Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	**19-014**
Appellant:	Dr Malcolm Stuart Nyst
Enforcement Authority:	Brisbane City Council
Concurrence Agency: (if applicable)	N/A
Site Address:	93 Logan Road, Woolloongabba, in the State of Queensland and described as Lot 50 on RP217072 ─ the subject site

Appeal

An appeal under section 229 and Item 6 of Table 1 of Schedule 1 of the *Planning Act 2016* (PA) against the decision of the Council to give an Enforcement Notice under section 248 of the *Building Act 1975* (BA) dated 27 February 2019, requiring the installation of a series of support systems to the building to secure the building on the subject site that the Council considered was in a dilapidated condition.

Date and time of hearing:	2pm, 4 July 2019
Place of hearing:	Meeting Room 3, Level 16, 41 George Street, Brisbane
Tribunal:	Samantha Hall – Chair Stafford Hopewell – Member Carolyn Hunt – Member Markus Pye - Member
Present:	**Appellant** Malcolm Nyst – Appellant Chris Nyst – Observer **Brisbane City Council** Morgan Pratt – Built Environment Supervisor, Council (Delegate) Nicholas Goulter – Business Manager Built Environment, Council Queensland Heritage Council Andrew Barnes Andrew Ladlay

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(b) of the *Planning Act 2016* (PA) **changes** the decision of the Council to give the Appellant the Enforcement Notice by changing the Enforcement Notice dated 27 February 2019 as follows:

Replace paragraph 1 (including the sentence starting “Compliance Date”) under the heading, “Requirements” with the following paragraph:

“1. Secure the building on the premises by installing a series of support systems to the building to address the structural instability identified by the further engineering report prepared by ACOR Consultants dated 25 February 2019, being the structural instability with respect to:

(a) the external parapet brick walls and facades on the eastern and northern elevations above the second storey;

(b) the chimneys; and

(c) several walls to the rear of the building.

Compliance Date: 60 calendar days after the date of decision of the Development Tribunal in Appeal Number 19-14 and then to be kept in existence until such time as the building is made structurally safe.”

Background:

The fire in The Broadway Hotel

1. The Appellant is the owner of the subject site, upon which is constructed a building that is colloquially known as “The Broadway Hotel” (the Hotel). The Hotel was constructed in 1889 and comprises 3 storeys.

2. On 2 September 2018, a fire burned within the upper levels of the Hotel.

3. The fire caused structural damage to the Hotel, the extent of which has been noted in two engineering reports, which commonly agree the damage included:

   (a) fire damage to the structural roof framing and roof sheeting;

   (b) some smoke and fire damage to brickwork;

   (c) structural instability including with respect to:

      (i) the external parapet brick walls and facades on the eastern and northern elevations above the second storey;

      (ii) the chimneys; and

      (iii) several walls to the rear of the building;

   (d) the removal of internal stud walls above the second storey to the roof;

   (e) little to no internal floor lining remaining on the second storey and significant charring and fire damage to the floor at the first storey. The ground floor has minimal damage;

   (f) damage to the floor joists in the second storey;

   (g) impact upon overall structural stability of the building.

The Enforcement Notice

4. The Council's Enforcement Notice dated 27 February 2019 (the Enforcement Notice) the subject of this appeal, provides a succinct summary of the facts and circumstances which won't be reproduced in full in this decision, except to relevantly note the following:

   (a) On 4 September 2018, a chain link fence was installed around the subject site by the Appellant under an approved Council Footway Permit;

   (b) On 7 September 2018, the Minister for the Environment and the Great Barrier Reef, Minister for Science and Minister for the Arts, Ms Leeanne Enoch (the Minister) issued a Stop Order under section 154 of the *Queensland Heritage Act 1992* to prevent the demolition of the Hotel except for parts of the roof, internal walls that are not brick above the second storey and all timber floor linings on the first and second storeys;

   (c) On 27 September 2018, the Council received two engineering reports regarding the Hotel:

      (i) Report titled "Structural Engineering Inspection – Fire Damaged Building Broadway Hotel Woolloongabba", dated September 20, 2019 [sic] prepared by Neil McKenzie & Associates Pty Ltd for the Appellant (McKenzie Report);

      (ii) Report titled "Structural Engineering Inspection – Fire Damaged Building Broadway Hotel, Woolloongabba QLD", dated 7 September 2018 (First ACOR Report), prepared by ACOR Consultants for the Department of Environment and Science (DES).

   (d) As a result of the McKenzie Report and the First ACOR Report, the Council formed a belief that the chain link fence was not sufficient to ensure public safety and on 5 October 2018, the Council issued a new Footway Permit to the Appellant to allow an exclusion area;

   (e) On 12 October 2018, the Council issued an enforcement notice (Ref: CA122354) to the Appellant, requiring the Appellant to undertake a number of actions which can collectively be described as requiring the design and installation of sufficient hoarding and gantry around the Hotel to ensure the safety of pedestrians using the pathway on the adjoining Council land;

   (f) On 31 October 2018, the Council received an Exemption Certificate for the Hotel issued by the DES which allowed the removal of loose roof sheeting and framing to the building;

   (g) On 2 November 2018, the Minister sent a letter to the Council advising of additional work the Minister suggested was required to the Hotel (Minister's letter);

   (h) On 12 November 2018, a Council officer inspected the Hotel to determine compliance with the *Building Act 1975* (BA) and identified further deterioration of the building (the inspection);

   (i) The Council formed a belief that the Hotel was in a dilapidated condition based on the following:

      (i) the advice in the Minister's letter;

      (ii) the First ACOR Report;

      (iii) the McKenzie Report;

(iv) the inspection;

(j) On 21 November 2018, the Council issued a Show Cause Notice to the Appellant (the Show Cause Notice) seeking representations from the Appellant as to why an enforcement notice should not be given in respect of "a dilapidated building" located on the subject site;

(k) Between 3 December 2018 and 12 December 2018, a significant amount of correspondence passed between the Council and the Appellant and the Council extended the Show Cause Notice period to 14 January 2019;

(l) On 11 January 2019, the Appellant provided representations to the Council as to why the Appellant was not prepared to undertake works on the Hotel (the Representations);

(m) On 19 February 2019, Council officers and DES contractors inspected the premises, in the presence of the Appellant, in response to the Representations;

(n) On 25 February 2019, the Council received a copy of a letter from ACOR Consultants to DES dated 25 February 2019 (Second ACOR Report), which identified how stabilisation work could be carried out to the Hotel;

(o) After considering the Representations, the Second ACOR Report and the earlier engineering reports, the Council considered it appropriate to issue the Enforcement Notice.

5. The Requirements of the Enforcement Notice were to "*Secure the building on the premises by installing a series of support systems to the building in accordance with the proposed propping design and methodology within the*" Second ACOR Report.

6. The Compliance Date of the Enforcement Notice was "*30 April 2019 and then to be maintained until such time as the building is made structurally safe*."

<u>The appeal</u>

7. The Appellant filed a Notice of Appeal (Form 10) with the Tribunal's Registrar on 26 March 2019.

8. The Appellant's Form 10 identified the Appellant's grounds of appeal which comprised 26 grounds spanning 9 typed pages.

9. At 12.45pm on 4 July 2019, the Appellant provided by way of email to the Council and the Registrar, material that the Appellant was seeking to rely upon at the hearing comprising two Affidavits and written submissions (Appellant's Further Material).

10. The appeal was heard by the Tribunal on 4 July 2019 from 2pm and the Tribunal received the Appellant's Further Material at the hearing.

11. It is worth noting that at the hearing, the Appellant was self-represented, however, he was also accompanied by his lawyer, Mr Chris Nyst. Section 248 of the PA relevantly provides that "a party to tribunal proceedings may appear … in person …. or … by an agent who is not a lawyer".

12. The Tribunal's Chairperson discussed the presence of Mr Nyst with the Appellant and the Council's representatives. During those discussions, the Council's representatives accepted Mr Nyst's presence in the room, provided Mr Nyst did not participate in the hearing nor offer advice or counsel to the Appellant during the hearing itself. Mr Nyst assured the Tribunal that he would abide by the Council's wishes and would not advocate for the Appellant during the hearing.

13. Mr Nyst largely complied; however, the Tribunal's Chairperson did have to remind him not to participate on several occasions during the hearing.

14. On 5 July 2019, the Tribunal made the following orders that were communicated by the Registry to the parties by email (Orders):

    (a) *"The Council is to provide written submissions to the Registrar by email on or before 4pm on Thursday 18 July 2019, which address the following:*

        (i) *provide a response to the Appellant's Grounds of Appeal dated 26 March 2019;*

        (ii) *provide a response to the further material provided by the Appellant to the Council and the Registry by email dated 4 July 2019; and*

        (iii) *advise the Council's attitude towards considering any alternate actions that the Appellant may propose (alternate actions) to those identified in the "Requirements" section of the Council's Enforcement Notice dated 27 February 2019 (Enforcement Notice).*

    (b) *The Appellant is to provide written submissions to the Registrar by email on or before 4pm on Thursday 1 August 2019, which address the following:*

        (i) *provide a response to the Council's responses provided pursuant to paragraphs 1(a) and (b) above;*

        (ii) *if the Council advises that it would consider alternate actions, advise the Appellant's attitude towards investigating alternate actions.*

    (c) *If the Council advises it does not wish to consider any alternate actions pursuant to paragraph 1(c) or the Appellant advises that it would not like to make investigations into alternate actions pursuant to paragraph 2(b), the Development Tribunal will proceed to prepare a decision notice.*

    (d) *If the Council advises it wishes to consider alternate actions pursuant to paragraph 1(c) and the Appellant advises that it would like to make investigations into alternate actions pursuant to paragraph 2(b):*

        (i) *the Appellant must do so and provide details of any alternate actions that it proposes to undertake to the Registrar by email on or before 4pm on Thursday 29 August 2019; and*

        (ii) *the Development Tribunal will then make further orders with respect to the conduct of this appeal."*

15. On 18 July 2019, the Council provided submissions by email to the Registry in accordance with the Orders (Council's Submissions).

16. Following an email from the Registry to the Council requiring clarification of the Council's position, the Council by email dated 22 July 2019, confirmed that it did not object to the idea of considering alternate methods to secure the building, as long as the alternate method achieved the outcome of securing the Hotel by a series of support systems to the building to prevent further dilapidation.

17. On 2 August 2019, the Appellant provided its submissions by email to the Registry in accordance with the Orders (Appellant's Submissions).

18. Following an email from the Registry to the Appellant requiring clarification of the Appellant's position, the Appellant by email dated 6 August 2019, confirmed that he would like to investigate alternate methods to secure the building.

