

Architects Registration Board of Victoria

Notice of Inquiry

TO: [Name of Architect]
Registered Architect No [...]

OF: [address]

1. BASIS OF INQUIRY:

TAKE NOTICE THAT the Architects Registration Board of Victoria (**Board**) pursuant to Division 1 of Part 4 of the *Architects Act 1991* (**Act**) has decided to hold an inquiry into your fitness to practise as an architect and into your professional conduct. The Board pursuant to Division 2 of Part 4 of the Act has constituted a Tribunal to conduct the Inquiry on its behalf.

2. MODE OF INQUIRY:

The Inquiry will proceed by way of oral hearing. Section 30 of the Act stipulates that:

At an inquiry—

- (a) subject to this Part [Part 4 of the Act], the procedure of the Tribunal is in its discretion; and*
- (b) 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*
- (c) the Tribunal is not bound by rules of evidence but may inform itself in any way it thinks fit; and*
- (d) 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*
- (e) the Tribunal is bound by the rules of natural justice.*

3. APPEARANCE OF PARTIES:

You have a right to be present, to make submissions and to be represented at the Inquiry.

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 respond to this Notice personally or in writing or both.

4. TIME AND DATE OF PRELIMINARY CONFERENCE:

Tuesday 22 February 2011 at 10:00 am. The Preliminary Conference and the inquiry will be held in the Conference Room, Level 7, 372 Albert Street, East Melbourne Victoria 3002

5. TIME AND DATE OF INQUIRY:

The time and date will be fixed at the preliminary conference

6. VENUE:

Both the preliminary conference and the Inquiry will be held in the Conference Room within the Board's Office, Level 7, 372 Albert Street, East Melbourne VIC 3002.

7. MATTERS AND/OR BEHAVIOUR ALLEGED:

The allegations below relate to your engagement to provide architectural services to **(Clients)** in relation to the proposed development of two townhouses at [Address].

Your engagement comprised an outline of fees and services to be provided by you dated 6 May 2008, plus attached 'Contract Terms of Conditions'. The outline set out fees which would be charged for different categories of work, and stated that in certain circumstances additional fees would be incurred 'which would be quoted at that time'. This outline was accepted by the Clients on 29 May 2008.

This outline, the 'Contract Terms of Conditions' and the Clients' acceptance of these, are together referred to in these allegations as the 'Agreement'.

References to the 'Regulations' in these allegations are to the *Architects Regulations 2004*.

References to amounts quoted and charged are exclusive of GST.

Allegation 1:

During the period 28 October 2008 - 12 May 2009 you were guilty of unprofessional conduct, in that you provided services of an architect while not registered as an architect.

Allegation 2:

During the period 28 October 2008 - 12 May 2009 you breached a provision of the Act (namely s 4(1)) in that you represented to your Clients that you were a registered architect when you were not registered.

Allegation 3:

During the period 25 July 2008 to 20 October 2008 you were guilty of unprofessional conduct (including in accordance with the meaning of 'unprofessional conduct' in Regulation 14) in that you failed to set out in writing the description, terms and conditions of a change in your engagement, and supply a copy of that document to your Clients as soon as practicable after that change.

Particulars

You undertook 'Town Planning Work' for which you charged your Clients \$3,348, which was \$2,948 over and above the amount of \$5,000 allowed for this category of work in the Agreement (reference - invoice no 6 - 20 October 2008 and attached charges schedule) without supplying any quotation to your Clients for that additional work prior to it being undertaken.

Allegation 4:

During the period 4 December 2008 - 16 February 2009 you were guilty of unprofessional conduct (including in accordance with the meaning of 'unprofessional conduct' in Regulation 14) in that you failed to set out in writing the description, terms and conditions of a change in your engagement, and supply a copy of that document to your Clients as soon as practicable after that change.

Particulars

You undertook 'Town Planning Stage' work and 'Re-design Work' for which you charged your Clients an additional \$3,260 over and above the amounts of \$5,000 and \$6,400 respectively allowed for those categories of work in the Agreement (reference - invoice no 8 - 16 February 2009 and attached charges schedule) without supplying any quotation to

your Clients for that additional work prior to it being undertaken.

