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Professional Conduct and the Building Act 1993

The Registered Building Practitioner (Building Practitioner) must conduct him or herself under the Building Act 1993 ("the Act") and comply with the professional requirements of a Registered Building Practitioner. The Act provides for inquiries into conduct of the under section 178. The investigating body is the Building Practitioners Board ("BPB"). The BPB is established under the Act through section 183.

Constitution of the Board

Under section 184 of the Act, the membership of the BPB is determined. The membership of the Board is such that there is a chairperson appointed. The membership is to be drawn from the certain disciplines. This is to include:

- an Australian Lawyer as defined Legal Profession Act 2004 of at least five years standing;
- A person who is able to represent the users of the services of Building Practitioners;
- A person who is a member of the of the Architects Registration Board of Victoria established under the Architects Act 1991;

One member of the Board is to be appointed in respect of each category of registered building practitioner.

Who may bring an Inquiry

Inquiries may be brought by the Board on its own initiative or after the

Melbourne
Level 2/405 Little Bourke Street
Melbourne VIC 3000 Australia
T +61 03 9600 3522
F +61 03 9600 3544
E reception@lovegrovesolicitors.com
www.lovegrovesolicitors.com

Canberra
Level 6/60 Marcus Clarke Street
Canberra ACT 2601 Australia
T 1300 662 869
F 1300 662 893
E reception@lovegrovesolicitors.com
www.lovegrovesolicitors.com

Sydney
Level 11/66 King Street
Sydney NSW 2000 Australia
GPO Box 839
Sydney NSW 2001
T 1300 662 869
F 1300 662 893

Commission has referred a matter to the Board. The inquiries thus brought may be as to the conduct of the Building Practitioner or as the Practitioner's ability to conduct. The Victorian Civil and Administrative Tribunal or an insurer may also refer a matter to the BPB.

Upon the initiation of an inquiry and the Building Practitioner being informed of the inquiry, the BPB may suspend the Practitioners ability to practice should it be warranted to protect the safety of the public.

The Inquiry

An inquiry into the conduct of a Building Practitioner may be conducted under section 179. This section allows the BPB to make certain findings. These findings will be that the Registered Building Practitioner:

- is guilty of unprofessional conduct; or
- has failed to comply with this Act or the regulations; or
- has failed to comply with a determination of the Building Appeals Board or a direction of the Commission; or
- has been guilty of conduct in relation to his or her practice as a building practitioner which—
  - (i) is constituted by a pattern of conduct or by gross negligence or gross incompetence in a particular matter; and
  - (ii) shows that he or she is not a fit and proper person to practise as a building practitioner; or
- has employed or engaged to do, on his or her behalf, work of a kind that can only be done by a person registered under this Part in a particular category or class, a person who is not so registered; or
- has obtained his or her registration under this Part or any required insurance by fraud or misrepresentation; or
- has failed to comply with a reasonable direction of an insurer in respect of the completion or rectification of defective building work or any payment to be made to the insurer in respect of the completion or rectification of defective building work in accordance with required insurance or in accordance with a guarantee under the House Contracts Guarantee Act 1987 or has failed to comply with a direction under section 44 of the House Contracts Guarantee Act 1987; or
- has failed to carry out a recommendation contained in an inspector's report under section 48 of the Domestic Building Contracts Act 1995; or
- has had his or her authority to practise as a building practitioner in a place outside Victoria cancelled or suspended otherwise than for failure to renew that authority; or
- has failed to comply with an undertaking given to the Board under this Division.

Upon making any of these findings the BPB may then make a decision. These decisions are in reality the punitive action that the BPB may then make once the finding has been made. The decisions that may be made are as follows:

- to reprimand the person;
- to require the person to pay the costs of or incidental to the inquiry;
- to require the person to give an undertaking not to do a specified thing;
- to impose a fine of not more than 50 penalty units;
- to suspend registration for not more than 3 years;
- to cancel registration.

