



University of Southern Queensland

Faculty of Engineering and Surveying

# **Surveying and the Law**

A dissertation submitted by

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in fulfilment of the requirements of

**Courses ENG4111 and ENG4112 Research Project**

towards the degree of

**Bachelor of Spatial Science (Surveying Major)**

Submitted: September, 2009

## **Abstract**

There is a general perception that we are living in a more litigious society than ever before. This dissertation investigates this statement in relation to the surveying profession. There are many aspects of law and legislation that confront the surveyor in daily practice. The threat of legal action is one consideration, but there is also the potential of facing disciplinary action from the Board of Surveyors, or the possibility of having to lodge an insurance claim if a mistake is made. After an extensive literature review, it was discovered that little had been written to document litigation taken against surveyors within Australia. Details of disciplinary hearings are scarce. Nor is there a readily accessible review of insurance claims lodged by surveyors. This dissertation attempts to fill that void.

After considering what it means to be a professional surveyor, and compiling law and legislation relevant to surveying, this dissertation investigates specific cases where surveyors have come into conflict with the law. Examples are provided where surveyors have faced disciplinary action from their governing body and where professional indemnity insurance claims have been lodged.

A detailed questionnaire and set of interview questions was provided to a sample of professional surveyors. These questions related to qualifications, experience, knowledge of the law and moral and ethical attitudes. The results are both quantitatively and qualitatively analysed, and their impact is discussed. Further to this, consideration of the issues facing the modern surveyor is explored, and recommendations for avoiding litigation, and Board of Surveyors investigations or for lodging insurance claims is provided.

The general perception within the surveying profession appears to be that we are living in a more litigious society, and this dissertation goes a long way to supporting this statement in terms of the surveying profession.

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**ENG4111 Research Project Part 1 &  
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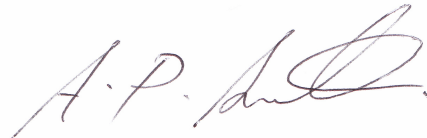
# Certification

I certify that the ideas, designs and experimental work, results, analyses and conclusions set out in this dissertation are entirely my own effort, except where otherwise indicated and acknowledged.

I further certify that the work is original and has not been previously submitted for assessment in any other course or institution, except where specifically stated.

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**Signature**

5<sup>th</sup> September 2009

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**Date**

## **Acknowledgements**

This dissertation is the culmination of several years of external study. Whilst this has been an onerous task at times, it has also been very satisfying and rewarding.

There are several people I would like to thank for their assistance with the completion of this project.

Mr. Shane Simmons, senior lecturer from the Faculty of Engineering and Surveying at the University of Southern Queensland for his assistance during the supervision of this project.

Mrs. Susanne Schultz, law librarian from the Division of Academic Information Services at the University of Southern Queensland for her assistance with the research part of the project.

My fellow work colleagues at RailCorp New South Wales, for their continued interest and support.

My sincere appreciation to all of my fellow surveyors who answered my questionnaire and short answer surveys.

I would sincerely like to thank my friends and their families for their continued friendship and belief in me.

Sincere gratitude to my extended family for their love, prayers and encouragement.

Lastly, and most importantly to my wonderful wife Sharlene and to my two children Nicole and Matthew for their love, support, patience and understanding throughout this journey.

I could not have achieved this without you all. Thank you.

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# Glossary

ACSIS – Australian Consulting Surveyors Insurance Society

APAS – Association of Public Authority Surveyors

APRA – Australian Prudential Regulation Authority

BOSSI NSW – Board of Surveying and Spatial Information – New South Wales

BLF – Builders Labourers’ Federation

CPD – Continued Professional Development

DLI – Department of Land Information (WA)

FSC – Final Survey Certificate (WA)

HIH – Health International Holdings

ISNSW – Institution of Surveyors - New South Wales

ISNZ – Institution of Surveyors – New Zealand

ISA – Institution of Surveyors Australia

LS – Licensed Surveyor (VIC) & (WA)

LS Act – Licensed Surveyor Act (WA)

NSW – New South Wales

NT – Northern Territory

NZ – New Zealand

OH&S – Occupational Health and Safety

QA – Quality Assurance

QLD – Queensland

RTA – Roads and Traffic Authority

SA – South Australia

SCIMS – Survey Control Information Management System



SSA – Special Survey Area (WA)

SYDNET - A network of continuously operating reference stations (CORS)

located in the Sydney metropolitan area

SSSI – Surveying and Spatial Sciences Institute

SSI – Spatial Sciences Institute

TAS – Tasmania

TLA – Transfer of Land Act (WA)

VIC – Victoria

WA – Western Australia

# Chapter 1 – Introduction

## **1.1 Introduction**

Surveyors are constantly under pressure to perform work to a very high standard. They must comply with Government legislation and regulations; comply with standards set by professional institutions encompassing their code of ethics; and they must deal with the demands of clients and consumers. Surveyors are faced with consumers that have an increasing awareness of their rights. New technology and equipment is constantly changing the way survey tasks are performed, and the surveyor must keep pace with these new developments to remain competitive. Whilst meeting these demands and attempting to run a successful business, the survey practice is required by law to have professional indemnity and public liability insurance to help protect the business; the employees; personal assets; professional credibility and the general public.

The surveying profession by its very nature is associated with the legal profession and the insurance society. On a daily basis, regulations, legislation and law have a profound influence on many decisions a surveyor makes. For the most part, these rules and regulations set out clear guidelines for the surveyor to follow and assist in the various tasks performed. Occasionally however the surveyor may fall outside these guidelines for various reasons, and it is some of these situations that will be covered in this dissertation.

## **1.2 Background**

The background to this topic is borne out of a conversation amongst fellow surveyors based around the general perception that we are living in a more litigious society than in years gone by. This topic provided a robust and thought provoking discussion, with several interesting examples of litigation taken against surveyors being raised. One intention of this dissertation is to investigate if there is any truth in the comment ‘we are living in a more litigious society than in years gone by’ and to uncover and examine examples of such litigation and its effect on the professional surveyor.

## **1.3 Research Problem**

The project will investigate whether a void exists in information relating to litigation, insurance claims and disciplinary hearings relevant to surveyors in Australia. It is possible that there may be reluctance within some sections of the surveying profession to provide negative information relating to surveying misconduct. This dissertation will consider whether a lack of transparency exists, and whether data is not being made readily available, or whether it is simply a case that this data is not being documented.

## **1.4 Project Aim**

The aim of this dissertation is to examine various cases where litigation has been taken against surveyors, and to examine the cause and effects of this litigation. Cases where surveyors have faced disciplinary action from their overseeing Boards will be investigated. Further to this, various insurance claims lodged by surveyors will be investigated.

After considering the impacts of this litigation, disciplinary action and insurance claims, recommendations will be suggested to help safeguard surveyors in the future.

## **1.5 Project Objectives**

- To consider what are the hallmarks of a professional surveyor. What are the professional, legal and moral requirements needed to practice as a professional surveyor.
- To research, summarise and document various legal proceedings, disciplinary hearings and professional indemnity insurance claims that have been pursued through the courts and insurance society that relate to surveying.
- To research and investigate the relationship between the role and expectations placed on the modern surveyor and to explore the effect of these expectations on the individual, the business and the profession overall.
- To analyse how decisions made as a professional surveyor can impact upon you and your client.
- To numerically and graphically illustrate the amount of litigation, disciplinary action and insurance claims faced by the surveying profession over the last decade.
- To suggest recommendations on how to reduce litigation against surveyors.
- To research methods of risk assessment and loss prevention for surveyors.

## 1.6 Structure of the Dissertation

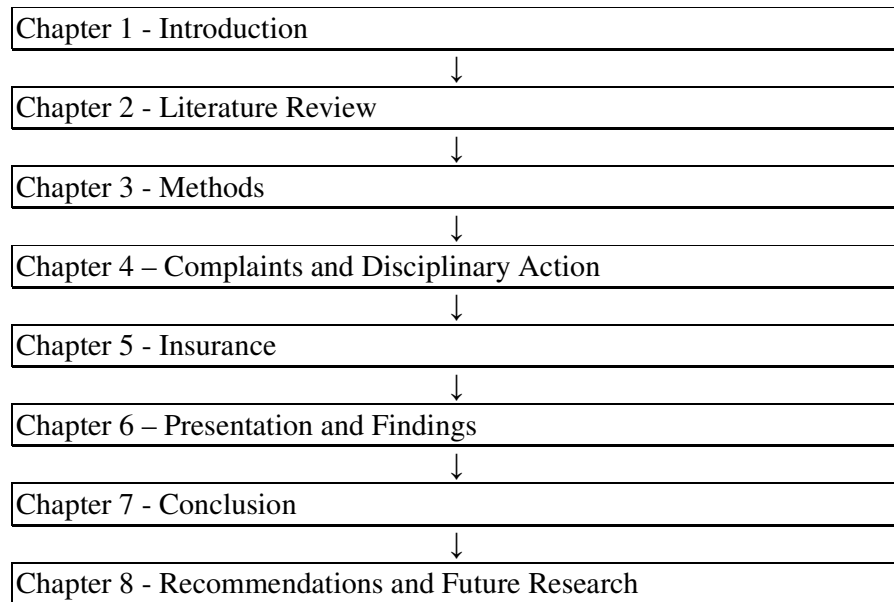


Figure 1.1 Dissertation Structure

The overall flow of the dissertation is demonstrated in Figure 1.1 above.

## 1.7 Conclusion

It is hoped the consequences of this dissertation will be significant, in that it will provide an insight into many issues that must be considered by the professional surveyor. It will provide warnings to surveyors and highlight potential situations where conflict may arise with others in the profession, with clients, with the legal profession or with the general public. The aim is to provide strategies to safeguard the surveyor and protect the client, whilst producing a professional product and work within the constraints of the law.

## Chapter 2 - Literature Review

### **2.1 Introduction**

This chapter will review literature relevant to the surveying profession. It will provide definitions of the key elements involved in being a professional, and will examine the effect of litigation on the professional surveyor and the associated risks involved in working as a practitioner. It will discuss how this risk effects the profession as a whole, and will consider strategies that can be put in place to reduce these risks.

### **2.2 The Surveying Profession**

The Oxford English dictionary online (2009) describes a profession as ‘an occupation in which a professed knowledge of some subject, field, or science is applied; a vocation or career, especially one that involves prolonged training and a formal qualification.’

The national Australian organisation of professional associations, Professions Australia (2009) defines a profession as ‘a disciplined group of individuals who adhere to ethical standards and who hold themselves out as, and are accepted by the public as possessing special knowledge and skills. They are required to undertake a widely recognised body of learning derived from research, education and training at a high level, and are prepared to apply this knowledge and exercise these skills in the interest of others.’

It is generally accepted that an occupational group counts as a profession when it exhibits the following features: the work of its members is to the better good of the community; the members of the group hold a high academic level of education in the provision of this good; they possess a high degree of autonomy in the exercise of their expertise; they are grouped together as a self-conscious community; and, they have a certain institutional status which has a legal holding on its members and equally a protective status to those members.

Enemark and Higgins (2006) broadly define a surveyor as ‘a professional person, with academic qualifications, technical expertise, interpretative ability and management skills.’ Surveyors are a diverse group of professionals that are governed by law and provide a service to their client and to the community in the execution of their daily work. Chalkley (1999) states the ‘professional knowledge, and ethical standards are both important characteristics of the competent surveyor.’

Surveying is a profession based on the following factors: the work of a surveyor provides the community with accurate data in relation to spatial information for all necessary infrastructure of the society; the academic level for a person to become a registered surveyor is at a tertiary level; surveyors are responsible for their own actions regarding the execution of work practices; the surveyor is responsible to maintain the appropriate image of the surveying profession as a whole; and, to become a registered surveyor in Australia there are requirements set out by the appropriate Board of Surveyors in each state. To continue practicing, the surveyor must satisfy these requirements each year. On this basis, surveying can confidently

hold its position alongside other professions such as engineers, solicitors and medical practitioners.

It is not simply enough for a person to possess a qualification and then call themselves a professional. McLeod and Hayward (2003) state 'unless they become members of the recognised controlling body, they are not members of any profession.' Businesses such as 'Professional Nails' or 'Professional Plumbing' for example believe they have the right to take on the title of 'Professional' simply because they are good at what they do, or have been doing it for a long time. Indeed they use the term as a marketing tool.

Kearsley (2007) asks 'is it sufficient to earn money at a particular job in order for it to earn the right to be called a "Profession"?' Certainly not, indeed many who are in the traditional professions earn less than those outside them.' The fee charged for services rendered is also an important part of being a professional. Beardslee (2002) suggests 'in the professional service business we are selling a relationship, and the more expensive that relationship, the more likely the client is to feel that the relationship is valuable.' Conversely it could be said that the cheaper the service, the more likely the service is of little value. Surveyors should be prepared to charge a premium fee for their services, in line with the training they have undertaken to achieve their professional status.

In a manual of loss prevention Blume, Gibbons, & Gill (1986) states 'it is well recognised in our community that a surveyor is a professional person like a lawyer, doctor, dentist, engineer or architect. The right to practice as a surveyor in



Australia is governed by state, and territory acts and ordinances and is restricted by that legislation to persons registered or licensed under such legislation.’

