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LOVEGROVE & LORD LEGAL BULLETIN

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## Registration of building practitioners under the *Building Act 1993* (Vic)

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### What is a building practitioner?

Section 3 of the *Building Act 1993* defines “Building practitioner” as:

1. building surveyor;
2. building inspector;
3. quantity surveyor;
4. an engineer engaged in the building industry;
5. a draftsman who carries on a business preparing plans for building work or preparing documentation relating to permits or permit applications;
6. a builder including domestic builder;

7. a person who erects or supervises the erection of prescribed temporary structures;
8. a person responsible for a building project or any stage of a building project and who belongs to a class or category of people prescribed to be building practitioners, but does not include an architect or a person (other than a domestic builder) who does not carry on the business of building.

This does not include engineers, draftspersons, etc, who do not work in the building industry, e.g. a marine engineer.

### Who can apply to be registered as a building practitioner?

Section 169 of the *Building Act* provides that: “a natural person may apply to the *Building Practitioners Board* to be a registered building practitioner”. A

natural person is a flesh and blood individual, not a company or partnership.

Provided that the person carries appropriate insurance cover, is appropriately qualified and experienced, is of good character and has complied with any condition applying to that particular class of practitioner they will be able to be registered as a building practitioner.

### **What are the consequences of not being registered?**

Section 176 of the *Building Act* makes it an offence for a person to take or use the title of building practitioner or to hold out as being a registered or qualified building practitioner.

Section 176 also specifically provides that it will be an offence for a person to practise as a building surveyor or building inspector, e.g. carry out an inspection, or to carry out domestic building work under a major domestic building contract, where they are not registered as a building practitioner.

Persons who breach section 176 may be prosecuted.

### **“Taking or using a title”**

A reference to title for the purposes of section 176 includes titles of building

practitioners such as building surveyor, building inspector, engineer, draftsman, quantity surveyor, and so forth.

“*Take or use a title*” is not defined by the *Building Act*. In plain English it means to describe yourself as a building professional. This may be done orally or in writing. For example, a person may tell another person that they are a building practitioner, or may have “building practitioner” or “John Smith Engineer” on their business card or letterhead. This would also apply if someone described themselves as a building practitioner in advertising, on a letter head or on their premises.

### **“Holding out”**

“*Hold out*” is not defined by the *Building Act*. In plain English it means to cause a reasonable belief in another person’s mind that they are a registered building practitioner or qualified to practise as a building practitioner through their conduct. For example, a person may perform a function of a registered, qualified building practitioner such as issuing a permit, preparing a report, carrying out works, performing an inspection, or otherwise giving advice or rendering the services of a building practitioner.

Holding out may also include situations where the person is conducting themselves in a manner which causes them to be known as registered or qualified. For example, there could be a pattern of conduct which may include such things as being a member of a registered building practitioner body. Providing that it can be proven that the belief is reasonable, a holding out impression may have been created.

### **Building surveyors and building inspectors**

Section 176 also specifically provides that persons must not practise as building surveyors or building inspectors where they are not registered.

*“Practise”* is not defined by the *Building Act*. In plain English it means to carry out a function of a building surveyor or building inspector, e.g. conducting an inspection.

Section 176 places emphasis on building surveyors and building inspectors who carry out a statutory function as a “public official” or “public authority”.

Contrary to the belief held by some in the industry that building inspectors can carry out inspections under the supervision of a registered practitioner, without the need to be registered

themselves, section 176 makes it clear that the individual building inspector must be registered. Section 176 provides that *“a person... must not practise as a building inspector”*.

### **Liability of businesses/employers**

Companies who employ building practitioners who are not registered may also be at risk. A plaintiff who could establish a prima facie statutory breach may be able to impute businesses/employers with liability where key statutory functions, which can only be performed by a qualified practitioner, are carried out by an unregistered person in the employ of the business/employer.

In such cases it would be suggested that a court would expect far more from a building practitioner to explain away the negligence.

Furthermore, an insurer may be able to deny cover in circumstances where work has been carried out by an unregistered person simply because of the fact that legislation requires them to be registered.

A breach of legislative expectation is normally at odds with indemnity criteria. A tenuous analogy, but insurers do not

usually provide indemnification where a person has a car accident where they are unlicensed. At the very least it is an issue which needs to be canvassed with one's broker.

If a building practitioner carries out work without being registered it may also suggest that businesses/employers may be liable by virtue of having aided and abetted the commission of an offence.

If an employer, be he or she a director or co-director, is knowingly concerned with conduct of unregistered building practitioners in their employ, they may be found to have not performed their work in a competent manner and to a professional standard.

It is fair to say that unregistered building practitioners could place businesses/employers in a very invidious position.

Employers of registered building practitioners need to be vigilant that those who purport to carry out a prescribed function are not just qualified, but more importantly, registered.

### **Modelling of section 176**

The modelling of section 176 is closely based upon similar provisions under the registration system for legal

professionals in Victoria. By way of clarification it may be appropriate to briefly explain this system.

To practise as a lawyer in Victoria, a person is required to have a LLB degree or recognised equivalent plus one year's relevant experience as an articled clerk in a law firm. In addition, the lawyer must pay an annual fee to purchase a practising certificate and over and above this must purchase professional indemnity cover. Should a lawyer commit an offence he or she must answer to the relevant registration body and, in some circumstances, may even be deregistered and have his or her practising certificate rendered void.

Each lawyer, whether working for a big law firm or as a sole practitioner, must carry a current practising certificate in order to hold out or represent him or herself as being able to practise law and offer legal services. Indeed, it is illegal to do so without such a certificate.

The registration system for building practitioners in Victoria closely follows this model.

### **Conclusion**

Natural persons may apply to practise as a building practitioner.

Natural persons who carry on the functions of a registered building practitioner must be registered. Section 176 makes it an offence to take or use a title or hold out to be a registered or qualified building practitioner if a person is not registered in the appropriate category or class.

In particular, persons who carry out the functions of a building surveyor or building inspector must be registered. It is not sufficient for the person to be acting under the supervision of a registered building practitioner.

Employers/businesses could also be placed in an invidious position and may be vicariously liable where their employees carry out functions of registered building practitioners where they are not registered.

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