

# Insurance law update

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CASE NOTE

## Building inspectors' role **judicially clarified**

Recently, the Victorian Civil and Administrative Tribunal (“**VCAT**”) had cause to clarify the role and responsibilities of a building inspector in *O’Hehir v Building Practitioners Board (Review and Regulation)* [2015] VCAT 113.

In Victoria, building inspectors are engaged by building surveyors to assist in carrying out their functions under the *Building Act 1993 (Vic)* (“**Building Act**”), in particular, undertaking inspections of building work for which a building permit has been issued.

### **BACKGROUND**

In August 2007, a private building surveyor engaged a building inspector to undertake inspections of building work of a domestic residence upon the “completion of framework” and “completion of all building work” stages. These are the stages at which it is mandatory for a building surveyor to undertake an inspection under the *Building Act* and associated Building Regulations 2006 (Vic) (“**Regulations**”).

In or around 2012, the owner of the residence discovered defects in its construction. Expert evidence established that these defects could have been identified by the building inspector when he conducted his inspections of the building work.

## BUILDING PRACTITIONERS BOARD INQUIRY

The owner requested the Building Practitioners Board (“BPB”) to conduct an inquiry, including an investigation into the building inspector’s professional conduct.

The BPB determined that the building inspector had failed to identify defective and non-compliant work, and had failed to carry out his duties in a competent manner, and to a professional standard, when undertaking the mandatory inspections of the building works. The BPB ordered that the building inspector’s registration be suspended for 3 months, and that he pay \$3,000 towards the BPB’s inquiry costs.

## APPEALS TO VCAT

Both the property owner and the building inspector appealed the BPB’s determination in respect of the penalty to be imposed. The building inspector submitted that the penalty was too severe, and the owner contended that the penalty was too lenient.

Counsel for the building surveyor submitted that VCAT should have regard to the reasons behind the building surveyor’s failure to identify or act on upon deficiencies in the building work when considering what decision it should make concerning the penalty.

This required VCAT to consider in detail the building inspector’s defence to the findings of professional misconduct, resulting in VCAT making some important findings regarding the role and responsibilities of building inspectors.

## VCAT’S DECISION

### *Professional misconduct clarified*

VCAT held that the building inspector’s professional misconduct included the following:

- » Issuing oral instructions to the builder on site to undertake remedial works to defects identified during the inspections, and not confirming these directions in writing;
- » Failing to re-check the building work to ensure that his oral instructions had been complied with;

- » Failing to identify defects and departures from the original design drawings in his inspection report, so that these issues were brought to the attention of the building surveyor;
- » Unilaterally approving departures from the engineering design without notifying the building surveyor;
- » Failing to identify that elements of the building work were missing, notwithstanding that the drawings did not provide for these elements; and
- » Failing to inspect at the “completion of framework” inspection all works undertaken to date, including drainage, and not only the frame.

### *Important findings regarding the role of building inspectors*

In reaching its conclusion that the building inspector engaged in professional misconduct, VCAT noted the following about the role of a building inspector:

- » The role of an inspector is to require compliance with the building permit and to give directions, which must be confirmed in writing, to ensure compliance;
- » A building inspector should not allow building work to remain non-compliant;
- » A building inspector should draw non-compliant building work and design departures to the attention of the building surveyor by noting such issues in the inspection report;
- » It is not an element of the building inspector’s role to form an opinion as to whether it is permissible to depart from the original design; and
- » Section 34 of the *Building Act*, which relates to inspections of building work at mandatory notification stages, imposes a wide obligation on building inspectors to inspect all building work undertaken in respect of the building permit, not just an element of that work, such as the frame.

## Penalty to be imposed

Notwithstanding the breaches of professional misconduct committed by the building inspector, VCAT held that suspending the building inspector's registration was not warranted in this instance for the following reasons:

- » The building inspector had altered and improved his work practices since 2007, and had learnt from his mistakes;
- » Reprimanding the building inspector and imposing a penalty of \$4,000 would act as a sufficient deterrence; and
- » Suspending the building inspector's registration was likely to have significant financial ramifications for the building inspector, which would extend well past the period of suspension.

Accordingly, the building inspector was ordered to pay a fine of \$4,000, and the BPB's inquiry costs in the amount of \$3,000.

## KEY MESSAGES FOR BUILDING INSPECTORS

The key messages for building inspectors from this case are:

1. Oral directions to rectify defects are not sufficient. Oral directions must be confirmed in writing, and noted in the inspection report.
2. Building inspectors do not have the power to approve departures from the approved design; rather, they must bring any design departures to the attention of the relevant building surveyor by noting the departures in the inspection report.
3. Any issues of concern, even if not depicted in the design drawings, should be brought to the attention of the building surveyor.
4. "Completion of framework" inspections require building inspectors to assess all works undertaken to date in respect of the building permit, not just the frame.

### Authors:

**Hubert Wajszel, Partner**

**Sasha Jeffrey-Bailey, Associate**

**Ella van der Merwe, Graduate-At-Law**

## CONTACTS

Shona Wilde, **Sydney**

Peter Ewin, **Melbourne**

Hubert Wajszel, **Melbourne**

Peter Harvey, **Newcastle**

Peter Jones, **Adelaide**

Peter Forbes-Smith, **Hobart**

Darren Miller, **Perth**

Chris Osborne, **Darwin**