The surveyor will have exposure to and work alongside many other disciplines on a regular basis. One such association is that between a solicitor and a surveyor. In a manual of loss prevention Blume, Gibbons, & Gill (1986) states ‘The surveyor’s and solicitor’s professions have long been associated in amity and in mutual co-operation and respect. Each complements the other in providing the community the high standards of care and service in real estate transaction which characterise the conveyancing system and distinguish it from others which ride rough-shod over matters of survey and associated title problems.’

A working relationship between the surveying profession and the legal profession can be a difficult one to balance. For example on the one hand, solicitors constantly rely on surveyors for identification surveys or plans of survey during property transactions and yet on the other hand, some solicitors are keen to promote the possibility of taking legal action against surveyors if something goes wrong. There is often a contradiction between working together to provide a high quality service to the client and one looking to actively promote litigation to the detriment of the other.

Even though there is considerable pressure placed on the surveyor to engage in such partnerships Jones (2009) states ‘the surveyors have the ability to influence this process and partnership. I would like to suggest that surveyors should consider

that a working partnership with a lawyer or the client's lawyer is an essential part of providing service to their client.'

Whilst a relationship between a surveyor and a solicitor can be fruitful, surveyors can find themselves on the receiving end of solicitors securing future business for themselves. Media and the internet have seen the use of advertising as a way for the legal profession to exploit the surveying profession, and others, to attract business.

Winston Solicitors from the United Kingdom advertise on their Claims Connection (2009) website under the heading Complaints against Surveyors for professional negligence, 'If you have been the victim of poor or negligent advice received from a Surveyor that has led to financial loss - you may be able to claim compensation.

We are a firm of compensation lawyers who specialise in claims against professionals who wrongly advise their clients. If you have suffered loss or damage as a result of the negligent advice provided by a surveyor or similar professional - please make an enquiry with us today.

If you have a problem that has arisen as a result of a poor survey report from a qualified professional - you may be entitled to compensation. Despite excellent standards set by most professional surveying organisations, mistakes do happen and the people on the receiving end will quite rightly should explore the prospect of a compensation claim.

This is where our specialised 'no win no fee' service can help. We have a team of dedicated professional negligence solicitors who can advise you on your prospects of taking legal action against the party or parties who provided the poor advice.

If we are able to take your 'surveyor compensation' case further, we will provide you with a completely free legal opinion on the merits of your case. We will advise

you in detail about how your claim may proceed. If we feel that your case has merit, we will consider dealing with the matter ‘no win no fee’.

With members of the legal profession encouraging the public to take litigation against the surveying profession, it is quite understandable that many surveyors feel that we are living in a more litigious society. This situation raises the question of the ethics and professionalism of the legal profession, however that is beyond the scope of this dissertation. There is a paradox here in that surveyors are expected to maintain a strong code of ethics, and yet these principles are not necessarily followed by other professions. This sort of information being provided to the general public is a growing concern for the surveying profession. As the public becomes more informed and knowledgeable of their rights, there is likely to be an increase in litigation taken out against surveyors in the future.

According to ACSIS (2006) ‘The statutory right to practice as a surveyor depends upon a person attending academic and practical skills determined according to the standards of persons already in the profession.’ There is an obligation for the profession to act in a manner that is seen as not only in the interest of its members, but the community as a whole. McLeod and Hayward (2003) states “public consideration is required in all matters relating to the service being provided. This obligation is a major distinction between professions and industrial bodies.’ Such community obligations are the underpinning of the surveying profession and are the basis for the profession’s code of ethics.

## **2.3 Ethics**

Central to the ideals of any professional body is a code of ethics. The Oxford English dictionary online (2009) describes ethics as ‘The moral principles or system of a particular leader or school of thought. The rules of conduct recognised in certain associations or departments of human life.’ The four keywords here are morals; principles; rules and conduct. These are all relevant to the surveying profession.

A professional code of ethics extends beyond the normal moral code every member of society should follow. A professional is expected to commit to specific responsibilities that relate to their daily work practice. The willingness to follow such guidelines is the key to the growth of the profession and the level of respect the public shows towards that profession. Hence the saying ‘trust me, I am a Doctor’.

The advice a professional gives to a client is based on skill, knowledge, ability and experience, and is the main reason why a member of the community seeks out and relies on the opinion of that professional. The community expects such advice to be correct, and in their best interests.

There are currently several professional bodies representing surveying in NSW. These are the Institution of Surveyors NSW (ISNSW); the Institution of Surveyors Australia (ISA); the Institution of Engineering and Mining Surveyors NSW (IEMS), the Association of Public Authority Surveyors (APAS), the Association of Consulting Surveyors (ACS) and the Spatial Sciences Institute (SSI). The Spatial Sciences Institute members and the Institution of Surveyors Australia members

recently voted to merge the two institutes to create the new Surveying and Spatial Sciences Institute (SSSI).

The surveying code of ethics encompasses what is expected from the surveyor and from the staff associated with the practice. It requires all involved to maintain a high standard of work practice when dealing with the public, and includes matters such as professional conduct and dignity. The various professional surveying bodies within Australia have established a code of ethics, and members are bound to accept and practice this code as part of their membership requirements. The Institution of Surveyors NSW incorporated (2009) for example is 'bound by a constitution under the Corporations Act 2001 as a public company limited by guarantee, registered in NSW. Its ethics are described as 'rules of conduct based on honesty, justice and courtesy and are central to appropriate standards of professional behaviour.'

#### **2.4 The role of the Board of Surveying and Spatial Information**

The registration process in New South Wales has a long history dating back to 1837 when Governor Bourke introduced a licensing system for land surveyors. This saw the creation of a licensing board, which is known today as the Board of Surveying and Spatial Information (BOSSI). The BOSSI website (2009) states that it 'was constituted under the Surveying Act, 2002, to provide for the registration of land and mining surveyors, to regulate the making of surveys and to advise government, through the Minister responsible for the Surveying Act (2002), on spatial information.'

In January 2006, BOSSI formed the Spatial Information Committee for the coordination of spatial information and to develop a vision and strategies to significantly improve access to, and use of spatial information across the whole NSW community. It is the Board that regulates the surveying profession in NSW, and each state or territory of Australia has a similar governing body to oversee surveying activities within their jurisdiction.

The BOSSI website (2009) states that to become a registered surveyor in NSW ‘A person who has either completed a four year university degree in NSW or an equivalent degree gained in a reciprocating state can apply to the Board to become a candidate Surveyor. A candidate surveyor will be required to gain a certificate of competency through completing a set amount of practical experience and either sit four examinations or complete a Professional Training Agreement (PTA) for land surveyors or three examinations for mining surveyors. Once they have gained competency, they are able to apply for registration as a surveyor.’

In a manual of loss prevention Blume, Gibbons, & Gill, (1986) state ‘registration is not an automatic procedure. A person seeking registration is required to be of good fame and character and to have attained an accepted standard of education and practical training. The right to be registered as a surveyor is determined by a board set up under the appropriate legislation.’

A surveyor must accumulate continuing professional development (CPD) points to remain registered in any state of Australia, and is required to attend continued professional development meetings; workshops; seminars and training days on a

regular basis to obtain these points. This enables the members of the various institutions to stay informed of changes within the profession, and help maintain a high standard of professionalism. It should be noted that Queensland is in the early stages of trialling an alternative to the CPD system, by introducing random auditing of surveyors.

Traditionally the role of the Board of Surveyors has been implemented by Government legislation, and is used as a Government regulator of the surveying profession. However changing economic conditions, and new technology will require the role of the Boards of Surveying across the country to adjust to these social trends. A report by Professor Ian Williamson from the University of Melbourne, and discussed in a paper by Powers (2002) states that ‘the statutory role set out in the Surveyors Act 1929 should be changed to foster the development of a spatial framework for the creation and maintenance of land management information systems which support the sustainable development of the state.’ Such a change would expand the role of the Board beyond the regulation of cadastral surveyors to include other professionals who have interests in the development of the state as whole.

Williamson’s point of view as discussed by Powers (2002) stresses that ‘changes to the constitution of the board cannot be considered in isolation from other trends in society. He says it is critical to understand that government will not abrogate its responsibility for maintaining the integrity of the cadastre. But he argues that this can be accomplished by regulating survey practice rather than regulating the profession itself.’ The Governments role would be to ensure quality assurance

rather than professional practice. There would be a reduction in examination of survey plans and it would be replaced by risk management.

Self-regulation is not a new concept. Most jurisdictions have moved or are considering a move in this direction. There are several models in different states that are in the developing stages. Powers (2002) discusses 'a recently published paper in Victoria suggests that surveyors retain licensing on an industrial self-regulating model. The Victorian Land Surveying Bill strengthens the regulatory powers of the Board and introduces the concept of continuing professional development, so that the right to undertake cadastral surveys is no longer a licence for life. South Australia has had a system of co-regulation since 1993. A co-regulation model has been recommended for Queensland.' It is suggested that the Surveyor-General should take responsibility for the integrity and quality of spatial data infrastructure in NSW through the formation of a new Spatial Data Infrastructure Act. For this change to occur, it would be necessary for the surveying profession as a whole to be proactive in the development of appropriate legislation, and to ensure its members have the necessary education and training, to maintain the reputation of the surveying profession during such change.

Surveyors have a responsibility to the community in which they serve. These responsibilities lie in the delivery of a high quality service with the required duty of care being maintained throughout. Surveyors risk facing claims of professional negligence or litigation, if this duty of care is breached. Disciplinary action from the Board may also result, which could see the surveyor license suspended or cancelled depending on the severity of the negligence. Thorough knowledge of the



law relating to surveying will go a long way to help protect the surveyor from facing such litigation.

## **2.5 Law and Legislation**

Common law in Australia is still based on English Laws. Over time Common Law has not kept pace with Australia as it has grown and developed. Legislation in the form of statutes has been created to supplement the areas of Common Law that have become deficient. According to the Duhaime Legal Dictionary online (2009), 'statutes are the written laws approved by legislatures, parliaments or elected or appointed houses of assembly, also known as legislation. States have, generally, two methods of determining the law as regards the conduct of their citizens. One is to support the development of law through local customs, traditionally the common law. But the common law gives tremendous law-moulding powers to the discretion of judges; unelected individuals. The common law has some flexibility built into it where as a statute, once enacted, continues in full force and effect until it is repealed.'

The surveying profession is governed by such legislation in the form of Acts and Bills, relevant to each state in Australia. BOSSI (2009) states 'the NSW survey system is governed by the Surveying Act 2002 No 83, and the functions of the system are set out in the Surveying Regulation 2006.' The Surveying Act 2002 is 'an Act to make provision with respect to the functions of the Surveyor-General, the registration of surveyors, the control of surveys and the constitution and functions of the Board of Surveyors and Spatial Information; to repeal the Surveyors Act 1929, the Survey Co-ordination Act 1949 and certain other Acts and

instruments; to make consequential amendments to certain other Acts and instruments; and for other purposes.’

Surveyors in each state of Australia are governed by similar acts including; the Surveyors Act 2003, Section 39 for Queensland; the Surveying Act 2004 for Victoria; the Licensed Surveyors Act 1909 for Western Australia; the Licensed Surveyors Act for the Northern Territory; the Surveyors Act 2002 for Tasmania and the Survey Act 1992 for South Australia. These Acts provide a framework and guidelines under which surveyors operate.

The surveyor must become familiar with whichever Acts or Legislation are relevant to their chosen discipline, and they must apply this knowledge of the law and continually update it to provide a service to the client and to the general public. Failure to do so could leave the surveyor exposed to the potential of facing litigation.

Two specific areas of law relevant to surveyors are the tort of negligence, and the tort of liability.

### **2.51 Law of Tort**

A tort is a civil wrong (as opposed to a criminal wrong) other than a breach of contract. The Law of tort is to compensate the person who has suffered an injury by awarding monetary compensation or damages. The law only recognises that certain injuries, interests or rights can be addressed by a person under this jurisdiction of the law. For example: the interest or right of a person to physical

safety is recognised by the tort of assault and tort of negligence; the interest or right of ownership or possession of land and goods is protected by the tort of trespass; the interest or right of a person to protect his or her reputation is recognised by the tort of defamation; and the interest or right of a person to protect the goodwill in a business is recognised by the tort of passing off.

### **2.52 Liability in Tort**

This affects the surveyor in their non-professional capacity, and includes activity not relating to their professional skills. A function of the law of tort is to decide who should bear the loss caused by the actions of others. Any action by a person that causes harm to another should be compensated, even if the harm caused was not intentional. Blume, Gibbons, & Gill (1986) states 'this duty of care so far as a surveyor is concerned may be seen in the context of a surveyor's non-professional duty of care and in the context of a surveyor's duty of care arising out of professional conduct.' Courts later recognised that if there was not intent, and actions were not the other person's fault, compensation would only be awarded if fault could be proven which is known as 'fault liability.'

Vicarious Liability is where one person, who is blameless, is made responsible for the torts committed by another. The most important example of this is where an employer is made liable for the torts of their employee. Blume, Gibbons, & Gill (1986) states 'an employer if sued will be vicariously liable for damage suffered by clients or third parties arising from the negligence of employees for work performed by employees in the course of employment. The nature and extent of

that liability will be the same as if the employer committed the negligence personally.’

The employer is responsible for the employee during the course of the employee’s daily work. It is the registered surveyor’s responsibility to supervise and correct any employee, to maintain the surveying practice standards. The surveyor will be held liable for any breach in that standard.