19. On 29 August 2019, the Appellant provided details of the alternate actions the Appellant would be prepared to take if the Tribunal decided that the Enforcement Notice was lawful.

20. The Tribunal proceeded to consider the evidence provided by the parties and by way of email dated 29 October 2019, on behalf of the Tribunal, the Registry made a request to the Council to provide by way of an affidavit true copies of the relevant instruments of delegation under which the Enforcement Notice was signed.

21. By email dated 30 October 2019, Morgan Pratt, Built Environment Supervisor of the Council, provided copies of the relevant instruments of delegation requested by the Tribunal.

22. By email dated 31 October 2019, the Registry provided a copy of Mr Pratt's email dated 30 October 2019, with attachments, to the Appellant and afforded the Appellant an opportunity to provide comments about those documents on or before close of business on 1 November 2019.

23. In response, the Appellant by email dated 1 November 2019 sent at 1.14pm and by a further email that day sent at 3.23pm, queried the Council's lack of provision of an affidavit, the lack of evidence provided by the Council with respect to Mr Pratt's appointment and requested additional time to consider the material and provide a response.

24. By email dated 1 November 2019 and sent at 4.48pm, the Registry on behalf of the Tribunal:

    (a) asked the Council to provide by close of business on 4 November 2019, confirmation with respect to aspects of the instruments of delegation and evidence regarding Mr Pratt's appointment; and

    (b) advised the Appellant that the Tribunal would accept submissions by the Appellant on or before 6 November 2019, in respect of the material already provided and to be provided by the Council.

25. The Council provided a response to the Tribunal's request in the following two emails sent to the Registry:

    (a) email received on 1 November 2019 at 5.05pm with affidavit attached; and

    (b) email received on 4 November 2019 at 4.10pm providing Mr Pratt's position history.

26. The Appellant provided submissions in respect of the material provided by the Council by email dated 6 November 2019.

Jurisdiction:

27. Schedule 1 of the PA states the matters that may be appealed to the Tribunal.[1]

28. Section 1(1) of Schedule 1 of the PA provides that Table 1 states the matters that may be appealed to a tribunal. However, pursuant to section 1(2) of Schedule 1 of the PA, Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in sub-section (2).

29. Section 1(2)(h) of Schedule 1 of the PA, relevantly refers to a decision to give an enforcement notice in relation to a matter under paragraphs (a) to (g). Paragraph (g) refers to a matter under the PA, to the extent the matter relates to the BA, other than a matter under the BA that may or must be decided by the Queensland Building and Construction Commission.

[1] Section 229(1)(a) of the PA.

30. Section 248(5) of the BA, relevantly provides that an enforcement notice given under that section is taken to be an enforcement notice given under section 168 of the PA.

31. Accordingly, an enforcement notice given under section 248 of the BA, would come within section 1(2)(g) of Schedule 1 of the PA and consequently, also section 1(2)(h) of Schedule 1 of the PA.

32. So, Table 1 of Schedule 1 of the PA applies to the Tribunal.

33. Under item 6 of table 1 of Schedule 1 of the PA, an appeal may be made against the decision to give an enforcement notice. The appeal is to be made by the person given the enforcement notice, who in this case was the Appellant and the Respondent to the appeal is the enforcement authority, who in this case is the Council.

34. Accordingly, the Tribunal is satisfied that it has the jurisdiction to hear this appeal.

Decision Framework:

35. The Enforcement Notice the subject of this appeal was issued by the Council on or about 27 February 2019. At that time, the PA was in force, as was the BA.

36. The Appellant filed a Form 10 – Appeal Notice on 26 March 2019.

37. The appeal is a PA appeal, commenced after 3 July 2017 under section 229 of the PA. As such, the appeal is to be heard and determined under the PA.

38. This is an appeal by the Appellant, the recipient of the Enforcement Notice and accordingly, the Council, being the enforcement authority that gave the Enforcement Notice, must establish that the appeal should be dismissed.[2]

39. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Council which decided to give the Enforcement Notice the subject of this appeal.[3]

40. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal[4].

41. At the hearing of this appeal, the Appellant sought leave from the Tribunal to present other evidence to the Tribunal comprising the following material (Appellant's Further Material):

    (a) a letter dated 4 July 2019 from Nyst Legal to Brisbane City Council;

    (b) submissions dated 4 July 2019;

    (c) copy of an Affidavit of the Appellant sworn 3 July 2019; and

    (d) copy of an Affidavit of Neil McKenzie sworn 3 July 2019.

42. The Council did not oppose the presentation of the other evidence by the Appellant and the Chairperson of the Tribunal granted the leave sought by the Appellant during the hearing.

[2] Section 253(3) of the PA.
[3] Section 253(4) of the PA.
[4] Section 253(5)(a) of the PA.

43. At the hearing of this appeal, the Council sought leave from the Tribunal to present other evidence to the Tribunal comprising the following material:

    (a) a copy of the Show Cause Notice;

    (b) a copy of an email dated 28 March 2019 from Glenn Wilshier, Special Counsel of Crown Law to Brendan Nyst, Director, Nyst Legal;

    (c) a copy of Brisbane City Council Delegations – Building Act 1975, amendment 15 May 2018.

44. The Appellant did not oppose the presentation of the other evidence by the Council and the Chairperson of the Tribunal granted the leave sought by the Council during the hearing.

45. The PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceedings and may seek the views of any person[5].

46. The Tribunal may consider other information that the Registrar asks a person to give to the Tribunal.[6]

47. By email dated 31 May 2019, Jo Ketter, the Executive Officer of the Queensland Heritage Council (QHC) made a request to the Registrar for representatives of the QHC to attend the hearing of this appeal and to also be heard at the hearing.

48. By email dated 25 June 2019, the Registrar, at the Tribunal's request, advised the QHC that the Tribunal agreed to QHC representatives attending and being heard at the hearing of the appeal. By email dated 26 June 2019, the Registrar advised the Appellant and the Council of the Tribunal's decision in this regard.

49. The Tribunal is required to decide the appeal in one of the following ways set out in section 254(2) of the PA:

    (a) confirming the decision; or

    (b) changing the decision; or

    (c) replacing the decision with another decision; or

    (d) setting the decision aside and ordering the person who made the decision to remake the decision by a stated time; or

    (e) for a deemed refusal of an application:

        (i) ordering the entity responsible for deciding the application to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or

        (ii) deciding the application.

[5] Section 249 of the PA.
[6] Section 253 and section 246 of the PA.

Material Considered:

50. The material considered in arriving at this decision comprises:

(a) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Development Tribunals Registrar on 26 March 2019.

(b) An email dated 30 May 2019 from Jo Ketter, Executive Officer of the QHC to the Acting Registrar, Development Tribunals, requesting that the QHC attend the hearing of this appeal and be provided with a copy of the Form 10.

(c) An email dated 3 June 2019 from Moreen Ma, Build Environment Officer of the Council to Rachel Groessler, the Acting Registrar, Development Tribunals with attached:

(i) copy of the McKenzie Report;

(ii) copy of the First ACOR Report.

(d) An email dated 25 June 2019 from Rachael Groessler, the Acting Registrar, Development Tribunals to Jo Ketter, Executive Officer of the QHC, advising the Tribunal's decision to consent to the QHC attending the hearing of the appeal.

(e) An email dated 27 June 2019 from Brendan Nyst, Director, Nyst Legal to Rachael Groessler, the Acting Registrar, Development Tribunals, requesting written reasons for the Tribunal's decision to consent to the QHC attending the hearing of the appeal.

(f) An email dated 28 June 2019 from Rachael Groessler, the Acting Registrar, Development Tribunals to Brendan Nyst, Director, Nyst Legal responding to the Appellant's request for written reasons.

(g) Correspondence dated 4 July 2019 from Nyst Legal to Brisbane City Council provided to the Tribunal in hard copy at the hearing with attached (Appellant's Further Material):

(i) Appellant's submissions dated 4 July 2019;

(ii) copy of Affidavit of Dr Malcolm Nyst sworn 3 July 2019; and

(iii) copy of Affidavit of Neil McKenzie sworn 3 July 2019.

(h) Bundle of material provided by the Council to the Tribunal at the hearing which included:

(i) Council Delegations under the Building Act 1975, last delegation amendment 15 May 2018;

(ii) report titled "Structural Engineering Inspection – Fire Damaged Building Broadway Hotel Woolloongabba", dated September 20, 2019 [sic] prepared by Neil McKenzie & Associates Pty Ltd, prepared for the Appellant;

(iii) report titled "Structural Engineering Inspection – Fire Damaged Building Broadway Hotel, Woolloongabba QLD", dated 7 September 2018, prepared by ACOR Consultants for the Department of Environment and Science;

(iv) letter from the Minister to the Council dated 2 November 2018;

(v) the Show Cause Notice;

(vi) letter from Nyst Legal to the Council dated 7 December 2018;

(vii) letter from Nyst Legal to the Council dated 11 January 2019;

(viii) the Second ACOR Report; and

(ix) an email dated 28 March 2019 from Glenn Wilshier of Crown Law to Brendan Nyst, Director, Nyst Legal with attached information prepared by Queensland Heritage Restorations (QHR).

(i) An email dated 5 July 2019 from Jill Molloy, the Acting Registrar, Development Tribunals to the parties, identifying orders made by the Tribunal with respect to a timetable for the making of further submissions following the hearing.

(j) An email dated 18 July 2019 from Jill Molloy, the Acting Registrar, Development Tribunals to the parties, with attached submissions from the Council (Council's Submissions).

(k) An email dated 22 July 2019 from Morgan Pratt, Built Environment Supervisor of the Council to Jill Molloy, the Acting Registrar, Development Tribunals.

(l) An email dated 2 August 2019 from Jill Molloy, the Acting Registrar, Development Tribunals to the parties, with attached submissions from the Appellant (Appellant's Submissions).

(m) An email dated 2 August 2019 from Jill Molloy, the Acting Registrar, Development Tribunals to the parties, regarding the prosecution of the appeal and whether the Appellant intended to investigate alternate actions.

(n) An email dated 6 August 2019 from Jill Molloy, the Acting Registrar, Development Tribunals to the parties, which included a copy of an email received from Nyst Legal on 5 August 2019 advising that the Appellant did intend to investigate alternate actions.

(o) An email dated 13 August 2019 from Jill Molloy, the Acting Registrar, Development Tribunals to the parties, advising the Tribunal would make further orders for the conduct of the appeal following receipt of the Appellant's notification about alternate actions.

(p) An email dated 29 August 2019 from Jill Molloy, the Acting Registrar, Development Tribunals to the parties, providing details of the alternate actions the Appellant would be prepared to take if the Tribunal decided that the Enforcement Notice was lawful.

