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Issued 19 November 2010

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Legal Bulletin

“Pleading the Fifth....How Far Reaching is the Duty to Co-operate with a Building Commission Inquiry?”

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It goes without saying that it will look better for a building practitioner if, at the end of an Inquiry hearing before the Building Practitioners Board (“the Board”), the practitioner is able to say that they have been helpful and co-operative in resolving the Inquiry. And that they have co-operated in rectifying any mistakes as a result of any errors made.

But is there any duty to co-operate with an Inquiry investigation, and if so, what are the penalties for failing to comply? Is it necessary to attend an interview with a Building Commission investigator?

There is a general duty to be co-operative with the investigation but with the qualification that a building practitioner does not have to answer a question, if the answer would tend to incriminate that person. In other words, the person has a right to silence or to say “no comment”.

In addition, there is no specific law that requires a person to attend an interview with an investigator, and for that reason as lawyers we sometimes request that the Building Commission investigator instead send the questions in writing.

Firstly, let’s examine the nature of an Inquiry. The Board may hold an inquiry into the conduct or ability to practice of a registered building practitioner following a formal request on its own initiative, on the recommendation of a person appointed under section 177 of the Building Act,

on a referral by the Commission, by VCAT, an insurer or at the request of any other person.

The Inquiry before the Board can proceed by way of written submission or by inquiry in person (a hearing type format). There is often a lawyer “assisting the Board” who is effectively cast in the role as prosecutor, and the practitioner is entitled to have a lawyer also.

Before any Inquiry is held, it is necessary for the evidence to be gathered, and this is the role of an investigator. However, for the purposes of section 179 of the Act, the term “investigator” is not defined. Instead, the Act appoints a “person” to “report and make recommendations”.

An investigation often involves an invitation to attend an interview in person. As I said, there is no compulsion to attend an interview in person, but if you do there is the ability to decline to comment on any questions. A record of the interview will be taken and you should always check that record at the time to ensure it is an accurate record of what you have said. You do not need to sign the record if you do not wish to. But bear in mind that it is difficult to argue contrary facts if it is inconsistent with the earlier record of interview, so you should check that it is correct.

At the start of every interview it is customary for the investigator to warn the practitioner that they do not need to answer every question and that

any answers they do give may be used as evidence in any later inquiry proceeding. This is consistent with the right of the practitioner to avoid giving answers that incriminate him or her.

The Building Act also allows for “performance auditors” to examine work carried out by registered building practitioners, for example to ensure that work has been competently carried out and the Act and building regulations have been followed. These auditors must carry identity cards when on duty that states that he or she is authorised to conduct performance audits on behalf of the Building Commission.

While the Act gives the performance auditor the ability to require the production of documents by the practitioner, and to require them to supply any other information or document, there remains the provision in section 227D that “a person need not answer any question put to him or her under section 227C(3)(c) if the answer might incriminate him or her”.

There is a requirement that the practitioner cooperate with a performance auditor, for fear of penalties being incurred, but that is subject to the protection against self incrimination just mentioned.

A performance auditor is not the same as a Building Commission investigator carrying out duties for the purpose of an Inquiry under section 179, however they are still tasked with auditing practitioners for the purpose of reporting to the Commission.

When faced with either an Inquiry investigation or a performance audit, it is advisable to seek legal advice at an early stage as it will allow you to plan any defence or mitigation more effectively.

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