mr Elmaaraoui had a satisfactory reason for the extended period of suspension.
- 62 I have accepted him as an honest witness in this proceeding and do not suspect him of engaging in commercial conduct for which registration as a Commercial Builder (Unlimited) is required, while not registered to do so. There is nothing in his conduct that leads me to conclude he does not have a satisfactory excuse for failing to renew his registration.
- 63 I accept Mr Elmaaraoui's evidence that over the years in question, he did not need registration as a Commercial Builder (Unlimited). He was busy with his underfloor work, relying on his domestic building license and as a supervisor on a range of projects as discussed above. I accept he understood following telephone conversations with staff of the Board that obtaining re-registration would not be a problem.

- 64 That said, the question remained, within the terms of s 172(4A) of the Act, whether a point was reached where the time that had elapsed since registration was suspended was of such duration that his excuse was no longer satisfactory due to the risk that Mr Elmaaraoui does not now possess the requisite skills to be re-registered as a Commercial Builder (Unlimited).
- 65 Section 172(4A) does not place a high hurdle to re-registration of a person who has held registration and over the years remains active in the field of building related to the relevant reregistration. Parliament has not included some form of currency of qualification and/or experience criterion.
- 66 Mr Elmaaraoui has provided sufficient evidence to clear that hurdle, being evidence of his ongoing supervision of commercial building projects, his subfloor work, the according to his referees high quality of his work, the good opinion those who work with him in the industry hold of him and his skills and him relatively recently obtaining relevant qualifications.

Orders

- 67 As mentioned above, the VBA has replaced the Board and will presumably become responsible for supervision of Mr Elmaaraoui's ongoing registration.
- 68 With the Board being the respondent in this proceeding, under s 51(d) of the *Victorian Civil And Administrative Tribunal Act 1998* I have set aside the Board's decision and remitted the matter for reconsideration by the Board with a direction that the Board is to re-register Mr Elmaaraoui as a Commercial Builder (Unlimited), subject to Mr Elmaaraoui satisfying the Board concerning matters related to re-registration following this decision, such as payment of fees and appropriate insurance.
- 69 I leave it to the Board and to the VBA to implement this decision in the context of transitional legislative provisions which I assume transfer the registration responsibility from the Board to the VBA.
- 70 I have given the parties liberty to make further application to VCAT in respect of this decision, if any issue arises which either of the parties wishes VCAT to address.



Ian Proctor
Senior Member