The employee is not always able to hide behind their employer if there is evidence that proves the employee is at fault. This is known as vicarious liability. However in most instances, the employer will have coverage under their professional negligence insurance for this situation.

A surveyor has a responsibility to execute professional skills at a level that is expected by society, for a person with such qualifications. To not maintain this level of expertise, the surveyor could be in breach of a Tort of Negligence.

It is this area of the law that the Federal Government of Australia generated an inquiry into, in 2002. Subsequently a reform of Public Liability and Professional Indemnity Insurance was instigated, to stem the escalating cost of insurance premiums, and cost of large claims on all professions including surveying. The reform brought about the following amendments at Commonwealth Government level; *The Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004* was enacted on 13 July 2004. This Act ensures that a nationally consistent approach is taken to limitation periods and constraints on damages arising from

personal injury or death. These rules will apply to any claim for personal injuries or death brought in the form of an unconscionable conduct claim, a contravention of the product safety and information provisions, a supply by a manufacturer or importer of unsatisfactory consumer goods or a supply by a manufacturer or importer of defective goods.

*The Trade Practices Amendment (Personal Injuries and Death) Bill 2004* was introduced into the Parliament on 9 December 2004. This Bill will prevent individuals, and the Australian Competition and Consumer Commission, in a representative capacity, from bringing actions for damages for personal injuries or death resulting from contraventions of Division 1 of Part V of the *Trade Practices Act 1974*.

## **2.6 Professional Negligence**

Professional Negligence occurs when a surveyor fails to execute the required duty of care, technical competence and skill that is expected of a surveyor with the same level of experience. The claimant must prove that they have suffered a personal injury, or damage to property, to be able to sue the surveyor for professional negligence. This means that a party can sue for negligence when they are injured by another person who either: did an act which a reasonable person in the circumstances would not have done; or failed to do an act which a reasonable person in the circumstances would have done, and that action or failure to act caused the injury suffered.

The plaintiff (injured party) must prove, on the balance of probabilities, all of the following: That the defendant owed a duty to the plaintiff to take reasonable care to prevent the plaintiff suffering injury, loss or damage. The defendant breached that duty, by failing to live up to the standard of care expected. The defendant's breach of duty caused damage to the plaintiff. The plaintiff suffered damage, loss or injury that was of a kind which was reasonably foreseeable i.e. the damage was not too remote.

### **2.61 Duty of Care**

The legal aid website (2009) states 'the law says we all have a duty of care to take reasonable care not to cause foreseeable harm to other people or their property. This is also known as the law of negligence.' A surveyor is responsible of a duty of care towards any person they have been contracted by.

A Surveyor can be liable to someone, who they are not under contract to, for a breach of duty of care in tort. This can be on a professional level or a non-professional level.

Non-professional liability occurs when a surveyor is negligent during the course of the time at work but not in direct line of the surveying tasks. When a surveyor is negligent in the execution of their work and the negligence affects a person or their property, however if the person is not their client, the surveyor is responsible under the law of professional liability.

There are some situations where a duty of care is readily recognised, for example:

**By the common law:** Employers owe a duty to employees to provide a safe working environment. This entails providing competent staff, safe equipment and a safe system of work. Drivers owe a duty to others using the road (and their

property). Occupiers of land owe a duty to those entering their property (even trespassers in certain circumstances). Professional persons owe a duty to their clients.

**By statute:** Parliaments have, on occasion; added circumstances where a duty is owed; clarified the common law duty; restricted access to common law rights; or altered the actual standard of care owed once the duty has been established. For example, consider the various legislative instruments relating to: occupational health and safety; workers' compensation; occupier's liability; and product liability.

## 2.62 The Standard of Care

Once the duty of care is established it is necessary to determine the standard of care, which is the benchmark a professional person is expected to meet in the execution of their work practice. The following case lays down this precedent.

*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583 Wikipedia (2009) 'is an [English tort law](#) case that lays down the typical rule for assessing the appropriate standard of reasonable care in [negligence](#) cases involving skilled professionals (for example, doctors): the "Bolam test". Where the defendant has represented him or herself as having more than average skills and abilities, this test expects standards which must be in accordance with a responsible body of opinion, even if others differ in opinion.'

The legal requirements are such that a surveyor will exert a degree of skill that is expected of a competent surveyor, and such a standard will be executed in any contract. The measurement of this skill is controlled by the overseeing professional body. Breaches to this standard are dealt with by that body or in court. Blume,

Gibbons, & Gill (1986) refers to the case of ‘Lanphier –v- Phipo (1838) in which the following principles were laid down. Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. There may be persons who have higher possible education and greater advantage than he has but he undertakes to bring a fair, reasonable and competent degree of skill, which is the standard that has been followed ever since.’

The surveyor’s duty of care extends not only to their client but also to persons directly affected by the surveyor’s actions. The time frame and areas that duty of care may cover is known as the extent of the duty of care. It is important that a surveyor is familiar with these expectations, so as to avoid claims against the surveyor’s practice.

### **2.63 Negligent Misstatement**

The inaccurate reporting of information, either verbal or written, is the most common form of professional liability for the surveyor. Liability lies with the surveyor not reporting the correct information to the client, and is called negligent misstatement. This often occurs unintentionally, however it can lead to claims of damages and economic loss experienced by the claimant or client.

### **2.64 Contracts**

A contract occurs between two parties, and is a binding agreement which details the requirements that will be expected to be completed over the job at hand. These include the cost, time frame, productivity and finished results. Contracts are formal and informal. Formal are contracts under seal such as a deed. Informal are in the form of a written agreement or verbal agreement, or a combination of both.



The court is able to decide if the contract is binding, and can add areas as the judge sees fit. The additions must seem to be fair to both parties concerned. Confidentiality is another important matter that may be implied in a contract where it is not specifically mentioned.

It is an important rule of risk management and good business to have all contracts in writing, to avoid future disputes. The following points should be included in every contract: a detailed list of expected services or goods to be provided; the price in full; time frame for delivery of the goods or completion of the service; special needs or terms relating to the job at hand; resolution plan for any unexpected difficulties along the way. Electronic forms of communication such as E-mail are a written form of agreement, and can be used as written proof of a contract between two parties. The surveyor must be aware of the limitations in all contracts and never sign any contract that is unclear. If there are any doubts, legal advice should be sought before signing.

### **2.65 Trade Practices Act**

There are requirements in Australia that monitor the sale of goods and services covered by legislation. The focus for this study is on the implied terms of contract for surveying services as covered by The Trade Practices Act 1974. The Trade Practices Act 1974 states that 'the services will be rendered with due care and skill, and that any material supplied in connection with those services will be reasonably fit for the purposes for which they are supplied.' It is an Act to monitor the delivery of goods and services to the community, and states 'a corporation shall

not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.’ Initially the Act did not cover surveying, as it did not see it as one of the services protected under the Act. Amendments to the fair trading legislation however has seen responsibility to deliver a high quality product to be a requirement of the individual, as important as that delivered by a corporation, and this has an impact on professions such as surveying.

### **2.66 Fair Trading Amendment Bill**

Recent false representations in relation to land have seen the need to extend the Trade Practices Act, and legislation has been altered to include the Fair Trading Amendment Bill (1994) which states that ‘the latter Act did not cover transactions in land from a consumer protection perspective. Such provisions remained at that time with the former Act. However, in the intervening period, it has become clear that certain consumer transactions may not be covered by either Act, given the range of matters which the Land (Fair Dealings) Act covers. There are certain transactions relating to representations in connection with subject to finance clauses in land contracts which potentially come within this category. Therefore, in order to remove such loopholes and to streamline and unify consumer protection Legislation generally, it has been determined that land transactions should be subject to the ordinary and uniform requirements contained in the Fair Trading Act. In this way, land transactions will be on the same footing as those pertaining to goods and services generally and, consequently, the Fair Trading Act may be characterised as a code of consumer protection Legislation.’

This area of the Act affects those dealing with transfers of land; however it is an area of the Law a surveyor must be familiar with, as so much of a surveyors practice relates to land and associated transfers. Section 53A of the Fair Trading Act (1974) states, in part, as follows: ‘a corporation shall not, in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land; make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land.’

### **2.67 Confidentiality**

The surveying profession by its nature is a collector of information, and often a surveyor is exposed to a client’s personal information. The Law relating to confidentiality requires the surveyor to know how to handle and process this information, so as to protect the client and not expose the practice from any breaches of confidentiality.

### **2.7 Public Liability**

Public liability is an issue that the modern surveyor must constantly consider. According to Blume, Gibbons, & Gill (1986) ‘the liability of a surveyor for professional negligence is a liability arising out of the professional conduct of a surveyor; a partner; an officer of a corporation; or an employee for whom the surveyor is vicariously liable.’

Public liability refers to financial damages and legal expenses arising out of the death, bodily injury or damage to property suffered by members of the general public. In recent years, these two issues have had an increased effect on the surveying profession.

### **2.71 The 2002 Senate Economics References Committee**

In 2002, The Senate Economics References Committee commissioned a Review of Public Liability and Professional Indemnity Insurance. The terms of reference were to report on: the impact of public liability insurance for small business and community and sporting organisations; and the impact of professional indemnity insurance, including Directors and Officers Insurance, for small business. Particular reference was made to: the cost of such insurance; reasons for the increase in premiums for such insurance; and schemes, arrangements or reforms that can reduce the cost of such insurance and/or better calculate and pool risk.

Chapter 3, paragraph 8 of the Senate Economics Review (2002) states ‘Suggested causes of increasing claims include arguments that Australia has become a more litigious society; that ‘no win no fee’ arrangements encourage claims; that there are not enough disincentives to pursuing unmeritorious claims; that courts over time have defined ‘negligence’ more generously to plaintiffs. However there seems to be little hard evidence on the validity of these arguments or the relative importance of the various items. This finding is in keeping with many of the findings of this dissertation, and provides evidence to suggest that in fact, in relation to the surveying profession, we are not living in a more litigious society over time.

The legal aid website of Queensland (2009) noted that ‘the federal government is currently reviewing the law of negligence as a result of the increase in the size of the claims made in recent years and the impact that this has had on insurance premiums. The Inquiry into the impact of public liability and professional indemnity insurance cost increases report commissioned by the federal government has recommended changes to the law to which governments at federal, state and territory levels are now responding. Significant changes are now in progress, including proposed amendments to the Trade Practices Act to make it compatible with existing and proposed professional standards legislation.’

There has been much debate as to the need to revise such legislation and the effect this will have on all professions including surveying. A submission by the Law Council of Australia (2000), to the Commonwealth Minister for Financial Services highlighted the fact that much of the basis of law in Australia was that ‘traditionally, professionals have accepted unlimited liability for their professional default because they have been able to sue against default. Liability insurance has proved an effective and equitable means of spreading legally compensable loss throughout the community through the flow on from insurance premiums built into the professional’s fee. This situation worked effectively whilst the scale of claims was, in general, modest. However, this is no longer the case. Over the past fifteen years or so there has been a substantial and escalating increase in the number and quantum of claims against professionals.’

The review of Public liability and Professional Indemnity insurance cost increases in 2002 by professionals from all areas of society including surveying, documented

the effects these increases have had on professionals. The representative for the surveying profession was Mr. I G Marler, and in a report to the Secretary of the Senate Economics Reference Committee (2002) Marler mentioned the need to introduce a regulating system to control increasing insurance costs. Marler (2002) states ‘the concepts and management of the ACSIS scheme are commended to you for consideration in the interests of stabilising Professional Indemnity costs to many professional groups. Furthermore we would suggest encouragement for State Legislation, similar to New South Wales and Western Australia that caps a professional’s liability and additionally amendment of the Federal Trade Practice Legislation so as not to override State Legislation and Schemes in this area. In summary our views in this regard are that from the community’s perspective it is better to have a Professional with their liability capped than to have no professional at all. The latter being the result of spiralling Professional Indemnity costs and unobtainable insurance cover.’

### **2.72 Strategies**

It is important for surveyors to put strategies in place to avoid having to lodge a professional indemnity or public liability insurance claim, and to protect against facing litigation. Marler and Ferguson (1999) suggest that ‘survey offices have to develop a culture that traps errors before they become public’. This idea needs to be ingrained into the psyche of the surveyor, and become part of their everyday routine. Marler and Ferguson (1999) provide an example stating ‘that if a surveyor had not kept his triplicate carbon book and not been given the site instruction in writing, it would have been one persons word against another’. By incorporating

such a simple and yet practical practice in the daily work routine, the surveyor is able to gain protection against potential litigation.

### **2.73 Disclaimers**

There are many publications that provide the surveyor with assistance in trying to avoid litigation. A Disclaimer Manual for Surveyors, is a publication produced by the Association of Consulting Surveyors Australia, and is an invaluable tool in any surveying practice, De Lange (1991) states ‘This manual can assist the surveyor by supporting office procedures and plan preparation, assisting in the use of explanatory contract clauses and warnings’. The Macquarie Dictionary online describes a disclaimer as ‘a clause added to legal documents limiting the application of previous clauses.’

