

Notice of Inquiry

TO: [The Architect]

OF: []

1. BASIS OF INQUIRY:

The Architects Registration Board of Victoria (“the Board”) pursuant to Division 1 of Part 4 of the *Architects Act* 1991 (“the Act”) has decided to hold an inquiry into your professional conduct. The Board pursuant to Division 2 of Part 4 of the Act has constituted a Tribunal to conduct the inquiry.

2. THE MODE OF INQUIRY

The Inquiry will proceed by way of oral hearing. The Act stipulates that:

At an inquiry—

1. subject to Part 4 of the Act, the procedure of the Tribunal is in its discretion; and
2. the proceedings must be conducted with as little formality and technicality as the requirements of this Act and the proper consideration of the matter permit; and
3. the Tribunal is not bound by rules of evidence but may inform itself in any way it thinks fit; and
4. the Tribunal may require evidence to be given on oath or affirmation and any member may administer an oath or take an affirmation for that purpose; and
5. the Tribunal is bound by the rules of natural justice.

3. APPEARANCE OF PARTIES

It is in your best interests to appear personally or through a representative at the inquiry. If neither you nor a nominated representative appears at the hearing, the Tribunal may proceed in your absence and will make a finding on the evidence before it at the inquiry. You may explain your behaviour or answer the allegations personally or in writing or both.

4. TIME AND DATE OF INQUIRY:

The time and date will be fixed at the preliminary conference.

5. VENUE:

Both the preliminary conference (if one is held) and the inquiry will be held in the Conference Room, Level 7, 372 Albert Street, East Melbourne.

6. MATTERS AND/OR BEHAVIOUR ALLEGED:**Allegation One – breach of section 32(c) of the Architects Act 1991**

1. From on or about October 2005 to June 2006 you were guilty of unprofessional conduct within the meaning of paragraph 32(c) of the *Architects Act 1991* in that, in relation to the provision of contract administration services for the alterations and additions 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* (**Regulations**).

Particulars

- 1.1 On or about 1 February 2005 you entered into a standard form RAIA Client and Architect Agreement with the owners of the Site, [...] (**Clients**) pursuant to which you agreed to provide design services, working drawing documentation and contract administration services for the alterations and additions at the Site (**Agreement**).
- 1.2 Pursuant to clause 3.5 of the Agreement you were required to undertake periodic inspections of the Site to check work in progress regarding design quality control, materials selections and performance as described in the contract documents.
- 1.3 Further, pursuant to the document headed 'Current Scope of Work' you were responsible for the supervision of the painting.
- 1.4 In December 2011 the Clients discovered non-compliances and deficiencies in the painting and cladding works carried out at the Site.
- 1.5 In breach of the Agreement and the Current Scope of Works document, you failed to identify the non-compliances and defects with the cladding and therefore failed to ensure the defects were rectified prior to the painter commencing the work and whilst the painting works were being undertaken.
- 1.6 The defects and non-compliances in the Works which you failed to identify are as follows:
 - 1.6.1 the cladding was rotting due to the ends of the timber not being properly sealed;
 - 1.6.2 the builder had used incorrect nails to complete the cladding work in that:
 - 1.6.2.1 they were not non-corrosive;
 - 1.6.2.2 37mm nail gun nails that had

- flat heads were used in lieu of 50mm bullet head;
- 1.6.2.3 double 50 narrow nail gun nails were used in lieu of 1 nail per board;
- 1.6.2.4 50mm nail gun nails that have flat heads were used in lieu of 50mm bullet head;
- 1.6.3 incorrect filler was used;
- 1.6.4 one coat application of paintwork was applied in places instead of two coats;
- 1.6.5 the cladding was incorrectly fastened due to nails penetrating the cladding tongue of the adjoining board which has produced a bowing of the timbers;
- 1.6.6 there had been a failure to punch nail heads to 3-5 mm to prepare for painter;
- 1.6.7 the weatherboards had been allowed in some areas to be nailed top and bottom and not allowing for shrinkage; and
- 1.6.8 flat head nails have been punched and attempted to be stopped but these are not designed for punching and the depth of cover is inadequate.

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

2. In the alternative to allegation one above, between on or about October 2005 to June 2006, you were careless or incompetent in your practice as an architect in relation to the contract administration services provided in respect of alterations and additions to [...] (**Site**), within the meaning of paragraph 32(a) of the *Architects Act 1991*.