(q) An email dated 29 October 2019 from Jill Molloy, the Acting Registrar, Development Tribunals to the parties.

(r) An email dated 30 October 2019 from Morgan Pratt, Built Environment Supervisor of the Council to Jill Molloy, the Acting Registrar, Development Tribunals.

(s) An email dated 31 October 2019 from Jill Molloy, the Acting Registrar, Development Tribunals to the parties.

(t) An email dated 1 November 2019 sent at 1.14pm from Brendan Nyst, Director, Nyst Legal to Jill Molloy, the Acting Registrar, Development Tribunals.

(u) An email dated 1 November 2019 sent at 3.23pm from Brendan Nyst, Director, Nyst Legal to Jill Molloy, the Acting Registrar, Development Tribunals with attached letter.

(v) An email dated 1 November 2019 sent at 4.48pm from Jill Molloy, the Acting Registrar Development Tribunals to the parties.

(w) An email dated 1 November 2019 from Morgan Pratt, Built Environment Supervisor of the Council to Jill Molloy, the Acting Registrar, Development Tribunals with attached affidavit of Kevin Dennis Cartledge of the Council.

(x) An email dated 4 November 2019 from Morgan Pratt, Built Environment Supervisor of the Council to Jill Molloy, the Acting Registrar, Development Tribunals with attached position history of Mr Pratt.

(y) An email dated 4 November 2019 from Jill Molloy, the Acting Registrar, Development Tribunals to Brendan Nyst, Director, Nyst Legal with attached copies of two emails received by the Registry from the Council.

(z) An email dated 6 November 2019 from Nyst Legal to the parties with attached the Appellant's further submissions (Appellant's Further Submissions).

(aa) *Planning Act 2016* (PA).

(bb) *Planning Regulation 2017* (PR).

(cc) *Building Act 1975* (BA).

(dd) *Queensland Heritage Act 1992* (QHA).

(ee) *Work Health and Safety Act 2001* (WHSA).

(ff) *Acts Interpretation Act 1954* (AIA).

(gg) *City of Brisbane Act 2010* (CoBA).

Findings of Fact:

The Tribunal makes the following findings of fact:

<u>The grounds of the appeal</u>

51. As identified above, the Appellant's grounds of appeal are lengthy.

52. The Council bears the onus in this appeal and the Council's Submissions grouped the 26 grounds of appeal into 10 overarching grounds.

53. Having considered both the Appellant's grounds of appeal in full, the Appellant's Further Material and the groupings of those grounds identified in the Council's Submissions, the Tribunal adopts the 10 overarching groupings of the grounds that were identified by the Council in considering the issues in the appeal, with the exception of the grouping of ground 19, which the Tribunal considers is more practically grouped together with grounds 20 and 21.

54. Accordingly, the 10 overarching groupings of the grounds considered by the Tribunal are as follows:

(a) Content of the Show Cause Notice (Grounds 1 and 2);

(b) The Second ACOR Report (Grounds 3 – 6);

(c) Improper exercise of discretion (Grounds 7 to 11);

(d) Unreasonably broad requirements (Grounds 12 and 13);

(e) Unreasonableness of time to comply (Grounds 14 and 15);

(f) Work health safety issues (Grounds 16, 17 and 24);

(g) Failure to have regard to engineering opinion (Ground 18);

(h) Mr Pratt's belief was not that of Council (Grounds 19, 20 and 21);

(i) Belief the work was required to secure the building (Ground 22); and

(j) Conflict and inconsistency with the *Queensland Heritage Act 1992* (Ground 23).

Alternate action

55. While the First ACOR Report and the McKenzie Report both identified several items of structural damage to the Hotel as a result of the fire, the Council in the Enforcement Notice was clear to identify that the Enforcement Notice was intended only to address the structural instability identified by the Second ACOR Report, being that with respect to:

    (a) the external parapet brick walls and facades on the eastern and northern elevations above the second storey;

    (b) the chimneys; and

    (c) several walls to the rear of the building.

56. The Tribunal understands that it is common ground between the parties that there has been structural damage to the Hotel caused by the fire as identified in paragraph 55 of this Decision.

57. Putting aside the Appellant's procedural grounds with respect to the issue of the Enforcement Notice, the remaining issue in the appeal related to the method identified by the Council in the "Requirements" section of the Enforcement Notice for addressing that structural instability.

58. During the hearing, discussions turned to the parties considering whether there was any alternate action that could be taken that would be acceptable to both the Council and the Appellant to address the structural damage to the Hotel caused by the fire and identified in paragraph 55 of this Decision. The Orders made by the Tribunal reflected those discussions.

59. The Appellant did identify alternate action that could be taken and this was considered by the Tribunal in its consideration of the grounds relating to the "Requirements" section of the Enforcement Notice.

Content of the Show Cause Notice (Grounds 1 and 2)

60. Grounds 1 and 2 of the Appellant's grounds of appeal can be summarised to be that the Enforcement Notice was not lawfully issued because the Show Cause Notice did not comply with the requirements of section 247 of the BA, in particular:

    (a) it did not outline the relevant facts;

    (b) it did not identify the scope of work required, in particular:

        (i) it failed to clarify the scope of work required;

(ii) it failed to notify the Appellant of any proposed action for requiring the securing of the building;

(iii) it did not give the Appellant an opportunity to make written representations within the show cause period as to why the proposed action should not occur;

(iv) it did not identify an intent to impose an ongoing duty on the Appellant to maintain works indefinitely or until the Hotel was made structurally sound;

(v) it did not identify what, if any, proposed enforcement order was being contemplated to allow the Appellant to be accorded natural justice and to properly respond to the Show Cause Notice.

61. As identified in the Council's Submissions, section 248(3) of the BA requires a local government to give a person a show cause notice before giving that person an enforcement notice.

62. Section 247(1) of the BA relevantly identifies the requirements for a show cause notice as follows:

A notice (a show cause notice) inviting a person to show cause why an enforcement or revocation notice should not be given to the person must –

(a) be in writing; and

(b) outline the facts and circumstances forming the basis for the belief that an enforcement notice or revocation notice should be given to the person; and

(c) state that representations may be made about the show cause notice; and

(d) state how the representations may be made; and

(e) state where the representations may be made or sent; and

(f) state –

(i) a date and time for making the representations; or

(ii) a period within which the representations must be made.

It did not outline the relevant facts

63. Paragraphs (a), (c), (d), (e) and (f) of section 247(1) of the BA are not in issue between the parties.

64. The Appellant's grounds allege that the Show Cause Notice "failed to properly outline" the relevant facts as required by section 247(1)(b) of the BA.

65. Section 247(1)(b) of the BA simply requires a show cause notice to "outline the facts and circumstances forming the basis for the belief that an enforcement notice ... should be given". The section does not impose any test as to whether "those facts are "proper" in their content.

66. The Council's Submissions at paragraph 17, state that the facts and circumstances set out in the Show Cause Notice detailed the basis for the belief that an enforcement notice should be given to the Appellant. This is supported in paragraph 14 of the Show Cause Notice, which states "*As a result of the information provided in the letter from the Minister, read in conjunction with the the* [sic] *engineering report and structural engineering report prepared for DES, as well as the inspection conducted by Council, Council formed a*

reasonable belief that the building located on land at the premises is in a dilapidated condition."

67. The Tribunal is satisfied that section 247(1)(b) of the BA does not impose any qualitative requirement as to the "proper" facts and circumstances to be identified by the Council, it merely requires that the Council state the facts and circumstances that formed the basis for the Council's belief that an enforcement notice should be given.

68. The Tribunal is satisfied that the Show Cause Notice clearly sets out a number of facts and circumstances which the Council states formed the basis for its belief that an enforcement notice should be given. Accordingly, the Tribunal is satisfied that paragraphs 1-13 of the Show Cause Notice did set out the facts and circumstances required by section 247(1)(b) of the BA.

It did not identify the scope of work required

69. As the Council's Submissions identify, the crux of the Appellant's submissions is that the Show Cause Notice did not identify the scope of work that the Council required the Appellant to carry out to address the dilapidated state of the Hotel.

70. The Tribunal has considered section 247(1) of the BA and agrees with the Council's Submissions, specifically at paragraph 12, that there is no requirement in section 247(1) of the BA to state a scope of work or proposed action that the Council may require.

71. A show cause notice issued pursuant to section 247(1) of the BA seems to merely be "setting the scene" for the issue of an enforcement notice, such that it gives the Council an ability to notify a person that the Council has reason to believe an enforcement notice should be given, why the Council has formed that belief and then time for that person to make representations effectively about the belief the Council has formed.

72. Section 247(1) of the BA does not require a show cause notice to identify any scope of work to be taken by the recipient. This can be contrasted with section 249 of the BA, which relevantly sets out specific requirements for enforcement notices and clearly requires an enforcement notice to identify the action or scope of work that may be required to repair or rectify the building or structure.

73. As the Council's Submissions state in paragraph 16, if it was intended by section 247(1) of the BA for a show cause notice to identify the scope of work required, the drafters of that section could clearly have done so and in a manner similar to how section 249 of the BA imposes such a requirement for enforcement notices, however, this is not the case.

74. Accordingly, the Tribunal is satisfied that the Show Cause Notice complies with each of the paragraphs in section 247(1) of the BA and was lawfully issued.

The Second ACOR Report (Grounds 3 – 6)

75. Grounds 3 to 6 of the Appellant's grounds of appeal can be summarised as follows:

    (a) The Council's reference to the Second ACOR Report in the Enforcement Notice was unlawful and unreasonable as the Appellant had not had an opportunity to provide any response to the Second ACOR Report;

    (b) Prior to issuing the Enforcement Notice the Council should have provided to the Appellant with particulars about:

        (i) the methodology prepared by QHR, including elements regarding safety;

        (ii) QHR's availability and willingness to undertake the stabilisation works in accordance with the proposed propping design; and

(iii) any estimate of the cost of the work;

(c) The Council directed the Appellant not to communicate with QHR in a communication between the Council's legal representative and the Appellant on 22 March 2019, thereby obstructing performance and rendering it impossible to comply with the Enforcement Notice; and

(d) Council in adopting the methodology referred to in the Second ACOR Report as the basis for the Enforcement Notice did so unlawfully and unreasonably.

76. The Tribunal has further grouped these grounds into two main issues:

(a) the use of the Second ACOR Report as the basis for the requirements in the Enforcement Notice, including the methodology and the consultation with QHR; and

(b) the Council's communication to the Appellant on 22 March 2019.