The case of *Butcher-v- Lachlan Elder Realty* discussed by Haly (2005) considered ‘whether the disclaimers on real estate brochure could prevent the agent being liable under section 52 of the Trades Practices Act. The Trade Practices Act (1974) states that ‘a corporation shall not, trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.’ Although the case involved a real estate agent, the lessons learnt from this case applies to all professions that use a disclaimer on documents. Haly (2005) states ‘whilst the real estate agency in this case avoided liability under the Act, it is my opinion that this case should not be seen as giving authority to the proposition that a disclaimer printed in a small font will always be effective. Flirting with the boundaries of the law in this regard is imprudent at best.’

## **2.8 The Russell Island (Morgan) inquiry**

The surveyor faces pressure from the client to produce a survey that gives the best financial results. At times it can be a fine balance in private practice, between producing the result the client wants and at the same time complying with legal regulations and moral requirements of the profession. The importance of maintaining professional standards cannot be underestimated, so as not to work in breach of the law.

An example of a surveyor facing litigation and disciplinary action is the Russell Island (Morgan) Inquiry. The Moreton Bay Combined Island Associations Incorporated newsletter (2009) claims ‘A surveyor who surveyed 7335 Russell Island lots was found by the enquiry to have “conducted himself unprofessionally”. He had “surveyed for the purposes of subdividing lots without the reasonable expectation they would be filled before sale” and “engaged in a survey for the subdivision of land into residential lots and when such land was obviously inundated he failed in many instances to take levels or other precautionary measures to ensure that it would properly be done.’ Survey plans were registered at the Titles Office without the rectification work being done.

According to a Courier-Mail article of by Peter Morely on 11/5/1979, the surveyor was to be charged with professional misconduct and could be directed to rectify, at his own cost any deficient work on the 7335 allotments he surveyed. With release of the 30 year old report inquiry report, we all now know that the State Government alone and not the Redland City Council needs now to rectify the island’s “unprofessional” survey and everything that stems from that.’



This case falls into the categories of unconscionable conduct and professional misconduct. Unconscionable conduct is conduct that it is so extreme that it is appalling to any reasonable person. Such conduct can occur when one party has more power than the other within the transaction, and uses that power to benefit themselves. This could be in a financial way or to gain even more power in the social arena. This type of conduct has been seen many times in the political arena, and often plays out that a politician has used their position to increase their financial stakes in society. Duhaime (2009) states that professional misconduct is ‘conduct on the part of a certified professional that is contrary to the interests of the public served by that professional, or which harms the standing of the profession in the eyes of the public.

## **2.9 The Future of Surveying**

The surveyors of the future will be faced with an ever changing technical environment. This is going to require many changes to the way surveyors are governed, both in relation to legislation and by their governing bodies. Enemark (2006) explores the course the profession is taking by stating that ‘the future imposes all kinds of challenges upon our profession and educational institutions. Furthermore, issues such as curricular development; quality assurance; continuing professional development; and mutual recognition are crucial to any professional organisation at national, regional or international level. The issues become even more acute when looking at the challenges facing the surveying profession.’

A call for change is gaining momentum, as more surveyors are looking to the future with the ideas for a new and modern approach. The surveying profession, or

spatial science profession, as many would like it to be known faces many challenges. Ristevski and Williamson (2001) remark that the current system ‘has for one hundred years delivered a remarkably successful, efficient, low-cost form of regulation which has maintained the integrity of land records, contributed to certainty of title and the all important credibility of the land registration system. While the system has been a relatively effective one, the tenets that define it remain outdated in the current environment. The outmoded nature has been recognised in Victoria and the current reform process is aimed at delivering a modern regulatory system.’

Reforms to the system will ultimately see a new role for the modern surveyor. Such calls for reform have been discussed in commissioned working groups to recommend the way into the future for surveying. The International Federation of Surveyors (FIG) published a document in 1998 titled “Cadastre 2014, A Vision for a Future Cadastral Systems” by the Swiss surveyors Jurg Kauffman and Daniel Steudler. The main elements of this paper are; the separation between maps and register will be abolished; cadastral mapping will be no longer used; paper and pencil cadastre will have gone completely. Cadastre 2014 will be highly privatised with public and private practice working closely together and will be cost effective. The Cadastre 2014 will show the complete legal situation of land, which will make land administration and management simpler in the future.

Jones, Rowe and Kentish (1999) state ‘the land-related professions have traditionally functioned as distinct entities, liaising when appropriate to accomplish specific outcomes. It is debatable whether this is an appropriate structure for the

future. The growing ability to access and update integrated land-related information raises questions regarding segmentation of the professions. It is appropriate to move away from relatively narrow professional streams and develop a more broadly based multi-skilled profession?' Clearly this is a very contentious debate. With advances in technology the surveying profession will experience the use of its skill by other industries. The public will look to the surveyor for the more skilled aspects of the profession. This will see a doubling up of information collection. It is debated that the modern surveying practice will consist of multi-disciplinary professionals that that can best deal with the demands of the future.

There is also pressure placed on the relevant Boards, for a reform of surveying administrations. Jones, Rowe and Kentish (1999) state 'it should be noted that the advent of a legal coordinate-based cadastre would remove a large part of the current rationale for licensing and registration. It would also remove much of the need for survey examination, requiring surveyors to take a much higher level of responsibility for their work. It would not, however, remove the need for practitioners to be competent, nor would it remove the need for discipline specialists.'

The future for spatial information is a global one. The technology revolution will see the need for a global data collection system and those countries that adapt to this move will have an advantage in the modern market. This will require reforms to legislation that at present regulate only a local industry. In response to these dynamic changes Williamson and Grant (1999) suggest 'there will be differing roles for individuals, government's bodies and agencies at all levels as well as

government systems. On the one hand, governments will have to take on the role of an umpire in resolving competing land, water and natural resource use demands. On the other, public participation in the debate on land and natural resource access and allocation is vital in resolving such important issues in a democratic manner.’ This process should be the basis for the policies that set the rules for the future roles of both these parties, and the potential changes to legislation at government level. The surveyor’s role is to evolve with these changes, and to continually gain the required knowledge on the way into the future.

## Chapter 3 – Methods

### 3.1 Introduction

This project will involve the use a mixed research methodology combining the use of quantitative and qualitative research methods to investigate the hypotheses set out below. The results will be analysed to determine the effect on the overall project.

### 3.2 Hypothesis 1

**Does the statistical data support the statement that we are living in a more litigious society in relation to surveying?**

#### 3.21 Aim

- To provide the number of litigation cases involving surveyors in Australia.
- To provide the number of disciplinary hearings conducted by the relevant surveying boards in Australia.
- To provide the number of professional indemnity and public liability claims lodged with insurance companies by surveyors in Australia.

#### 3.22 Method

- To collect data from legal databases involving surveyors under such sections of the law as negligence; duty of care; negligent mis-statement; contract law; misleading and deceptive conduct; false representations and

confidentiality. Relevant cases involving surveyors will be summarised and relevant areas of the law highlighted.

- Databases include; LexisNexis AU, Lawbook online, Legal Aid website, AUSTLII online, CCH online, Hein online, Oxford dictionary, Macquarie dictionary online and Duhaime Legal Dictionary online.
- To collect statistical data from phone calls and E-mail relating to the number and severity of complaints taken by relevant surveying Boards in Australia. This included the Surveyors Board of Queensland; Surveyors Registration Board of Victoria; Land Surveyors Licensing Board of Western Australia; The Surveyors Board of The Northern Territory; The Board of Surveying and Spatial Information of New South Wales; The Tasmanian Land Surveyors Accreditation Board and The Institution of Surveyors, Australia Inc. (South Australia). The results will be numerically and graphically illustrated.
- To collect data from the websites of relevant Boards of surveying in each state, regarding disciplinary hearings and to investigate the outcomes of such hearings.
- To collect data from insurance companies relating to Professional Indemnity and Public Liability claims made against surveyors, collected from the Australian Prudential Regulation Authority (APRA). The results will be numerically and graphically illustrated.

### **3.23 Conclusion**

The researching methods involved a quantitative research style and produced numerically and graphically illustrated data to determine the potential risk for the

professional surveyor facing litigation or disciplinary action by the Boards of Surveying in each state. However the number of legal cases that had lead to prosecution are relatively few and many breaches in surveying practice are dealt with by insurance companies in the form of professional indemnity or public liability claims.

It became apparent during the course of the research, that there was more to this topic then meets the eye. During conversations with fellow surveyors, there was a general feeling of pressure being placed on the professional surveyor with regards to the risk of litigation. Therefore a second hypothesis was required which would have a qualitative research angle.

### **3.3 Hypothesis 2**

**Does the surveying profession perceive that we are living in a more litigious society in relation to the surveying profession?**

#### **3.31 Aim**

- To determine the principles defining a profession, and a professional.
- To analyse relevant areas of the law relating to the professional surveyor.
- To analyse the effect Government legislation has on the surveying profession.
- To discuss the role of the Board of Surveyors and the processes by which they regulate the surveying profession.
- To discuss the future changes to the relevant Boards of Surveying and the profession as a whole into the future.

- To analyse the effect the insurance industry has on the surveying profession.
- To discuss and analyse the pressures faced by the modern surveyor.
- To explore the knowledge of law and legislation possessed by experienced surveyors from both public and private practice.

### **3.32 Method**

An extensive literature review was required to discuss the relevant law and related Government legislation relevant to the surveying profession was conducted. The role of the board of surveyors in each state was investigated, and the effect the current economic environment has on the modern surveyor was explored.

The actual numbers of legal cases and insurance claims are relatively few, but due to the transparent society that we live in, the pressure on the surveying professional had to be considered. Therefore the methodology was expanded to include face to face interviews, to determine if the general surveying community was feeling this pressure.

It may be assumed that the methodology was to become qualitative in nature, relying on the surveyors opinions. However the benefits of applying a mixed research methodology using survey questions to gather information was considered more appropriate. This data was then graphed and analysed.



### **3.33 Survey Questionnaire**

The survey questionnaire investigated the knowledge of thirteen professional surveyors. The answers are graphed in groups of yes and no categories. The short questionnaire was used to collect factual data about the surveyor interviewed including their knowledge of law and experience relating to surveying.

### **3.34 Interview Questions**

It was necessary to apply a qualitative research technique in the form of face to face interviews. The information collected was analysed to explain the relevance of the hypothesis that surveyors are experiencing a more litigious work environment than in previous years. Relevant parts of the interviews are included, thus forming a mixed research methodology.

### **3.3.4 Conclusion**

The questionnaire and interview questions provided relevant data on the effects that the current economic climate has on the surveyor and the surveying profession. The data demonstrated the vast knowledge required to be a professional surveyor in Australia, and the responsibilities they face.

## **3.4 Mixed Methodology research**

There is some debate on the use of a mixed research methodology, and the formation of the necessary framework models it generates. It is not the aim here to develop such a model. However there is a benefit within this study to use both quantitative and qualitative research techniques.

### **3.5 Ethical issues**

The information collected by both the questionnaire and interview questions is anonymous, and the answers are treated with the same practices of confidentiality as any professional would maintain when dealing with any client or member of the public.

### **3.6 Conclusion**

This chapter has described the style of methodology that was used to collect the necessary information to prove or disprove the above mentioned hypotheses. It explains the reason in using both quantitative and qualitative research methods. The next chapter will investigate the results and endeavour to analysis the effect on the surveying profession.

# Chapter 4 – Complaints & Disciplinary Action

## 4.1 Introduction - Complaints

If a surveyor falls in breach of the law often the Board of Surveyors is contacted, and a complaint lodged. An investigation into the number of complaints made against surveyors to the surveying Board's throughout Australia was undertaken. Information was difficult to obtain in all states. Some states did not provide public access to this data, and some states, such as South Australia did not actually record the data at all. The eastern states of Australia provided the best data source as can be seen in the following graphs.