Particulars

- 2.1 Refer to the particulars to allegation one above.

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

3. From on or about December 2011 to February 2014 you were guilty of unprofessional conduct within the meaning of paragraph 32(c) of the *Architects Act 1991* in that, in relation to the provision of contract administration services for the alterations and additions 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* (**Regulations**).

Particulars

- 3.1 On or about 1 February 2005 you entered into a standard form RAlA Client and Architect Agreement with the owners of the Site, [...] (**Clients**) pursuant to which you agreed to provide design services, working drawing documentation and contract administration services for the alterations and additions at the Site (**Agreement**).
- 3.2 Pursuant to clause 3.5 of the Agreement you were required to undertake periodic inspections of the Site to check work in progress regarding design quality control, materials selections and performance as described in the contract documents.
- 3.3 In December 2011 the Clients notified you of concerns they had with defects in the cladding and painting and asked you to attend the Site to inspect those works.
- 3.4 You have failed to respond to concerns raised by the Clients in a timely manner.
- 3.5 Despite numerous telephone calls and emails sent by the Clients on 18 December 2011, 12 January 2012, 5 February 2012 and 29 May 2012 you did not attend the Site until 6 July 2012.
- 3.6 At the inspection on 6 July 2012 you told the Clients you would return to Site with appropriate tools to allow you to assess the alleged defective work, in particular, the nails.
- 3.7 Despite numerous telephone calls and emails from the Clients sent on 20 September 2012 and 4 December 2012, you failed to return to the Site until 10 January 2013.
- 3.8 On 28 February 2013 the Clients requested a copy of the specifications for the installation of the cladding from you. You have not provided a copy of the specifications.
- 3.9 On 28 February 2013 you told the Clients you would contact your insurer and by email dated 19 March 2013 you told the Clients you were awaiting a response from the insurers. Despite many telephone calls and emails sent on 24 December 2013 and 14 January 2014 from the Clients you have not advised them of the outcome of that discussion.
- 3.10 By letter dated 25 August 2013 the Clients wrote to you requesting a further meeting in relation to a number of deficiencies in workmanship. In response you told the Clients you were waiting on a response from your insurer.

- 3.11 The Clients sought to arrange a further meeting with you in December 2013 to discuss the non-compliant works. Despite advising you would attend the meeting you did not. You did not contact anyone to notify them that you would not attend, nor apologise for failing to attend.

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

4. In the alternative to allegation three above, between on or about December 2011 to February 2014 you were careless or incompetent in your practice as an architect in relation to the provision of contract administration services to [...] (**Site**) within the meaning of paragraph 32(a) of the *Architects Act 1991*.

Particulars

- 4.1 Refer to the particulars to allegation three above.

7. POWERS EXERCISABLE BY THE TRIBUNAL:

The Tribunal may, as a result of the inquiry and pursuant to section 32 of the Act, make one or more of the following determinations—

1. to caution the architect;
2. to reprimand the architect;
3. to require the architect to undertake further education of a kind, and to complete it within a period, stated in the determination;
4. to impose a condition or limitation on the architect's registration relating to the architect's practice;
5. to impose a penalty not exceeding 50 penalty units;
6. to suspend the architect's registration for the period stated in the determination;
7. to cancel the architect's registration—

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

8. TRIBUNAL DETERMINATIONS AND REASONS

(Pursuant to Section 33 of the Act)

1. A determination made on an inquiry comes into operation on its making or at any later time stated in the determination.
2. As soon as possible after making a determination on an inquiry the Tribunal must give to the person to whom the determination relates a written statement setting out its determination.
3. A person affected by a determination made on an inquiry may, by notice in writing given to the Board

within 2 months after the date on which the determination is made request the Board for the reason for the determination.

- 4. As soon as possible but not later than one month after receiving the request, the Board must give the applicant a written statement setting out the determination made on the inquiry, the reason for the determination and the findings of fact on which they were based.

The Tribunal in its discretion may issue written findings and reasons for findings before receiving submissions on penalty and costs and making determinations on penalty and costs.

9. ENFORCEMENT TRIBUNAL DETERMINATIONS	OF	The Act states that the Board must take all action necessary to give effect to a determination
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10. TIME AND DATE OF PRELIMINARY CONFERENCE	10:00 a.m. on Tuesday 24 March 2015 in the Conference Room, Level 7, 372 Albert Street, East Melbourne.
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This Notice is given to you pursuant to Section 27 of the Act.