77. The Tribunal notes that ground 5 of the Appellant's grounds of appeal identifies the Council's communication to the Appellant as being made on 22 March "2018", however, a copy of the communication is exhibited to the Affidavit of the Appellant sworn 3 July 2019 and it is clearly dated 22 March "2019". Accordingly, the Tribunal is satisfied that the date in ground 5 of the Appellant's grounds is an error and that the Council's communication is dated 22 March 2019.

The Second ACOR Report

78. The Tribunal would like to firstly identify an error in paragraph 21 of the Council's Submissions, in which the Council makes reference to QHR being in attendance at the hearing and providing evidence to the Tribunal.

79. The Council appears to have mistaken the "Queensland Heritage Council" with "Queensland Heritage Restorations". It was the QHC that sought the Tribunal's leave to attend the hearing and give evidence to the Tribunal, not QHR. That said, the QHC representatives who were in attendance and gave evidence, had been present at the inspections carried out by both the Council and the Appellant's engineers and accordingly had firsthand knowledge and opinions regarding the matters in issue. But it should be made clear that QHR was not in attendance at the hearing nor did its representatives provide any evidence to the Tribunal.

80. Paragraphs 22 to 26 of the Council's Submissions addressed the Appellant's grounds regarding the Second ACOR Report in identifying that the Second ACOR Report was consistent with the First ACOR Report and further proposed a method of securing the building by way of a series of structural supports.

81. The Council's Submissions suggest that the information provided to the Appellant in the Second ACOR Report provided one method by which further deterioration of the building could be prevented by way of support systems and propping for the external walls. The Council contended that the information was adequate to allow the Appellant to make his own enquiries into options available to him to address the issues identified within the ACOR Reports.

82. Turning to the Second ACOR Report, it provides some clarity in respect of the grounds raised by the Appellant, specifically in the following paragraphs [underlined emphasis added]:

"Acor provided a report on the property dated 31/12/2018 rev E. This letter is supplementary to this report and provides further clarification in respect to the structural condition of the building."

"A building contractor, Queensland Heritage Restorations (QHR) experienced in heritage building restorations, was engaged to undertake a construction methodology for the wall stabilisation and roof installation based on the proposed concept propping design prepared by Acor".

"…this letter intends to clarify the local and global nature of the instability noted in the original Acor report and provides additional supporting documentation on the possible repairs."

"Acor has prepared a concept design for the wall stabilisation and propping which is attached to this letter. Queensland Heritage Restorations is an experienced contractor and has reviewed the project and together with our propping design prepared a methodology to undertake the stabilisation works in a safe manner."

"…it is the opinion that a competent contractor is able to undertake repairs to the Broadway Hotel in a safe manner to both stabilise the building and to provide a new roof that will protect the remaining internal structure and finishes from water damage. If required, we understand QHR are available and willing to undertake the stabilisation works. Once the site is handed over to a contractor, the safety on site becomes the responsibility of the contractor and their engineer rather than the owner to manage."

83. It is clear from a number of paragraphs within the Second ACOR Report, as well as a comparison between the First ACOR Report and the Second ACOR Report that the Second ACOR Report is supplementary to and provides further detail about the proposed wall stabilisation and propping and methodology set out in the First ACOR Report, specifically that in paragraph 8 of the First ACOR Report.

84. The Appellant therefore had opportunity between the issue of the First ACOR Report in September 2018 (and that of the Show Cause Notice) and the issue of the Enforcement Notice in February 2019 to respond to the Council in respect of any concerns the Appellant had about the wall stabilisation and propping and methodology set out in the First ACOR Report.

85. Given this, the Tribunal is satisfied that the Appellant was sufficiently aware of the content of the First ACOR Report and that as the Second ACOR Report was supplementary to that report, the Council was not acting unreasonably or unlawfully in referencing the Second ACOR Report in the Enforcement Notice.

Communications with QHR

86. The Tribunal understands from its consideration of the Appellant's grounds of appeal, the Appellant's Further Material and the Appellant's Submissions that the Appellant is of an understanding that the Enforcement Notice required the Appellant to engage QHR to carry out the proposed propping design and methodology as set out in the Second ACOR Report.

87. As a result of the Tribunal's consideration of the Second ACOR Report and the requirements of the Enforcement Notice, the Tribunal has reached a different view.

88. In preparing the Second ACOR Report, ACOR Consultants appear to have consulted with QHR to assist ACOR Consultants in identifying a construction methodology that could be undertaken to carry out the proposed propping design.

89. The Second ACOR Report does not require that QHR be engaged by the Appellant nor does it dictate the exact methodology to be used, instead the Tribunal's reading of the Second ACOR Report is that the methodology identified by QHR is provided as an example of how the propping design proposed by ACOR Consultants in the First ACOR Report could be done. The next to final paragraph of the Second ACOR Report states "it is the opinion that a competent contractor is able to undertake repairs to the Broadway Hotel" [emphasis added].

90. Similarly, the requirements of the Enforcement Notice do not specify that the Appellant must engage QHR to carry out the work. Instead it states the Appellant is to "secure the building on the premises by installing a series of support systems to the building in accordance with …" the Second ACOR Report.

91. Accordingly, the ground in paragraph 5 of the Appellant's grounds of appeal with respect to whether the Council directed the Appellant not to communicate with QHR is rendered of less import because it was not a requirement of the Enforcement Notice that the Appellant engage QHR to complete the work.

92. That said, the Council's email dated 22 March 2019 explained the Council's concerns with respect to the Appellant directly contacting QHR, being a potential conflict of interest that QHR may have, but that this would exist only until such time as any appeal against the Enforcement Notice was resolved. At that time, the Council had no concerns with the Appellant engaging QHR to undertake the work.

93. A later email sent by Morgan Pratt of Council to Brendan Nyst, Director, Nyst Legal (solicitors for the Appellant), dated 25 March 2019, further pointed out that the Enforcement Notice did not require the Appellant to engage the services of QHR and noted that the Council had no objection to the Appellant engaging any suitably qualified person to action the Enforcement Notice.

94. Despite this, the Appellant's legal representatives continued to seek information regarding QHR from the Council in an email dated 25 March 2019 and it seems the Council did provide the information sought by the Appellant by email dated 28 March 2019 from Glenn Wilshier of Crown Law to Brendan Nyst, Director, Nyst Legal. This information included a document prepared by QHR providing an estimate of the cost for QHR to carry out the work in accordance with the Second ACOR Report and further details regarding the methodology QHR proposed to do the work.

95. The Tribunal is satisfied that the Council's email dated 22 March 2019, particularly when considered within the context of the subsequent email correspondence between the parties, did not obstruct the Appellant's performance of the requirements in the Enforcement Notice, nor did it render it impossible for the Appellant to comply with the Enforcement Notice.

<u>Improper exercise of discretion (Grounds 7 to 11)</u>

96. Grounds 7 to 11 of the Appellant's grounds of appeal allege that the Council improperly exercised its discretion to issue the Enforcement Notice for the following reasons:

    (a) The Council failed to exercise or properly exercise, the discretion required to be exercised under section 248 and 249 of the BA before issuing the Enforcement Notice;

    (b) The Council was acting under the decision, direction, advice or requirement of either the State of Queensland or a Minister of the State of Queensland in issuing the Enforcement Notice;

    (c) The Council took into account irrelevant considerations, namely the advice, opinion, perspective, belief or preference of the State of Queensland or a Minister or officer of the State of Queensland and if it did so, it did not give notice of this to the Appellant;

    (d) An unstated proposition implicit in the decision to issue the Enforcement Notice was that the Appellant was responsible for the dilapidated condition of the Hotel.

97. The Council's Submissions addressed these points convincingly and the Tribunal accepts that the Council has discharged its onus in the response it has provided.

98. In particular, paragraph 29 of the Council's Submissions points out that section 248(1)(c) of the BA allowed the Council to give an enforcement to the owner of a building where, amongst other things, the Council "reasonably believes the building … is in a dilapidated condition".

99. While the Council acknowledges the question of whether the belief was reasonable is a matter for the Tribunal to decide, the Council does identify that the discretion exercised to give the Appellant the Enforcement Notice was exercised on the basis of the engineering reports, including the McKenzie Report (that was prepared for the Appellant), each of which identified that the Hotel suffered structural damage caused by the fire as identified in paragraph 55 of this Decision.

100. The facts and circumstances set out in the Enforcement Notice clearly list a chain of events, correspondence and reporting that was considered by the Council in making the decision to give the Appellant the Enforcement Notice. The Tribunal is satisfied that on the basis of the facts and circumstances identified in the Enforcement Notice, the Council was entitled to hold a reasonable belief that the Hotel was in a dilapidated condition.

101. The Council's Submissions go on to address the Appellant's grounds regarding irrelevant consideration and the input by the State Government through a Minister or an officer, in the Council's decision to issue the Enforcement Notice.

102. In paragraphs 34 to 37, the Council's Submissions clearly refute those grounds and identify that while communications with the State Government formed part of the facts and circumstances leading to the decision to issue the Enforcement Notice, it was by no means determinative. Indeed, the Council's Submissions point out that the requirements of the Enforcement Notice fell short of the requirements suggested in communications by the State Government, thus evidencing the Council's independent exercise of its discretion under section 248 of the BA.

103. As the Council's Submissions stated in paragraph 38, "the facts of the matter speak for themselves", being the facts and circumstances set out in the Enforcement Notice which the Tribunal is satisfied could give rise to a reasonable belief held by the Council that the Hotel was in a dilapidated condition.

104. The Tribunal is satisfied that the Council has satisfied its onus in this regard.

Appellant responsible for dilapidated condition

105. For completeness, the Tribunal notes that the Council's Submissions did not address the final ground made by the Appellant in ground 11(b), being the unstated proposition implicit in the Enforcement Notice that the Council believed the Appellant was responsible for any dilapidated condition of the Hotel.

106. While it is true that the culpability or otherwise of the Appellant for the dilapidated state of the Hotel is not a relevant factor in the context of sections 247 and 248 of the BA, the Tribunal does not consider that, as asserted by the Appellant, there is any "unstated proposition" implicit in the Enforcement Notice that the Council believed the Appellant was responsible for the dilapidated condition of the Hotel.

107. The Appellant's Submissions also do not provide any explanation of this ground, however, it is identified within the context of Ministerial media releases and alleged communications between the State Government and the Council. Given that no specific evidence was provided by the Appellant to support this ground and there was no assertion made in the Enforcement Notice to suggest that the Appellant was responsible for any

dilapidated condition of the Hotel, the Tribunal considers this ground is devoid of any merit.

