

# FIRE PROTECTION ASSOCIATION AUSTRALIA

Presented by Robert McGirr  
Co-Founder and Director of Elit Lawyers by McGirr & Snell

# ROBERT MCGIRR

Robert McGirr, an industry veteran, was admitted to practice in 1978 and became one of the Victoria's first Accredited Commercial Litigation Specialists in 1993.

Rob has over 40 years' experience in the legal industry as a Senior Partner responsible for commercial litigation and insurance legal teams. He has practiced throughout Australia and in New Zealand at both trial and appellate levels.

Rob practices substantially in commercial litigation, arbitration, equity, trade practices, contract disputes, corporate governance/directors duties/oppression actions, and has particular expertise in professional indemnity defence work.

A special interest in media and defamation matters led to his completion of a masters subject in the discipline, thereafter working in proceedings for high profile individuals as well as providing pre-publication advice for weekly Australian magazine "New Idea".

For more than 30 years, Rob represented the sole insurer for solicitors in Victoria, the Legal Practitioners' Liability Committee. This has involved acting on behalf of Victorian solicitors and the insurer in a variety of litigious matters in all jurisdictions.

Rob is highly regarded for his depth of expertise, integrity and tenacity, attributing much of his success to having a high attention to detail and thorough understanding of the facts and dynamics at play in a litigation matter.

After taking a sabbatical between late 2019 and early 2020, Rob partnered with former colleague Danielle Snell to create a new transformational way of providing legal services and to pursue his passion to help clients achieve commercial solutions. Rob splits his time between Melbourne and Noosa, and is a member of the Noosa Lifesaving Club.

Rob sits on the Law Institute of Victoria's Commercial Litigation Advisory Committee, and was formerly a member of the Litigation Lawyers Executive Committee, and the Alternative Dispute Resolution Committee.



## Robert McGirr

Co-Founder and Director

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A handwritten signature of Robert McGirr in black ink.



➤ What is legal liability?

Legal liability refers to the responsibilities a professional or business has under the law for any injuries, loss or damage they inflict upon others.

➤ How is legal liability applicable to FPA members and practitioners?

All FPA members and practitioners are subject to its Code of Conduct, which has specific obligations (**general obligations**). Further, FPA members and practitioners have legal obligations they must adhere to, generally stipulated in their retainer and/or consultancy agreements and prescribed by law (**legal obligations**).

We will commence with the legal obligations.

# FPA Members and Practitioners' Legal Obligations

FPA members and practitioners' legal obligations will generally be specified in their:-

- Retainer; and/or Consultancy agreement;
- Building Code of Australia;
- Australian Standards;
- Relevant Guidelines;
- Legislation such as Building Act and Regulations; Planning and Development Act (these vary from state to state); and
- Obligations to accrediting authorities such as FPA Australia/Registered Practitioner Board/Architects Registration Board Victoria

#### Fire Protection Accreditation Scheme (FPAS) Types

- Fire System Design
- Fire System Compliance
- Inspect & Test
- Fire Safety Assessment

#### Bushfire Planning & Design (BPAD)

- Levels 1, 2 & 3

# Retainer and/or Consultancy Agreements

Upon taking on a particular job, FPA members and practitioners should have a retainer and/or consultancy agreement in place with their client that covers, but is not limited to, the following:

- Specifies the precise nature of the work to be undertaken by the FPA member and practitioner;
- Specifies the precise nature of the work that will not be undertaken by the FPA member and practitioner;
- Specifies the fee involved for the FPA member's and practitioners' work;
- Provides relevant contractual indemnities, if applicable, regarding the work of the FPA member and practitioner in accordance with the scope of the retainer;
- Clearly indicates that the FPA member and practitioner holds relevant professional indemnity and public liability insurance for the work they are retained to perform and the value of each insurance policy.

## Relevant Case: Tanah Merah Vic Pty Ltd v Owners Corporation No.1 & Ors [2021] VSCA 72 (Lacrosse case)



- This Court of Appeal decision backed the Victorian Civil and Administrative Tribunal's (VCAT) previous decision that the fire engineer, Tanah Merah, building surveyor, Gardner Group and architect, Elenberg Fraser (**the Consultants**) were liable for the combustible cladding that spread a fire at the Lacrosse apartment building tower in Lonsdale Street, Melbourne in 2014 (**the Tower**). In summary, the aluminium cladding contributed to the fire.
- The case involved Mr Gubitta, who lived in the Tower, and left his cigarette burning in a plastic food container on the balcony. Fire quickly spread throughout the whole building. Mr Gubitta did not take part in the proceeding and no party sought to obtain judgment in default against him.
- At first instance at VCAT, it was held that the Consultants breached their consultancy agreements with L U Simon Pty Ltd (**the Builder**), by failing to exercise due care and skill in the provisions of their services. The failure to exercise reasonable care by each of the Consultants and Mr Gubitta was held to be a cause of the harm to the Builder, resulting in its breach of the Design and Construct Contract as per section 51 of the *Wrong Act* 1958.