Many inquiries into the conduct of Building practitioners are brought against under a failure to comply with the regulations. There exists a regulation that relates to Professional Standards. This regulation is applicable to almost any alleged failure of professional standards of the Building Practitioner. The wording of this regulation puts certain requirements on the Building Practitioner as follows:

> ***Professional standards***
>
> *A registered building practitioner must—*
>
> ***(a) perform his or her work as a building practitioner in a competent manner and to a professional standard; and***
>
> *(b) immediately inform the client in writing if a conflict of interest arises or appears likely to arise between his or her interest as a building practitioner and that of his or her client; and*
>
> *(c) receive remuneration for his or her services as a building practitioner solely by the professional fee or other benefits specified in the contract of engagement or by the salary and other benefits payable by the building practitioner's employer.*

This regulation is therefore applicable where there is a failure in the conduct of the building practitioner. Whether this is minor or major, it may be captured by the operation of the regulations. That is to say any breach of the regulations is in effect a breach of the Act by default. This creates a distinctly strict disciplinary landscape.

A relevant question, therefore is, what constitutes performing work as a building practitioner in a competent manner and to a professional standard? As a practical reality, this regulation will be invoked whenever there is some discrepancy in the as built product and the building regulations.

What is the threshold?

The use of this regulation and the Act itself therefore lacks the demarcation between conduct that is merely unsatisfactory conduct and professional misconduct. That is to say, for example, a building practitioner is equally liable to be subject to the most severe sanction for a breach of the regulations under the Professional Standards regulation as well as for obtaining his or her registration by way of fraud or even a pattern of gross negligence.

The BPB must therefore be careful to ensure that it is comfortable with its decision and that it is not excessive within the circumstances. It does not have the luxury of determining that the Building Practitioner's conduct can merely be characterised as careless or more is in fact more serious.

In New South Wales ("NSW") and the Australian Capital Territory ("ACT") there are certain differences to the regimes. One of the major differences is that both provide reasons for their determinations. The BPB does not provide as comprehensive reasons. It is interesting to note that in NSW and ACT there are far fewer suspensions and cancellations of Building Practitioners. The Environmental Planning and Assessment Act 1979 ("the EPAA") does have a demarcation between Unsatisfactory Professional Conduct and Professional Misconduct. When Lovegrove was engaged to advise on the EPAA, it was recommended that the ultimate judgment should be entrusted to a Judge or full time judicial adjudicator who hands down a judicially reasoned determination and finding. In Victoria, by comparison to NSW and ACT there is a distinct lack of precedent.

What is the Standard of proof?

The standard of proof is apparently a civil standard of proof. That is to say a standard that is a standard requiring less than the criminal onus of beyond reasonable doubt. The case of ***Veterinary Surgeons Investigating Committee v Lloyd (Inquiry 2: Gypsy-Finding)***[1] where the Administrative Decisions Tribunal stated that:

"*The standard of proof requires more than a balancing of the scales. It requires the tribunal to give* ***the evidence close and careful scrutiny;*** *the standard requires* ***precise and not inexact proofs of the allegations*** *of misconduct and requires the Tribunal to come to a conclusion that it is comfortably satisfied that the conclusion is just and correct before the proof of the complaint has been established."*

This is a satisfactory characterisation of the requirements of the standard required of a tribunal because it can impose economic sanction against the Building Practitioner and it can cause the Building Practitioner to lose his or her professional existence. As such a qualified standard of proof is required especially where there is a power to cancel or suspend the registration of the Building Practitioner.

What constitutes Conduct that Warrants Cancellation of Registration?

As stated there is no demarcation between conduct that is of such a nature to warrant censure and conduct that is of such significant and greater nature to warrant a more severe sanction. Therefore it is necessary to consider case law that deals with the removal of a person's ability to practice in his or her chosen field.

[1] [2003] NSWADT 96

In the case of ***Law Society of NSW v McElvenny***[2] involving professional misconduct charges against a solicitor. In this case the following matters were raised by the tribunal at the hearing as matters that should be considered to the benefit of the person whose conduct has been impugned:

- demeanour of the person;
- honesty at the hearing;
- openness and candidness of the person;
- character references and testimonials;
- that the conduct was isolated and not a systematic course of conduct;
- the openness with the investigating body during the investigation process.

