NOTE:

The Architects Tribunal concluded its inquiry by issuing its Determination on 19 January 2015 (*below*).

The Architect applied to the Victorian Civil and Administrative Tribunal (VCAT) for a review of the Architects Tribunal's decision.

VCAT issued its decision regarding the appeal on 25 May 2016. This decision may be appealed within 28 days of its making.

McSteen v Architects Registration Board of Victoria (Review and Regulation) [2016] VCAT 841 (25 May 2016)

The VCAT decision may be accessed here:

http://www.austlii.edu.au/au/cases/vic/VCAT/2016/841.html

ARCHITECTS TRIBUNAL 12-13/9

DETERMINATION

IN THE MATTER OF [. . .]
REGISTERED ARCHITECT NUMBER [. . .]

1. By Notice of Inquiry ("**Notice**") dated 6 November 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:

   Allegation One – breach of section 32(c) of the *Architects Act* 1991

   In or about October 2009 you were guilty of unprofessional conduct within the meaning of paragraph 32(c) of the *Architects Act* 1991 in that, in relation to the design of additions and alterations to [. . .] (**Site**), you failed, as soon as practicable after a change to the terms, conditions and/or scope of your engagement with [. . .] (**Client**), to set out in writing the change and to supply a copy of that document to the Client, in breach of regulation 14 of the *Architects Regulations* 2004 (**Regulations**) and pursuant to regulation 16 of those Regulations you are therefore guilty of unprofessional conduct.

Particulars

i. In or around July 2005 the Client engaged you to provide architectural services for alterations and additions at the Site.

ii. In or around August or September 2009 the scope of your engagement was changed to include full architectural assistance for alterations and additions at the Site.

iii. You did not set out in writing a change of scope to your services, and/or you did not provide the Client with a copy of the document evidencing the agreement.

Allegation Two – breach of section 32(a) of the *Architects Act* 1991

In the alternative to allegation one above, in or about October 2009, you were careless or incompetent in your practice as an architect in relation to the design of additions and alterations to [. . .] (**Site**) within the meaning of paragraph 32(a) of the *Architects Act* 1991 in that you failed, as soon as practicable after a change to the terms, conditions and/or scope of your engagement with [. . .] (**Client**), to set out in writing the change and to supply a copy of that document to your Client.

Particulars

i. Refer to the particulars to allegation one above.

Allegation Three – breach of section 32(c) of the *Architects Act* 1991

Between August 2009 and October 2012 you were guilty of unprofessional conduct within the meaning of paragraph 32(c) of the *Architects Act* 1991 in that, in relation to the design of additions and alterations to [. . .] (**Site**), you failed to perform your work in a competent manner and to a professional standard contrary to regulation 6 of the *Architects Regulations* 2004.

Particulars

i. In or around August and/or September 2009 the owner of the Site (**Client**) engaged you to provide full architectural assistance for alterations and additions at the Site.

ii. At the time of your engagement in 2009 your fee for the work was agreed to be 12.5% of the cost of building work based upon your estimate of the cost of building work of approximately $400,000.00.

iii. By invoice dated 9 October 2012 you claimed professional fees of 12.5% based on a building cost of $555,660.00.

iv. Between September 2009 and October 2012 you failed to adequately inform or consult with the Client regarding the reasons and/or basis for the increase in the estimated cost of the building work from $400,000.00 to $555,660.00.

Allegation Four – breach of section 32(a) of the *Architects Act* 1991

In the alternative to allegation three above, between August 2009 and October 2012 you were careless or incompetent in your practice as an

architect in relation to the design of additions and alterations to [. . .] (**Site**) within the meaning of paragraph 32(a) of the *Architects Act* 1991.

Particulars

i. Refer to the particulars to allegation three above.

Allegation Five – breach of section 32(c) of the *Architects Act* 1991

Between on or about August 2009 and October 2012 you were guilty of unprofessional conduct within the meaning of paragraph 32(c) of the *Architects Act* 1991 in that, in relation to the design of additions and alterations to [. . .] (**Site**), you failed to perform your work in a competent manner and to a professional standard contrary to regulation 6 of the *Architects Regulations* 2004.

Particulars

i. In about August or September 2009 you were engaged by the owner of the Site to perform architectural services being the provision of drawings including plans, elevations and sections, together with other details and schedules to enable the project to be tendered and so that the documents could be submitted for building approval in relation to the design at the Site.

ii. The drawings prepared by you did not comply with the *Building Regulations* 2006 and the National Construction Code such that a building permit could not be issued in relation to the project.

iii. The drawings did not comply as follows:

    a) The proposed balcony at the rear of the extension did not comply with the fire separation requirements as defined by clause 3.7.1.7 of volume 2 of NCC 2013.

    b) The proposed open terrace/balcony at the front of the extension did not comply with the fire separation requirements as defined by clause 3.7.1.7 of volume 2 of NCC 2013.

    c) The proposed canopy roof on the first floor of the extension did not comply with the fire separation requirements as defined by clause 3.7.1.7 of volume 2 of NCC 2013.

Allegation Six – breach of section 32(a) of the *Architects Act* 1991

In the alternative to allegation 5 above, between August 2009 and October 2012 you were careless or incompetent in your practice as an architect in relation to the design of additions and alterations to [. . .] (**Site**) within the meaning of paragraph 32(a) of the *Architects Act* 1991.

Particulars

i. Refer to the particulars to allegation five above.

Allegation Seven – breach of section 32(c) of the *Architects Act* 1991

In March 2013 you were guilty of unprofessional conduct within the meaning of paragraph 32(c) of the *Architects Act* 1991 in that, in relation to the design of additions and alterations to [. . .] (**Site**), you failed to perform your work in a competent manner and to a professional standard contrary to regulation 6 of the *Architects Regulations* 2004.

Particulars

i. The drawings prepared by you and provided to the owner of the Site for the purpose of applying for building permit approval did not comply with the Building Regulations 2006 nor the National Construction Code.

ii. In or around 6 March 2013, the owner of the Site requested the drawings in a format in which they could be digitally modified in order to make modifications to them as required to be made to comply with the fire rating provisions of the NCC and the Building Regulations 2006.

iii. On or about 6 March 2013, you refused to provide drawings, in a format in which they could be digitally modified, to the owner of the Site.

Allegation Eight – breach of section 32(a) of the *Architects Act* 1991

In the alternative to allegation seven above, in March 2013 you were careless or incompetent in your practice as an architect in relation to the design of additions and alterations to [. . .] (**Site**) within the meaning of paragraph 32(a) of the *Architects Act* 1991.

Particulars

Refer to the particulars to allegation seven above.

6. A preliminary conference was set to be held on 15 November 2013.

7. The Tribunal was advised that the date set for the preliminary conference had become unavailable and the conference was rescheduled to be held on 30 January 2014.

8. At the preliminary conference, Mr D. McSteen, Counsel acting on behalf of the Architect, submitted that the Tribunal ought not proceed with the holding of a hearing into the professional conduct of the architect and, following further submissions from Mr McSteen for the architect and Ms Eastman on behalf of the Board, the Tribunal ordered that that aspect of the matter would be determined as a preliminary issue.

9. The question to be considered, the wording of which was agreed by the parties, was:

"Can the Tribunal conduct this Inquiry into the professional conduct of [. . .] (Architect) having regard to the fact that the Architect has lodged an application against [. . .] at the Victorian Civil and Administrative Tribunal on 14 January 2013 and terms of settlement were entered into between the Architect and [. . .] on 15 March 2013?"

10. The hearing was set down to be held on 28 February 2014 and the parties ordered to provide outlines of submissions to the Tribunal on or before 25 February 2014. Submissions on behalf of the Board were received by the Tribunal on 25 February 2014 and submissions on behalf of the Architect were received on 26 February 2014.

