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13 June 2023

David Wagner FRAIA
Victorian Chapter President
Australian Institute of Architects
Level 1, 41 Exhibition Street
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via email: national@architecture.com.au

Dear Mr Wagner,

Architects acting as Superintendents

We refer to your letter to the Victorian School Building Authority (VSBA) of the Department of Education dated 2 June 2023. We thank you for your attendance at the 2023 Victorian Education Infrastructure Industry Briefing (VEIIB) and for your positive commentary on the VSBA's practices and construction program.

In relation to your comments on the obligations of architects engaged to act as a Superintendent under the VSBA's minor and major construction contracts (VSBA Contracts), we do not consider there is a direct conflict between the role of the Superintendent under the VSBA Contracts and the requirement under the Victorian Architects Code of Professional Conduct (Code) for an Architect to act with integrity, fairness and impartiality when they are administering a building contract.

The role of the Superintendent under the VSBA Contracts is established by the terms of the contract. As you are aware, under the VSBA Contracts, the Superintendent carries out a dual role of agent of the Principal and as independent certifier or assessor.

The VEIIB presentation sought to explain that in the unamended Australian Standard contracts, there is a contractual requirement for the Superintendent to (amongst other things) act fairly in all instances but that given there has been a number of disputes about what is considered to be 'fair' in the context of a Superintendent exercising its function under construction contracts and the term is subjective, the general reference to the Superintendent acting fairly has been removed from the VSBA Contracts. This amendment reflects a common amended to the Australian Standard contracts to address the issues set out above.

In the VSBA Contracts where the Superintendent is acting as agent for the Principal the Superintendent is required to act honestly, within the prescribed time or, if no time is prescribed, within a reasonable time, and arrive at a reasonable measure or value of work, quantities or time. The use of the word 'fair' in the context of the Superintendent's function as agent has been removed as it creates uncertainty in relation to how it is applied in the context of the Superintendent acting as agent. For example, the requirement to act 'fairly' should not overlay any of the rights of the Principal that are exercised by the Superintendent such as the right to direct a variation. While the word 'fairly' is omitted in this context, an Architect acting as agent for the Principal can still act with integrity, *fairness* and impartiality pursuant to the Code while acting in the Principal's best interests and in accordance with the contractual functions of the Superintendent.

Where the Superintendent is acting as an assessor or certifier under the VSBA Contracts, we confirm that the VSBA contracts expressly require the Superintendent to act '*fairly*'. An extract of the relevant part of the clause from the VSBA Contracts is set out below:

The Principal shall ensure that in the exercise of its functions under Clauses 5.7, 8.1, 21.5, 35 (other than Clause 35.4), 36, 40.5 and 42, the Superintendent acts fairly.

This drafting prescribes the requirements that the Superintendent is required to discharge when undertaking the nominated assessment or certification functions (as opposed to all functions of the Superintendent under the contract).

We hope this clarifies the position raised at VEIIB.

Regards



Tom Kirkland
Chief Executive Officer
Victorian School Building Authority
Department of Education and Training

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