Allegation 5:

During the period 16 February 2009 - 24 March 2009 you were guilty of unprofessional conduct (including in accordance with the meaning of 'unprofessional conduct' in Regulation 14) in that you failed to set out in writing the description, terms and conditions of a change in your engagement, and supply a copy of that document to your Clients as soon as practicable after that change.

Particulars

You undertook 'Further Town Planning Re-design Work' for which you charged your Clients an additional \$4,055 over and above the amount of \$5,000 allowed for 'Town Planning Work' in the Agreement (reference invoice no 9 - 24 March 2009 and attached charges schedule) without supplying any quotation to your Clients for that additional work prior to it being undertaken.

Allegation 6:

During the period 16 February 2009 - 24 March 2009 you were guilty of unprofessional conduct (including in accordance with the meaning of 'unprofessional conduct' in Regulation 14) in that you failed to set out in writing the description, terms and conditions of a change in your engagement, and supply a copy of that document to your Clients as soon as practicable after that change.

Particulars

You undertook 'Working Drawing Work', and invoiced the Clients for it in the amount of \$5,871 (reference invoice no 10 - 24 March 2009), prior to a town planning permit having been issued, contrary to the terms of the Agreement, without notifying your Clients of that departure from the terms of the Agreement until the date on which you invoiced the Clients for the additional amount. At no stage prior to the change in your engagement did you provide a quote to the Clients of the estimated costs of additional charges.

Pursuant to section 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.*

9. 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.

10. ENFORCEMENT OF TRIBUNAL DETERMINATIONS:

Section 35 of the Act states that the Board must take all action necessary to give effect to a determination.

11. REVIEW BY VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL:

You have a right under section 42(c) of the Act to apply to the Victorian Civil and Administrative Tribunal for review of a determination made at an Inquiry under Part 4 of the Act.

Under section 44(c) of the Act, any such application for review must be made within 3 months after the day on which the Tribunal gives notice of the determination.

This Notice is given to you pursuant to section 27 of the Act.

DATED this 28th day of January, 2011

SIGNED:

.....
Mark YORSTON
Chairman of the Tribunal

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

1. By Notice of Inquiry ("Notice") dated 28 January 2011 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 6 separate allegations.
5. On the morning of the hearing of the Inquiry on 26 July 2011 the Board and the Architect agreed, with the concurrence of the Tribunal, that allegations 3 to 6 inclusive would be combined into a single allegation containing particulars of 4 separate events.
6. The allegations as finally constituted are set out below:-

(a) Allegation 1

During the period 28 October 2008 – 12 May 2009 [the Architect was] guilty of unprofessional conduct, in that [he] provided services of an architect while not registered as an architect.

(b) Allegation 2

During the period 28 October 2008 – 12 May 2009 [the Architect] breached a provision of the Act (namely s 4(1)) in that [he] represented to [his] Clients that [he was] a registered architect when [he was] not registered.

(c) Allegation 3

During the period 25 July 2008 to 24 March 2009 [the Architect was] guilty of unprofessional conduct (in accordance with the meaning of 'unprofessional conduct' in Regulation 14) in that [he] failed to set out in writing the description, terms and conditions of changes in [his] engagement, and supply a copy of such documents to [his] Clients as soon as practicable after those changes.

Particulars

- (i) [The Architect] undertook 'Town Planning Work' for which [he] charged [his] Clients \$3,348 which was \$2,948 over and above the amount of \$5,000 allowed for this category of work in the Agreement (reference – invoice no 6 – 20 October 2008 and attached charges schedule) without supplying any quotation to [his] Clients for that additional work prior to it being undertaken.
- (ii) [The Architect] undertook 'Town Planning Stage' work and 'Re-design Work' for which [he] charged your Clients an additional \$3,260 over and above the amounts of \$5,000 and \$6,500

respectively allowed for those categories of work in the Agreement (reference – invoice no 8 – 16 February 2009 and attached charges schedule) without supplying any quotation to [his] Clients for that additional work prior to it being undertaken.