11. At the hearing of the preliminary issue, the Tribunal was assisted by the oral submissions of Mr Gillespie-Jones on behalf of the architect and Ms Eastman on behalf of the Board.

12. The Tribunal determined that it was able to conduct an Inquiry into the professional conduct of the architect and delivered its reasons for that decision on 2 April 2014 (**the Preliminary Issue Reasons**).

13. A further directions hearing was held on 22 May 2014. The architect was again represented by Mr McSteen and the Board by Ms Eastman.

14. Following submissions by Counsel and by Ms Eastman, the Tribunal ordered:

    (a) The Board shall serve any witness statements and any other materials upon which it intends to rely on the architect's solicitors by 18 June 2014.

    (b) The architect shall, if he wishes to rely on any witness statements or other material, serve any such material on the Board's solicitors by 18 July 2014.

    (c) The Board shall serve any witness statements or other materials in reply to the architect's witness statements and material on the architect's solicitors by 1 August 2014.

    (d) The witness statements shall stand as evidence in chief at the Inquiry and no further evidence shall be permitted without the leave of the Tribunal.

    (e) Both parties shall ensure their witnesses attend the Inquiry for the purposes of cross-examination.

    (f) The Board shall prepare an indexed Tribunal Book containing all of the witness statements and all of the other materials upon which both parties intend to rely at the hearing. The Board shall provide a copy of the Tribunal Book to each of the members of the Tribunal and to the architect's solicitors no later than 7 business days before the hearing.

    (g) Subject to the availability of the Tribunal members, the Inquiry is set down for hearing in the Board Room of the Architects Registration Board of Victoria at 10:00am on 10, 11 and 12 September 2014. The estimated length of the hearing is 3 days.

    (h) Liberty to apply upon written notice to the other party.

    (i) Costs of this day are reserved.

15. In accordance with the directions, the Board served the material on which it intended to rely on the architect's solicitors on 18 June 2014 and provided a

Tribunal Book to the Tribunal on 29 August 2014. The architect filed no material with the Tribunal. Nor did he serve any material on the Board's solicitors.

16. [. . .], the complainant, gave evidence-in-chief by way of a Witness Statement dated 18 June 2014.

17. The Tribunal does not intend to restate, in exhaustive detail, the contents of that Witness Statement, however, the Tribunal feels it important to note that it was helped considerably by the provision of this comprehensive statement, when read in the context of having had the opportunity to observe and hear from the witness during a cross-examination, which extended across 3 sitting days.

18. The Client gave evidence that she was the registered proprietor of a property known as [. . .] ("the Site") and that she resided at that property.

19. The Client approached the architect in 2005 to discuss proposed alterations and additions to the home on the Site. She approached the architect as she wished to achieve a similar result for her proposed renovations as the architect had achieved at a property in Carlton, which she had seen and liked.

20. Following a meeting between the Client and the architect some time prior to 12 May 2005, the architect forwarded a document to the Client bearing that date and entitled "Design Report" ("the Report").

21. The Report set out, in brief terms, a description of the works and, at the conclusion of that section of the Report, raised the question of whether the works proposed could be carried out for the sum of $170,000.00. The Report went on to identify that works requested could not be achieved for $170,000.00, but were more likely to be in the region of $260,000.00 to $300,000.00.

22. The Client gave evidence that she wished the design of the proposed renovations to be similar to that which had been designed by the architect in respect of an earlier project in Carlton (paragraph 2 of Witness Statement).

23. During the course of the hearing, much was sought to be made of whether she required a similar design or an exact copy of that earlier design (paragraph 9 of Witness Statement of the Client).

24. It seems to the Tribunal that the request was for a similar design, and support for that view might also be gleaned from the Report prepared by the architect at a time largely contemporaneous with the holding of the discussions which led the architect to prepare the Report.

25. In that Report, the architect stated "costs for an extension of this size, constructed in a <u>similar</u> fashion to our recently completed project in Carlton, are really likely to be in the $260,000.00 to $300,000.00 range…" (emphasis added).

26. By letter dated 20 July 2005, the architect set out his fees for partial service for design and documentation of the proposed renovations as being $12,000.00.

27. On 2 September 2005, the Client and the architect entered into an RAIA client and architect agreement which reflected the partial service arrangement. The Tribunal notes that, in that agreement, the architect estimated the cost of building work for the project to be $250,000.00.

28. The project was delayed until August 2009 for matters unconnected directly with the project itself, but which were necessary to deal with to allow the project to proceed.

29. During the period of the delay, the architect continued to provide certain services to the Client. He submitted seven (7) invoices in respect of that ongoing work totaling $17,292.00 and those invoices were paid by the Client.

30. In or around August or September 2009, the architect suggested to the Client, and she verbally agreed, that the arrangement between them should be varied from "partial service" to "full service", and that the fee for that full service arrangement should be based on 12.5% (inclusive of GST) of the build price.

31. The architect further suggested at the time that, by reason of the passage of some years from the time at which the project was first commenced, the build price was likely to be between $340,000.00 and $440,000.00.

32. The next invoice, dated 30 September 2009, was prepared on the basis of the new arrangement, and identified an estimated project cost of $400,000.00. That tax invoice also referred to the overall fee being 12.5% of a budget of $400,000.00, as if to say that those terms, namely "estimated project cost" and "budget", could be used interchangeably.

33. By a further letter some three days later, on 3 October 2009, the architect expanded on the basis on which he assessed the range of costs to be between $340,000.00 and $440,000.00, and noted there would be an additional cost of approximately $65,000.00 if certain miscellaneous items were also included, they being specified as specialised commercial type glazing, heating and cooling and landscaping. The letter went on to suggest that savings could be achieved, if necessary, by the adoption of certain measures, namely:

    - *staging the work, consider fitting out the first floor en-suite at a later date;*
    - *keeping all construction to timber framed construction only i.e. no brickwork, no concrete slab, no steel work;*
    - *reduce the overall size of the first floor, match the new ground floor area; and*
    - *delete the first floor balcony*.

34. On 7 October 2009 the Client telephoned the architect to discuss the contents of the 3 October letter. She advised the architect that her budget was $350,000.00 plus an amount for specific stairs and glass doors. The architect agreed to talk to the builder whom he proposed to use to discuss that budget, and that, thereafter, the architect and the Client would meet to discuss the project.

35. The architect and the Client then met to discuss the project on 23 December 2009 and various matters were discussed to identify ways to bring the project within the Client's proposed budget. It was suggested by the architect, and agreed by the Client, that a quantity surveyor should be engaged to provide a cost estimate.

36. Cost Control Victoria Pty Ltd was thereafter engaged to provide a cost estimate and, by a report dated 19 February 2010, estimated the probable costs of the build to be $374,500.00.

37. Further tax invoices dated 10 May 2010 and 3 December 2010 both reflected the changed fee arrangement and identified the amount by reference to an overall fee of 12.5% of a budget of $375,000.00.

38. The next tax invoice received by the Client was dated 30 July 2012 and was based on an estimated project cost of $400,000.00.

39. The Client queried the change in the probable budget in an email dated 6 August 2012 and the architect, by email dated 13 August 2012, replied that the change reflected the probable changes to costing due to the effluxion of time. He also pointed out that he would expect the actual costs to exceed that estimate.

40. The drawings were completed and were sent out to tender. The documents forwarded to the prospective builders were identified as drawings WD00 – WD26, a specification document dated June 2012, and an addendum to that specification dated 17 July 2012.

41. The specification divided the project into two stages and identified a number of PC items for which an allowance of $31,000.00 was made. The Client's evidence was that she ultimately spent $10,158.00 on those items.

42. The Client gave evidence that the cabinetry allowance in the specification was $55,000.00, and the Client considered that allowance to be excessive in light of the material specified in the specification. Her evidence was that that allowance was not discussed prior to the documents being sent to the prospective builders. The Client also gave evidence that the specification included a number of items which ought to have been excluded in accordance with matters which had been discussed between the Client and the architect in 2009.