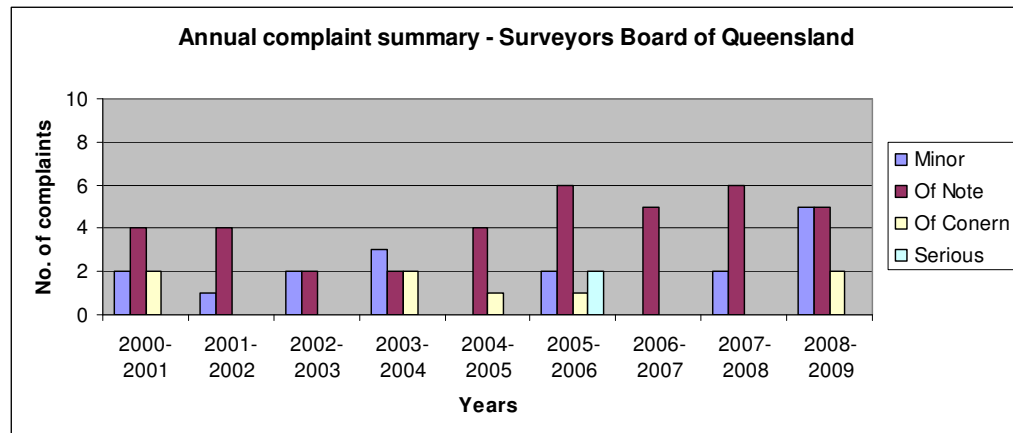


Figure 4.1 Annual Complaints Summary – Source: Surveyors Board of Queensland

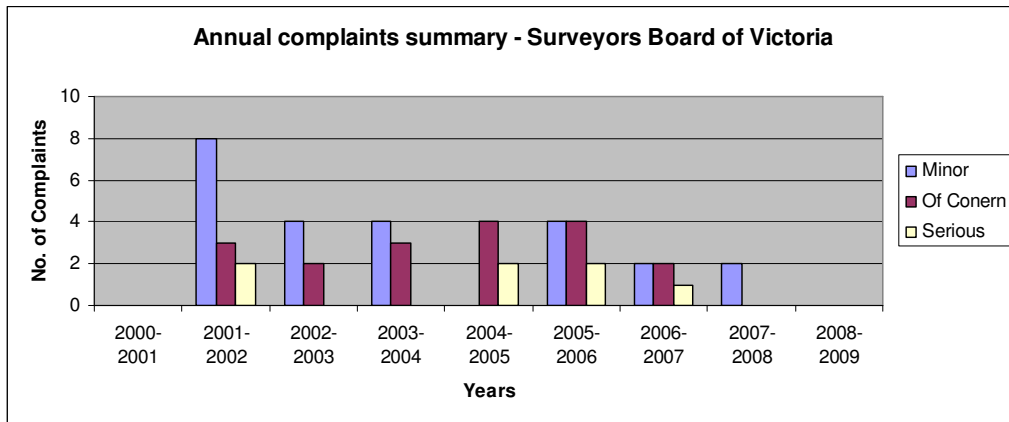


Figure 4.2 Annual Complaints Summary – Source: Surveyors Board of Victoria

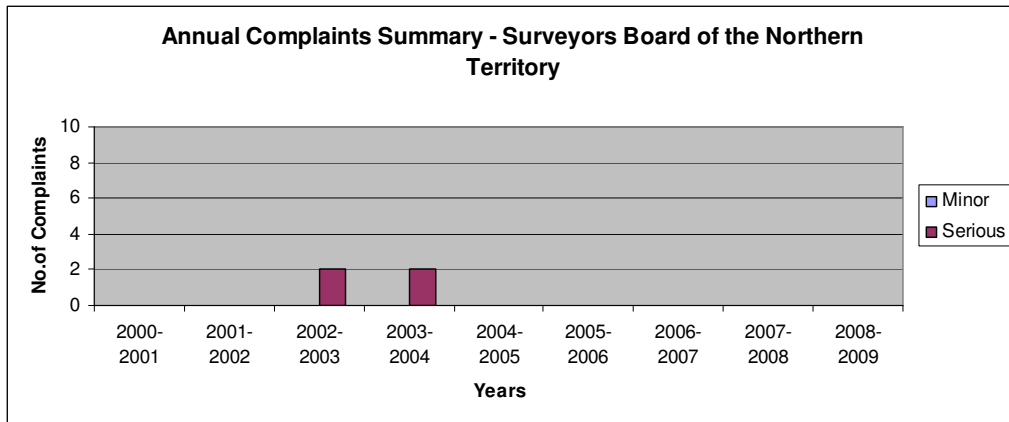


Figure 4.3 Annual Complaints Summary – Source: Surveyors Board of the Northern Territory

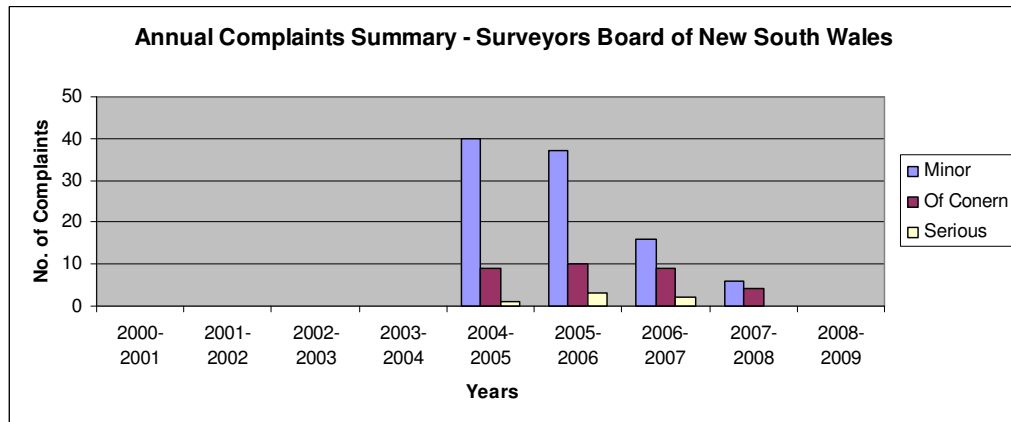


Figure 4.4 Annual Complaints Summary – Source: Surveyors Board of New South Wales

#### 4.11 Results and Discussion

The Surveyors Board of the Northern Territory is an interesting case, with only four complaints lodged in the last nine years.

The complaints are broken up into various categories, ranging from ‘minor’ to ‘serious’, and there is a general trend of a decrease in complaints lodged with the Board’s over recent times.

#### 4.2 Introduction - Disciplinary Action

The following cases are examples of disciplinary action taken by various Australian state Surveying Boards, against licensed or registered surveyors under their jurisdiction. These cases are compiled to highlight areas where surveyors have come into conflict with their governing bodies, and are used to provide a warning for surveyors on how to avoid similar problems in the future.

### **4.3 Case No.1**

This case details a Formal Hearing into the Professional Conduct of Mr. Graham Shaw Licensed Surveyor (Registration. No. 1063) Reference: S.23/04. Surveyors Registration Board of Victoria website (2009).

#### **4.31 Summary of the Board's Decision**

On 20 June 2008, the Surveyors Registration Board of Victoria received advice of Mr. Shaw's audit history from the Office of Surveyor-General Victoria.

The Board noted from that advice, the history of Mr. Shaw's audits from 1 August 1997 to 11 February 2008, and that the results of his last two audits, PS 544665K and PS 517687C, were unsatisfactory.

Following consideration of this advice, the Board determined to conduct a formal hearing, in accordance with Section 23 of the Surveying Act 2004 to determine whether Mr. Shaw, in his business as a licensed surveyor, had engaged in unprofessional conduct.

The hearing was conducted on 15 September 2008 and the Panel made the following decision:

#### **4.32 Findings**

That the Licensed Surveyor had engaged in unprofessional conduct which was of a serious nature.

#### **4.33 Determination**

That the Registration of the Licensed Surveyor be subject to the following condition:

‘That all Abstracts of Field Notes certified by the Licensed Surveyor between September 15, 2008 and March 31, 2009 be countersigned by another Licensed Surveyor who certifies that the Abstract of Field Notes correctly represents the adopted boundaries and the related features as at the date of the survey.’

#### **4.4 Case No.2**

This case details a Formal Hearing into the Professional Conduct of Mr John Muldowney LS (Registration. No. 1790). Reference: S23/05. Surveyors Registration Board of Victoria website (2009).

##### **4.41 Summary of the Board’s Decision**

On 24 November 2008, the Surveyors Registration Board of Victoria received advice of Mr Muldowney’s audit history from the Office of Surveyor-General Victoria. The Board noted from that advice, the history of Mr Muldowney’s audits from 27 August 2001 to 18 April 2008, and that the results of the last three audits, PS 603889K, PS 603895Q and PS 545232N, were unsatisfactory. Following consideration of this advice, the Board determined to conduct a formal hearing, in accordance with Section 23 of the *Surveying Act 2004* to determine whether Mr Muldowney, in his business as a licensed surveyor, had engaged in unprofessional conduct. The hearing was conducted on 9 June 2009 and the Panel made the following decision:

#### **4.42 Findings**

The Motion of the Surveyors Registration Board of Victoria was made out in that the Licensed Surveyor had engaged in unprofessional conduct which was not of a serious nature.

#### **4.43 Determination**

The Licensed Surveyor be reprimanded.

That the Licensed Surveyor be required to undertake further training in the form of an office audit of his procedures and checking systems by a Licensed Surveyor appointed by the Board (“the supervising Licensed Surveyor”).

The supervising Licensed Surveyor shall not be a professional competitor of the Licensed Surveyor.

The duration of the audit shall be approximately one half a day to a day.

The audit shall be conducted within three months of the date of this Decision and the Licensed Surveyor shall be given at least 28 days prior notice of the date of the audit.

The cost of the audit shall be fully reimbursed by the Licensed Surveyor to the Board within 30 days of receipt of the Board’s invoice or such further extension of time the Board deems fit.

#### **4.5 Case No.3**

This case details a Formal Hearing into the Professional Conduct of Mr. Robert Tudor Owen LS, Enquiry E1 of 2004. Land Surveyors Licensing Board of Western Australia website (2009).



#### **4.51 Summary of the Board's Decision**

In accordance with Section 21 (7) of the Licensed Surveyors Act 1909 the following orders of the Board are notified for general information.

#### **4.52 Findings**

Having found 1 charge laid under Section 21 (1) (f) of the Licensed Surveyors Act against Robert Tudor Owen proven, the Board ordered that Mr Tudor Owen be reprimanded, pay a fine of \$1000 and pay part of the cost of the enquiry of an amount of \$500.

#### **4.53 Determination**

The Board ordered that the following conditions be placed on Mr. Tudor Owen's Practising Certificate.

1. Mr. Tudor Owen is to complete the subdivision expeditiously and submit progress reports to the Board after 2 weeks and thereafter every 4 weeks until completion.
2. Provide the Board, by 31st January 2005, with a Business Plan showing how he will improve his record keeping, document control and communications with his client.

#### **4.6 Introduction - Tribunal Hearings**

The following cases detail Tribunal hearings following on from disciplinary action taken by various Australian state Surveying Boards against licensed or registered surveyors under their jurisdiction.

## **4.7 Case No.4**

This is a case between the Land Surveyors Licensing Board of Western Australia (WA) and Licensed Surveyor Mr Peter Neale. WASAT 176 (5 July 2007). File No. VR 128 of 2006. The relevant legislation to this case is the *Licensed Surveyors (Transfer of Land Act 1893) Regulations 1961*(WA); the *Licensed Surveyors Act 1909* (WA); the *Medical Act 1894* (WA) and the *State Administrative Tribunal Act 2004* (WA). The tribunal ordered that there was cause for disciplinary action found on one of ten allegations.

### **4.71 Summary of Tribunal's Decision**

Mr Peter Neale is a licensed surveyor. In 1999 he was approached by Ms Elsa Lloyd to undertake certain work in relation to her proposal to subdivide her property in White Gum Valley. Following their initial discussions, Mr Neale prepared a sketch plan of the subdivision, and arranged for the necessary documents to be signed by Ms Lloyd to enable an application to be made to the Western Australian Planning Commission (WAPC) for approval of the proposed subdivision. In February 2000, the WAPC approved the application subject to certain conditions. The approval was valid for a period of three years.

The conditions of the approval were not fulfilled by Ms Lloyd within the three year time frame, and in June 2003, Ms Lloyd made a second application to the WAPC for subdivision approval. After negotiation by Ms Lloyd to have two newly imposed conditions removed, that application was approved, subject to the same conditions as the original approval. In February 2004, Ms Lloyd contacted Mr Neale to have him undertake further work in relation to the completion of the subdivision. After further delays in clearing the conditions of approval, Mr Neale

completed his survey and lodged the plan of subdivision in November 2004. From 17 December 2004 to 16 March 2005, Mr Neale's licence was suspended in relation to an unrelated matter. During that time, requisitions were sent to Mr Neale in relation to the plans lodged by him with the Department of Land Information. Mr Neale did not attend to those requisitions because of his suspension. Nor did he let Ms Lloyd know either of the requisitions, or of his suspension. Eventually, Mr Neale dealt with the requisitions in August 2005.

In July 2005, Ms Lloyd made certain complaints to the Land Surveyors Licensing Board concerning Mr Neale's conduct in relation to her subdivision. The Board reviewed the complaints and made a number of allegations to the Tribunal asserting that, in various respects, Mr Neale had been guilty of incompetence or negligence or alternatively unprofessional conduct in relation to his work for Ms Lloyd. Mr Neale admitted that he had acted unprofessionally in failing to tell Ms Lloyd of his incapacity to deal with the requisition in February 2005, but otherwise denied the allegations against him.

The Tribunal considered each of the allegations against Mr Neale. It considered that, apart from the matter admitted by Mr Neale, the evidence did not support findings against him on any of the allegations. In order to determine the allegations, the Tribunal examined the scope of the expression "in the course of surveying practice" as it is used in the disciplinary provisions of the *Licensed Surveyors Act 1909 (WA)*.

The Land Surveyors Licensing Board of Western Australia (The Board) alleged that Mr Neale acted negligently, incompetently or unprofessionally in relation to his work for Ms. Lloyd in ten respects.

#### **4.72 Allegations**

The Board alleged that Mr. Neale failed:

- 1/. To confirm in writing the scope of works;
- 2/. Within reasonable time to provide the owner with the letter of approval he received;
- 3/. To record in writing the delivery to the owner of the approval;
- 4/. To provide any advice, written or otherwise, as to the effect of the approval;
- 5/. At all times to keep the owner reasonably informed in writing as to the progress of the subdivision, and as to the ultimate completion of the subdivision;
- 6/. To give the owner any notice after receiving requisitions, and as to his incapacity to deal with the requisition so as to afford the owner reasonable opportunity to comply with the requisitions;
- 7/. To maintain any written record of the verbal communications with the owner;
- 8/. To return telephone calls received from the owner within a reasonable time;
- 9/. To maintain proper payment records regarding accounts for his services, to correctly charge the owner for services rendered and/or to refund the balance of any statutory fees paid by the owner; and
- 10/. To properly perform survey work on the property and lodge a satisfactory field book in accordance with the *Licensed Surveyors Act 1909 (WA)*.