- (iii) [The Architect] undertook 'Further Town Planning Re-design Work' for which [he] charged [his] Clients an additional \$4,055 over and above the amount of \$5,00 allowed for 'Town Planning Work' in the Agreement (reference invoice no 9 – 24 March 2009 and attached charges schedule) without supplying any quotation to [his] Clients for that additional work prior to it being undertaken.
- (iv) [The Architect] undertook 'Working Drawing Work', and invoiced the Clients for it in the amount of \$5,871 (reference invoice no 10 – 24 March 2009), prior to a town planning permit having been issued, contrary to the terms of the Agreement, without notifying [his] Client of that departure from the terms of the Agreement until the date on which [he] invoiced the Clients for the additional amount. At no stage prior to the change in [The Architect's] engagement did [he] provide a quote to the Clients of the estimated costs of additional charges.

- 7. By his legal advisor, [Name], the Architect has pleaded guilty to each of the allegations.
- 8. The Tribunal was assisted during the submissions made on behalf of the Board and the Architect by an agreed statement of facts which had been prepared by the Parties.
- 9. The Tribunal notes that on 29 May 2008 the Architect was engaged by the Clients to develop land owned by the Clients on which their family home was located into a three unit site ("Project").
- 10. The Project involved the design, town planning application and possible construction of two additional two storey dwellings on the subject land in addition to the family home which would remain.
- 11. The agreement between the Architect and the Clients for the provision of architectural services comprised:-
 - (a) a letter of engagement dated 6 May 2008 which was signed by the clients on 29 May 2008; and
 - (b) contract terms and conditions.
- 12. The estimated fees in the letter of engagement were broken down into three stages namely:-
 - (a) Stage 1 - architectural design and drafting fees - budgeted at \$15,800.00;
 - (b) Stage 2 – working drawings to develop documentation standard – budgeted at \$14,400.00; and

- (c) Stage 3 – design, drafting and working drawings for the necessary works – budgeted at 4.2% of the \$600,000.00 preliminary project budget.
13. The letter of engagement identified that the scope of the architectural services would be:-
- “The work would include preparation of Sketch Designs and Working drawings for a **Town Planning & Building Permits for a three-unit** development on your site – an additional 2 double-story units plus garages associated driveway, fencing, drainage and landscaping work. We estimate the cost of the works would be around \$600-\$650,000.”
14. The letter of engagement also provided that:-
- “Any other special Council requirements, protracted negotiations, Council meeting appearances or a more extensive scope of drawings, would involve additional fees – which would be quoted at that time.”
15. The terms and conditions also included the following relevant provision for additional work:-
- “Should the scope of design, drawing or liaison work be extended, or the design or construction program be protracted or extended beyond the scope of this contract, then additional fees would be payable.”
16. The terms and condition set out individual charge out rates ranging from \$55 per hour for office staff and up to \$250 per hour in respect of the principal's professional time.
17. From the commencement of the project until termination of the Architect's retainer the project was the subject of a significant number of variations, largely to meet anticipated or actual requirements of the local Council and its officers.
18. The architect rendered ten invoices.
19. Eight of those invoices were paid during the course of the retainer.
20. Invoices nine and ten were paid following the settlement of a separate legal proceeding brought by the Architect against the Clients in respect of the unpaid fees.
21. In summary the Architect has billed \$36,591.00 in respect of fees, disbursements and GST.
22. A total of \$35,148.00 has been paid by the Clients which includes the monies paid under the settlement of the legal proceeding which, in turn included an amount in respect of legal costs of that proceeding.
23. The accounts submitted by the Architect set out a summary of the work which had been conducted by the Architect and the fees and disbursements associated with that work.
24. With the exception of an email dated 28 April 2009 where additional costs associated with further proposed changes were quantified, prior to any work being carried out the Architect consistently failed to provide estimates of the

costs which would be associated with the carrying out of additional work prior to actually carrying out that work.

25. The Tribunal's attention was drawn to letters from the Architect dated 16 December 2008, 24 March 2009 and 29 April 2009 as well as emails of 22 September 2008, 14 February, 23 March and 28 April 2009.
26. By way of one example only the Tribunal notes that the letter dated 16 December 2008 enclosed with it account number six for \$3,994.00 including \$311 in costs for work completed in late October and that invoice was dated 20 October 2008.