Further Justice Viscount Maugham is quoted from the Privy Council case of ***Myers v Elman***[3], as stating that:

"*a solicitor may be struck off the rolls or suspended on the grounds of professional misconduct, words which have been properly defined as conduct which could reasonably be regarded as disgraceful or dishonourable by solicitors who are of good repute and competency. Mere negligence, even of a serious character, will not suffice*".

This statement comes from a case that is often quoted in matters of misconduct. This is a Privy Council decision that related to a solicitor being struck of from the rolls. It sets the requirements that are often quoted in that the conduct must be disgraceful or dishonourable or disgraceful. Mere negligence is not enough to allow a person to be struck off the rolls, or in the case of the Building Practitioner to have their registration cancelled. This therefore is in accord with the suggestion that there is in law a requirement for a demarcation between the more serious and the less serious breaches of Professional Standards.

The requirement for behaviour that is disgraceful or dishonourable was established in the case of ***Allinson v. General Council of Medical Education and Registration***[4]. This case is accepted in Australia as the standard by which a person must be judged in a case of an allegation relating to the failure of professional conduct.

Lord Esher MR in this case defined conduct that is susceptible to such a decision as follows:

> *"…'If it is shewn that a Medical man, in pursuit of his profession, has done something with regard as disgraceful or dishonourable by his professional brethren of good repute and competency' … then it is open* [for the professional body]… *to say that he has been guilty of* ***'infamous conduct'****…"*

This is concurrent with the idea of a peer review system. This is different to the system in New South Wales under the Environmental Planning and Assessment Act 1979. This legislation differs from the Victorian requirements of a public interest test.

In ***Re Mayes & the Legal Practitioners Act***[5], Reynolds and Hutley JJ.A said:

[2] [2002] NSWADT 166
[3] [1940] A C 282
[4] [1894] QB 750
[5] [1974] 1 NSWLR 19 at 25

> *"Despite this dictum, there is no reason in principle why conduct which can be classified as negligent cannot amount to professional misconduct". Thus a breach of the statutory provisions and regulations concerning solicitors' trust accounts, if "wilful" constitutes statutory professional misconduct and includes reckless as well as deliberate misconduct."*

This judgment therefore makes a determination as to the Law which does in reality blur the lines between mere negligence and more serious failings as to Professional Conduct. It states that Professional Misconduct must be wilful, deliberate or reckless.

Further we refer to the case of ***Veterinary Surgeons Investigating Committee -v- Lloyd (Inquiry 2: Gypsy - Findings)***[6]**.** The Veterinary Surgeons Disciplinary Tribunal outlined the common law position as it applied to veterinary surgeons in Re Lloyd (His Honour Judge Wall DCJ, Professor C Bellenger and Dr W Howey, unreported, 16 December 1994), at 4-5:

> *'It is not possible to lay down a standard of professional conduct in other than general terms. Whether a departure from professional standards in a particular case constitutes misconduct in a professional respect is basically determined by peer judgment, i.e. the judgment of practitioners of good repute and competence and standing in the profession."*

The following test was cited in this case is also in accord with the peer test:

> *"The Court formulated the criteria of misconduct in a professional respect to be conduct 'which, being sufficiently related to be the pursuit of the profession is such as would reasonably incur the strong reprobation of professional brethren of good repute and competence."*

In the case of ***Law Society of NSW v Bannister***[7] the statement was made as to the purpose of disciplinary hearings.

> This was that … *"Where misconduct is established the task for the professional Tribunal is to determine whether it indicates unfitness or is more properly to be treated as an isolated or passing departure from proper professional standards amounting to something less than proved unfitness."*

In the case of ***Fekete and Chief Executive of ACT Department of Urban Services***[8] was an appeal arising from disciplinary action taken by a delegate of the Chief Executive of ACT Department Of Urban Services against Fekete in respect of his alleged failure to exercise due skill, care or diligence in the performance of his functions as a certifier under the Building Act 1972.

This case involved certifier, Fekete turning of "a blind eye" to an obviously altered insurance certificate and also where the fact that the builder who carried out the work was not in fact a licensed builder.