43. The Client knew a builder and the builder's wife and, for that reason, requested that that builder, Glen Johnston, be included as one of the tenderers.

44. The Client, after being provided with a summary of the tender responses, but not with copies of the tender responses themselves, decided that she would select Glen Johnston as the project builder, and a meeting was arranged between the architect, the Client and the builder.

45. Shortly after that meeting, the architect forwarded a further tax invoice under cover of a letter advising her that the architect needed to finalise his fees for the project and the extent of additional services.

46. The 9 October 2012 letter stated, in part:

"*Our fees are based on:* *the average value of the work designed & documented, or*
our assessment of the average value of the work designed and documented
X a 12.5% fee
X the % of our service completed"

47. The tax invoice dated 9 October 2012 identified the budget as being $555,660.00.

48. The Client sent an email, dated 12 October 2012, by way of response, which stated:

"*I received your invoice in the mail last night and was quite distressed to say the least.*

My understanding of how your fees are charged is 12.5% on the overall construction cost, charged in stages. I appreciate that an estimate is used until the final tender price is determined. In this case, a $375,000 to $400,000 estimate had been used consistently throughout the project.

When I signed the the Client/Architect Agreement back in 2005 my budget was approximately $250k, and a partial service was required, we then changed to a full service in September 2009 and the budget was assessed more realistically at $340k to $440. A formal amendment to the contract was never signed but stated in your invoice No. 8 Sep 2009, budget $400,000.

I have never indicated that my budget would be in the $500, on numerous occasions I have stressed that my budget was reduced to approx. $350k after the GFC. On that note we proceeded to cut costs by eliminating items I could live without, i.e. upstairs bathroom fit out, part kitchen fit out, pergola etc.

Bottom line, I simply cannot afford to pay you an extra $20,000 plus, I believe my payment of $35,000 up to date on the actual building cost of $347,000 with Glenn represents 81% costs to date."

49. The architect responded the same day with an email which read:

"*Dear* [. . .]*,*

I'm very happy to re-visit things re the budget and our fees and I'm upset that you are offended by the current account.

I fully understand that you wish to reduce costs where ever possible, however, I'm not sure that we were looking to do so when we carried out our documentation. As recent as last year we were instructed by you to add additional cabinets into the kitchen north wall, to allow for travertine finishes, to add in rusted metal cladding, etc. – none of thse (sic) things being a cost cutting exercise.

Certainly, for some time we have been waiting for a better economic climate for you to proceed with the project and we have looked at staging the project to spread the spend.

Our fees can't just be based on the current stage 1 'lock up' work that Glen is planning to carry out, because we have fully documented the project beyond Glen's proposed stage.

In our correspondence to you, 3.10.2009, we stated that a Medium build spend would be $480,000. We then continued, from your instructions, to add in items that attract High end costs.

So, I'm happy to discuss where we are with you. Would you like to come in for a discussion, how would you like to proceed?"

50. The Client's evidence was that she believed a number of the statements in the architect's email were inaccurate.

51. The Client received further correspondence from the architect dated 15 October 2012 in which, amongst other things, the architect offered to base his fees on a project cost of $500,000.00.

52. In response to that letter, the Client sent a letter dated 16 October 2012 which stated:

"*In response to your letter dated 15 October 2012, I am still disappointed to find that you are assessing your fees on an estimate cost rather than the actual cost of $347,000….My original brief and contract was for a budget of $250k and a partial service. As time went on we changed to a full service arrangement and a verbal discussion on a fee of 12.5% of the building cost. Never was I informed of a fee based on estimates.*

In fairness, we did come to the conclusion that a cost blowout to around the $400,000 level would be more realistic, after meeting with you, and going into greater detail…A probable cost of $347,500 was determined and I believe that was the figure we were working around, based on your drawings dated 1 February 2010 and your invoices to date based on $375k to $400k.

As I've stressed before, my budget was never in the $500k+ range, it has always been stretched to a max of 400K. As a duty of care and responsibility between the Client and architect I believe it is reasonable to expect that figure would be kept in check.

Given the fact that I believe I have paid up to date, I would like to formally advise you that I will no longer be proceeding with your services."

53. We will say more concerning the events which thereafter unfolded between the architect and the Client later in these reasons, but now turn to the allegations themselves.

54. In the submissions provided by the Board, the Board rightly conceded that, notwithstanding that the Notice of Inquiry identifies eight allegations, four of those allegations are by way of alternative to the other four, and that, when the allegations are so grouped, they related to four specific matters.

Allegations 1 & 2

55. As stated above, it was common ground that, in or about September 2009, the architect and the Client met and agreed that the basis on which the architect would provide his services should change.

56. It is clear to the Tribunal that the architect felt, in 2009, that, as a result of the change in arrangements between himself and the Client, that change ought to be documented, and that the manner in which it should be documented was in the form of a fresh agreement.

57. Notwithstanding that the change in arrangements was agreed in September, the architect gave evidence that he produced a new agreement reflecting those changes and provided it to the Client in a meeting which was said to have occurred on 23 December 2009. It is common ground that the meeting did take place, however, the Client denies having received any new agreement, and gave evidence that she did not see a copy of that document until it was presented at a mediation, which took place in 2013 following the institution of proceedings against her by the architect at VCAT.

58. It will be necessary to say more about that VCAT dispute later in these reasons regarding separate allegations.

59. It is unfortunate that no contemporaneous note, either by the architect or the Client, was produced in evidence before the Tribunal in relation to that document, and that no attempt was made by the architect, between 2009 and the termination of his services in October 2012, to obtain a signed copy of that document. Had that occurred, this issue could not, obviously, have arisen.

60. The Tribunal also notes that, in the architect's particulars of claim dated 14 January 2013, which were filed in support of his application to VCAT, it was he who informed the Client that, as the cost of the building work and scope of the work on the project had changed, the 2005 agreement was not applicable, and that a further agreement should be entered into.

61. The points of claim set out (attachment AA of the Client's Witness Statement):

> *11. On or about 3rd October 2009 the Applicant informed the Respondent that the cost of the building work and the scope of the work on the domestic building project had changed from what had been agreed upon in the first agreement.*
>
> ***PARTICULARS***
>
> *The Plaintiff informed the Defendant of the above matters in a letter dated 3rd October 2009.*
>
> *12. On 23rd December 2009, the Applicant informed the Respondent the first agreement was not applicable to the provision of further architectural services as the cost of the building work and the scope of the work on the domestic building project had changed from what had been agreed in the first agreement.*
>
> *13. By a written agreement made on the 23rd December 2009 ("the second agreement") the Respondent appointed the Applicant to provide full architectural services for the project.*

PARTICULARS

The full architectural services to be provided were sated in paragraph 4.2 of the second agreement.

14. The second agreement provided the Respondent would pay the Applicant a percentage fee of the building work for the architectural services provided.

PARTICULARS

Pursuant to paragraph 4.2 of the second agreement the fee was 12.5% including GST (1/11th) of the cost of the building work and was to be assessed as follows:

Sketch design	*)*	
Detailed design	*)*	*30% of total fee*
Documentation		*45% of total fee*
Contract administration		*25% of total fee*

being: tender 5%; &

on site administration 25%.

15. The Defendant agreed on 23rd December 2009 to sign the second agreement in due course, but failed to do so.

62. The statement that the architect informed the Client of the need for certain changes is at odds with paragraph 10 of the architect's Witness Statement, which states:

"[. . .] requested that the fee structure pursuant to the agreement be changed to a full service arrangement whereby my fees would be charged on the basis of 12.5% of the build cost of the project."