The Registration Issue

27. Pursuant to Section 15A of the Act, the Architect was required to provide to the Board by 1 July in each year written proof that he would be covered by the required insurance for the period until 30 June of the following year.
28. The Board notified the Architect by letter dated 18 September 2008 that it had not received the necessary proof of his current professional indemnity insurance for the year ending 30 June 2009. The Architect was required to provide that proof by 13 October 2008. If it was not provided by that date the Board could decide to suspend the Architect's registration.
29. On 28 October 2008 the Board resolved to suspend the Architect's registration as it had not received proof of current insurance.
30. By letter dated 29 October 2008 the Board advised the Architect that his registration had been suspended for failure to provide proof of insurance.
31. The Tribunal notes that the Architect did not recall receiving, but accepts that the Board served on him, a notice suspending his registration on or about 29 October 2008.
32. On or about 7 May 2009 the Board received the Architect's application for reinstatement of registration. Accompanying that application was a completed "Reinstatement Account 2008 – 2009".
33. On 12 May 2009 the Board resolved to reinstate the Architect's registration.
34. On or about 27 April 2009 the Architect and the Clients met to discuss the project and the costs overruns. The Clients subsequently sent an email to the Architect dated 27 April 2009 which amongst other matters specifically asked:-

“Could you please also explain why you are not registered with the Architects Registration Board of Victoria.”
35. By email dated 28 April 2009 the Architect, amongst other matters, sought to respond to the matters which had been raised in the email from the Client's dated 27 April 2008. In response to the question regarding registration which had been raised by the Clients he said:-

“I am currently Registered. I have been a Registered member of the ARB since 1972. There may have been a short period when registration was in-limbo awaiting further re-insurance details. (I will check with the ARB)”

36. At the time that statement was made the Architect was not registered and therefore that statement was untrue.
37. As the Architect accepts that the Board served on him a notice suspending his registration on or about 29 October 2008 that statement was made either knowingly or recklessly by the Architect as to whether the statement was true or not.
38. The statement of Agreed Facts identifies that by letter dated 18 September 2008 the Board notified the Architect that it had not received proof of the Architects current professional indemnity insurance for the 2008-2009 Registration Year. The Architect was required to provide that proof by 13 October 2008 after which a decision could be made by the Board to suspend the Architects registration.
39. The failure to be registered may well be an issue brought about by ineffective office management processes within the Architect's practice. It may not have been a deliberate attempt to flaunt the requirements of the act. However, the response to the client query shows a disturbing lack of awareness of the status of the architect's registration, which could so easily have been ascertained and remedied and the client so advised.
40. In order for any profession to maintain public confidence it is necessary for that profession to demonstrate that it is able to monitor and demand compliance with the standards of behavior and rules applicable to that profession and all those who seek to practice within that profession.
41. One fundamental requirement of those seeking to hold themselves out as architects is that they possess the necessary qualifications and that they have applied for and been given registration by the Architects Board.
42. Section 4 of the Act provides:-

“4. Representing a natural person to be an architect

- (1) A natural person must not represent himself or herself to be an architect and must not allow himself or herself to be represented to be an architect unless he or she is registered as an architect under this Act.

Penalty: 60 penalty units.

- (2) A person must not represent a natural person to be an architect if the person knows or ought reasonably to know that the natural person is not registered as an architect under this Act.

Penalty: 60 penalty units.”

43. Section 7 of the Act identifies a number of ways in which a person can be considered to be represented to be a architect in the following terms:-

“7. When is a person or body represented as an architect?

- (1) Without limiting the ways in which a person or body can be considered to be represented to be an architect, using any of the following titles, names or descriptions constitutes such a representation—

- (a) the title "architect";
 - (b) any other title, name or description that indicates, or is capable of being understood to indicate, or is calculated to lead a person to infer, that the person or body is an architect or is registered or approved under this Act.
- (2) Without limiting the ways in which a person can be considered to be represented to be an architect, a representation that the person provides the services of an architect constitutes a representation that the person is an architect.
- (3) Without limiting the ways in which a body can be considered to be represented to be an architect, a representation that the body—
- (a) consists of or comprises one or more architects; or
 - (b) provides the services of an architect; or
 - (c) is registered or approved under this Act—
- constitutes a representation that the body is an architect.
- (4) Without limiting the ways in which a person or body can be considered to be represented to be an architect, the making or publication of a statement or document that states or implies that the person or body—
- (a) is an architect; or
 - (b) practises as an architect; or
 - (c) undertakes or is willing to undertake work as an architect—
- constitutes a representation that the person or body is an architect.”