#### **4.73 An Admission**

Mr Neale denied each of the allegations against him except for an admission that he was guilty of the failure referred to in allegation 6 above, and that that failure amounts to unprofessional conduct.

#### **4.74 Statutory Provisions**

The licensing of surveyors is governed by the *Licensed Surveyors Act 1909* (WA) (LS Act). The LS Act establishes the Board, and gives it the power to issue licenses to persons who meet the qualifications set out in section 7. The Board is given the power to make any inquiry necessary to determine applications before it, to determine whether a licensed surveyor has been complying with the LS Act or whether cause for disciplinary action against a licensed surveyor exists, and for detecting offences against the LS Act. The LS Act provides for practicing certificates to be issued to licensed surveyors.

Section 16 of the LS Act sets out the powers of licensed surveyors. It provides: A person shall not practice as a licensed surveyor unless he is the holder of a licence. A person shall not make or attempt to make any authorised survey unless he is a licensed surveyor and the holder of a practicing certificate. Any person who practices as a licensed surveyor or makes or attempts to make any authorised survey, contrary to this section, commits an offence and is liable to a penalty not exceeding \$10 000."

Authorised surveys are defined in section 3 of the LS Act. In summary, authorised surveys are surveys of land authorised or required in relation to dealings with Crown land or legislation affecting titles to land or by the proprietor, lessee or mortgagee under any Act affecting titles to land. By conducting "authorised surveys", licensed surveyors perform an important function in the land titles system in Western Australia.

Section 21 of the LS Act deals with misconduct by licensed surveyors. Section 21(1) provides:

There is proper cause for disciplinary action in respect of a licensed surveyor if:

(a) he has falsely or negligently certified in respect of an authorised survey; or

(aa) he has falsely or negligently certified in respect of any plan, diagram, map or other document required or authorised under this Act or any other written law to be certified by a licensed surveyor; or

(b) he wilfully or by negligence has made, or caused to be made under his supervision, any survey which is so inaccurate or defective as to be unreliable; or

(ba) he has, in the course of surveying practice, been guilty of incompetence or negligence; or

(c) his certificate of competency, licence or practicing certificate has been obtained by fraud; or

(d) after being licensed under this Act, or any repealed Act relating to the licensing of surveyors, he has been convicted of any indictable offence, or offence under this Act or under regulations made under section 26; or

(e) he has been guilty of a contravention or attempted contravention of section 20; or

(f) he has been guilty of unprofessional conduct; or

(fa) he has disobeyed any order made under this subsection; or

(g) his certificate, licence, practicing certificate or registration in any reciprocating State or in any other country has been suspended or cancelled in such reciprocating State or country."

Section 21(1)(aa) provides a range of penalties that can be imposed by the Tribunal upon being satisfied that proper cause for disciplinary action exists.

#### 4.75 Reasoning

Section 21(1)(ba) provides that there is proper cause for disciplinary action where a licensed surveyor has "in the course of surveying practice" been guilty of incompetence or negligence. The LS Act is concerned with land or cadastral surveying, as distinct from activities in the broader surveying industry such as mining, engineering or hydrographic surveying. That is clear from the purpose of the LS Act which is "to provide for the registration and licensing of land surveyors; to control the practice of such surveyors, and for other purposes incidental thereto." The expression "surveying practice" is not defined. It would appear, however, to encompass a wider or at least different, range of land survey activities than activities associated with the conduct of "authorised surveys". The distinction between surveying practice and conducting authorised surveys can be seen in section 16 and section 21. Section 16(3) prohibits a person from "practice as a licensed surveyor" unless he is the holder of a licence. Section 16(3a) prohibits the making of an authorised survey unless the person is a licensed surveyor *and the holder of a practicing certificate* (italics added). It is apparent that a practicing certificate is not necessary to "practice as a licensed surveyor", but is necessary to make an authorised survey. Similarly, the offence provision in section 16(4) speaks of practice as a licensed surveyor, and making or attempting to make an authorised survey, as alternatives.

Similarly, section 21(1)(a) deals with negligence in a context of certification of an authorised survey, whereas section 21(ba) speaks of negligence "in the course of surveying practice".

The question of what constitutes conduct "in the course of surveying practice" is significant in this case because most of the allegations against Mr Neale relate to activities not directed to a particular survey of land affecting title. For example, the submission of a sketch plan and application for sub divisional approval to the WAPC does not involve an authorised survey, albeit that it is a preparatory step which may ultimately lead to an authorised survey being performed. In the court's view, "surveying practice" incorporates work commonly done by surveyors, in connection with land surveys, in the usual course of their business. It is apparent from Mr Neale's evidence, and from the evidence of Mr Graham Marion and Mr Stuart Colam, expert surveyors called by the applicant and respondent respectively, that work associated with applications to the WAPC for sub divisional approval, and in relation to the clearance of conditions of approval, are tasks commonly undertaken in the usual practice of surveyors. Putting aside for one moment the precise scope of the work undertaken by Mr Neale for Ms Lloyd, his engagement by her was an engagement to undertake tasks which came within the course of surveying practice. Thus, if Mr Neale were guilty of incompetence or negligence in relation to those tasks, his conduct would amount to proper cause for disciplinary action pursuant to section 21(1)(ba).

#### **4.76 Rulings**

All allegations except allegation 6 are not made out.

Allegation 6 - Failure to give notice of the Department of Land Information (DLI) requisition and Mr Neale's suspension.

As previously indicated, Mr Neale accepted the sixth allegation against him, and that he is guilty of unprofessional conduct in that respect. That concession is



rightly made, and the Board found that there is proper cause for disciplinary action in relation to allegation 6.

#### **4.77 Orders**

1. The respondent Mr Neale was ordered to pay a fine of \$750.
2. The respondent Mr Neale was ordered to pay to the applicant its costs fixed at \$1000.

Source: AUSTLII online legal database (2009)

#### **4.8 Case No.5**

This is a case between the Land Surveyors Licensing Board of Western Australia (WA) and Licensed Surveyor Mr Peter Neale. WASAT 309 (30 November 2007). File No. VR 188 of 2006. The relevant legislation to this case is the Licensed Surveyors (Guidance of Surveyors) Regulations 1961 (WA) and the Licensed Surveyors Act 1909 (WA). The tribunal ordered that there was Proper cause for disciplinary action for unprofessional conduct. Other complaints were dismissed.

#### **4.81 Summary of the Tribunal's Decision**

The Land Surveyors Licensing Board brought four complaints against Mr Neale:

1. The first related to him failing to properly complete a "release" letter to the Department of Land Information (DLI) advising that all clearances had been obtained in relation to a subdivision. The Board alleged that signing the release letter constituted a false certification in respect of an authorised survey.

2. The third complaint also related to the release letter, and proposed that Mr Neale was guilty of unprofessional conduct in providing an undated release letter to the owner of the land, the subject of the subdivision at a time when he knew that the clearances for the subdivision had not, in fact, been obtained.
3. The second allegation was that Mr Neale failed to lodge a statement that was required under certain guidelines published by the Board at the time of lodging other documents with the Department of Land Information.
4. The final allegation was that Mr Neale refused to take the steps necessary to enable final approval of the plan of subdivision unless the owner of the land withdrew a complaint that had been made to the Board about Mr Neale.

Having reviewed the history of the dealings between Mr Neale and his client, and the breakdown of the relationship between them, the Tribunal concluded that the signing of the release letter and its provision to the owner in advance of the final clearance being obtained did not amount to a false certification, nor to unprofessional conduct. The Tribunal concluded that the letter served an essentially administrative process, and it was reasonable for Mr Neale to have provided it to his client for use at the appropriate time. The Tribunal found that Mr Neale was not responsible for the fact that the letter was, in fact, dated by the client and used at a time which rendered its contents inaccurate.

The Tribunal found that, although Mr Neale had been guilty of an oversight in not providing the statement contemplated by the relevant guidelines, that this did not materially affect the approval of the subdivisional plans and was remedied immediately upon the oversight being drawn to his attention. The Tribunal did not

consider the oversight constituted negligence nor incompetence such as to give rise to cause for disciplinary action.

The Tribunal found that Mr Neale did make the threat not to complete the work until such time as the complaint to the Board was withdrawn. It found that the conduct amounted to unprofessional conduct warranting a disciplinary sanction.

#### **4.82 Allegations**

The Tribunal has power, on application of the Land Surveyors Licensing Board, to impose various disciplinary sanctions on a licensed surveyor where there is proper cause for disciplinary action. Section 21 of the *Licensed Surveyors Act 1909* (WA) identifies the type of conduct which gives proper cause to disciplinary action. This case concerns allegations that Mr Peter Neale, a licensed surveyor, had falsely or negligently certified in respect of an authorised survey (section 21(1)(a)), and had, in the course of surveyor practice, been guilty of incompetence or negligence (section 21(1)(ba)), and was guilty of unprofessional conduct (section 21(1)(f)).

The Board alleged that there is proper cause for disciplinary conduct against Mr Neale on the ground that he failed to properly complete a release letter in the form specified in the DLI Survey Plan Practice Manual and Notice to Surveyors T5/2005 issued 6 September 2005 ("Release Letter").

The Notice to Surveyors T5/2005 requires that, in any Release Letter, a surveyor is to certify to DLI that all clearances and conditions have been met prior to execution by the surveyor of the Release Letter.

On 16 February 2006 DLI received a Release Letter signed by the respondent for DP 47980 certifying that clearance documents had been lodged with WAPC. The City of Gosnells did not provide any clearance until 8 May 2005. The WAPC approval for DP 47980 was not obtained until 15 May 2006. The respondent knew that clearance documents had not been lodged with WAPC when he signed the Release Letter. The Board alleged that the surveyor failed to 'properly and/or within a reasonable time lodge with the DLI, a final survey certificate for DP 47980.

The respondent lodged a Final Survey Certificate (FSC) on 31 May 2006 approximately 6 months after the survey was conducted. Having lodged the FSC more than 2 months after the survey was conducted, the surveyor failed to lodge with the FSC a statement in accordance with the Special Survey Area (SSA) Guidelines to the effect that the marks shown on the deposited plan remained in place at the date of lodgement of the FSC. The respondent gave the signed but undated Release Letter to the Owner or another person at a time when the respondent knew that matters certified in the Release Letter had not occurred. In a telephone conversation between the respondent and Robert Auguste on or about 31 May 2006, the respondent refused to lodge at DLI the FSC required for the Commissioner unless, and on condition that, Mr Auguste first discontinue the Complaint about the respondent made to the applicant." The allegations numbered 1 and 2 above are said to constitute falsely or negligently certifying in respect of an authorised survey, or alternatively to constitute incompetence or negligence. The allegations numbered 3 and 4 above are said to constitute unprofessional conduct.

#### 4.83 Statutory Provisions

Section 26(1)(m) of the LS Act authorises the Board to make regulations that provide for the direction and guidance of licensed surveyors in carrying out the provisions of legislation relating to authorised surveys. The Board has promulgated several sets of regulations, including the *Licensed Surveyors (Guidance of Surveyors) Regulations 1961* (WA). Regulation 3A provides that "from time to time the Board may make guidelines as to the practices to be followed by surveyors". Regulation 26A deals with special surveys. The regulation provides that "the Surveyor General or the Board, as the case requires, may issue directions or guidelines applying to a survey or type of survey conducted in accordance with an authorisation under sub regulation 1 or 2." Regulation 26A was applicable to surveys of the type undertaken by Mr Neale in this case, being surveys covered by the SSA Guidelines. The SSA Guidelines are made pursuant to regulation 26A of the *Licensed Surveyors (Guidance of Surveyors) Regulations 1961* (WA). Clause 9.5 of the SSA Guidelines provides that "surveyors must submit a release letter before plans will be delivered to the WAPC". It then specifies that plans will not be made in order for dealings until WAPC approval has been endorsed.

Regulation 5 of the *Licensed Surveyors (Transfer of Land Act 1893) Regulations 1961* (WA) (the TLA Regulations) required surveyors to comply with notice T5/2005. Regulation 5 of the TLA Regulations relevantly requires every surveyor to observe and comply with any special direction given by the inspector of plans and surveys "in relation to plans and surveys". Notice T5/2005 is headed "Miscellaneous plan issues".

#### **4.84 Rulings**

It was found that on or in the few days before 31 May 2006, Mr Neale told Mr Auguste that he would lodge the final survey certificate if Mr Auguste discontinued his complaint to the Board. Mr Neale accepted that, if that finding were made, the conduct would amount to unprofessional conduct for the purposes of s 21(1)(f).

It followed that there was proper cause for disciplinary action in respect of Mr Neale by reason of his unprofessional conduct in telling Mr Auguste that he would not complete the work unless the complaint to the Board were withdrawn.

#### **4.85 Orders**

The allegations numbered 1, 2 and 3 against Mr Neale are not made out. There was proper cause for disciplinary action in respect of Mr Neale in relation to allegation 4, and all parties were heard on the question of penalty and costs. The final outcome of this case in relation to penalty and costs was not disclosed.