DATED thisday of....., 2015.

SIGNED:

.....
 Tony HINZ
 Chair of the Tribunal

1.1 INFORMATION FOR THE ARCHITECT

The Architects Registration Board of Victoria ("The Board") has determined to hold an inquiry into either your fitness to practice or your professional conduct or both. The Board has constituted a Tribunal to conduct the inquiry on its behalf.

PRELIMINARY CONFERENCE

If the Tribunal considers it necessary, it will hold a preliminary conference in respect of this matter at a time and place specified in the Notice of Inquiry.

The preliminary conference is attended by the Chairperson of the Tribunal, the Inquiries Officer of the Board, the Board's lawyer, yourself and/or your representative.

The purpose of a preliminary conference is to:

- fix the time and date for the hearing(s);
- determine if you intend to admit all or any of the matters alleged;
- determine which issues are in dispute;
- determine the witnesses to be called;
- determine whether you intend to be represented by another person at the inquiry, and if so, by whom.
- estimate the length of time required for the inquiry.

IF FOR ANY REASON YOU ARE UNABLE TO ATTEND THE PRELIMINARY CONFERENCE YOU MUST CONTACT THE REGISTRAR OF THE BOARD AT LEAST 7 DAYS PRIOR TO THE PRELIMINARY CONFERENCE.

A copy of the folder of documents expected to be referred to in the course of the hearing will be provided to you in advance of the Tribunal hearing.

AT THE INQUIRY

You or your representative will be asked whether you admit or do not admit to the matters alleged. If you or your representative say that you do not admit to the matters alleged, you or your representative can indicate at any point that you wish to admit to them.

The Tribunal is not bound by the Rules of Evidence, however it is bound by the rules of Natural Justice.

IF YOU ADMIT TO THE MATTERS ALLEGED

1. At the Inquiry, Counsel representing the Board will give a summary of the facts and you will be given an opportunity to respond.
2. The Tribunal will find that the matters alleged are true.
3. You may give evidence in mitigation, that is, any information that you feel should be taken into consideration by the Tribunal in considering its penalty determination, e.g. references, hardship, medical problems etc.
4. Counsel representing the Board will ask the Tribunal that you pay the Board's costs of the inquiry, and you will be given an opportunity to respond.
5. The Tribunal will make its Determinations on Penalty and Costs, and issue its Findings and Determinations in writing at a later date.

IF YOU DO NOT ADMIT TO THE MATTERS ALLEGED

1. The Inquiry will proceed more formally and witnesses may be called to give evidence, that is, any witness called must swear under oath or affirm to tell the truth.
2. Counsel representing the Board will call witnesses and you will have the opportunity to cross-examine.
3. Once the case against you has been presented, you can
 - i) argue that the allegations against you are not proven and/or
 - ii) call witnesses in support of your case, who may be cross-examined.
4. Both you and Counsel representing the Board may give closing arguments and make submissions.
5. The Tribunal will consider all the evidence and will decide if the allegations are proven or not proven.
6. If the Tribunal finds against you, you may give evidence in mitigation, that is, any information that you feel should be taken into consideration by the Tribunal in considering its penalty determination, e.g. references, hardship, medical problems etc.
7. Counsel representing the Board will ask the Tribunal that you pay the Board's costs of the inquiry, and you will be given an opportunity to respond.
8. The Tribunal will make its Determinations on Penalty and Costs, and issue its Findings and Determinations in writing at a later date.
9. If the Tribunal finds the matters alleged against you not proven, you are as a result exonerated. There is no provision for the Tribunal to make a Determination on costs in this circumstance.

**IN THE MATTER of the Architects Act 1991
AND IN THE MATTER of an Inquiry into the professional conduct of [], Registered
Architect No. []**

TRIBUNAL FINDINGS AND REASONS

ARCHITECT	[]
COMPLAINT NUMBER	13-14/8
DATE OF DECISION	28 December 2015

Antecedents

- A. On 5 March 2015 a Notice of Inquiry was given to the Architect as to his professional conduct in comprising four allegations brought by the Architects Registration Board of Victoria (the Board).
- B. The allegations brought by the Board were supported by particulars of material facts; two allegations of unprofessional conduct and two alternative allegations of him being careless or incompetent in his practice as an Architect.
- C. At a Preliminary Conference held on 12 May 2015 at which the Board and the Architect were legally represented the Inquiry was set down for hearing, which hearing was subsequent adjourned to 18 November 2015.
- D. The hearing proceeded on 18 November 2015 at which the Board and the Architect were legally represented and witnesses were called to give evidence.