Unreasonably broad requirements (Grounds 12 and 13)

108. Grounds 12 and 13 of the Appellant's grounds of appeal allege that the Enforcement Notice was unreasonably broad in scope for the following reasons:

    (a) It failed to specify particular works in that the Second ACOR Report contained no propping design or methodology or to the extent to which it did contain design or methodology, it was incapable of being given effect by its terms;

    (b) It lacked any requisite detail necessary to properly notify the Appellant of the works which it was required to perform and the words "proposed propping design and methodology" referred to in the Second ACOR Report were too general; and

    (c) Grounds 3, 4 and 5 were reiterated.

109. The Appellant's Submissions provided further explanation about these grounds in paragraphs 68 to 84 and similar to grounds 3, 4 and 5 considered above, made a number of submissions with respect to QHR. The Tribunal has dealt with those matters sufficiently in the above paragraphs under the heading "The Second ACOR Report".

110. The Tribunal has noted an error in paragraph 78 of the Appellant's Submissions in the quote that is made from the Second ACOR Report. The last sentence of paragraph 78 reads "*If required, we under QHR are available, and willing to undertake the stabilisation works*." Paragraph 79 of the Appellant's Submissions then states that there has been no commitment by QHR to undertake those stabilisation works.

111. However, the Second ACOR Report has been misquoted in paragraph 78. The last sentence should read "*If required, we understand QHR are available and willing to undertake the stabilisation works*." The actual sentence in the Second ACOR Report therefore has a completely different meaning to what paragraphs 78 and 79 of the Appellant's Submissions suggest.

Unreasonably broad

112. The Council's Submissions address grounds 12 and 13 by expressing surprise that the Appellant considered the Enforcement Notice was too broad, given the specific requirements of the Enforcement Notice, which required the installation of a specific support system which was detailed in a plan and attached to the Enforcement Notice.

113. The Council's Submissions maintain the Council's view that the requirements in the Enforcement Notice were appropriate and note the Tribunal's power to change the requirements if the Tribunal so chooses.

114. The Tribunal notes that section 249(1)(d) of the BA provides that "*without limiting specific requirements an enforcement notice may impose, an enforcement notice may require a person to do any of the following … to secure the building or structure (whether by a system of supports or in another way)*".

115. The requirements in the Enforcement Notice are to:

    "*Secure the building on the premises by installing a series of support systems to the building in accordance with the proposed propping design and methodology within the attached* [Second ACOR Report]".

116. These requirements are consistent with the words in section 249(1)(d) of the BA in that they require the Appellant to secure the building on the premises and then specify the

way in which that is to be done, that is, in accordance with the proposed propping design and methodology within the Second ACOR Report. This does not seem to the Tribunal to be unreasonably broad as contended by the Appellant.

117. The Second ACOR Report does not provide a step by step detailed methodology for the entire process that would be required to undertake the proposed propping of the Hotel. What it does provide is a self-professed "concept design" which is demonstrated:

    (a) on the plan titled "Broadway Hotel – Proposed Parapet Restraint Scheme" which is attached to the Second ACOR Report; and

    (b) in the methodology set out in the following two paragraphs:

        1. *"Work from external to the building and above the walls via cranes and booms to install props to stabilise the local areas of instability. The Acor propping design allows for strong backs and props external to the building to allow the installation of a new roof without affecting the propping design.*

        2. *After the wall stabilising props are installed, inspected and signed off by an RPEQ, the building is considered safe to enter to allow further structural assessments to be undertaken of the floor framing."*

118. It appears that the Second ACOR Report intended to identify an overarching way to secure the Hotel, being the proposed propping design but to leave the specific methodology for how the propping is to be installed, including the type and specifics of materials required, the machinery to be used, the time required and the cost, to be determined by a future contractor engaged by the Appellant. This does not seem to be unreasonably broad but instead a common sense approach to allow for an individual contractor to identify its preferred way to implement the proposed propping design.

119. As discussed above, the Second ACOR Report did not require the Appellant to engage a specific contractor, being QHR, which was consulted by ACOR Consulting when it prepared the Second ACOR Report, but instead leaves it open to the Appellant to engage a "competent contractor".

120. It is the view of the Tribunal that the requirements in the Enforcement Notice do meet the requirements for an enforcement notice set out in section 249 of the BA.

Alternative requirement

121. With respect to whether there is an alternative requirement that is more appropriate, the Tribunal notes that the Appellant provided details of alternate actions the Appellant would be prepared to take if the Tribunal decided that the Enforcement Notice was valid.

122. These alternate actions took the form of propping works utilising a scaffold type method to stabilise the building and allow for refurbishment works to be undertaken. The contractor that provided the alternative action, Austruct Pty Ltd (Austruct), acknowledged that the scaffold method was not the same method as in the Second ACOR Report but that it would achieve the same result, being to secure the Hotel.

123. This scaffolding method is one of the methods that could be used to secure the Hotel that was identified by Andrew Barnes of the QHC (and ACOR Consulting) during the hearing.

124. Mr Barnes explained a number of different propping methodologies that would be available to the Appellant to safely secure the Hotel, including a propping system, a scaffolding system, the placement of containers around the outside of the building which could be strapped to the building itself and also the installation of steel posts around the outside of the building.

125. Accordingly, the Tribunal is satisfied that there are a number of ways in which the Appellant could secure the Hotel, not just the proposed propping design and methodology in the Second ACOR Report.

126. On that basis, the Tribunal considers that it is reasonable to change the requirements to clarify the intent and more clearly provide the Appellant with flexibility to secure the Hotel whether by the proposed propping design and methodology in the Second ACOR Report or in another way.

127. The Tribunal's changed requirements are as follows:

> *"1. Secure the building on the premises by installing a series of support systems to the building to address the structural instability identified by the further engineering report prepared by ACOR Consultants dated 25 February 2019, being the structural instability with respect to:*
>
> *(a) the external parapet brick walls and facades on the eastern and northern elevations above the second storey;*
>
> *(b) the chimneys; and*
>
> *(c) several walls to the rear of the building."*

Unreasonableness of time to comply (Grounds 14 and 15)

128. Grounds 14 and 15 of the Appellant's grounds of appeal allege that the time within which compliance was required was unreasonable and unlawful for the following reasons:

    (a) there was no reasonable basis at the time of issue to expect the work could be performed by 30 April 2019 when there was no competent contractor who could perform them for the Appellant within that time; and

    (b) additional work, described as maintenance was required, the scope of which was unidentified and insufficiently certain.

129. The Council's Submissions refer to the evidence given at the hearing with respect to the reasonable time it would take to carry out the proposed propping of the Hotel.

130. The Tribunal expects the Council is referring to the evidence given by Andrew Barnes of the QHC (and also ACOR Consulting) during the hearing.

131. When Mr Barnes explained the number of different propping methodologies that would be available to the Appellant to safely secure the Hotel, he also identified some estimated timeframes for the installation of each of these solutions, being from as little as 48 hours for the container solution to a week for the propping system.

132. The Appellant's grounds of appeal, in the use of the words "*where there was no competent contractor who could perform them for the Appellant within that time*", hark back to the Appellant's mistaken belief that the Enforcement Notice and the Second ACOR Report, required him to engage QHR to perform the requirements of the Enforcement Notice.

133. As discussed above, the Tribunal has formed the view that neither the Enforcement Notice nor the Second ACOR Report obliged the Appellant to engage QHR but instead provided a broad scope for the Appellant to engage any competent contractor to safely secure the building utilising the propping methodology.

134. Therefore, the compliance date in the Enforcement Notice of 30 April 2019, gave the Appellant a little over 2 months to source and engage a competent contractor and for that

contractor to do the work, which itself was estimated by Mr Barnes as requiring approximately 1 week to complete.

135. The Tribunal is accordingly satisfied that the compliance timeframe in the Enforcement Notice was reasonable.

136. Finally, the Appellant raised a ground with respect to the requirement in the Enforcement Notice that the propping of the building "be maintained until such time as the building is made structurally safe".

137. The Council does not address this point specifically in the Council's Submissions except to state broadly that if the Tribunal considers a different period of time for compliance is appropriate, then the Tribunal has the power to change the compliance date.

138. This is obviously not a positive approach taken by the Council to discharge its onus of proof, however, the Tribunal is satisfied that due to the structural condition of the building and the fact that the requirements of the Enforcement Notice aren't aimed at the repair of the Hotel, an ongoing responsibility on the Appellant to maintain the proposed propping of the building until the building is made structurally safe, is reasonable in the circumstances.

139. The Appellant's grounds of appeal consider the word "maintenance" within the context of its usage implying additional works. The Tribunal's reading of the Enforcement Notice is that the use of the word "maintenance" is consistent with the Macquarie Dictionary definition of "maintenance" to mean "the act of maintaining", with "maintain" meaning "to keep in existence or continuance; preserve; retain".

140. Accordingly, the Tribunal is satisfied that the time for compliance in the Enforcement Notice was reasonable and that the requirement that the propping be "kept in existence" or "continued" until the building is made structurally safe", is also reasonable.

Work health safety issues (Grounds 16, 17 and 24)

141. Grounds 16, 17 and 24 of the Appellant's grounds of appeal allege that the Council failed to have proper regard to workplace safety laws, including the *Work Health and Safety Act 2011* (WHSA) (WHS issues). More particularly, the Appellant alleges:

    (a) the Council failed to give proper consideration to requirements upon the Appellant to comply with the workplace safety laws, including the WHSA (ground 16);

    (b) there was the absence of reliable evidence that there was an engineering design and work method to give effect to the proposal that complied with the WHSA (ground 17); and

    (c) the Enforcement Notice required works that would be in contravention of the WHSA (ground 24).

142. The Council's Submissions at paragraphs 46 to 54, respond to the WHS issues by submitting that any WHSA obligations in respect of the works required under the Enforcement Notice would be the responsibility of the relevant contractor undertaking the works and not the Appellant.

143. The Appellant's Submissions in reply rejected this assertion and maintained that the Appellant would retain responsibility under the WHSA for works on the premises and maintained that the requirements of the Enforcement Notice are in conflict with the WHSA.

144. The WHSA, among other things, provides for work health and safety and its object includes protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.

145. While there was much commentary in the parties' respective submissions about the WHSA, there was nothing of substance provided to the Tribunal which sought to identify or clarify the specific obligations that would be imposed on the Appellant, any contractor or other person engaged in work pursuant to the Enforcement Notice that would conflict with any WHSA obligation.

146. Based on the material provided, the Tribunal is not satisfied that there is any conflict between the Enforcement Notice and the WHSA. While the Tribunal readily accepts that persons carrying out works required by the Enforcement Notice may have obligations under the WHSA, this is not the same as saying that compliance with the Enforcement Notice is in conflict with the WHSA.

