

IN THE MATTER OF [NAME] – REGISTERED ARCHITECT [NUMBER]

1. By Further Amended Notice of Inquiry (“Notice”) filed and served 5 June 2013, the Architects Registration Board of Victoria (“Board”), pursuant to Division 1 of Part 4 of the *Architects Act* 1991 (“Act”), gave notice to the Architect that it had decided to hold an inquiry into the Architect’s fitness to practice as an architect and into his professional conduct (“Inquiry”).
2. The Board, pursuant to Division 2 of Part 4 of the Act, has constituted a Tribunal to conduct the Inquiry on its behalf.
3. The Tribunal, having conducted an Inquiry into the matters raised in the Notice, now sets out its Findings and Reasons for Findings and its Determinations.
4. The Notice issued to the Architect identified 4 separate allegations and the Particulars appended to each of the allegations.
5. The allegations, as finally constituted, are set out below:

(a) **Allegation 1:**

You are guilty of unprofessional conduct (including in accordance with the meaning of 'unprofessional conduct' in regs 10 and 16 of the *Architects Regulations* 2004) as demonstrated by your failure between December 2011 and March 2012 to administer the conditions of the building contract concerning **[Lot 591 building contract]** between **[owners]** and **[builder]** impartially between the owners and builder.

Particulars:

1. Pursuant to the Lot 591 building contract, specifically clause A6.1, clause A6.2 and Item 2 of the Introduction, you were appointed to administer the contract on behalf of the owners. You administered the contract for the period 2 April 2009 to 24 April 2012.
2. On 13 December 2011 the builder submitted a quotation for the costs to achieve practical completion of the works broken down into:
 - (a) The costs to undertake the variation works covered in AI10278 (Part A of the quotation); and
 - (b) The revised costs to complete the remainder of the work under the building contract (Part B of the quotation).

The builder requested that you provide instructions as to whether the builder was to proceed with those works or not.

3. On 2 March 2012 you issued Architect's Instruction AI10290. You advised the builder that Part A of the quotation had been reviewed and approved by the owner however Part B of the costs had been rejected. The builder was directed to complete the remainder of the works according to the costs originally set out in the building contract.

4. On 19 March 2012, the builder issued a Notice pursuant to clause A8.1 of the building contract. The notice alleged AI10290 was invalid as it was not issued in accordance with the contract because it did not arise from the Architect's independent assessment of the variation but rather arose from the owners' 'review and approval'.
5. On 29 March 2012 you issued Architect's Notice AN10128 pursuant to clause A8.3 of the Lot 591 building contract without giving impartial consideration of the disputed matters raised in the Notice of Dispute issued by the builder on 19 March 2012 pursuant to clause A8.1 of the Lot 591 building contract.

(b) **Allegation 2:**

Your professional standards are demonstrably lower than the standards which a competent architect should meet as demonstrated by your failure during the period February 2011 to March 2012 to take reasonable steps to inquire into allegations of defective structural engineer designs affecting the development of a dwelling at [Lot 589] for which you were responsible for the administration of the building contract (**Lot 589 building contract**) between [owners] and [builder].

Particulars:

1. Pursuant to the Lot 589 building contract, specifically clause A6.1, clause A6.2 and Item 2 of the Introduction, you were appointed to administer the contract on behalf of the owners. You administered the contract for the period 27 April 2009 to 24 April 2012.
2. On 15 December 2010 you were provided with a copy of correspondence from the builder to the owners of Lot 589 advising that as a result of concerns in relation to the structural stability of the design at Lot 592, the builder would be arranging for an independent engineer to review the structural design and integrity of the building at Lot 589.
3. On 16 February 2011, you were advised by the builder that it was concerned that the engineering drawings forming part of the Lot 589 building contract documents were inadequate and, if followed, would lead to the construction of a structurally defective dwelling. You were also provided with a copy of [independent engineer's] report of 14 February 2011.
4. On 24 February 2011 you issued Architect's Notice AN1011 to the builder, requesting that [independent engineer] put forward a solution to the issues identified in his report.
5. On 3 March 2011 you attended a site meeting with representatives of the builder and [independent engineer] who was present via telephone for part of the meeting. [independent engineer] explained his report of 14 February 2011 and the builder recommended that the owners seek the advice of an independent structural engineer.