63. It seems to this Tribunal that, at least at the start of 2013, the architect had a clear understanding of what had occurred and has caused a document to be submitted to that Tribunal setting out his then understanding.

64. The architect produced, as attachment 'C' to the Witness Statement setting out his evidence-in-chief, a summary which he had prepared of the various meetings which he stated he had had with the Client concerning this project. Nowhere in that attachment, either in the summaries of discussions or the actual notes of discussions which were included, is there a reference to the preparation of an agreement in 2009. The absence of any reference to the agreement in the summary prepared by the architect concerning the meeting which took place on 23 December 2009 is particularly troubling.

65. The Tribunal finds it strange that the architect had not, in the almost three years following the date on which he has asserted he provided the agreement to the Client, made any attempt to obtain a signed copy from her, nor was there any reference to the agreement or terms of the agreement in any of the invoices forwarded by the architect.

66. In that regard, the Tribunal notes that the Client signed the agreement provided by the architect in 2005, apparently without complaint, and no evidence was led which might explain why there would've been any reluctance on her part to sign a new agreement in 2009, given that the fact that fees would be charged on the basis of 12.5% of the build price appeared to have been understood by both parties from the time it was discussed by them in September 2009.

67. The Tribunal does not accept that the document identified as the 2009 Agreement was provided to the Client at the meeting held on 23 December 2009.

68. It was put on behalf of the architect that the tax invoices themselves were sufficient written notification of the changes in scope and manner of calculation of fees agreed in 2009.

69. It is clear that the architect did not, himself, think that such notification was sufficient, since he has given evidence that he did in fact prepare a new agreement.

70. The agreement, which the architect states he prepared at that time, does indeed set out the full terms and conditions on which the architect was then to be retained.

71. The Tribunal is of the view that, in a circumstance where an architect's retainer changes from "partial service" to "full service", it is appropriate and prudent for an architect to prepare a new agreement.

72. The Tribunal was also of the view that it is also prudent and appropriate for an architect to obtain a signed copy of the agreement or other written communication signifying acceptance by the Client of the terms of such an agreement.

73. In this regard, the Tribunal notes that, in response to a question from the Tribunal, the architect agreed that he did not have in place an office procedure to chase up documents from the clients (page 255).

74. Had either of those courses been adopted, this issue could not have arisen.

75. The Tribunal further notes that the architect's solicitor, presumably on instructions provided by the architect, wrote to the Client in the following terms:

"With all due respect as a matter of law on our instructions, the fees due to our client have nothing to do with:

1. *What is a reasonable fee to pay for…services; or*

2. *The client architect agreement dated 2nd September, 2005* (emphasis added)*; or*

3. *"common practice" to change (sic) between 65% and 70% of the total fee for design."*

Further, the letter went on to say*:*

"We have sought advice from Counsel as to what contractual terms you are bound by. He has advised you are bound by the agreement given to you and discussed on 23rd December 2009, and are estopped from denying otherwise."

76. The Tribunal was not provided with a copy of that advice from Counsel, however, it may, we think, reasonably be inferred that Counsel would have given that advice, having been instructed that the agreement in question had in fact been provided to the Client by the architect.

77. It appears to the Tribunal that the architect himself must have thought it necessary to prepare a new agreement in order to comply with his disclosure obligations. If it was not necessary, we do not understand why he would have, on his evidence, prepared it in the first place and yet, clearly, the document exists.

78. It is equally clear that the 2009 Agreement contains more than the change in the way fees were to be charged. It sets out, for example, details of the % breakdown of the total fee according to different stages of the project. It sets out the hourly rates of those working on the project, which rates are different from those which were applicable at the time the 2005 agreement was prepared and signed.

79. Similarly, it is clear that the tax invoices themselves would not serve to comply with the architect's obligations, as they do not set out the changes in the scope of the retainer or clarify for the Client the difference between "the estimated cost" and the actual cost of construction which is clearly set out in the agreement as being the basis for the relevant fee to be paid by the Client.

Allegations 3 & 4

80. The Tribunal accepts that, in September 2009, the Client and the architect changed the nature of the architect's retainer from partial to full service. His fees were to be based on 12.5% of the building cost.

81. The Client gave evidence that her budget was between $350,000.00 and $400,000.00. It was said, and the Tribunal accepts, that this was conveyed to the architect in a telephone conversation between the architect and the Client on 7 October 2009 shortly after she received a letter from the architect dated 3 October 2009 in which letter the architect advised that he expected the building costs to be in the range of $340,000.00 to $440,000.00, with the possibility that the costs may be higher.

82. The Client's note of the telephone conversation made on the 2nd page of the 3 October letter identifies that she informed the architect that her budget was $350,000.00 plus extra for stairs, laser cut steel and glass doors. The note further indicated that the architect was to speak with the builder who had carried out a project identified simply as "The Terraces" and that the architect would work out a budget.

83. We take it, although nothing turns on it, that the reference to "The Terraces" is a reference to a previous project with which the architect had been involved and which the Client admired.

84. The architect and the Client met to discuss the project on 23 December 2009 and it was decided to engage a quantity surveyor.

85. The quantity surveyor estimated the probable costs to be $374,500.00, although that estimate was qualified by a number of exclusions.

86. The architect submitted five tax invoices from the time the full service arrangement commenced. Those tax invoices were:

    i) Tax invoice dated 30 September 2009 based on an estimated project cost of $400,000.00 and a budget of $400,000.00;

    ii) Tax invoice dated 9 May 2010 based on an estimated project cost of $375,000.00 and a budget of $375,000.00;

    iii) Tax invoice dated 3 December 2010 based on an estimated project cost of $375,000.00 and a probable budget of $375,000.00;

    iv) Tax invoice dated 30 July 2012 based on an estimated project cost of $400,000.00 and a probable budget of $400,000.00; and

    v) Tax invoice dated 9 October 2012 based on an estimated project cost of $400,000.00 and a budget of $550,660.00.

87. It is, in the Tribunal's mind, telling that the Client, in her letter to the architect dated 16 October 2012, set out her understanding of the history of the matter insofar as it related to her budget, namely the amount she was able, or was prepared, to spend on the project.

88. That letter provided:

    "*As time went on we changed to a full service arrangement and a verbal discussion on a fee of 12.5% of the building cost. …In fairness, we did come to the conclusion that a cost blowout to around the $400,000 level would be more realistic, after meeting with you, and going into greater detail. …A probable cost of $374,500 was determined and I believe that was the figure we were working around, based on your drawings dated 1 February 2012 and your invoices to date based on $375k to $400k.*

    As I have stressed before, my budget was never in the $500k+ range, it has always been stretched to a maximum of $400k."

89. In contrast, the architect gave evidence as follows:

    "MR RIDGEWAY: *All right. You put on your invoices estimated budget 375, 400, these are the later invoices. You've given evidence that because you tend to underestimate and not have to hand money back - - - ?---Well, I'd given my client an assessment of where the costs could go in 2009.*

    Yes?---That was roughly, from memory without looking it up, between a very low figure and a higher figure of 440, but it could go 65,000 above that with things added in.

    505?---Correct. So – but I didn't base my fees on the 505 or the lower figure, I just went for a figure that seemed reasonable at the time, the 400,000.

When we approached the quantity surveyor he came in with a lower figure for doing less work and that seemed to be reasonable that we could run with that if we were going to do less work. But my figure was going to be based on the actual cost of the work and that was yet to be assessed.

And the work that was assessed in your view was 555,000, is that correct?---Yes.

When the builder's quotes came in?---Yes."

90. The architect gave further evidence that he did not ever believe the Client had a budget of $400,000.00:

"*So just picking up on what you've just said, are you saying that you never believed* [. . .] *had a budget of $400,000?*

---No. And let me tell you why - - -

Why? - - - ?---No, let me tell you why I say that."