Source: AUSTLII online legal database (2009)

#### **4.9 Case No.6**

This is a case between Licensed Surveyor Mr George Szirom and the Surveyors Registration Board of Victoria (VIC). VICSC 184 (18 August 1995). File No. 4622 of 1995. The relevant legislation to this case is the Surveyors Act 1978 (VIC).

section 20. The tribunal ordered that there was cause for disciplinary action found on one of ten allegations.

#### **4.91 Summary of Court's Decision**

BEACH J This is the return of a summons filed on behalf of the defendant, the Surveyors' Board of Victoria (the Board) whereby the Board seeks an order that the proceeding be stayed or dismissed as an abuse of the process of the court.

The plaintiff, George Szirom, is a registered surveyor. Between 19 July 1993 and 16 February 1995 the Board held inquiries into complaints made against the plaintiff in respect of two surveys carried out by him. One inquiry is referred to in the originating motion filed by the plaintiff as the Carmichael Street Inquiry, the other is referred to as the Parish of Deutgam Inquiry.

At the conclusion of the inquiries the Board found the plaintiff guilty of culpable negligence in respect of each survey and guilty of certifying to the accuracy of a survey which did not comply with the Surveyors' (Cadastral Surveys) Regulations 1985 in respect of the Deutgam survey.

#### **4.92 Statutory Provisions**

By orders of the Board dated 17 February 1995 various penalties were imposed on the plaintiff. In respect of the Carmichael Street survey, the plaintiff's registration as a surveyor was suspended until 25 March 1995 and he was ordered to pay \$12,500 costs to the Board. In respect of the Deutgam survey, the plaintiff's registration was first suspended until 23 August 1995 (the

culpable negligence charge) and then cancelled (the breach of regulation charge).

The plaintiff was also ordered to pay \$15,576.35 costs to the Board.

On 23 February 1995 the plaintiff filed the originating motion in the proceeding whereby he seeks to have the findings of the Board quashed. Numerous allegations are made against the Board in the originating motion and supporting material, including allegations that the plaintiff was denied natural justice by the Board.

On 19 May 1995 the plaintiff filed in the County Court two notices of appeal against the orders of the Board. The notices were filed pursuant to the provisions of section 20 of the Surveyors Act 1978, which reads:

"20 Appeal.

(1) Any person who feels aggrieved by an order of the Board under section 18 cancelling or suspending his registration under section 12 or the endorsement of the register under section 16 in relation to him may appeal to the County Court within three months after receiving notification of the cancellation or suspension as the case may be.

(2) The decision of the County Court on an appeal under sub-section (1) is final and without appeal."

Two principle arguments were advanced on behalf of the Board in support of its summons. In the first place it was said that section 20 provided the exclusive remedy available to a surveyor who wished to challenge a decision of the Board. In the second place it was said that it was vexatious for the plaintiff to bring two



proceedings against the Board seeking the same relief. In the circumstances the plaintiff must make an election as to which proceeding should go forward.

The question whether a section such as section 20 should be read as providing an exclusive remedy was considered by the High Court in *Twist v. Randwick Municipal Council* [1976] HCA 58; (1976) 136 CLR 106.

It was agreed by counsel for the plaintiff and counsel for the Board that the appeal to the County Court involved a hearing de novo (rehearing of the case). Therefore, if the matter proceeds in the County Court by way of appeal, there will be a comprehensive hearing of the appeals with both parties entitled to call whatever relevant evidence they wish to concerning the surveys and penalty in the event that question arises, and with both parties given the right to make submissions to the court. In my opinion, the fact that the plaintiff has a full statutory right of appeal on facts and law is indicative of a legislative intention that the right of appeal is the exclusive remedy available to a surveyor who wishes to challenge the validity or correctness of an order of the Board. If that is not so, one could have a situation where proceedings relating to a surveyor could be the subject of a multiplicity of hearings both before the Board and the courts.

In the present case, if the plaintiff succeeded in this court in establishing that he had been denied natural justice, in the ordinary course of events the matter would be sent back to the Board for a rehearing by a differently constituted board. If the fresh board found against the plaintiff, the plaintiff would then have a right of appeal to the County Court pursuant to section 20 of the Act. Limiting the plaintiff to his right of appeal to the County Court has the potential to reduce the number of hearings from four to two.

If this court determined the plaintiff's originating motion and found against him, would the plaintiff be able then to pursue his appeals in the County Court? If I may say so, a totally unsatisfactory situation. In my opinion, no other relief is available to the plaintiff than his right to appeal to the County Court and on that ground the present proceedings should be dismissed. Lest that finding is later held to be erroneous, I propose to express my view concerning the Board's second contention.

The principle applicable in a situation such as the present was restated by Cox J in *Australian Consolidated Industries and Anor. v. Scholle Industries Proprietary Limited* (1982) 62 FLR 289. At p 294 His Honour said:

"The principle is well established that a defendant is not, generally speaking, to be subjected to the hazard and expense of being sued simultaneously in different courts with respect to the same cause of action. 'In this country, where the two proceed, and where the judgments are followed by the same remedies, it is prima facie vexatious to bring two actions where one will do'. (*McHenry v. Lewis* (1882) 22 ChD 397, at p 400); see also *Moore v. Inglis* (1976) 50 ALJR 589."

In the present case one has two proceedings brought by the same plaintiff against the same defendant in different courts with respect to the same subject matter. Judgment in either court in favour of the plaintiff will result in the orders of the Board being set aside. In that situation the plaintiff has brought two actions where one will do. In my opinion it is vexatious for a plaintiff to adopt such a course. On that ground I would also dismiss the present proceeding.

#### **4.93 Orders**

The Judge ordered that the defendant's costs of this application and its costs of the proceeding up to and including 31 May 1995 be taxed and when taxed paid by the plaintiff.

Source: AUSTLII online legal database (2009)

#### **4.94 Summary**

Case one highlights a surveyor being reprimanded for engaging in unprofessional conduct of a serious nature.

Case two highlights a surveyor being reprimanded for engaging in unprofessional conduct not of a serious nature.

Case three highlights a surveyor being reprimanded, fined and ordered to undertake additional training.

Case four highlights a surveyor being reprimanded, fined and having his license to practice suspended for a period of time.

Case five highlights a surveyor being reprimanded, heavily fined and having his license to practice suspended for a period of time.

Case six highlights a surveyor's appeal against disciplinary action being quashed, and for the surveyor to pay court costs and associated taxes for bringing a vexatious claim against the Board.

## **4.95 Conclusion**

These cases highlight the need for surveyors to act professionally and work within the guidelines set-out by legislation and overseen by the relevant governing bodies within each state.

The surveyors in each of these cases have chosen to take a risk. By failing to work to an accepted standard, they have risked their reputation and professional standing and jeopardised the relationship with their client and their client's associates. Risk management is becoming increasingly important, and professional surveyors must carefully consider associated risks before making decisions.

Some of these cases also highlight examples of negligence and the surveyor's lack of duty of care to their clients. This issue is becoming increasingly important to surveyors, and responsibilities to the client; to the profession; to society and to themselves are important considerations when practising.

As explained in the literary review chapter of this dissertation, and highlighted in this chapter, the Board of Surveyors in each state plays a pivotal role in policing surveyors under their jurisdiction, and assists in upholding the professional standing of surveying within the community.

Following on from the investigation of disciplinary action and tribunal cases, the research turned to the insurance industry and the relationship between surveying and insurance was explored. Surveyors carry insurances in the form of professional indemnity, public liability, workers compensation and others for protection against litigation, and the following chapter explores this.

## Chapter 5 - Insurance

### **5.1 Introduction**

The need for adequate insurance cover for professional surveyors is an important part of the management of risks in any surveying practice. The investigation into the amount of litigation facing the surveyor required research into the effects of the insurance industry on the surveying profession in NSW and Australia. The statistics have been collected for the three main types of insurance relating to surveying. These include; Professional indemnity, Public liability and Workers compensation.

Raw data has been collected from the Australian Prudential Regulating Authority (APRA) for both Public Liability and Professional Indemnity insurances. Data for the Worker Compensation graphs was obtained from the WorkCover NSW. The following section provides an overview of insurance statistics relevant to the surveying profession.

### **5.2 Professional Indemnity Insurance**

Professional indemnity insurance is a form of insurance that indemnifies the insured against the consequences of a breach of professional duty, and particularly professional negligence. A professional indemnity insurance policy may provide indemnity against all losses that the insured sustained resulting from professional errors or omissions in the conduct of its business.

A surveyor carries professional indemnity insurance with respect to liabilities arising out of or in the course of their daily work.

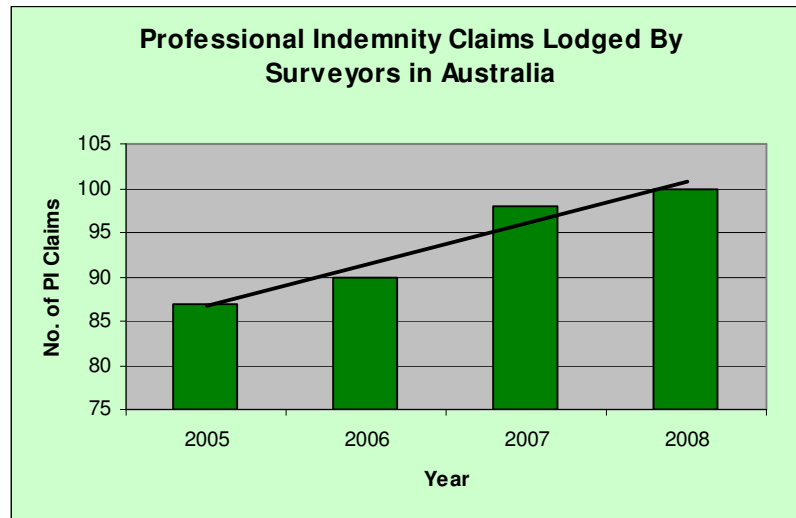


Figure 5.1 Professional Indemnity Insurance Claims in Australia (No. of Claims)

### 5.21 Results

In relation to professional indemnity, the statistics show an increase in the number of claims lodged by surveyors over the last four years. In figure 6.5 there is an increase in claims from eighty seven in 2005, to one hundred in 2008.

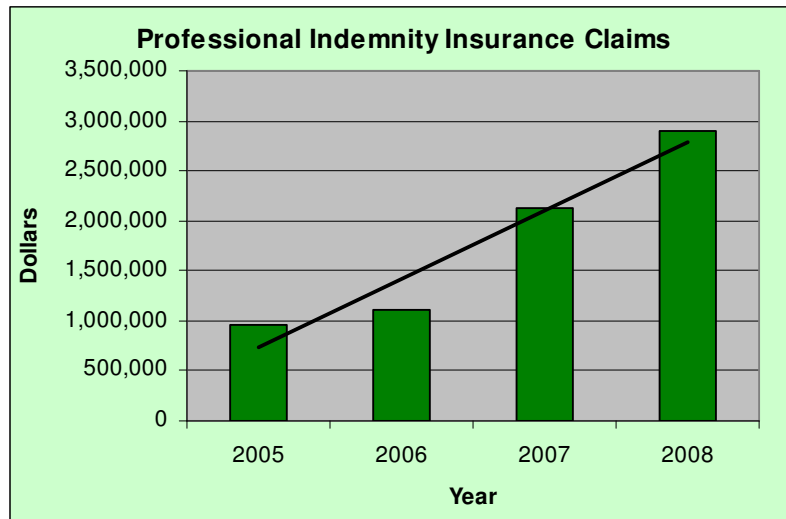


Figure 5.2 Professional Indemnity Insurance Claims in Australia (Dollar Value)

### 5.22 Results

Figure 6.6 shows a proportional increase also occurs in the dollar value of these claims, jumping from one million dollars in 2005 to just under three million dollars in 2008.

### 5.23 Discussion

The trend highlighted in these graphs clearly shows that the cost and amount of professional indemnity insurance claims is rapidly increasing over recent times. This is a clear indication that surveyors are facing increased pressure, and are having to deal with a client base that is increasingly willing to claim compensation if an error is made.

## 5.3 Public Liability Insurance

Public liability is part of the law of tort which focuses on civil wrongs. The injured party sues the respondent under common law based on negligence and/or damages.

Claims are successful when it can be shown that the respondent was responsible and breached their duty of care.

The duty of care is basically the standard by which one would expect to be treated whilst one is in the care of another. Once a breach of duty of care has been established, an action brought in a common law court is often successful.

Based on the injuries and the losses of the applicant, the court could award a financial compensation package. Public liability insurance is taken out to protect the surveyor against facing this situation.