6. On 7 March 2011, the builder issued a Notice pursuant to clause Q11 of the Lot 589 building contract requesting that the owners rectify a default by providing structural designs that complied with the Building Code of Australia and relevant Australian Standards.
7. On 8 March 2011, you issued Architect's Notice AN1016, including an instruction to the builder to 'proceed with the Works in accordance with the contract documents and the instructions previously issued by the Architect', without undertaking any investigation into matters raised in the builder's Notice, particularly the engineering drawings forming part of the Lot 589 building contract documents.
8. On 2 June 2011 you issued Architect's Instruction AI10265 in which you attached amending engineering documentation in response to the Notice of 7 March 2011.
9. On 18 July 2011 the builder made Request for Further Information in relation to the amended engineering documentations of 2 June 2011.
10. On 25 July 2011 you issued Architect's Instruction AI10273 attaching a letter from [the engineer engaged by the owners] under the Lot 589 building contract responding to the builder's Request for Further Information dated 18 July 2011.
11. On 19 September 2011 the builder issued a further Request for Information in relation to the amended engineering documentation.
12. On 30 September 2011 you issued Architect's Instruction AI10280 in which you requested the builder provide quotations for the cost of undertaking two options for variation to works which involved structural bracing as set out in the amended engineering plans. Those quotations were provided to you on 21 October 2011 and 13 December 2011.
13. On 2 March 2012 you issued Architect's Instruction AI10289 advising the builder that Part A of the quotation of 13 December 2011 had been approved by the owners however Part B had been rejected. The builder was directed to proceed with all works within Part A of the quotation and then continue with works set out in the building contract.
14. On 19 March 2012 the builder issued a Notice pursuant to clause A8.1 of the building contract.

(c) **Allegation 3:**

Your professional standards are demonstrably lower than the standards which a competent architect should meet as demonstrated by your failure during the period February 2011 to March 2012 to take reasonable steps to inquire into allegations of defective structural engineer designs affecting the development of a dwelling at [Lot 591] for which you were responsible for the administration of the building contract [Lot 591 building contract] between [owners] and [builder].

Particulars:

1. Pursuant to the Lot 591 building contract, specifically clause A6.1, clause A6.2 and Item 2 of the Introduction, you were appointed to administer the contract on behalf of the owners. You administered the contract for the period 2 April 2009 to 20 April 2012.
2. On 16 February 2011 you were advised by the builder that it was concerned that the engineering drawings forming part of the Lot 591 building contract documents were inadequate and, if followed, would lead to the construction of a structurally defective dwelling. You were also provided with a copy of [independent engineer's] report of 14 February 2011.
3. On 3 March 2011 you attended a site meeting with representatives of the builder and [independent engineer] who was present via telephone for part of the meeting. [independent engineer] explained his report of 14 February 2011 and the builder recommended that the owners seek the advice of an independent structural engineer.
4. On 7 March 2011, the builder issued a Notice pursuant to clause Q11 of the Lot 591 building contract requesting that the owners rectify a default by providing structural designs that complied with the Building Code of Australia and relevant Australian Standards.
5. On 8 March 2011, you issued Architect's Notice AN1017, including an instruction to the builder to 'proceed with the Works in accordance with the contract documents and the instructions previously issued by the Architect', without undertaking any investigation into matters raised in the builder's Notice, particularly the engineering drawings forming part of the Lot 591 building contract documents.
6. On 2 June 2011 you issued Architect's Instruction AI10264 in which you attached amended engineering documentation in response to the Notice of 7 March 2011.
7. On 19 July 2011 the builder advised you that the amended engineering documentation was still not compliant with Australian standards and building regulations and requested evidence from the engineer or an independent structural engineer of all outstanding items as addressed by [independent engineer].
8. On 25 July 2011 you issued Architect's Instruction AI10272 attaching a letter from [the engineer engaged by the owners] under the Lot 589 building contract responding to the builder's concerns of 19 July 2011.
9. On 19 September 2011 the builder issued a Request for Information in relation to the amended engineering documentation.

10. On 30 September 2011 you issued Architect's Instruction AI10281 in which you requested the builder provide quotations for the cost of undertaking two options for variation to works which involved structural bracing as set out in the amended engineering plans. Those quotations were provided to you on 13 December 2011.
11. On 16 December 2011 you issued Architect's Instruction AI10284 advising the builder that the quotation was rejected. The builder was directed not to proceed with the works.
12. On 2 March 2012 you issued Architect's Instruction AI10290 advising the builder that Part A of the quotation of 13 December 2011 had been approved by the owners however Part B had been rejected. The builder was directed to proceed with all works within Part A of the quotation and then continue with works as set out in the building contract.
13. On 19 March 2012 the builder issued a Notice pursuant to clause A8.1 of the building contract.