TRIBUNAL FINDINGS AND REASONS

This Inquiry is authorised by Section 18 of the Architects Act 1991 and it is conducted by this Tribunal which is constituted by Members Mr, Bruce Allen, practising architect, Ms Nicole Feeney, legal practitioner and Mr Tony Hinz, legal practitioner (Chair).

Pursuant to Section 20 the Tribunal is constituted to conduct a public inquiry into the professional conduct of [], Registered Architect No. [] and to make findings and determinations as to matters arising from the evidence which may result in a sanction, penalty or the imposition of a condition relating to the architect's registration.

Evidence and other material

At the hearing on 18 November 2015, the Tribunal received evidence and it has reserved its determinations pending the delivery of these findings and until after receiving further submissions from the representatives of the parties.

In reaching the following findings of fact the Tribunal considered the following evidence:

- (a) Documents contained in the Tribunal Book (Indexed Tribunal Book);
- (b) The oral evidence of:
 - i Alistair McLeod (expert engaged by the Board)
 - ii [] (Architect)
 - iii Terence O'Donoghue (Builder's project manager)
 - iv Bryan Miller (expert engaged by the Architect)
- (c) Submissions and contentions put by Krista Weymouth, Solicitor on behalf of the Board and Suzanne Kirton, Counsel for the Architect.

REASONS FOR DECISION

The Tribunal considered whether any or all of the alleged breaches of section 32 of the Architects Act 1991 had been proven by asking itself whether the evidence supported such a finding and it has come to the conclusions set out below.

Note: the only expert evidence provided to the Tribunal based on actual visual inspection examination of the defective work and materials and photographic evidence of same is the

report of Alastair McLeod dated 22 July 2014 obtained by the Board to assist in deciding whether to hold this Inquiry and the numbers in brackets which follow correspond to the respective page references in the McLeod report.

The following facts were agreed.

1. The Architect is a registered architect, registration number []. He conducts a company, [] Pty Ltd (**Company**), of which he is a director.
2. The complainants are [...] (**Owners**) who are the owners of the property at [...] (**Site**).
3. On 1 February 2005 the Complainants entered into a standard RAlA Client and Architect Agreement (**Agreement**) with the Company pursuant to which the Company agree to provide architectural services for the alterations and additions to the house at the Site. The services to be provided included design services, working drawing documentation and contract administration. The percentage fee agree to be paid to the Company was 11% of the cost of building work estimated to be \$330,000 excluding GST.
4. On 26 September 2005 an Australian Building Industry Contract: Simple Works Contract (**ABIC Building Contract**) was entered into between the Owners, [...] (**Builder**) and the Company. At the same time an "Alterations and Additions Specification" was signed by the Owners and the Builder.
5. The Site renovations commenced in about October 2005 and continued until approximately June 2006.
6. In late 2011 the Owners became aware that there were issues with the cladding and painting works. The Owners contacted the Architect in early December 2011 to request that he attend their home to discuss the issue regarding the painting and cladding and to assess it.

The Architect admitted that, under the Agreement, he was responsible for the supervision of the "painting works" component of the renovations.

1. Allegation 1 Section 32 (c)

The allegation is that the Architect is guilty of unprofessional conduct in that he failed to perform his work in a competent manner and to a professional standard (contrary to regulation 6).

The particulars of the breach alleged is that the Architect in breach of the Agreement failed to identify the following non-compliances and defects with the cladding and therefore failed to ensure that the defects were rectified prior to the painter commencing the work and whilst the painting works were being undertaken:

- a. The cladding was rotting due to the ends of the timber not being properly sealed;
- b. The Builder had used incorrect nails to complete the cladding work in that:
 - i. they were non-corrosive;
 - ii. 37mm nail gun nails that had flat heads were used in lieu of 50mm bullet head;
 - iii. Double 50 narrow nail gun nails were used in lieu of 1 nail per board;
 - iv. 50mm nail gun nails that have flat heads were used in lieu of 50mm bullet head;
- c. Incorrect filler was used;
- d. One coat application of paintwork was applied in places instead of two coats;
- e. The cladding was incorrectly fastened due to nails penetrating the cladding tongue of the adjoining board which had produced a bowing of the timbers;

- f. There had been a failure to punch nail heads to 3-5mm to prepare for painter;
- g. The weatherboards had been allowed in some areas to be nailed top and bottom and not allowing for shrinkage; and
- h. Flat head nails have been punched and attempted to be stopped but these are not designed for punching and the depth of cover is inadequate.