91. The architect gave evidence that his invoices based on a $400,000.00 estimate did not reflect an estimated build cost, but were simply an attempt by him to be fair to his client.

92. At page 109 of the Transcript, the architect stated:

"*With respect, [. .], your argument therefore you don't need to put any figure in because - - - ?---No, I do need to put a figure in.*

- - - you're sitting there saying it doesn't matter, whatever it costs in the end, that's what the client is going to pay? ---Well, if the client instructs me to put things into the job that are going to lift the cost up, yes.

I mean you're the professional here, aren't you? You're the architect?---Yes.

You're the one whose fees are going to be paid, but you're the one in control of this agreement - - - ?---Yes.

- - - in terms of, you know, it's in your interest from how you're putting it to design something that's going to cost a million dollars, doesn't matter if your clients budget is 400,000."

93. It would appear that the Client was proceeding down one path, believing that her project would be able to be constructed for an amount within her budget. Her view was reinforced by all the tax invoices she received, save for the last.

94. On the other hand, the architect was always of the view that the project could not be completed for that sum, and at no time did he clearly and unambiguously identify that her expectation in respect of that which he had designed at her request could not be built for that price.

95. Had he done so at any stage between 2009 and October 2012, it is, in the Tribunal's view, unlikely that events would have developed as they did.

96. The Tribunal also felt uneasy about the evidence of the architect concerning the establishment of the $400,000.00 figure. The architect stated that he had

prepared the 2009 Agreement and filled it out in the presence of the Client. Since the figure of $400,000.00 appears in that document, it would be unlikely that he would have inserted that figure without explaining the basis for it to the Client. However, the conversation concerning that document was said to have occurred on 23 December 2009.

97. The sum of $400,000.00 is, however, used as the basis for the fees charged in the tax invoice dated 30 September 2009. In that regard, the architect gave evidence that:

WITNESS: "*…I just, to be reasonable to my client, I just went in a figure that seemed reasonable at the time and that was, you know, the lower of the figures. Because at some stage we would establish exactly where the building costs would be based on instructions from my client.*

MS EASTMAN: *Mr [. . .], we're talking about an agreement I'm assuming - - - ?---Yes.*

- - - *it's a verbal agreement in September 2009 where you moved to a full service agreement? - - - M'mm.*

You agree you had that discussion? - - - Yes.

And do you not agree that the figure of $400,000 was what you agreed to base your percentage fees on? - - - No. I - - -

You don't agree with that? - - - No, I don't.

All right. Look at Attachment E? - - - Attachment E. Yep. This is the first invoice rendered after the change in the scope? - - - M'mm.

So you're changing the basis of how you're - - - ? - - - Yes.

- - - going to charge for your work? - - - M'mm.

*And we have, "*Based on an estimated project cost of 400,000*", was that wrong, was it? - - - I think it comes back to what I said before. I could easily have said to the client – my the client "*Pay me on 500,000*"."*

98. It is, in the Tribunal's view, inappropriate for an architect to adopt, as a basis for a fee, a figure which does not accurately reflect his assessment of the likely cost of the project. By adopting a lower figure, he is misleading his Client and, in effect, allowing her to believe that that which is being designed is able to be built for a price which the Client is able to afford.

99. The architect was asked about his use of the phrase "finalise our fees" in the 9 October letter, and he stated that he was asked to do so by the Client. The following exchange took place:

MS EASTMAN: "*All right, well you submit you're reasonable and I'll put it to you that there was no basis for you to calculate it in that way. But even just looking at how - - - ?---Well, I had – but hold on, if my the Client has said "*How are you going to

base your fees*?", or, "*How are you going to finalise your fees*?", I've got to do something.*

There's no evidence of that? - - -There's no what?

The Client did not say that in her statement, she wasn't asked about that, and that's the first time we've heard it is you sitting there saying she asked me to finalise the fees? - - - Well, I'm assuming that we had a discussion along those lines. I can't be specific, I would agree with you there."

100. The giving of such an answer was not helpful, and added to the Tribunal's concern as to the ability of the architect to actually remember what had occurred.

101. The Tribunal accepts and agrees with the submissions by the Board that the architect's conduct in rendering a tax invoice which had as its basis an estimated build cost of $555,600.00 was in all the circumstances of the matter below the standard to be expected of a careful and competent architect.

Allegations 5 & 6

102. The architect, by his tax invoice dated 9 October 2012, charged fees on the basis that he had completed documentation, including permit drawings, tender drawings and construction drawings (75%) and tender procedures (5%), and on that basis was entitled to charge 80% of an overall fee of 12.5% of a budget of $555,660.00.

103. The remaining 20% of the architect's fee would have been earned by him once the project reached the stage where the building contract had been finalised and on-site administration was required.

104. After the retained of the architect was terminated and the dispute at VCAT had been resolved, the Client became aware that the drawings were non-compliant.

105. At that time, the Client's new building surveyor advised her that there were 3 items on non-compliance with the *Building Regulations* 2006 and the *National Construction Code* (NCC) and that an application should be made to the Building Appeals Board in respect of those items.

106. It eventually turned out, following an unsuccessful application to the Building Appeals Board, that only one item of non-compliance required the making of a minor amendment to the plans.

107. Much time was taken during the hearing of this matter discussing the nature of the non-compliance and how such errors are dealt with and might have been dealt with by building surveyors different to those engaged by the Client at the time.

108. That evidence was unhelpful in dealing with two central issues concerning the behaviour of the architect.

109. The first of these issues was whether, in the circumstances which existed in the present case, the Client was entitled to expect that the plans were compliant, given that the Client had received a tax invoice by which she could

reasonably infer that everything which needed to be done to satisfy the requirements for obtaining a building permit had been done. We think she was entitled to form that view, and it is clear on the evidence that she had formed that view.

110. The second issue was whether the architect had an obligation to tell the Client that there was an issue concerning non-compliance which was unresolved at the time his retainer was terminated, or when he instigated proceedings at VCAT against the Client and then resolved that proceeding at mediation, in circumstances where he had been aware of the non-compliance since 2011.

111. The architect's evidence was:

MS EASTMAN: *"…Were you aware of this non-compliance in May 2010? - - - I may not have been aware of it in May 2010, but I would have been aware of it in 2011 when we went to our building surveyor.*

And why do you say you would have been aware it then? - - - Because that's we submitted documents to our building surveyor, 2011.

Yes. Just because you submit documents doesn't make you aware of the non-compliance? - - - Doesn't make me aware of the non-compliance? I think you're missing the point. The point is that when we have matters that are perhaps slightly irregular we go to our building surveyor to work through them with our building surveyor.

All right. So you knew it was slightly irregular and so you went to your building surveyor to work through it with him? - - - Yes, correct.

So you knew that you had an issue that you didn't satisfy the strict requirements of the code and therefore you would need to go and see your building surveyor to discuss how you might overcome that? - - - Yes, and then based on those discussions have a discussion with my client about how to resolve it.

Correct. Now, the client has given evidence the first she was aware that there was an issue with the plans was when she went to the new building surveyor. Do you agree with that? - - - I don't disagree with that."

112. The Tribunal thinks that the architect had an obligation to inform the Client of the issue.

113. The Tribunal accepts that the Client would have incurred expense in having the problem resolved regardless of whether she had retained the services of the architect and his selected building surveyor, Mr Lorenzini, or not, however, that is not germane to the question of whether she should have been given a tax invoice which suggested that no issue existed.

114. It is worth noting, in passing, that Mr Lorenzini did write to the architect on 21 August 2013 and confirmed in that letter that the plans were non-compliant and that Mr Lorenzini himself would have suggested an application would need to be made to the Building Appeals Board.

115. Mr Lorenzini went on to say:

"*There has now been an allegation that you designed a building that would not have been capable of receiving a building permit.*

The basis of this allegation is that the owner took your plans to another building surveyor for a building permit who required the roof to be redesigned to comply with the fire separation of the Building Code of Australia.