147. The Tribunal is satisfied that whether or not the Appellant or the contractor engaged by the Appellant or another party has relevant obligations under the WHSA in respect of work required to be carried out under the Enforcement Notice does not affect the lawfulness of the Enforcement Notice in this instance.

148. The Enforcement Notice directs that works be carried out to secure the building by installing a series of support systems to the building in accordance with the proposed propping design and methodology in the Second ACOR Report.

149. Fundamentally, the Appellant is concerned the proposed propping and design system required by the Enforcement Notice is unsafe and inappropriate and, if implemented, would expose the Appellant to potential breach of the WHSA.

150. The Appellant provided affidavit material from his consulting engineer, Mr Neil McKenzie, in which Mr McKenzie stated that based on the level of detail provided in the Second ACOR Report he, as a Registered Professional Engineer Queensland, would not certify the design and methodology. This appears to be the primary basis on which the Appellant asserts that the proposed propping design and methodology required by the Enforcement Notice is unsafe.

151. The Appellant, notwithstanding the extensive grounds of appeal and supporting material provided by him, does not however identify any specific contravention, breach or inconsistency of the proposed propping design and methodology with the WHSA.

152. Further, (as noted earlier in this decision) the Second ACOR Report states that it is the author's opinion that a competent contractor is able to undertake works in a safe manner to stabilise the building in accordance with the proposed propping design and methodology in the Second ACOR Report.

153. The Tribunal is satisfied that, notwithstanding the concerns raised by the Appellant, the Council had obtained sufficient independent expert advice to form the reasonable belief that the proposed design and methodology required by the Enforcement Notice was appropriate to secure the building, including that it could be safely implemented and that the ability to safely carry out the works required by the Enforcement Notice was properly considered by the Council.

154. The Tribunal also notes that the Appellant's lawyers in their correspondence regarding alternate actions of 29 August 2019 confirmed that the Appellant had received advice from Austruct, being the construction contractor identified by the Appellant, advising that it could safely stabilise the building (using a different propping design and methodology) and that the risk in terms of the WHSA would fall upon Austruct.

155. As noted earlier in this decision, the Tribunal is satisfied that there are a number of ways in which the Appellant could secure the Hotel in conformity with section 249(1)(d) of the BA, not just the proposed propping design and methodology by the Second ACOR Report.

156. On that basis, the Tribunal considers that it is reasonable to change the requirements of the Enforcement Notice to clarify the intent and more clearly provide the Appellant with flexibility to secure the Hotel whether by the proposed propping design and methodology by the Second ACOR Report or in another way.

157. The Tribunal is satisfied that this change would enable the Appellant to comply with the Enforcement Notice in a manner that is compatible with any work health and safety obligations, including the WHSA.

Failure to have regard to engineering opinion (Ground 18)

158. Ground 18 of the Appellant's grounds of appeal alleges that the decision to issue the Enforcement Notice failed to take into account that the Appellant's engineer was not satisfied that there was an engineering design and work method to give effect to the proposal which complied with the WHSA.

159. It is clearly evident that the Council had the benefit of engineering advice provided by ACOR Consultants and Neil McKenzie & Associates prior to making the decision to issue the Enforcement Notice and that the issues associated with the ability to secure the building in a safe manner were a primary consideration in the dealings between the Appellant and the Council prior to the Council's decision to give the Enforcement Notice.

160. While the Council preferred the advice provided by ACOR Consultants over that of the Appellant's engineer, the Tribunal is not satisfied that this was based upon or demonstrates any failure by the Council to properly consider whether there was an engineering design and work method to give effect to the proposal which complied with the WHSA.

161. This is so even though the Tribunal notes the Appellant's engineer in his affidavit of 3 July 2019 continued to maintain his objections to the proposed propping design and methodology, stating *"[i]n my opinion, the propping or other stabilization design referred to in the ACOR Report of 25 February 2019 is a rudimentary design lacking in critical detail. It is not such as would permit the safe and effective completion of works to achieve the outcome described in the Enforcement Notice… As an experienced engineer, I would not be prepared to approve or certify such works as an appropriate design or accept it as one where there had been appropriate analysis of risk, or where there had been developed appropriate controls to manage that risk. On the contrary, it is my view that [the proposed propping design] …, would present an unacceptable risk to those involved in carrying out those works".*

162. The concerns of the Appellant's engineer however, need to be weighed and balanced against the totality of the evidence, including the Appellant's lawyers' correspondence regarding alternate actions of 29 August 2019, in which it is stated that the Appellant received advice from a company that has "relevant and appropriate expertise in stabilising and restoring heritage listed buildings such as the Broadway Hotel" which "has given its assurance that is can safely stabilise the building" (using a different design and methodology).

163. Overall, the Tribunal is satisfied that the Appellant's concerns about workplace safety and WHSA compliance issues were properly considered by the Council and that the Council's decision to issue the Enforcement Notice was supported by professional engineering advice.

164. The Tribunal also considers it has not been established that under the sections 248 and 249 of the BA, the Council was formally required to consider compliance with the WHSA as part of its decision as to whether to give an Enforcement Notice. However, given the Tribunal's satisfaction that the Council did consider workplace safety issues and that the building can be secured in a safe manner, the Tribunal has not pursued this aspect.

Mr Pratt's belief was not that of Council (Grounds 19, 20 and 21)

165. Grounds 19, 20 and 21 of the Appellant's grounds of appeal allege that Mr Pratt, the Council officer who issued the Enforcement Notice, did not hold any relevant belief or to the extent that he did, this was not the belief of the Council. Further, it is alleged that Mr Pratt was not an authorised delegate of the Council.

166. The Council's Submissions at paragraphs 59 to 66 address the appointment of Mr Pratt as an authorised delegate of the Council. The Council also provided a copy of a document titled "Brisbane City Council Delegations Building Act 1975" dated 15 May 2018 which identifies the "Built Environment Supervisor, Compliance and Regulatory Services" as being an authorised delegate for the purpose of sections 248(1) and (2) of the BA.

167. The Tribunal through the Registry requested further information from the Council regarding Mr Pratt's appointment as an authorised delegate of the Council. On 30 October 2019, Mr Pratt on behalf of the Council provided the following Council documents to the Tribunal:

    (a) Resolution 240 2011-12 Dated 1 November 2011;

    (b) CEO sub-delegation dated 15 November 2011;

    (c) CEO sub-delegation dated 21 January 2015;

    (d) Resolution 299 2016-17 dated 6 December 2016.

168. A series of further email communications were exchanged between the parties through the Registry, which included:

    (a) On 1 November 2019, an email from Mr Pratt to the Registry providing an affidavit prepared by Mr Kevin Cartledge, the Solicitor in charge of the Council's Litigation, Risk and Enforcement team within City Legal – Brisbane City Council, which attached a true copy of the documents referred to in the preceding paragraph and stating that there were no other documents or instruments in existence that had any effect on the powers delegated to Council officers in relation to the enforcement notice provisions under the BA.

    (b) On 4 November 2019, an email from Mr Pratt to the Registry confirming his appointment as Acting Built Environment Supervisor on 3 November 2018 and that he acted in this position until 19 April 2019. Mr Pratt also provided a copy of his position history at the Council.

    (c) On 6 November 2019, an email from Nyst Legal on behalf of the Appellant providing the Appellant's Further Submissions in response to the additional material provided by the Council in relation to the delegation issues.

169. The Appellant's Further Submissions maintained the Appellant's objections to the validity of the Enforcement Notice on the grounds previously raised by the Appellant and responded to the further material provided by the Council.

170. The Appellant identified three key grounds on which he submitted that the Enforcement Notice was invalid being:

(a) Mr Pratt was not the subject of any relevant delegation of powers under sections 248 or 249 of the BA;

(b) alternatively, to the extent Mr Pratt held any relevant belief, his belief was irrelevant;

(c) alternatively, it was the Council's belief that was relevant.

Delegation to Mr Pratt

171. The Appellant's first issue is that there was no valid delegation to Mr Pratt and that he lacked authority to give the Enforcement Notice.

172. The Appellant's submissions on this issue argue that there was both a failure (or lack of power) of the Council to delegate power to give an enforcement notice to the position of "Built Environment Supervisor" and / or that Mr Pratt did not hold the position of "Built Environment Supervisor" at the time he purported to give the Enforcement Notice.

173. The Enforcement Notice was signed by Mr Pratt. The signature block below where he signed begins with his name "Morgan Pratt" in bold on the first line and is followed with his stated position title "A/ Built Environment Supervisor" located on the next line. Three more lines provide further information as to the organisational unit of the Council. On a separate line at the bottom of the signature block is the word "Delegate" in bold.

174. On the face of the Enforcement Notice, it is given by Mr Pratt in his capacity as A/ Built Environment Supervisor being a delegate of the Council.

175. The Council has asserted that Mr Pratt was a properly authorised delegate of the Council and had authority to give the Enforcement Notice on the basis that the power to issue enforcement notices under section 248 of the BA had been delegated to a range of persons, including the position of Built Environment Supervisor and that Mr Pratt was acting in this position at the time the Enforcement Notice was given.

176. Having regard to the material provided by the Council in relation to its delegations, the Tribunal is satisfied that the power to give an enforcement notice had been delegated to the position of Built Environment Supervisor. The Tribunal is also satisfied that Mr Pratt was acting in the position of Built Environment Supervisor at the time he gave the Enforcement Notice.

177. These findings of facts are based on the following:

(a) section 238 of the CoBA authorises the Council to delegate a power under an Act to the chief executive officer (CEO) and section 239 of the CoBA authorises the CEO to delegate the CEO's powers;

(b) pursuant to Council Resolution 240/2011-12, the Council delegated its powers under the BA to the CEO;

(c) pursuant to the CEO sub-delegation of 15 November 2011, the CEO sub-delegated the power to give an enforcement notice under section 248 of the BA to a range of positions, including "Built Environment Team Leader, CARS";

(d) pursuant to the CEO sub-delegation of 21 January 2015, the CEO amended the sub-delegations to (relevantly) provide that powers previously delegated to the "Team Leader, Built Environment, Compliance and Regulatory Services Branch" to the "Built Environment Supervisor, Compliance and Regulatory Services Branch";

(e) the Brisbane City Council Delegations – Building Act 1975 (Last delegation amendment 15 May 201) document records that the "Built Environment Supervisor, Compliance and Regulatory Services" is a delegate in respect of section 248(3).

178. While there are some minor differences in terminology in the delegation instruments, the Tribunal is satisfied that the Council had lawfully delegated the power to give an enforcement notice to the current position of Built Environment Supervisor.