Q. In being responsible for the supervision of the painting works (which included exterior painting) was the Architect guilty of unprofessional conduct in failing to discover or identify the alleged non-compliances and defects prior to the painter commencing work and whilst the painting works were being undertaken?

Evidence

The fixing of the exterior timber cladding was by nailing and was undertaken by one of the Builder's contracted trades. It is accepted that the person installing the cladding was not the painter supervised by the Architect. The project specifications called for treated pine shiplap weatherboards to be used on the upper level of the extension and Baltic pine square edge weather boards on the lower level of the extension and to replace rotted existing weatherboards.

All the external timber cladding was fixed with incorrect nails. The correct nail for the job is a non-corrosive 50 mm bullet head. These were not used and Mr McLeod produced three samples of nails taken from the site - all of them incorrect and inadequate for the job. The incorrect nails had not been adequately punched resulting in adequate depth for filler prior to painting. In addition, many weatherboards were double nailed which meant that any movement or shrinkage of the boards after fixing resulted in cupping and splitting.

McLeod says (3) and Miller agrees that the Builder had used incorrect nails to complete the cladding work in that they were non-corrosive, 37mm nail gun nails that had flat heads were used in lieu of 50mm bullet head, double 50 narrow nail gun nails were used in lieu of 1 nail per board, 50mm nail gun nails that have flat heads were used in lieu of 50mm bullet head.

McLeod says (3) that the weatherboards were incorrectly fastened due to nails penetrating the cladding tongue of the adjoining board and the weatherboards had been allowed in some areas to be nailed top and bottom.

McLeod says (9) that the nail heads had not been punched when they weren't designed to be punched and they were not sufficiently deep to allow for adequate depth of cover by filling.

Evidence was given that it was part of the painting works under the supervision of the Architect to seal the ends of the timber. Both the Builder's project manager and the Architect gave evidence that they saw the timber being primed on site including the ends. This was supported by McLeod (7). There was no evidence to support the allegation that the ends of the timber had not being properly sealed.

Evidence was given that it was part of the painting works under the supervision of the Architect to fill or "stop" the nail holes under the supervision of the Architect to seal the ends of the timber. The Architect gave evidence that in early April 2006 he saw the filler that the painter would use on the external cladding and that it was definitely external type filler and that the filling or "stopping" to be carried out by the painter had yet to occur and the inference from these observations is that the external timbers had already fixed. McLeod could not determine the type of filler used. There was no evidence to support the allegation that incorrect filler was used.

The application of paintwork was part of the painting works under the supervision of the Architect. The Builder's project manager gave evidence that he saw the painter apply two coats of paint. McLeod says that the paint cover is not an issue (8). There was no evidence to support the allegation that one coat application of paintwork was applied in places instead of two coats.

Finding

The Architect is not guilty of unprofessional conduct in failing to discover or identify non-compliances and defects prior to the painter commencing work and/ or whilst the painting works were being undertaken.

Reasons

The evidence was that the fixing of external timber cladding was part of carpentry work provided for in the project specifications and that this work was carried out around late February - March 2006 by one of the Builder's contractors.

Prior to the commencement of the painting works, on 26 March 2006, [...] of the Builder sent an email to the Architect and to the Owners about the painting works, the relevant part of which read: "Our obligation is to advise a practice (sic) start time and provide finished surfaces for the contractors. Peter and Jo & John are in charge after this".

This is evidence of the Builder taking responsibility for the surface of the weatherboards and timber cladding prior to the commencement of the painting works.

The Architect was not responsible for the supervision of the cladding works. At the time the cladding works were undertaken, under the Agreement, the Architect was responsible for contract administration and his evidence was, in that role, that he was attending the site regularly, on average every 1 to 1.5 weeks and was usually present for a number of hours to attend to queries. The Builder's project manager, a qualified engineer, gave evidence that he was on site on a daily basis during this time and that the Architect too, regularly attended the site.

Aside from the corrosion issue with steel nails, the double nailing into the square edge cladding timbers with brad nails and short flat steel nails into the weatherboards over the passage of time has proven to be a defective fixing method because it has not allowed for movement and has resulted in cupping and splitting.