44. We mention only for the sake of completeness that Section 39 of the Act provides:-

“39. Effect of suspension or variation

- (1) While a person's registration is suspended, the person must be taken not to be registered under this Act.
- (2) While an approval under this Act is suspended, the partnership or company concerned must be taken not to be an approved partnership or an approved company.”

Requirement to provide details of change to terms and conditions or scope of engagement

45. In respect of allegation number 3 Tribunal notes that Regulation 14 of the Architects Regulations 2004 provides:-

“14. Defining the terms of engagement

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.”

46. Whilst the Regulation identifies the necessity for the Architect to identify, as soon as practicable any change in the terms and conditions or scope of engagement, it does not, specifically provide that the written notification of that change of scope must identify the additional fees (or a reasonable estimate thereof) which will be occasioned by virtue of that change of scope.

47. The purpose behind this 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.

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

49. Were that not to be the case the Regulation would be of little effect since it would be able to be overcome by a very broad general statements which might be largely overcome by very broad statement which could be given at the very commencement of a retainer.

50. In this matter the Architect, by the Terms and Conditions dated 6 May 2008 identifies clearly that:-

“The fees include Design and Drafting work to document the project for a Town planning Permit and a subsequent Building Permit. Any other special Council requirements, protracted negotiations, Council meeting appearances or a more extensive scope of drawings, would involve additional fees – **which would be quoted at that time.**”
(emphasis added)

51. Despite the term contained in his own letter of engagement about providing further quotes, the Architect did not provide a “quote” or an estimate of the anticipated additional costs. Instead he sent tax invoices to the Clients for the additional work after the work had been completed.

52. The Tribunal notes that the task of providing a quotation for the cost of extra work may not be easy. This is particularly so when the extra work arises from planning matters which tend to be imprecise, when charging on a time basis. However, the Architect did state that this is what he would do.

Determination

53. The Tribunal having conducted an Inquiry into the matters raised in the Notice dated 28 January 2011 as amended by agreement on 26 July 2011 issued to Robert Sydney Rogers Registered Architect Number 1237 of 657 Whitehorse

Road, Mont Albert pursuant to Section 27 of the Act, the Tribunal now makes the following determinations:-

- (a) Pursuant to Section 32 of the Act the Tribunal finds that the Architect is guilty of unprofessional conduct in that the Architect provided services of an Architect while not registered as an Architect. The Tribunal determines to reprimand the Architect and impose a penalty of \$2,000.00
 - (b) In relation to Allegation 2, the Tribunal finds that the Architect has breached Section 4 of the Act. The Tribunal determines to reprimand the Architect and impose a penalty of \$3,000.00.
 - (c) In respect of Allegation 3 the Tribunal finds that the Architect is guilty of unprofessional conduct in that he has breached Regulation 14 of the Architects Regulations 2004. The Tribunal determines to reprimand the Architect and impose a penalty of \$1,500.00.
54. Payment of the penalties set out in paragraph 53 are to be made to the Board pursuant to Section 58 of the Act within 3 months of the date of this determination.
55. Pursuant to Section 32 of the Act the costs of the Board in respect of this Inquiry (including reserved costs) should be paid by the Architect. The Board's costs shall be calculated on a party party basis in accordance with Scale C of the County Court Scale. In the absence of agreement between the Board and the Architect as to the quantum of these costs, the costs shall be assessed by an assessor appointed by President of the Law Institute of Victoria, with the fee for obtaining such assessment to be borne equally by the Board and the Architect. The costs shall be paid to the Board within 60 days of the date of agreement as to the costs or the date of the Certificate of Assessment, whichever applies.

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Mark Yorston – Tribunal Chair

Dated: 15 / 8 / 2011