That Building Surveyor, rightly, advised that the design did not comply with the Building Code of Australia.

However, based on the facts above, and my experience in the Building Surveying Industry, I am quite confident that you would have received a modification from the Building Appeals Board, and thus allow the design to be constructed without any amendment."

116. The architect was careless in allowing the tax invoice to be prepared and sent to the Client in October 2012 when he knew that further work needed to be done to make the plans compliant.

Allegations 7 & 8

117. During the course of the hearing, Allegation 7 was amended as follows:

7.1 The drawings prepared by you and provided to the owner of the Site for the purpose of applying for building permit approval did not comply with the Building Regulations 2006 nor the National Construction Code.

7.2 In or around 6 March 2013, the owner of the Site requested the drawings in a format in which they could be digitally modified in order to make modifications to them as required to be made to comply with the fire rating provisions of the NCC and the Building Regulations 2006.

7.3 On or about 6 March 2013, you refused to provide drawings, in a format in which they could be digitally modified, to the owner of the Site.

118. Whilst the Tribunal was initially of the view that such an amendment to the original allegation was unnecessary, given the evidence which had been given to the Tribunal which helpfully served to identify the issue which we needed to decide, a comment by Counsel for the architect concerning possible confusion which might arise caused us to allow the amendment to be made.

119. Following the termination of the architect's retainer, a dispute arose as to whether the Client was able to use the drawings drawn by the architect.

120. The architect by email dated 16 October 2012 advised the Client that she could not use his documents without paying a reasonable fee.

121. On 18 October 2012, the architect wrote to the Client's builder, Glen Johnston, threatening legal action if the builder made use of the plans in the absence of authorisation by the architect.

122. By letter dated 25 October 2012, the Client wrote to the architect with a proposal for settlement, a term of which was that she be supplied with "copies of the drawings in CAD format for us on the project". Since the Client already

had in her possession paper copies of the drawings, her request identified above could only be taken to mean that she wished to obtain a copy of the drawings in a format which would enable digital amendment of those drawings to be made.

123. The architect's solicitors responded to the Client by letter dated 30 October 2012 rejecting the Client's settlement proposal and providing a counteroffer, which was rejected by the solicitors then engaged by the Client.

124. The architect then issued proceedings at VCAT against the Client seeking a further payment of outstanding fees of $21,361.50 plus interest and costs.

125. A mediation was held and the matter was resolved, with the Client paying the architect a further sum of $13,000.00. The terms of settlement signed by the parties reflecting that settlement were silent as to the provision of the drawings in digital format.

126. The architect gave evidence that part of the settlement at VCAT included a request he provide "working drawings" to the Client. Again, as the Client already had a paper copy of the plans, it must have been that the parties were talking about the provision of something other than that.

127. The architect contended that, even if drawings were to be supplied as a soft copy electronically, they would only have been forwarded in PDF format in order to prevent modification other than by hand.

128. That could not have been the case at the time the settlement was reached since, at that time, whilst he knew that his drawings were non-compliant and would require modification in order to allow the Client to obtain a building permit and proceed with the project, he could not have known the extent or nature of the modifications required as he had not consulted with Mr Lorenzini in the detail which would have allowed Mr Lorenzini to form a view on the matter and so could not have known whether modification by hand would have been possible or appropriate.

129. The Client's solicitors advised the architect by email dated 1 March 2013 as follows:

"*We refer to the above matter, recently settled at VCAT mediation, and to previous correspondence in connection with it.*

We look forward to the receipt of the drawings once our clients settlement cheque has cleared.

Our client's RBS requires the drawings to be modified slightly to ensure they comply with the fire-rating provisions of the BCA and building regulations.

Would you please confirm that your client has no objection to these modifications being made."

130. There followed a series of email exchanges between the Client and the architect's office, the end result of which was that the architect did not provide to the Client a copy of the drawings in a format in which they could be digitally modified.

131. Notwithstanding that the emails referred to in the previous paragraph were sent by an employee of the architect, and that the architect's evidence was that he was not aware of them at the time they were sent, he must bear the responsibility for their contents given that they were sent under the letterhead of the architect to the architect's then former client.

132. The main basis for the refusal of the architect to accede to the Client's request was that to do so might then allow the architect's plans to be modified by a third party, and the architect could then be liable for any damage which followed as a result of that subsequent modification.

133. That basis is, simply, wrong.

134. If a circumstance arose where damage did follow as a result of a modification of a drawing by a third party, it would be a simple matter for the drawings in their final form to be compared to the version which left the architect's office to establish that the architect should not be responsible for that damage.

135. Even if, in the ordinary course, the adoption of such a practice were appropriate, it would not be in the circumstances as existed here where the architect knew that the drawings for which he had received payment were not able to be used without modification to obtain a building permit to enable the project to proceed.

136. The Tribunal is of the view that the refusal by the architect was careless and incompetent.

137. It is appropriate at this point to make some observations about the main witnesses, the Client and the architect, [. . .].

138. In the view of the Tribunal, the Client gave her evidence in a straightforward fashion. She attempted to give an accurate account of events as recollected by her.

139. As one might expect, given that the events in question happened some years ago, there were occasions during cross-examination when it became apparent that her recollections may not have been completely accurate. On those occasions, such as, for example, when being asked whether she recalled certain matters being discussed with the architect, she conceded that she recalled some matters had been discussed, whilst remaining clear that certain other matters were not, to her recollection, discussed.

140. The evidence of the architect, however, appeared to have more of a "learned" quality. The Tribunal does not suggest that the architect was acting inappropriately, but rather that this appearance may have arisen simply by reason of the amount of work which the architect has no doubt done over the course of this matter to put himself in what he regarded as his best position for the purpose of giving detailed and accurate evidence. As with the Client, he too was attempting to recall events and conversations which took place some years ago and, in respect of some conversations, nearly a decade ago.

141. In that regard, the Tribunal notes that the architect has been in practice since 1980 and might well, over that period, have developed a practice of creating more detailed recording of conversations with the clients. Had the architect made detailed contemporaneous notes of all the conversations with the

Client, that would, in all likelihood, have assisted his ability to recall the detail of certain conversations, and especially those conversations which had relevance to the matters before this Tribunal.

142. The architect also appeared, on occasion, reluctant to answer some questions put to him in cross-examination concerning, for example, when being asked whether he considered himself bound by the terms contained in the document which was described as the "2009 Agreement". That reluctance, whilst no doubt arising from a concern as to what effect an answer, whether yes or no, might have on his case, served to assist the Tribunal in forming its view as to his evidence.

143. Accordingly, where the evidence of the Client and the architect differed as to that which occurred, the Tribunal accepts the version proffered by the Client save where expressly identified otherwise in these reasons.

144. During the course of the hearing, the Tribunal having been informed of the architect's intention to call another architect as a witness, the attention of the parties was drawn to *Watson & Ors v Ebsworth and Ebsworth (a firm) & Anor* [2008] VSC 510. In that case, Beach J cited with approval the dicta of Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp (a firm)* [1979] 1 Ch 384 at 402:

"*I must say that I doubt the value, or even the admissibility, of this sort of evidence, which seems to be becoming customary in cases of this type. The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court; whilst evidence of the witness' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide."*

145. In any event, the Board did not object to the calling of Mr Caulfield, an architect, and Mr Woolcock, a building surveyor.

146. The Tribunal was not helped by most of what was said by these witnesses, as the matters on which they gave evidence were not directly relevant to the matters which had to be decided by it.

147. By way of example, evidence from Mr Woolcock as to how he would have dealt with the non-compliant drawings is completely irrelevant to the matter before the Tribunal, namely, what did in fact occur between the architect and the Client.