When the cladding works were undertaken in 2006 the slender gun nails which were used would be finely recessed into the square edge cladding timbers and it would be difficult to see the extent of penetration into those timbers.

The Owners became aware of defects to the external timbers some 5 years after completion of the renovation works primarily due to inadequate fixing. Drying and splitting appears to have been caused by double nailing (8) rather than shrinkage although McLeod in photo JPG 707 indicated to be (6) a board shrinkage crack to the right hand side of hot water service.

No evidence was given that the Owners had undertaken any maintenance ensuring that the weatherboards were continued to be protected by paint after the 3 years period Mr McLeod agreed under cross examination was the suggested time frame in the Guide to Standards and Tolerances which, had it occurred, may have "settled down" the actual timbers and slowed the degradation.

However, with over counter sunk *steel nails* any painting over would not have been satisfactory (note the opinion expressed in the John Maloney Home Improvements report that nails should be painted over and McLeod at 7 "I would agree with that comment" but adding that "the nails would have to be non-corrosive in this situation").

Deficiencies with the fixing would have been near impossible to identify in 2006 and the photograph attachment PB-04 referred to in paragraph 21 of the Architect's witness statement dated 8 July 2015, which the Architect has stated was taken on 17 May 2006 is unremarkable and indicates a satisfactory presentation of surface finish to the painted external timbers.

We were referred by the solicitor for the Board to the decision of *Florida Hotels Pty Ltd v Mayo* (1965) 113 CLR 588 as guidance for what reasonable steps should be taken by an architect responsible for supervising building works. Whilst it is noted in that case [at 193] that due care required the supervision of work done *in preparation for* [our emphasis] further works, including undertaking inspections before that work was covered up, that case can be

distinguished from the current facts on the basis that the architect in that case was responsible for the supervision of all the building works.

The Architect was not responsible for the supervision of the cladding works. There are defects in the cladding works, however it was not reasonable to expect the Architect, during its supervision of the painting works, would have noticed these deficiencies prior to the commencement of the painting works or during the painting works for which the Architect did have responsibility for supervising.

Therefore the Tribunal does not find that the Architect was guilty of unprofessional conduct in failing to discover or identify the alleged non-compliances and defects.

The Architect was responsible for the supervision of the "painting works". No defects in the painting works were proven.

2. Allegation 2 Section 32 (a)

In the alternative to allegation one above was the Architect careless or incompetent in his practice as an Architect in relation to the contract administration services provided by him?

Finding

The Architect was not careless or incompetent in his practice in relation to the contract administration services provided by him in breach of regulation 6.

Reasons

The contract administration services did not include supervision of the Builder or the Builder's contracted trades, with the exception of the obligation which the Architect took on with the supervision of the painting.

There are defects in the cladding works, however it was not reasonable to expect the Architect, during its supervision of the painting works, would have noticed these deficiencies prior to the commencement of the painting works or during the painting works for which the Architect did have responsibility for supervising.

That onus of administering the contract was discharged by the Architect because he was on site on a regular basis and for reasonable period of time at each visit and in the absence of an obvious defect being apparent and in the absence of any special fixing requirements for the external timbers there would be no particular reason for the Architect to scrutinise the work of the carpenter or the painter.

Therefore the Tribunal does not find that the Architect was careless or incompetent in his practice by failing to discover or identify the alleged non-compliances and defects.

The Architect was responsible for the supervision of the "painting works". No defects in the painting works were proven.

3. Allegation 3 Section 32 (c)

This allegation was withdrawn by the Board.

4. Allegation 4 Section 32 (a)

In respect to the Architect's professional duty of courtesy and timely communication with the Owners between December 2011 and February 2014 the Board alleges that the Architect has been careless or incompetent in his practice as an architect in relation to the contract administration services provided by him.

Finding

This allegation is admitted to by the Architect and being uncontested it is accordingly found proven by the Tribunal.

Other matters

The Tribunal notes that the Architect says that his failure to respond was in accordance with advice he received from his professional indemnity insurer but the Architect accepts that does not provide an excuse for his failure to communicate with the Owners in accordance with his professional duty.

It is unclear to the Tribunal whether as a result of the Architect's breach of allegation 4 this has resulted in the Owners sustaining any loss and as this matter (if applicable) is a matter going to sanction or penalty and the Tribunal awaits any relevant submissions and evidence of this.