- VCAT determined that the \$12,765,812.92 claimed by the owners as payable by the Builder be apportioned between the Consultants and Mr Gubitta. Apportionment was as follows:-
  - The building surveyor: 33%
  - The architect: 25%
  - The fire engineer: 39%
  - The remaining 3% was Mr Gubitta's proportion (for damage to the balcony), which the Builder wore.
- The Consultants appealed VCAT's decision and the Supreme Court of Appeal, which essentially upheld VCAT's decision that the Builder had not failed to take reasonable care, which included *inter alia*, the fact that the Builder relied upon the Consultants' expertise in using combustible cladding to ensure compliance with the Building Code of Australia (BCA) and that it was not responsible for including aluminium composite panels in the design. The Court of Appeal agreed that although the Builder bore frontline responsibility, it engaged highly skilled professionals for the large and complex project to direct and supervise its work where it lacked expertise.



- Specifically, with respect to the fire engineer, he entered into a consultancy agreement with the Builder in 2010. Against him, it was alleged that:-
  - He failed to conduct a full engineering assessment of the Tower to the level required by the International Fire Engineering Guidelines and to include it in the fifth Fire Engineering Report - this led to the deletion of sprinklers on balconies without an alternative solution;
  - He failed to recognise that the panels proposed did not comply with the fire-resisting construction specifications of the BCA (on a deemed to satisfy basis) and failing to warn the builder and the other professional consultants of that fact and failure to advise about a solution; and
  - The Tribunal found that the fifth Fire Engineering Report was misleading and deceptive in contravention of the Australian Consumer Law.
- The Court of Appeal also upheld that VCAT made no error in determining that the breach of warranty claims that it had upheld against the Builder, were not apportionable.

## Subsequent Disciplinary Action



- Registered Building Surveyors (RBS) referred by the VBA to the Building Practitioners Board (BPB) for disciplinary action for breach of Building Code, Building Act and regulations.
- Architects referred by the VBA to the Architects Registration Board Victoria for disciplinary action.

## The impact for FPA members and practitioners following the Lacrosse case



- The Lacrosse case has been the catalyst for exclusions in professional indemnity insurances cover, withdrawal of insurance cover and increased premiums for practitioners in the fire, building and construction industry with respect to cladding-related projects.
- All FPA members and practitioners should:-
  - Ensure that their professional indemnity insurance policies cover them for their work, especially with respect to cladding-related projects, and that no relevant exclusions are triggered;
  - Ensure that their consultancy agreements specify the precise work that will and will not be performing;
  - Ensure that their consultancy agreements have relevant indemnities in their favour for the work they perform;
  - Ensure that the work they perform is undertaken with due care and skill in accordance with the law;
  - Ensure that the work they perform is undertaken in accordance with the BCA and any relevant Australian Standard or Guidelines;
  - Consider your involvement in cladding-related projects, if you are unable to secure relevant insurance for such work, particularly when the contract between the FPA member and builder will have contractual indemnities favouring the Builder in this regard.
  - Check if your professional indemnity cover provides covers for regulatory body investigations.

## Relevant Indemnities

The relevant indemnities to consider in your consultancy agreements are:-

- “Reverse” Indemnities: Party A indemnifies Party B against losses incurred as a result of Party B’s own acts and/or omissions (i.e. negligence).
- “Proportionate” Indemnities: These are the opposite to “reverse” indemnities, i.e. Party A indemnifies Party B against losses except those incurred as a result of Party B’s own acts and/or omissions.
- “Third Party” Indemnities: Party A indemnifies Party B against liabilities and claims by Party C.

The indemnity most FPA members and practitioners will find in their consultancy agreements will likely be reverse or proportionate indemnities.

## Potential Insurance Claims

All FPA members and practitioners should notify their relevant professional indemnity insurer of any potential claims in a timely fashion in accordance with their duty of disclosure under their insurance policy.

# Members General Obligations – Code of Conduct (the Code)

The Code prescribes the principles, standards of behaviour and service delivery requirements expected of all FPA members. These obligations are broader than the law. FPA members must sign the Code of Professional Conduct declaration, stating that they will abide by the requirements of the Code and accept any decision if it is determined they have breached the Code.