148. In respect to Mr Caulfield, the Tribunal noted his view of the danger of releasing a "CAD file". His position was strikingly similar to that of the architect. We have already set out in our reasons above why we disagree with that view.

149. If it should be that such a view as that expressed by the architect and Mr Caulfield is widely held in the profession, then it may be that the Board ought to consider whether some education program is advisable.

150. The architect also called evidence from Anthony Corrigan, Christopher Naylor, John Bertocchi and Richard Featherston, all of whom were the Clients of the architect, together with Kim Tan, Regina Bron and Terence Nott, each of whom are, themselves, architects. The evidence of them all attest to the architect being of good character. None, however, gave evidence as to the factual matters before the Tribunal and, to that extent, the use we are able to make of their evidence is limited.

151. We have not taken the Board to be asserting that the architect is of generally bad character but, rather, that, in the circumstances of this present matter, his professional conduct fell below that which is expected of an architect.

152. In reaching the conclusions expressed in these reasons, we have been particularly conscious of the need to satisfy ourselves to a comfortable and positive level of persuasion, beyond deciding on the mere balance of probabilities, in order to comply with what we accept as the correct standard established in *Briginshaw v Briginshaw* (1938) 60 CLR 336, and we have done so.

153. In our reasons handed down on 3 April 2014, we said:

> "*27. Sect 1 of the Act provides:*
>
> *The main purposes of the Act are—*
>
> *(a) to provide for the registration of architects;*
>
> *(b) to provide for the approval of partnerships and companies providing architectural services;*
>
> *(c) to regulate the professional conduct of architects;*
>
> *(d) to provide a procedure for handling complaints against architects;*
>
> *(e) to regulate the use of the terms "architect", "architectural services", "architectural design services" and "architectural design";*
>
> *(f) to establish the Architects Registration Board of Victoria.*
>
> *28. In the Second Reading speech of the Act, Mr Richardson stated:*
>
> *The Bill enables the Architects Registration Board of Victoria to establish tribunals to hear complaints - that is, complaints against architects - although it is important to note that such tribunals will not be dispute settlement tribunals. They will hear complaints against the misconduct of architects and will not cut across the activities of, for example, the Small Claims Tribunal [predecessor of VCAT], nor interfere with matters that might be heard in a Magistrates Court or in some other court.*

29. *It seems to the Tribunal to be beyond doubt that one of the driving reasons behind the Act and the formation of the Board was to establish a mechanism:*

    i. *by which the public is able to be satisfied that architects conform to the standards expected of them;*

    ii. *to ensure the public is protected in its dealings with architects; and*

    iii. *to ensure that the high standards of the profession are maintained at a level which enables the public to have confidence that the essential role played by an architect in the building, design and construction process is properly fulfilled.*

30. *In that respect, it may be noted that Justice Hollingworth, in* Rodwell v Building Practitioners Board*, made similar remarks concerning the role played by the Building Practitioners Board in conducting disciplinary inquiries into the behaviour of registered building practitioners. Her Honour stated at paragraph 35:*

    The Board has been given broad powers to inquire into the conduct of registered building practitioners, and to make certain findings and exercise certain powers against them. Having regard to the statutory scheme, I am satisfied that the main purpose of such an inquiry is to ensure that registered builders adhere to the high standards expected of them, primarily for the protection of the public and the reputation of the building industry itself. If the Board finds that a builder has failed to comply with the provision of the Act, it may impose one of a number of disciplinary sanctions. That disciplinary regime is separate from the provisions which create offences which are punishable through prosecution in the courts.

31. *The role of the Tribunal is set out in Sec 32 of the Act:*

    If, after considering the submissions made at an inquiry, the Tribunal finds that—

    (a) the architect is careless or incompetent in his or her practice; or

    (b) the professional standards of the architect are demonstrably lower than the standards which a competent architect should meet; or

    (c) the architect is guilty of unprofessional conduct; or

    (d) the architect has breached or failed to comply with any provision of this Act; or

    (e) the architect has been convicted in Victoria of an indictable offence or has elsewhere been convicted of an offence which if committed in Victoria, would be an indictable offence; or

(f) the registration of the architect has been obtained by fraud or misrepresentation or concealment of facts,

the Tribunal may make one or more of the following determinations—

(g) to caution the architect;

(h) to reprimand the architect;

(i) to require the architect to undertake further education of a kind, and to complete it within a period, stated in the determination;

(j) to impose a condition or limitation on the architect's registration relating to the architect's practice;

(k) to impose a penalty not exceeding 50 penalty units;

(l) to suspend the architect's registration for the period stated in the determination;

(m) to cancel the architect's registration,

and may make any determination as to costs that it thinks fit.

32. In the view of the Tribunal, one of the main purposes of the Act is to provide powers to the Board to implement disciplinary action against architects in the public interest. It does not do so to protect any private right of an individual, whether that individual is a complainant to the Board or not."

Those comments apply equally in respect of the matters before us and to which these reasons relate.

154. Regulation 6 of the *Architects Regulations* 2004 provides:

"*An architect must perform his or her work as an architect in a competent manner and to a professional standard*."

155. Regulation 14 of the *Architects Regulations* 2004 provides:

"*Before an architect accepts an engagement to provide architectural services or services as a developer or services both as an architect and a developer and as soon as practicable after any change to the terms and conditions or scope of engagement becomes known to the architect, he or she must—*

(a) in writing, set out the description, terms and conditions of the engagement or the change; and

(b) supply a copy of that document to the client."

156. Regulation 16 of the *Architects Regulations* 2004 provides:

"*Without limiting the meaning of "unprofessional conduct"—*

(a) an architect who contravenes one or more of regulations 6 to 14 is guilty of unprofessional conduct; and

Reg. 16(b) amended by S.R. No. 53/2005 reg. 8(2).

> *(b) a partner of an approved partnership or a director of an approved company who contravenes one or more of regulations 6 to 14 by operation of regulation 15 is guilty of unprofessional conduct."*

157. It is clear to the Tribunal that the architect felt, in 2009, that, as a result of the change in arrangements between himself and the Client, that change ought to be documented, and that the manner in which it should be documented was in the form of a fresh agreement.

158. It seems to the Tribunal that that would indeed have been the appropriate course to adopt, except for the evidence of the Client that the first occasion on which she saw the 2009 Agreement was at the mediation which took place at VCAT.

159. It may well be that the document was prepared in 2009 and that the architect intended to provide it to the Client, but did not, for whatever reason, do so.

160. It is unfortunate that no contemporaneous note, either by the architect or the Client, was produced in evidence before the Tribunal in relation to that document, and that no attempt was made by the architect, between 2009 and October 2012, to obtain a signed copy of that document. Had that occurred, this issue could not, obviously, have come about.

161. The Tribunal recognises that, during the course of a project, drawings are amended as a result of changes in instruction from a client, or in recognition that errors or inconsistencies in the drawings have been made or recognised, and those errors or inconsistencies are rectified prior to submitting the documents with a view to obtaining a building permit.

162. It is, however, the case that, when the drawings are finally submitted for the purpose of obtaining the building permit, they should be accurate and compliant. In the present case, the services of the architect were terminated before this was achieved.

163. Thereafter, the architect instituted a proceeding at VCAT against the Client seeking recovery of the fees which he asserted were outstanding. The amount which he sought constituted, in effect, the full amount which would have been payable to him had the project been completed.

164. The amount of fees claimed could only have been payable had the documents have been in a form compliant with the regulations, and in respect of which a building permit could have issued.

165. The Client was entitled to assume that the documents being so supplied were compliant. In the circumstances of this matter, it is not contested that the Client was required to expend more monies in order to have the documents made compliant.

166. Whether the steps which were taken by those whom the Client engaged to advise her were able to adopt a course different from that which they did is beside the point. It is, in the Tribunal's view, inescapable that additional steps, at the cost of the Client, would have been, and were, necessary.