179. In relation to whether Mr Pratt held this position at the time the Enforcement Notice was given, the Tribunal notes:

    (a) the CEO's sub-delegation of 21 January 2015 was subject to general conditions which included that the ""delegate", in relation to a position, means the person holding or acting in that position from time to time". Further, ""position" means the position as it appears or as subsequently renamed";

    (b) under section 24A of the AIA, an appointment may be made by reference to the title of the office and the appointment is taken to be the appointment of the person for the time being occupying or acting in the office;

    (c) the Enforcement Notice was signed by Mr Pratt who was described as "A / Built Environment Supervisor" being a reference to him "Acting" in the position at the time;

    (d) Mr Pratt provided an extract from Council records showing that he held the position of Built Environment Supervisor at the relevant time.

180. The Appellant criticised the material provided by the Council, including the information provided in relation to Mr Pratt's employment at the Council. However, despite these complaints, the Tribunal is satisfied that Mr Pratt was acting in the position of Built Environment Supervisor at the time he gave the Enforcement Notice and, in this capacity, he was an authorised delegate of the Council.

181. Having considered all of the material provided, the Tribunal is satisfied that the Council has demonstrated that it lawfully delegated the power to give the Enforcement Notice to the Built Environment Supervisor and Mr Pratt was acting in the position of the Build Environment Supervisor at the time the Enforcement Notice was given. The Tribunal is accordingly satisfied that Mr Pratt held a lawful delegation to give the Enforcement Notice.

182. The Tribunal is also satisfied that Mr Pratt held the requisite beliefs necessary to give the Enforcement Notice and that it was sufficient for those beliefs to be held by Mr Pratt as the authorised delegate of the Council.

183. Further, section 27A(8) of the AIA relevantly provides that if "*when performed or exercised by the delegator, a function or power is dependent on the delegator's opinion, belief or state of mind, then, when performed or exercised by the delegate, the function or power is dependent on the delegate's opinion, belief or state of mind*".

184. As such, it was the belief of Mr Pratt as the authorised delegate that was relevant to the Council's decision as to whether to give the Enforcement Notice.

185. The Tribunal is further satisfied that the relevant beliefs required to be held by Mr Pratt, being that the building was in a dilapidated condition and that it was appropriate to give an Enforcement Notice to require the building to be secured, were readily open to be formed by Mr Pratt on the facts and circumstances set out in the Enforcement Notice.

<u>Belief the work was required to secure the building (Ground 22)</u>

186. Ground 22 of the Appellant's grounds of appeal alleges that the Council did not hold a reasonable or any belief that the work identified in the Enforcement Notice was reasonably required to secure the building within the meaning of section 249(b) [sic] of the BA, nor was the work to "secure the building" within the meaning of section 249 of the BA.

187. There is no section 249(b) of the BA and the Tribunal understands that the Appellant meant to refer to section 249(1)(d) of the BA, which relates to securing a building.

188. The Council's Submissions respond to this ground in paragraphs 67 to 72.

189. There is no definition of the term to "secure the building" in the BA but having regard to the relevant principles of statutory interpretation, giving the phrase its plain meaning in the context of the provision and having regard to the purpose of the legislation, "secure the building" is considered by the Tribunal to mean to make the building stable and not at risk of collapse.

190. The Tribunal is satisfied that the building is damaged (which is common ground between the parties) and in a dilapidated condition and that the material before the Council, including the First ACOR Report and the Second ACOR Report, demonstrates the need for action to secure the building.

191. There is a difference of engineering opinion as to the stability of the Hotel and the ability to undertake works to secure the building. The First ACOR Report and the Second ACOR Report conclude that areas of the building are structurally unstable and at risk of collapse under a design event loading. However, the overall opinion of ACOR Consultants is that the overall building is structurally stable and capable of repair, stating in the First ACOR Report that “the global structural stability of the building does not appear to have been fully compromised by the fire”. In contrast, Mr Neil MacKenzie of Neil MacKenzie & Associates is of the view that the building is globally unstable and the MacKenzie Report concludes that it “is impossible to safely install” shoring.

192. Despite the conflicting engineering opinion as to the significance of the damage to the building and its effect on the stability of the building, the Tribunal is satisfied that the works required by the Enforcement Notice are works to secure the building within the meaning of section 249(1)(d) of the BA and that the Council (through its authorised delegate) held a reasonable belief that the work required in the Enforcement Notice was required to secure the building.

Conflict and inconsistency with the *Queensland Heritage Act 1992* (Ground 23)

193. Ground 23 of the Appellant's grounds of appeal alleges that the Council had no authority or jurisdiction to issue the Enforcement Notice because the Hotel is a State Heritage Place entered on the Queensland Heritage Register under the QHA which by its terms covered the field in relation to works which were permitted, or required to be performed upon any State Heritage Place and excluded the power to issue an enforcement notice upon the owner of a building and in respect of a building which was entered on the Queensland Heritage Register.

194. The objects of the QHA include regulating, in conjunction with other legislation, development affecting the cultural heritage significance of Queensland heritage places. The QHA thus expressly acknowledges that the QHA operates in conjunction with other legislation.

195. The Appellant did not identify any provisions in the QHA, the BA or any other authority for the proposition that the QHA excluded the operation of the enforcement notice powers under section 249 of the BA.

196. The BA provides a broad power to issue an enforcement notice to the owner of a building. The "owner" of a building is comprehensively defined in schedule 2 of the BA and there is nothing to suggest that the owner of a building listed on the Queensland Heritage Register is excluded from being the owner of a building for the purpose of the BA.

197. Having regard to the objects of the QHA and the BA and the drafting of these respective pieces of legislation, the Tribunal is satisfied that there is no express or implied exclusion of authority or jurisdiction for the Council to give an enforcement notice under the BA in relation to a State Heritage Place under the QHA.

198. Further, the Tribunal notes that while there are various powers under the QHA to take action to protect State Heritage Places, there is no equivalent power to section 249 of the BA. Therefore, if section 249 of the BA did not apply to State Heritage Places, there would be a significant gap in the ability to regulate and protect buildings included on the Queensland Heritage Register.

Reasons for the Decision:

Content of the Show Cause Notice (Grounds 1 and 2)

It did not outline the relevant facts

199. The Appellant's grounds allege that the Show Cause Notice failed to "properly" outline the relevant facts as required by section 247(1)(b) of the BA.

200. The Tribunal is satisfied that section 247(1)(b) of the BA does not impose any qualitative requirement as to the "proper" facts and circumstances to be identified by the Council, it merely requires that the Council state the facts and circumstances that formed the basis for the Council's belief that an enforcement notice be issued.

201. The Tribunal is satisfied that paragraphs 1-13 of the Show Cause Notice clearly set out the facts and circumstances required by section 247(1)(b) of the BA.

It did not identify the scope of work required

202. The crux of the Appellant's submissions is that the Show Cause Notice did not identify the scope of work that the Council required to address the dilapidated state of the Hotel.

203. The Tribunal agrees with the Council's Submissions at paragraph 12, that there is no requirement in section 247(1) of the BA to state a scope of work or proposed action that the Council may require.

204. As the Council's Submissions state in paragraph 16, if it was intended that a show cause notice identify the scope of work required, the drafters of section 247(1) of the BA could clearly have done so and in a manner similar to how section 249 of the BA has been drafted, however, this was not the case.

205. The Tribunal is satisfied that the Council's Show Cause Notice complied with each of the paragraphs in section 247(1) of the BA and was lawfully issued.

The Second ACOR Report (Grounds 3 – 6)

206. In considering these grounds of appeal, the Tribunal further grouped them into two main issues, the first being the use of the Second ACOR Report as the basis for the requirements in the Enforcement Notice, including the methodology and the consultation with QHR and the second being the Council's communication to the Appellant on 22 March 2019.

The Second ACOR Report

207. The Tribunal identified an error in the Council's Submissions in paragraph 21, in which the Council made reference to QHR being in attendance at the hearing and providing evidence to the Tribunal.

208. The Council appears to have mistaken the "Queensland Heritage Council" for "Queensland Heritage Restorations". It was the QHC that sought the Tribunal's leave to attend the hearing and give evidence to the Tribunal, not QHR.

209. The Appellant's grounds alleged that the Council's reference to the Second ACOR Report in the Enforcement Notice was unlawful and unreasonable as the Appellant had not had an opportunity to provide any response to the Second ACOR Report.

210. It is clear to the Tribunal from a number of paragraphs within the Second ACOR Report, as well as a comparison between the First ACOR Report and the Second ACOR Report that the Second ACOR Report was supplementary to and provided further detail about the proposed wall stabilisation and propping and methodology set out in the First ACOR Report, specifically that in paragraph 8 of the First ACOR Report.

211. The Appellant therefore had opportunity between the issue of the First ACOR Report in September 2018 (and the Show Cause Notice) and the issue of the Enforcement Notice in February 2019 to respond to the Council in respect of any concerns the Appellant had about the wall stabilisation and propping and methodology set out in the First ACOR Report.

212. Accordingly, the Tribunal is satisfied that the Council did not act unreasonably or unlawfully in referencing the Second ACOR Report in the Enforcement Notice.

Communications with QHR

213. As a result of the Tribunal's consideration of the Second ACOR Report and the requirements of the Enforcement Notice, the Tribunal is satisfied that the Second ACOR Report did not require that QHR be engaged by the Appellant nor did it dictate the exact methodology to be used.

214. The Tribunal's reading of the Second ACOR Report is that the methodology identified by QHR was provided as an example of how the propping design proposed by ACOR Consultants in the First ACOR Report could be done.

215. Similarly, the requirements of the Enforcement Notice did not specify that the Appellant must engage QHR to carry out the work.

216. Accordingly, the ground in paragraph 5 of the Appellant's grounds of appeal with respect to whether the Council directed the Appellant not to communicate with QHR is rendered of less import because it was not a requirement of the Enforcement Notice that the Appellant engage QHR to complete the work.

217. Within this context, the Tribunal is satisfied that the Council's email dated 22 March 2019, particularly when considered within the context of the subsequent email correspondence between the parties, did not obstruct the Appellant's performance of the requirements in the Enforcement Notice, nor did it render it impossible for the Appellant to comply with the Enforcement Notice.

Improper exercise of discretion (Grounds 7 to 11)

218. Grounds 7 to 11 of the Appellant's grounds of appeal allege that the Council improperly exercised its discretion to issue the Enforcement Notice.

219. The Council's Submissions addressed these points convincingly and the Tribunal accepts that the Council discharged its onus in the response it has provided.