Fekete's registration to practice as a certifier under the Construction Practitioners Registration Act 1998 was suspended for a period of 4 months. In this case it was considered that

[6] [2003] NSWADT 96

[7] [1990] NSW LST 7

[8] [2003] ACTAAT 6

financial hardship suffered by a Building Certifier in the case of cancellation of registration is a significant and relevant consideration when coming to a decision after a finding of guilt. This demonstrates the fact this particular tribunal took very seriously the matter in this case that the person's livelihood and ability to earn is a matter that should be taken very seriously.

The Utility of a Guilty Plea

An early plea of guilt is important where a charge cannot be defended. Such a plea in mitigation in itself entitles a Building Practitioner to a more lenient sanction than otherwise would be handed down. This is established in the case of ***Cameron v The Queen [2002]***[9]. At common law, a willingness to admit a charge should be taken into account by a court or tribunal when deciding a penalty, as a consideration in favour of a lighter penalty. This is a decision of the High Court. As such its validity is clear as well as its binding nature in relation to cases that are of a quasi criminal jurisdiction such as the disciplinary jurisdiction of the BPB. The principle is that the earlier the plea, the greater the mitigation.

While the BPB may contest that such a "discount" is necessarily due, it does take into account a guilty plea by way of mitigation.

In ***Victorian Lawyers RPA Ltd v Vodicka***[10] This case affirmed the requirement for a practitioner's conduct to be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency. This case involved a lawyer who had a conflict of interest in relation to his client's assets and. upon receipt of cash, the practitioner failed to keep proper records;

At 35 and 36 of the summation of Eames J the following comments were made:

> *"The question whether I should order that the practitioner be struck off the role arises before me some 14 months after the order was made cancelling his practising certificate and some six months before he would be eligible to re-apply for a new practising certificate. Whether he was fit and proper to be on the roll 14 months ago is not the issue; the issue is whether he is now a fit and proper person to remain on the roll.*

[9] HCA 6 (at paragraph 95)

[10] [2000] VSC 272

The conduct which constituted the findings of misconduct was, indeed, serious. The practitioner has not, however, been charged or convicted of any criminal offence, and the Tribunal accepted that a good deal of the conduct was explained by ignorance of the relevant rules. Whilst ignorance of the professional rules can not be a defence to a charge of misconduct it is relevant on the question whether at the moment, having very abruptly been confronted with his shortcomings, the practitioner is now unfit to practice…"

This is consistent with an approach where by a Building Practitioner is early on, contrite and makes changes to his or her business practice and or other failing that led to the inquiry will be more likely to continue practicing. As such it should be considered mandatory for the solicitor advising a Building Practitioner to be honest and open; to comply with the requirements stated in ***Law Society of NSW v. McElvenny*.**

Costs

It is the practice of the Board that an award of costs is brought against the Building when a finding is made against the Building Practitioner and as such it has legislative power to make an award for costs against the Building Practitioner. Equally there is the power to make an award for costs in favour of the Building Practitioner. This power is under section 181 for the BPB to make payment of costs to the Building Practitioner.

181. Costs

If on an inquiry the Building Practitioners Board makes a finding favourable to a registered building practitioner, it may pay that practitioner's reasonable costs of and incidental to the inquiry.

There is an obvious contradiction in this section in that the BPB is able to award costs against the Building Practitioner, however it is also able to award costs against the party that brings the inquiry into the conduct, that party being the BPB itself.

The costs that may be awarded against the BPB by the BPB would in most circumstances be higher than those that are due when a finding is made against the Building Practitioner. This state of affairs is constituted to by the following:

- That the Building must make his own submissions and investigations whilst sacrificing his own income or expending on legal fees to defend the matter;
- The BPB has the power of the state at its disposal and may engage the services of private investigation services;
- The Building Commission is in part funded by the levies that must be paid by the industry itself.

A finding favourable to the building Practitioner is indeed a rare occurrence and as such an award for costs is generally only applicable to the BPB. As such there is little practical precedent as to what should be awarded under section 181.