167. It is also suggested by the architect that he never provides a "soft" copy of the drawings in CAD format but, rather, will only supply a "hard" copy. The architect stated that it had always been his practice to do so.

168. The architect did not proffer a reason as to why he adopted this practice.

169. Another witness called on behalf of the architect, Mr Robert Caulfield, himself an architect, did proffer the view that the reason why soft copies of these documents should not be provided to a the Client was that "*the architect's particulars are on the CAD files and those files could be modified by others and the architect could find him or her self liable for such modifications*."

170. The Tribunal questioned Mr Caulfield as to how such a circumstance could possibly arise where one architect could be held liable for the work of another. Mr Caulfield suggested that amendments could be made to a document which might initially be thought to be the work of the first architect. When it was suggested to Mr Caulfield that that would not, of itself, render the first architect liable to any third party in respect of those subsequent amendments, the response was that Mr Caulfield stuck by his statement.

171. The Tribunal is unable to understand how such an argument, if it had any force whatsoever, would not equally apply to hard copy documents which were then modified and used.

172. It seems to the Tribunal that, in the 21st century, where so much communication is carried out electronically, the maintenance of such a practice is no longer justified, especially in the circumstances in this matter.

173. The attitude of the architect throughout this proceeding is, perhaps, exemplified by the final paragraph of his Witness Statement, in which he states:

"*I emphatically deny such claims and say further that it appears [. . .]-, as the principal instigator of these charges, has been motivated by highly improper reasons and an unreasonable desire to save herself money and avoid payment my agreed fees. I totally refute her vexatious claims and the charges brought by the Board.*"

174. It is clear to the Tribunal that the architect remains firmly of the view that he acted appropriately in respect of his dealings with the Client. It follows that he has no appreciation of what modifications to his conduct and professional practice ought to occur to ensure that there is no repetition of the circumstances in which he now finds himself.

175. This attitude adds to the difficulty faced by the Tribunal in determining an appropriate penalty in respect of the breaches which have been found to have occurred, and which are more towards the lower end of the range of breaches which might occur and the range of penalties which might apply to such breaches.

176. Whilst the regulation identifies the necessity for the architect to identify, as soon as practical, any change in the terms and conditions or scope of the engagement, it does not specify the manner in which that notification is to be given.

177. The purpose behind the regulation is to ensure that a client is able, on a properly informed basis, to provide instructions to the architect regarding the project and proposed changes to it.

178. In order to provide proper instructions to the architect, the client must have a clear understanding of the financial impact of any proposed changes to the scope of the project.

179. 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.

180. 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.

Determination

181. The Tribunal, having conducted an Inquiry into the matters raised in the Notice dated 6 November 2013, and amended on 6 November 2013, issued to [the Architect], pursuant to section 27 of the Act, the Tribunal now makes the following determinations:

a) In respect of Allegation 1, the Tribunal finds the architect guilty of unprofessional conduct in that he has breached Regulation 14 of the Regulations. The Tribunal has determined to reprimand the architect and impose the penalty set out below.

b) In respect of Allegation 2, the Tribunal finds the architect guilty of unprofessional conduct in that he has breached section 32(a) of the Act in that he failed, as soon as practicable after a change to the terms, conditions and/or scope of his engagement with the Client, to set out in writing the change and to supply a copy of that document to the Client. The Tribunal has determined to reprimand the architect and impose the penalty set out below.

c) In respect of Allegation 3, the Tribunal finds the architect guilty of unprofessional conduct in that he has breached Regulation 6 of the Regulations in that he failed to perform his work in a competent manner and to a professional standard. The Tribunal has determined to reprimand the architect and impose the penalty set out below.

d) In respect of Allegation 4, the Tribunal finds the architect guilty of unprofessional conduct in that he has breached Regulation 14 of the Regulations. The Tribunal has determined to reprimand the architect and impose the penalty set out below.

e) In respect of Allegation 5, the Tribunal finds the architect guilty of unprofessional conduct in that he has breached Regulation 14 of the Regulations. The Tribunal has determined to reprimand the architect and impose the penalty set out below.

f) In respect of Allegation 6, the Tribunal finds the architect guilty of unprofessional conduct in that he has breached Regulation 14 of the Regulations. The Tribunal has determined to reprimand the architect and impose the penalty set out below.

g) In respect of Allegation 7, the Tribunal finds the architect guilty of unprofessional conduct in that he has breached Regulation 14 of the Regulations. The Tribunal has determined to reprimand the architect and impose the penalty set out below.

h) In respect of Allegation 8, the Tribunal finds the architect guilty of unprofessional conduct in that he has breached Regulation 14 of the Regulations. The Tribunal has determined to reprimand the architect and impose the penalty set out below.

Penalty

182. The architect asserts that he prepared a new agreement in 2009 with an estimated build cost of $400,000.00. He says that he filled in the details of the agreement in The Client's presence. Notwithstanding the Tribunal's finding in regard to that document, the architect, on his version of events, discussed the figure with the Client, and that represented the only basis on which he could charge until the estimate was no longer necessary because the actual build cost had been identified.

183. If he did not consult with the Client concerning that figure, then it was inserted without consultation or explanation, and that, of itself, would be inappropriate.

184. The architect, in his letter dated 9 October 2012, sought to establish a basis for increasing his fees by adopting, as a starting point, figures identified in his letter to the Client dated 3 October 2009, notwithstanding that the Client had not agreed to the sums set out in that letter.

185. The architect then proceeded to add 5% to the costs for each passing year to arrive at a figure of $555,600.00. As a rough alternative, he also calculated an average of the tender prices received by him in 2012.

186. The adoption of either methodology is, in the view of the Tribunal, not the usual practice of a careful and competent architect. Further, it was done without consultant with the Client.

187. It is also of relevance to the Tribunal that the summary of meetings and conversations prepared by the architect after the commencement of this Inquiry, and in notes of the architect produced to the Tribunal by him, there is no reference anywhere to any discussion concerning costs.

188. Notwithstanding that the Tribunal has found breaches in respect of each of the eight allegations, four of the allegations are set out in the alternative. The Tribunal therefore proposes to impose a monetary penalty only in respect of four allegations to reflect the alternative nature of the allegations.

189. a) In respect of Allegation 1, the Tribunal imposes a monetary penalty of $1,000.00;

b) In respect of Allegation 3, the Tribunal imposes a monetary penalty of $1,500.00;

c) In respect of Allegation 5, the Tribunal imposes a monetary penalty of $1,000.00; and

d) In respect of Allegation 7, the Tribunal imposes a monetary penalty of $1,000.00.

190. Payment of the penalties set out in the preceding paragraph is to be made to the Board, pursuant to section 58 of the Act, within 3 months of the date of this determination.

Costs

191. Much might be said regarding costs and, if the *Civil Procedure Act* 2010 had any application, this Tribunal would certainly have taken its provisions and the statements of principle set out in *Yara Australia Pty Ltd & Ors v Oswal* [2013] VSCA 337 into account in making directions concerning costs.

192. Similarly, whilst it is unnecessary for us to do so, given the findings we have made, had we found otherwise, we would have given serious consideration to whether the architect should have been entitled to his costs, or at the least a considerable proportion of those costs.

193. We were urged by both parties that we should order costs on an indemnity basis and, in the case of the Board, that those costs should be on the Supreme Court Scale.

194. The Tribunal asked the Board's Counsel whether she was aware of any pervious occasion when the Supreme Court Scale had been applied by a Tribunal under this Act, and no prior occasion could be identified.

195. 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 (and, from the appropriate date, a standard) basis in accordance with the County Court Scale (which was amended during the course of this Inquiry). 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 dates of agreement as to the costs or the date of the Certificate of Assessment, whichever applies.

……..

Mark Yorston – Tribunal Chair