220. As the Council's Submissions stated in paragraph 38, "the facts of the matter speak for themselves", being the facts and circumstances set out in the Enforcement Notice which the Tribunal is satisfied could give rise to a reasonable belief held by the Council that the Hotel was in a dilapidated condition. The Tribunal is satisfied that the Council has satisfied its onus in this regard.

Appellant responsible for dilapidated condition

221. For completeness, the Tribunal notes that the Council's Submissions did not address the final ground made by the Appellant in ground 11(b), being the unstated proposition implicit in the Enforcement Notice that the Council believed the Appellant was responsible for any dilapidated condition of the Hotel.

222. Given that no specific evidence was provided by the Appellant to support this ground and there was no assertion made in the Enforcement Notice to the effect that the Appellant was responsible for any dilapidated condition of the Hotel, the Tribunal considers this ground is devoid of any merit.

Unreasonably broad requirements (Grounds 12 and 13)

223. Grounds 12 and 13 of the Appellant's grounds of appeal allege that the Enforcement Notice was unreasonably broad in scope.

224. The Appellant's Submissions provide further explanation about these grounds in paragraphs 68 to 84 and similar to grounds 3, 4 and 5 considered above, make a number of submissions with respect to QHR. The Tribunal has dealt with those matters sufficiently in the above paragraphs under the heading "The Second ACOR Report".

225. The Tribunal noted an error in paragraph 78 of the Appellant's Submissions in the quote that was made from the Second ACOR Report. That error distorted the meaning of the quote and that distorted meaning formed the basis for supporting contentions made in paragraphs 78 and 79 of the Appellant's Submissions. Accordingly, the Tribunal considers these paragraphs of the Appellant's Submissions are devoid of any merit.

Unreasonably broad

226. The Council's Submissions maintained the Council's view that the requirements in the Enforcement Notice were appropriate and noted the Tribunal's power to change the requirements if the Tribunal so chose.

227. The requirements in the Enforcement Notice are consistent with the words in section 249(1)(d) of the BA, in that they ask the Appellant to secure the building on the premises and then specify the way in which that is to be done, that is, in accordance with the proposed propping design and methodology within the Second ACOR Report. This does not seem to the Tribunal to be unreasonably broad as contended by the Appellant.

228. The Second ACOR Report does not provide a step by step detailed methodology for the process that would be required to undertake the proposed propping of the Hotel. What it does provide is a self-professed "concept design".

229. This seems to the Tribunal to be a common sense approach to allow for an individual contractor to identify its preferred way to implement the proposed propping design.

230. The Tribunal is satisfied the Second ACOR Report did not require the Appellant to engage a specific contractor, being QHR, but instead left it open to the Appellant to engage its own competent contractor.

231. It is the view of the Tribunal that the requirements in the Enforcement Notice do meet the requirements for an enforcement notice set out in section 249 of the BA.

Alternative requirement

232. With respect to whether there is an alternative requirement that is more appropriate, the Tribunal notes the Appellant provided details of alternate actions the Appellant would be prepared to take if the Tribunal decided that the Enforcement Notice was valid.

233. The Tribunal is satisfied that there are a number of ways in which the Appellant could secure the Hotel, not just the proposed propping design and methodology in the Second ACOR Report.

234. On that basis, the Tribunal considers that it is reasonable to change the requirements of the Enforcement Notice to clarify the Council's intent and provide the Appellant with the flexibility to secure the Hotel whether by the proposed propping design and methodology in the Second ACOR Report or in another way.

235. The Tribunal's changed requirements are as follows:

> *"1. Secure the building on the premises by installing a series of support systems to the building to address the structural instability identified by the further engineering report prepared by ACOR Consultants dated 25 February 2019, being the structural instability with respect to:*
>
> *(a) the external parapet brick walls and facades on the eastern and northern elevations above the second storey;*
>
> *(b) the chimneys; and*
>
> *(c) several walls to the rear of the building.*
>
> *Compliance Date: 60 calendar days after the date of decision of the Development Tribunal in Appeal Number 19-14 and then to be kept in existence until such time as the building is made structurally safe."*

Unreasonableness of time to comply (Grounds 14 and 15)

236. The Council's Submissions make reference to evidence given at the hearing with respect to the reasonable time it would take to carry out the proposed propping of the Hotel.

237. The Tribunal understands the Council is referring to the evidence given by Andrew Barnes of the QHC (and also ACOR Consulting) during the hearing.

238. Mr Barnes identified estimated timeframes for the installation of a number of available solutions, being from as little as 48 hours for the container solution to a week for the propping system.

239. As discussed above, the Tribunal has formed the view that neither the Enforcement Notice nor the Second ACOR Report obliged the Appellant to engage QHR but instead provided a broad scope for the Appellant to engage any competent contractor to safely secure the building utilising the propping system.

240. Therefore, the compliance date in the Enforcement Notice of 30 April 2019 gave the Appellant a little over 2 months to source and engage a competent contractor and for that contractor to do the work.

241. The Tribunal is satisfied that the compliance date in the Enforcement Notice is reasonable.

242. Finally, the Appellant raised a ground with respect to the requirement in the Enforcement Notice that the propping of the building “be maintained until such time as the building is made structurally safe”.

243. The Tribunal’s reading of the Enforcement Notice is that the use of the word “maintenance” is consistent with the Macquarie Dictionary definition of “maintenance” to mean “the act of maintaining”, with “maintain” meaning “to keep in existence or continuance; preserve; retain”.

244. Accordingly, the Tribunal is satisfied that the requirement that the propping be “kept in existence” or “continued” until the building is made structurally safe”, is also reasonable.

Work health safety issues (Grounds 16, 17 and 24)

245. The Appellant's grounds alleged that the Council failed to give proper consideration to requirements upon the Appellant to comply with workplace safety laws, including the WHSA, that the decision to give the Enforcement Notice failed to take into account the absence of evidence that there was an engineering design and work method which complied with the WHSA and that the decision to give the Enforcement Notice failed to take into account that the Appellant's engineer was not satisfied that there was an engineering design and work method which complied with the WHSA.

246. The Tribunal is not satisfied that the BA required the Council to give specific or detailed consideration to the Appellant's obligations to comply with workplace safety laws, including the WHSA, or the willingness or capacity of any contractor who might perform those works, in deciding to give the Enforcement Notice and the requirements imposed by the Enforcement Notice.

247. The Tribunal is however satisfied that, to the extent relevant, the Council considered the issue of whether the requirements imposed by the Enforcement Notice could be safely implemented and that the First ACOR Report and Second ACOR Report provided a reasonable basis for the Council to form the view that the required works were reasonable and appropriate.

248. The Tribunal is further satisfied that having regard to the fact that there are a number of ways in which the Appellant could secure the Hotel, it is reasonable for the Tribunal to change the requirements of the Enforcement Notice to provide the Appellant with the flexibility to secure the Hotel either by the proposed propping design and methodology in the Second ACOR Report or in another way. This will also resolve the Appellant's concerns about the proposed propping design and methodology in the Second ACOR Report.

Failure to have regard to engineering opinion (Ground 18)

249. Ground 18 of the Appellant's grounds of appeal alleges that the Enforcement Notice failed to take into account that the Appellant's engineer was not satisfied that there was an engineering design and work method to give effect to the proposal that complied with WHSA.

250. The Tribunal is satisfied the Council had the benefit of engineering advice provided by ACOR Consultants and Neil McKenzie & Associates when deciding whether to issue the Enforcement Notice.

251. The Council’s preference for the advice provided by ACOR Consultants rather than the Appellant’s engineer, does not demonstrate a failure by the Council to properly consider whether there was a methodology available to do the work required.

252. When weighed and balanced against all the evidence considered by the Council and the further evidence provided by the Appellant's lawyers' correspondence regarding alternate actions, the Tribunal is satisfied the Council properly considered the Appellant's concerns about workplace safety and WHSA compliance issues and the decision to issue the Enforcement Notice was supported by professional engineering opinion.

Mr Pratt's belief was not that of Council (Grounds 19, 20 and 21)

253. The Appellant challenged the validity of the Enforcement Notice on a number of grounds in relation to whether the Council held the requisite beliefs to give the notice under section 248 and 249 of the BA or, alternatively, whether Mr Pratt, being the Council officer who gave the Enforcement Notice, held the requisite beliefs and whether he was authorised to give the Enforcement Notice.

254. The Tribunal is satisfied that a valid delegation was made by the Council to the Built Environment Supervisor, and that Mr Pratt was at the relevant time appointed as an Acting Built Environment Supervisor. The Tribunal is therefore satisfied that Mr Pratt was an authorised delegate of the Council and had authority to give the Enforcement Notice.

255. The Tribunal is accordingly satisfied that the beliefs held by Mr Pratt were relevant to the giving of the Enforcement Notice and the Tribunal is satisfied that Mr Pratt reasonably held the belief that the Hotel was in a dilapidated condition and works were required to secure the building pursuant to sections 248 and 249 of the BA.

Belief the work was required to secure the building (Ground 22)

256. The Appellant's grounds of appeal allege that the Council did not hold a belief that the work required by the Enforcement Notice was reasonably required to secure the building, nor was it work to secure the building within the meaning of section 249 of the BA.

257. It is common ground between the parties that the Hotel was badly damaged by a fire that occurred on 2 September 2018 and that the building suffered the structural damage identified in paragraph 55 of this Decision.

258. The Appellant and the Council differ in their views as to the ability to secure the building and how this should be done (if it is required). Nonetheless, all the engineering evidence before the Council (and the Tribunal) confirmed that the building is damaged and in a dilapidated condition.

259. Having regard to the material before the Council and the requirements of section 249 of the BA, the Tribunal is satisfied that the Council (through its authorised delegate) had the basis to form a reasonable belief that the work required by the Enforcement Notice was reasonably required to secure the Hotel and that this was work to secure the building within the meaning of section 249 of the BA.

Conflict and inconsistency with the *Queensland Heritage Act 1992* (Ground 23)

260. The Appellant's grounds of appeal allege that the Council had no authority or jurisdiction to issue the Enforcement Notice because the Hotel is a State Heritage Place under the QHA, which by its terms covered the field in relation to works.

261. The Tribunal is satisfied that the listing of the Hotel under the QHA does not have the effect of ousting the authority or jurisdiction of the Council to give the Enforcement Notice under the BA.

262. The Tribunal's attention was not drawn to any provision of the QHA, the BA, or any other authority for the proposition that the QHA excluded the operation of the Enforcement Notice powers of the BA in respect to State Heritage Places.

Samantha Hall

Development Tribunal Chair
Date: 15 November 2019

Appeal Rights:

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

(a) an error or mistake in law on the part of the Tribunal; or
(b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

The following link outlines the steps required to lodge an appeal with the Court.
http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court

Enquiries:

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