The main specific obligations under the Code are:-

- Professional Behaviour;
- Conflict of Interest;
- Commitment to Best Practice;
- Communications;
- Contract Administration

# *Professional Behaviour*



When carrying out work, FPA members must:

- Abide by the terms and conditions and any guidelines established by the accreditation scheme and/or Professional Membership;
- Comply with all terms and conditions of this Code;
- Comply with the National Construction Code of Australia and any other relevant standards, laws, regulations and FPA Australia technical documents and guidelines related to the competent fire safety practitioner function;
- Make certain that decisions and actions made in the work place are reasonable, fair and appropriate;
- Take practical steps to consider all facts when making decisions and carrying out work activities and statutory functions;
- Avoid any action or oversight that may discredit the fire protection profession, including those that a third party would most likely conclude adversely affect the good reputation of the profession;
- Not misinform clients, government departments, professional organisations, the community, other fire protection service providers, accredited individuals and Professional Members of the Association about any matter relating to their work activities;
- Act honestly, equitably and with integrity, and without discrimination towards any person in relation to their work activities;
- Maintain the security of confidential documents or information for which they are responsible;
- Not use confidential information obtained through work activities for the purpose of gaining a private benefit for themselves or for any other person; and
- Act in the public interest above all other interests when performing their competent fire safety practitioner function.

# *Conflict of Interest*



FPA members must take into account actual, perceived and potential conflict of interest.

## *Actual Conflict of Interest*

FPA members hold a role where they can be influenced by private interests when performing a role.

## *Perceived conflict of interest*

FPA members hold a role where they appear to be influenced by private interests when performing a role.

## *Potential conflict of interest*

FPA members hold a role where they may in future be influenced by private interests when performing a role. FPA Members shall:

- Not take advantage of their position and responsibilities for the purpose of obtaining, any preferential treatment or other improper advantage for themselves or for any other person;
- Not request or receive a gift or benefit that is intended or perceived to cause them to act in an unfair or biased way whilst undertaking their work activities;
- Take all reasonable steps to ensure any person related to them does not receive any gifts or benefits related to the work activities performed by themselves; and
- Ensure that all conflicts of interest are disclosed and effectively managed. Unresolved or badly managed conflicts of interest can lead to corruption or abuse of role and responsibilities or the perception that these exist.



### *Commitment to Best Practice*

FPA members shall undertake their best endeavours to apply best practice in relation to:

- Quality and compliance of work activities;
- Timely completion of projects;
- Implementing and adhering to workplace health and safety requirements;
- Promoting practices that reduce environmental impacts and contribute to the sustainable use of resources and energy without compromising fire protection; and
- Developing ethical and responsible customer, competitor and community relationships.

### *Communications*

FPA members must:

- Be straightforward and honest in all professional and business relationships, ensuring that fair dealings with clients and the community are accurate, truthful and not misleading;
- Not make disparaging remarks in relation to clients, government departments, professional organisations, the community, other fire protection service providers, accredited individuals and Professional Members of the Association; and
- Inform a client of any matters affecting their ability to carry out their statutory or contractual work activities, and keep the client informed of any subsequent change in circumstances to their ability.

## *Contract Administration*

FPA members must:

- Uphold all contractual obligations and deliver to the client the agreed services;
- Advise clients promptly where variations to contracts or scope of work are unavoidable;
- Respond promptly to requests for information and co-operatively support efforts to resolve problems, claims and disputes;
- Ensure professional quality assurance processes are followed; and
- Protect commercial-in-confidence information or intellectual property.

## *Accreditation*

FPA members who hold accreditation shall support and comply with the requirements of the accreditation scheme within their discipline and field of practice. Accredited signatories are accredited to act only within, and not exceed their accreditation level, which means to operate within the limits of their qualifications, experience and expertise. Signatories shall support and agree to, any audit process required by FPA Australia's accreditation scheme or FPA Australia Professional Membership.

## *Insurance*

It is mandatory for all FPA members to hold relevant insurance covering their professional work. Presently, clause 5.2 of the FPAS requires the following insurance:

- Public Liability \$10m; and
- Professional Indemnity \$2m inclusive of costs or \$1m plus costs.

## *Breach of the Code*



The FPA will investigate any potential breaches by members of the Code. If a breach is determined, the FPA has the following options available to it:-

- Seek a formal apology from the FPA member for the breach as well as a written undertaking from the FPA member that the breach will not be repeated;
- Require the FPA member to take specified remedial action to correct the breach and avoid re-occurrence;
- Send a formal warning to the FPA member stating they may be suspended from accreditation or Professional Membership with FPA Australia unless certain actions are taken;
- Refer the matter to the appropriate Regulatory Authority;
- Suspend the accreditation or Professional Membership of the FPA member;
- Terminate the accreditation or Professional Membership of the FPA member; or
- Inform the FPA member and take immediate steps to cease using any promotional material relating to the accreditation scheme or Professional Membership and not imply in any way that he or she is an accredited individual under an accreditation scheme or a Professional Member of FPA Australia.

QUESTIONS?