(d) **Allegation 4:**

Your professional standards are demonstrably lower than the standards which a competent architect should meet as demonstrated by your failure during the period March 2010 to December 2010 to take reasonable steps to inquire into allegations of defective structural engineer designs affecting the development of a dwelling at [Lot 592] for which you were responsible for the administration of the building contract [Lot 592 building contract] between [owner] and [builder] .

Particulars:

1. Pursuant to the Lot 592 building contract, specifically clause A6.1, clause A6.2 and Item 2 of the Introduction, you were appointed to administer the contract on behalf of the owner. You administered the contract for the period 2 April 2009 to 13 December 2010.
2. On 10 May 2010 you were advised by the builder that it was concerned that the engineering drawings forming part of the Lot 592 building contract documents were inadequate and, if followed, would lead to the construction of a structurally defective dwelling.
3. You had previously been put on notice of the builder's concerns regarding the structural integrity of the engineering design including on 16 March 2010 and 3 May 2010.
4. You had further notice of the builder's concerns about the structural integrity of the engineering design on 14 May 2010, 20 May 2010 and 26 May 2010.
5. On 28 May 2010 you issued Architect's Instruction AI109203 instructing the builder that 'works continue onsite as per original documentation'.

6. On 11 June 2010, the builder issued a Notice pursuant to clause A8.1 of the Lot 592 building contract requesting that you assess and provide a written decision addressing the builder's dispute over your written instruction that 'works continue onsite as per original documentation' which would cause the removal of temporary structural works erected by the builder.
7. On or about 11 June 2010 you were provided with the report of [Engineer] dated 8 June 2010 that stated that the engineering drawings forming part of the Lot 592 building contract documents were inadequate as they did not provide for the structural stability of the dwelling.
8. On 12 June 2010 you were given notice under clause B1.1 of the Lot 592 building contract of discrepancies and omissions contained in the engineering drawings pursuant to the report of Joe Arcaro.
9. On 1 July 2010 you advised the builder that you were not required to undertake independent engineering certification of the existing structural design and you supported the existing structural design by [the engineer engaged by the owner] under the Lot 592 building contract.
10. Also on 1 July 2010 you issued Architect Notice AN1001-01, noting that there was 'no validity' to the structural defects alleged in respect of the dwelling.
11. On or about 24 August 2010 you were provided with a copy of the interim engineering report obtained by the builder from [independent engineer], that reported 'serious stability issues' in relation to the dwelling on Lot 592.
12. On 24 September 2010 you issued Architect's Instruction AI10235 enclosing amended engineering drawings.
13. On 4 October 2010 the builder issued a further Notice pursuant to clause A8.1 of the Lot 592 building contract disputing Architect's Instruction AI10235 on grounds including that the updated design remained deficient.
14. On 13 October 2010 you issued Architect's Notice AN1007 in response to the Notice of 4 October 2010. You noted there was 'no validity' to the issues raised by the builder and directed the builder to 'proceed with the contract documents and the instructions previously issued' by you.
15. On 8 November 2010, [special referee appointed by VCAT], attended a site meeting at which you also attended. At that meeting you were put on notice of [special referee appointed by VCAT's] initial concerns relating to the structural calculations and structural design documentation and as confirmed in his written comments dated 9 November 2010 and final report dated 30 November 2010.
16. On 8 December 2010 the builder issued a Notice pursuant to clause B1.1 of the Lot 592 building contract relating to

discrepancies and omissions contained in the engineering drawings pursuant to the report of John McFarlane.