The Tribunal seeks submissions on behalf of the Board and on behalf of the Architect as to any relevant factors going to the question of penalty and costs, following which; it shall give its determinations in accordance with Section 33 of the Act.

.....
Tony Hinz- Tribunal Chair
Architects Tribunal

Dated: 5 / 1 / 2015

IN THE MATTER of the Architects Act 1991
AND IN THE MATTER of an Inquiry into the professional conduct of [], Registered Architect
No. []

TRIBUNAL FINDINGS AND REASONS

ARCHITECT

[]

COMPLAINT NUMBER

13-14/8

DATE OF FURTHER DECISION

7 March 2016

Final Determination of the Inquiry

The Tribunal made findings which were delivered on 5 January 2016 in which allegation 4 was found proven and the Tribunal invited the Architects Registration Board and the Architect to file written submissions as to penalty and as to the costs.

This Tribunal re-convened on 2 March 2016 to consider the submissions which have been filed and to determine the disposition of this matter following the Tribunal's findings and decision.

Submissions by the Parties

The Tribunal has been assisted by these submissions which, on the part of the Board, include details of its legal costs of this Inquiry and on the part of the Complainants, the personal impact on them of the Architect's absence of due courtesy and timely communication between December 2011 and February 2014.

In its submission of 3 February 2016 the Board indicated to the Tribunal that as of 30 November 2015 that its legal costs, including expert witness fees were in the order of \$41,230.16 and following the filing of all written submissions it is to expected that there would be some increase since then.

The Board's submission also contains what is effectively an impact statement as to loss from the Complainants (in the form of an email to the Board's Solicitors).

The Tribunal considers that the email which is undated and unsigned is on the whole objectionable because it was not put as part of the Board's case into evidence at the hearing and the Architect has not had an opportunity to test the validity of the statements made and therefore as a matter of natural justice it cannot, post -hearing, enlarge the evidence which has already been given.

The Board did review the impact statement however for the reasons below the impact statement did not have any bearing on the further decision made.

The Complainants' claim of financial loss

The impact statement adds to matters in the Complainants' Witness Statements which are Tribunal documents.

The impact statement cannot be considered as evidence of the loss which the Complainants say arises from delay by the Architect in responding to their requests for information and documentation relating to the fixing of the weatherboard cladding.

Insofar as the Witness Statement of [...] **(Client)** infers financial loss on the basis that the lack of communication from the Architect actually hindered the Complainants' ability to resolve or address the defects to their dwelling and for them to take appropriate rectification and/or repair works and "on who to pursue", and that during this period of 2 years or so that they were waiting to hear from the Architect and to meet with him on site that, in particular, the external weatherboard deteriorated, this assertion bears scrutiny.

While it is clear that the Complainants were very keen to have the benefit of their architect's knowledge and experience and assistance as to how to most appropriately deal with the building defects and that they deferred taking alternative action until it was apparent to them

that the Architect would not be involved in this process it is not evident that his delay has caused them financial loss, for example increased rectification costs.

In regard to deterioration of the external timber cladding there was no evidence, in quantitative terms, that the damage resulting from rusting non-galvanised nails increased markedly (or at all) between 4 December 2011, when the Complainants sent an email to their Architect to asking him to "advise (sic) the next steps as soon as possible" and on 21 July 2014, when the Board's expert witness, Alasdair Macleod carried out an inspection.

The considerable rectification losses claimed by the Complainants which are referred to in their impact statement (which the Tribunal in this disciplinary process cannot accept as evidence of quantum) relate to defective building works which are a claim directed to their builder and not to the Architect.

The Tribunal has determined that the Architect was not responsible for the defective work in its findings which were delivered on 5 January 2016 and no evidence was given to the Tribunal that the Complainants are unable to make such a claim against their builder as a consequence of the delay in taking alternative action.

The architect's lack of appropriate communication

The Architect admits that he has been careless in his practice and this was conceded at the time of the Preliminary Conference held by the Tribunal on 12 May 2015 and this matter was found proven by the Tribunal at the hearing which occurred on 18 November 2015 and in its findings which were delivered on 5 January 2016.

The Tribunal takes into account this early plea in relation to allegation 4 and that that the necessity to call the Complainants to give evidence as to their communications has been avoided and the hearing time of the Tribunal has been reduced.

The Tribunal accepts that in part the Architect's inability or reluctance to engage with the Complainants was influenced by advice which the Architect received from his insurance broker which was not to comment on matters which may affect the attitude of his professional indemnity insurer in the event that the Complainants were to make a claim.