Legal fees to investigate and to defend a matter before the BPB will be necessarily much greater than the costs orders that are usually handed down to the Building Practitioner under section 179. Thus the costs due to the Building Practitioner should be somewhere

between party / party and solicitor client (i.e. full indemnity).

What is Reasonable?

This is in the circumstance where there is no definition as to the reasonable amount that should or may be claimed in the defence of the Building Practitioner. Therefore the relevant question to determine is what is reasonable.

Misconduct is certainly a serious matter. That is both in the situation of the person who must defend himself and the investigating body. In terms of the Building Practitioner, he or she does not have an endless war chest to fight misconduct charges. As such a Building Practitioner will not be in a position to leave a "stone unturned".

In leaving no stone unturned the Building Practitioner will necessarily expend significant legal fees and it is justified that an expert in the field of building law be retained. The costs of expensive legal representation must be offset against the Building Practitioner's continued ability to practice. Thus they must pay to defend their livelihood and professional reputation. Where the Building Practitioner is faced with the disapprobation of his or her peers, it is reasonable that he or she will deploy the best professionals he can find.

Further there is the complication as to the nature of the jurisdiction. As the BPB is a quasi criminal jurisdiction, it follows that there is no scale of costs that is referable to recovery. In the criminal jurisdiction, there is no scale, however in a failed case brought by the prosecution, costs are, as a matter of practice, bound to follow where the charge is misconceived at law.

The BPB and the Vexing Issue of Awarding Costs Against Itself

In light of the budgetary dynamic of the two parties outlined, it is incumbent on the prosecuting body to ensure that its charges and allegations are not misconceived. Thus the BPB is in an invidious position when it is faced with the making of a costs order. It therefore must act in a manner that is:

- Impartial;
- Reasonable;
- Judicial[11].

Not only must justice be done it must be seen to be done where there is a costs order against an investigation conducted by the BPB. The BPB must therefore stand back and make a decision as to costs as if it were an independent judicial officer. This must be seen in the backdrop of the BPB in most cases ordering costs against Building Practitioners where found guilty of allegations. It must show to the Building Practitioner that it is fair, impartial and behaving in a way to overcome a clear conflict of interest inherent in the legislation. The BPB must therefore ensure that it overcome its public perception.

The fact that the Act includes the term "costs of and incidental to" required judicial interpretation. In the case of **Australian Competition & Consumer Commission v. MHG Plastic Industries Pty Ltd**[12] *it was stated in his conclusion by Emmett J that:*

> *"I consider that the word 'costs', as used in s 43, and as used in the order of the Full*

[11] Mitchison v. Bullock (1886) 12 VLR 512, MaCauley v. MaCauley (1910) 10 CLR 434
[12] [2003] FCA 1624

Court, signifies professional legal fees, together with other expenses actually incurred in the conduct of litigation: see, for example, Cachia v Hanes (1994) 179 CLR 403 at 409-410 dealing with Pt 52 r 23(2) of the Supreme Court Rules 1970 (NSW) and the phrase ***'all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed'****"*

Costs in the Marketplace

In the VCAT case of *Reid v FAI General Insurance Co Ltd*[13], Deputy President Macnamara stated that:

> *"In my view there is a line of authority which shows that in appropriate circumstances "reasonable legal costs" equates with the rates at which those services must be purchased in the ordinary market."*

He then cited Lander J. in the case of ***Director of Public Prosecutions v George Petropolous*** of the Supreme Court of South Australia which considered issues in connection with the **South Australian Criminal Assets Confiscation Act 1996**. He concluded:

> *"It seems to me that costs of a "reasonable basis" for work done in a committal in the Magistrates' Court would ordinarily be assessed by having regard to costs charged in the market place by those who appear in the Magistrates' Court in committal proceedings ...*

A Building Practitioner who is unrepresented is likely to be found guilty of the allegations made against him. As such it is impossible for the Board to remove any component of the Building Practitioner's legal representative. It should be noted that the costs order would not cover the Building Practitioner's stress.

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Telephone: 9600 3522
Facsimile: 9600 3544
Email: reception@lovegrovesolicitors.com

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[13] [1999] VCAT 1773