6. By his legal representative, the Architect has admitted each of the allegations.
7. The Tribunal was assisted by the able submissions made on behalf of the Board and the Architect and by the provision of an Agreed Statement of Facts ("Statement") which had been prepared by the parties.
8. When the Statement was forwarded to the Tribunal, the document at its head contained the following paragraph:

"This statement of agreed facts is provided on a 'without prejudice basis' and is prepared solely for the purposes of the inquiry into the professional conduct of [the Architect] and is provided on the basis that it sets out the background circumstances in which [the Architect] is admitting to the allegations made in the Further Amended Notice of Inquiry dated 5 June 2013 provided that he be subject to the sanctions set out in the proposed consent determination of the Board appended to this statement",

and appended to that document was a further document entitled "Appendix – Proposed Consent to Termination".
9. The Tribunal was concerned to enquire, at the outset of the hearing, as to what, if any, use those documents could be put, given the inclusion of the paragraph set out above, especially in light of the recent decision of the Court of Appeal in *ASIC v Ingleby*¹.
10. It was submitted by [the Architect's representative] that the paragraph in question had been inserted in the document whilst the parties were still undertaking a process of negotiation and should have been deleted before the Statement was provided to the Tribunal. [The Board's representative], on behalf of the Board, adopted that submission.
11. It was further submitted by the parties that the appendix to the Statement was put forward only as a joint submission and was not in any way intended to supplant or limit the exercise by the Tribunal of its own discretion as to penalty after having considered the Statement and the oral submissions made on behalf of the parties in addition to that Statement.
12. The Tribunal was able to satisfy itself that it was sufficiently apprised of the facts and behaviour giving rise to the admitted breaches of section 32 of the Act to enable it to determine an appropriate penalty from the range of penalties set out in that section.
13. It was submitted, on behalf of the Architect, to the Tribunal that the Architect was the sole Director and shareholder of [Name of Company], an approved company for the purposes of section 8D of the Act.
14. In relation to Allegation 4, the Tribunal notes:
 - (a) That despite queries by the builder concerning the structural integrity of the designs, the Architect placed undue reliance on drawings prepared by [Name], an engineer engaged by the owner of Lot 592,

¹ [2013] VSCA 49

but selected by the Architect, in the face of alternate views expressed by other engineers;

- (b) That it was only following a meeting on site with [Name], a special referee appointed by VCAT, that a Notice dealing with the discrepancies and omissions in the drawings by [the engineer] was issued by the Architect; and
- (c) That one of the engineering reports prepared by [name] at the request of the builder was prepared only on the basis of documents supplied to him by the builder and that he made no onsite inspection prior to preparation of his report.

15. In relation to Allegations 2 and 3, the Tribunal notes:

- (a) That the Architect continued to place undue reliance on the drawings of [the engineer] in respect to Lot 589, owned by [names], and Lot 591, owned by [names], notwithstanding, he having already become aware of issues concerning the sufficiency of the drawings of [the engineer]. [The engineer] was, in addition to having been engaged in respect of Lot 592, also engaged by the respective owners on the recommendation of the Architect in respect to Lots 589 and 591; and
- (b) That the Tribunal was also informed that the buildings being constructed on all 3 sites were largely identical 3 storey dwellings, save that Lot 592 also contained a basement.

16. In respect of Allegation 1, the Tribunal notes:

- (a) That it was submitted that the Architect, in breach of regulations 10 and 16 of the *Architects Regulations 2004* failed to administer impartially between the owner and the builder proposed variations to the Lot 591 building contract but rather deferred to the owners' views in respect of those variations;
- (b) That at the hearing the Architect's Instruction dated 2 March 2012 was handed up to the Tribunal. On the face of that document, it is clear that the decision to approve one of the proposed variations to the contract (Part A of the quotation) had been reviewed and approved by the owners and the Architect had based his determination of that variation solely upon the owner's review;
- (c) That it was less clear from the Instruction that the Architect had adopted the same process in relation to the other proposed variation to the contract (Part B of the quotation);
- (d) That the parties conceded that whether the Architect had administered impartially the claim for the variation referred to in Part B of the quotation in the Architect's Instruction was ambiguous, and the Tribunal makes no findings in that regard; and
- (e) That the Architect has admitted breaching regulations 10 and 16 as alleged by the Board and, by reason of that plea, it is unnecessary for the Tribunal to make any additional findings in respect of this Allegation.