Coming from the position of professional conduct it is appreciated by this Tribunal that the Architect's communication as experienced by the Complainants from December 2011 may have come across as him being disinterested, uncaring and aloof and that that they found this to be frustrating and upsetting.

It is possible that the expectations of the Complainants as to the professional obligations of their Architect may arise from their view that he was acting as their overseer or supervisor of the works. That this is their view is evident in their complaints to the Board and from their witness statements to the Tribunal in which the Complainants refer to their decision to engage an architect as being based not only for the value of the design aspect but also to "oversee the works" and to supervise the works and that the Architect did agree to take on the role of supervision in relation to the painting works.

However, both the RAIA Client and Architect Agreement and the ABIC 2002 (SW-1) Contract with the Builder do not impose upon the Architect a supervisory role for the works. The Architect, although acting as the Owners' agent in a number of respects and as an independent certifier of the value of the works, is and remains throughout the works an administrator of the building works and is not the "supervisor" of the works or the supervisor of the builder.

For the reasons above the Tribunal is not satisfied on the evidence that the Architect's lack of communication between late 2011 and early 2014 caused actual financial loss to the Complainants.

Consideration of appropriate disciplinary action

This Tribunal in deciding to discipline the Architect under section 32 of the Act has taken into account all of the circumstances of the case, including whether the Architect's behaviour is of a minor or serious nature.

The Tribunal finds that the behaviour is not at the level of serious misconduct as it does not involve dishonesty, a blatant disregard for or a significant degree of indifference to the law or behaviour that has resulted in significant harm or substantial loss to his clients.

As mitigating factors the Tribunal has considered and it acknowledges the Architect's early plea, the Architect's explanation that he was strongly influenced by his insurance broker's advice not to comment and his previous good character and reputation.

The Tribunal has considered the potential impact that a disciplinary decision may have on the Architect's reputation, and how such a decision would affect the Architect's financial earning capacity, particularly as the Architect has practised professionally for a significant portion of his professional career.

While the Complainants are themselves professional people and well educated, in matters of building contractual arrangements and practices they are consumers of professional services of an architect and in that respect are often vulnerable and place a high degree of trust in their Architect and are therefore entitled to a high level of professional service .

In making this decision, the Tribunal has had due regard to the purpose of the regulatory scheme, including the conduct rules noting that the emphasis of scheme is not designed to punish architects but to protect their clients as consumers of an architect's professional services.

In reaching this decision the Tribunal has also reflected upon the nature of the impugned conduct and its objective seriousness, both in terms of the extent of the departure from appropriate standards and its actual consequences.

The behaviour demonstrated by the Architect falls short of the reasonably expected standards of a registered architect in that in repeatedly failing to communicate with the Complainants in the period subsequent to December 2011 this has demonstrated an absence of care and due consideration to his clients which is carelessness in his practice as an Architect, within the meaning of section 32(a) of the Act.

However, having regard to all of the circumstances, the Tribunal considers that whilst a disciplinary decision is warranted in the interests of consumer awareness, it would be inappropriate and disproportionate to impose a sanction at the higher end of the scale.

The Tribunal is not satisfied that the nature of the Architect's conduct warrants suspension or cancellation of his registration and it considers that the Architect's behaviour in the future can be rectified through this experience which for him no doubt has been unpleasant and has weighed heavily on his mind as it is intended to be a salutary lesson.

Accordingly, the Tribunal considers that a caution would adequately achieve the objectives of consumer protection without impacting on the Architect's ability to practise as a registered Architect and that the Architect should bear some portion of the Board's legal costs of this Inquiry.

Decision

Following consideration of the information before the Tribunal it has decided to and hereby makes the following determinations:-

1. The Architect is cautioned under section 32(g) of the Act which caution shall appear on the register held by the Architects Registration Board of Victoria
2. Under section 32(g) and in respect to a determination in respect to costs which the Tribunal thinks fit, the Architect is ordered to pay an amount fixed at \$5,000.00 towards the legal costs of Architects Registration Board of Victoria which it has incurred in this matter with a stay on payment of the entire sum of thirty (30) days from this day but then if not paid this shall be a condition remaining to be satisfied prior to registration (or re-registration) under section 32(j) of the Act.

.....
Tony Hinz- Tribunal Chair
Architects Tribunal

Dated: 07 / 03 / 2016