Penalty

17. The parties jointly submitted proposed orders dealing with penalty which they urged the Tribunal to adopt.
18. [The Board's representative] drew the Tribunal's attention to *Chiropractic Board of Australia V Hooper (Review and Regulation)*², a decision of the Victorian Civil and Administrative Tribunal earlier this year, and specifically to paragraph 8 of that decision which, she submitted, identified the considerations which the Tribunal ought to take into account when forming its view on penalty.
19. Whilst that decision related to the *Health Professions Registration Act 2005*, it was submitted to the Tribunal that the considerations under that act applied equally to the considerations to which we ought have regard under the Act.
20. Paragraph 8 of that decision provides:

"In summary, the role of the determination is as follows:

 - (a) Not punitive. That is, it is not to punish the respondent.
 - (b) Protection of the public;
 - (c) Maintenance of professional standards of the chiropractic profession in the eyes of the public; and
 - (d) Deterrence to other members of the profession."³
21. It is also worth setting out paragraph 9 of that decision, which provides:

"In considering the protection of the public, it is important to look at a number of factors:

 - (a) the likelihood of recidivism ie an assessment of the ongoing risks posed by the practitioner;
 - (b) whether Dr Hooper has acquired insight into his wrongdoing; and
 - (c) the likelihood of the respondent reoffending."
22. It was submitted, and the Tribunal accepts, that it is necessary for any penalty to clearly demonstrate the Board's strong disapproval of any conduct by an Architect which breaches the provisions of the Act.
23. The Tribunal also accepts that members of the public are entitled to be satisfied that the standards of behaviour and professional practice of an Architect will be maintained at the level which the community is entitled to expect.
24. The Architect has admitted all of the Allegations made against him.
25. [The Board's representative] further submitted that the Architect has demonstrated an insight into his wrongdoing and, prior to the hearing, has agreed to undertake additional education by completing the 15 modules of the PALS program (Practice of Architect Learning Series). He will, on completion of that course, provide a statutory declaration to the Board to the effect that

² [2013] VCAT 1346

³ Ibid

the course been completed, and will also provide proof of payment in respect of that course.

26. [The Architect's representative] submitted that there was no dishonesty or fraud in the behaviour of his client, and that the Architect did not personally benefit in any way from his actions.
27. It was further submitted that, as a result of his involvement in this inquiry and by reason of his now greater experience, the Architect would be better able to deal appropriately with matters such as were the subject of this Inquiry should they again occur.
28. In the document entitled 'Proposed Consent to Termination', one of the orders suggested by the parties was that the Architect be required to pay the Board's reasonable costs of the Inquiry.
29. It was submitted, on behalf of the Board, that the Board's costs, including Counsel fees, totalled approximately \$70,000.00, and that the Tribunal should make an order of costs in that sum.
30. It was submitted, on behalf of the Architect, that, by reason of discussions between the parties in August 2013, the Architect was expecting the Board's costs to be between \$10,000.00 and \$15,000.00.
31. If the Tribunal were to accede to the submission made on behalf of the Board that an order should be made fixing the amount of costs payable by the Architect, it would require each of the parties to prepare significant additional submissions concerning the manner in which the costs were incurred, and a detailed examination of the work carried out. It might also involve each party engaging experts to give evidence before the Tribunal, thereby significantly delaying the final determination of this matter.
32. In all the circumstances, the Tribunal proposes to make the orders set out below with regard to costs.

Determination

33. The Tribunal, having conducted an Inquiry into the matters raised in the Further Amended Notice of Inquiry dated 5 June 2013 issued to [Name], Registered Architect No. [Number], of [address], pursuant to section 27 of the Act, now makes the following determinations:
 1. [The Architect] be reprimanded;
 2. [The Architect] be required to undertake further education in relation to the administration of building contracts;
 3. A condition be imposed on [The Architect's] registration prohibiting him from contract administration until he has provided evidence acceptable to the Board that he has completed the further education described in paragraph 2 above;
 4. [The Architect] be fined the sum of \$2,500.00, such fine to be paid within 30 days of the date of this Determination; and
 5. Pursuant to section 32 of the Act, the costs of the Board in respect of this Inquiry (including reserved costs) should be paid by the Architect.

The Board's costs shall be calculated on a party-party basis in accordance with the County Court Scale. In the absence of agreement between the Board and the Architect as to the quantum of these costs, the costs shall be assessed by an assessor appointed by the President of the Law Institute of Victoria, with the fee for obtaining such assessment to be borne equally by the Board and the Architect. The costs shall be paid to the Board within 60 days of the date of agreement as to the costs, or the date of the Certificate of Assessment, whichever applies.



Mark Yorston – Tribunal Chair

Dated: 16 December 2013

NOTE:

The parties subsequently agreed that the Architect pay the Board costs in the amount of \$30,000.00 in monthly instalments of \$5,000.