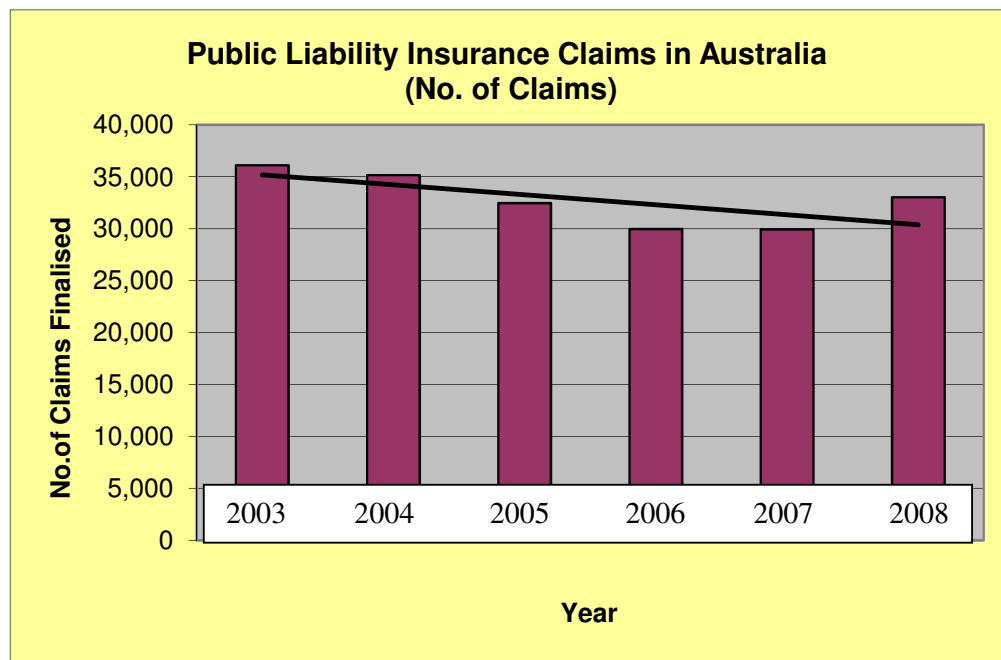


Figure 5.3 Public Liability Insurance Claims in Australia (No. of Claims)

### 5.31 Results

Statistics specific to the surveying profession are not available on public record, however, national statistics are available, and have been used in this project. The figures show a minor decrease in the number of successful claims relating to public liability over the last five years.



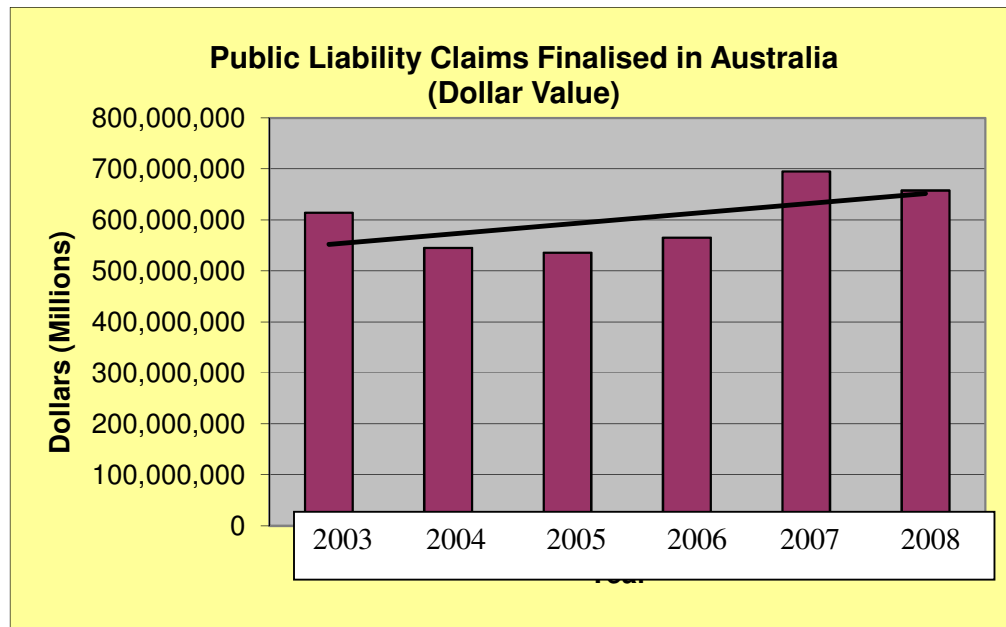


Figure 5.4 Public Liability Insurance Claims in Australia (Dollar Value)

### 5.32 Results

There is an increasing trend in the dollar value of these claims nationally, as can be seen in figure 6.8.

### 5.33 Discussion

It appears that the senate committee inquiry into the impact of insurance cost increases in 2002, and the subsequent changes to legislation has reduced the number of overall public liability insurance claims as can be seen in figure 6.7. These changes include *The Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004*, and *The Trade Practices Amendment (Personal Injuries and Death) Bill 2004*. Conversely, there is an increasing trend in the dollar value of these claims. This is likely to place added pressure on the cost of insurance premiums to the surveyor.

## 5.4 Workers Compensation Insurance

Workers compensation insurance provides protection against workers being injured whilst carrying out their daily tasks. It is insurance paid by companies to provide benefits to employees who become ill or injured on the job. Through this program, workers are provided with benefits and medical care, and employers have the assurance that they will not be sued by the employee.

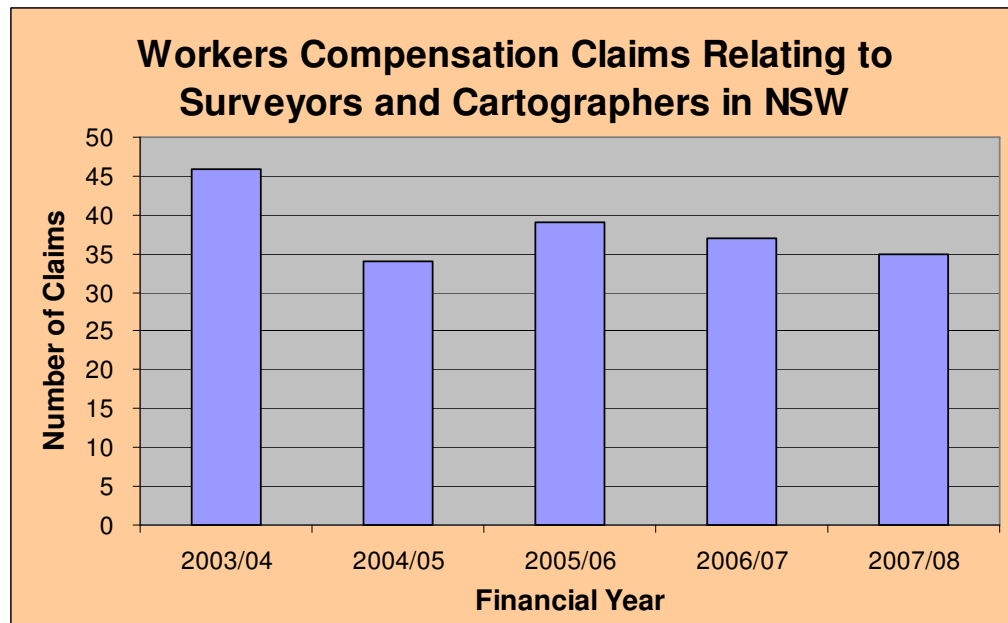


Figure 5.5 Workers Compensation Insurance Claims in NSW (No. of Claims)

### 5.41 Results

Figure 6.9 shows a consistent number of workers compensation claims being lodged over the recent five year period. An average of thirty five claims per year has been lodged in NSW by the surveying profession.

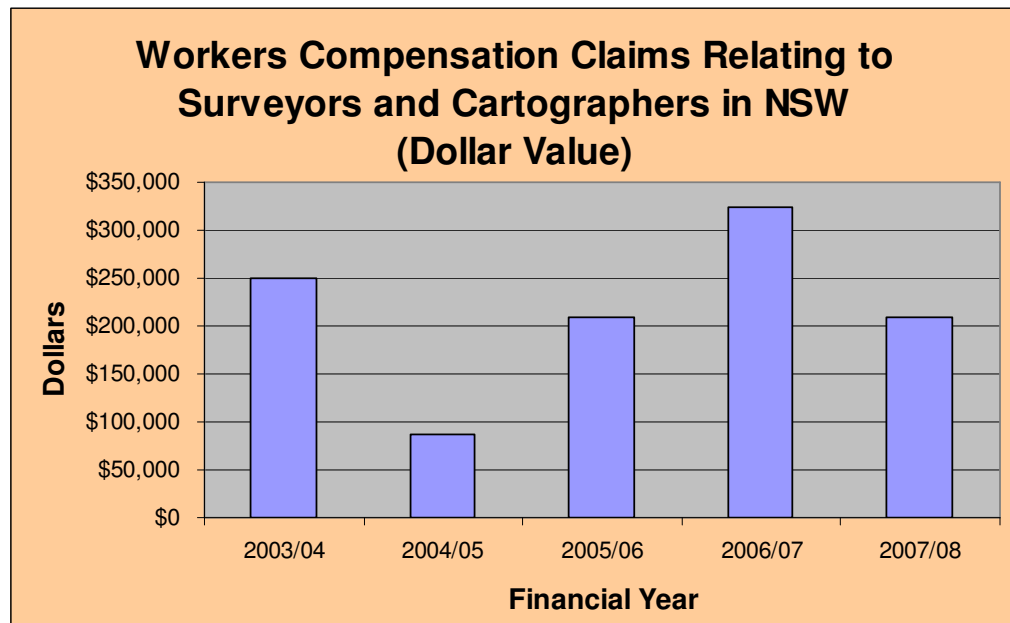


Figure 5.6 Workers Compensation Insurance Claims in NSW (Dollar Value)

#### 5.42 Results

Figure 7.0 shows quite a variable amount of workers compensation claims in terms of dollar value over the recent five year period.

#### 5.43 Discussion

Whilst the number of workers compensation claims remains fairly stable, there are fluctuations in the dollar value of these claims. These fluctuations are likely to be related to the type and severity of injuries that occurred. The Work Cover NSW website reports that the cost of insurance premiums is at its lowest level in eleven years, and there are continual reforms underway to address workers compensation insurance and its impact on the community.

In November 2007 The NSW Government announced a number of changes to workers compensation, aimed at cutting red tape for employers and assisting injured workers access benefits. The Workers Compensation Amendment Bill 2008 was passed to the existing Workers Compensation Act 1987. It will be

interesting to see what effect this has on the number and dollar value of workers compensation claims into the future.

## **5.5 Conclusion**

The increase in the number of professional indemnity insurance claims lodged and the associated increase in their dollar value supports the notion that we are living in a more litigious society over time.

The 2002 senate committee inquiry and changes to legislation appears to have made an impact on the number of public liability and workers compensation claims, as the number of claims in both insurance types have decreased.

The impact of insurances on a surveying practitioner cannot be underestimated, and the scope and complexity of this issue appears to be increasing over time.

After considering the theory and data behind disciplinary action, litigation and insurance issues relating to surveyors, the research switched to a more practical approach and the opinions of experienced surveyors was captured to add relevance to dissertation.

## Chapter 6 - Presentation & Findings

### **6.1 Introduction**

This chapter is a presentation of the findings of the questionnaire and interview questions carried out. The anonymity of the respondents was assured, and the presentations of the results are in accordance with this guarantee. It is intended that the information gathered from the respondents would provide a valuable insight into several issues regarding legal, moral and ethical concerns within the surveying profession. Several key background questions are asked relating to age, qualifications and experience. This adds integrity to the survey, by establishing the credentials of the surveyors questioned. The questionnaire delves into overall knowledge of the law, and investigates the respondent's attitudes towards hypothetical scenarios. The interview questions are more specific and give the respondents the opportunity to raise issues that they feel are important to them and to the surveying profession as a whole.

### **6.2 The Research Sample**

The questionnaire and interview questions were provided to thirteen professional surveyors. Eleven are surveyors from New South Wales (NSW), and the remaining two are surveyors from New Zealand and Canada.

### 6.3 Age Group of the Surveyors Interviewed

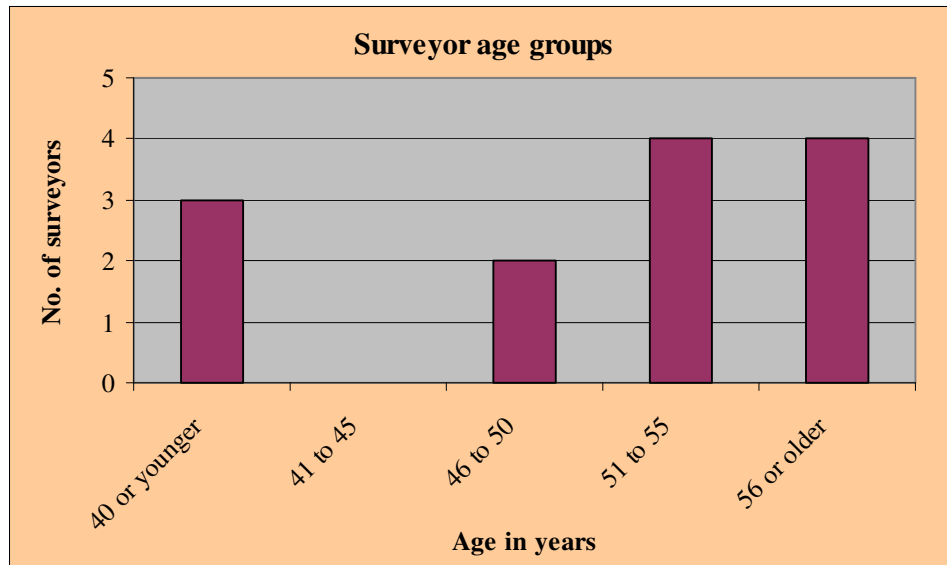


Figure 6.1 Age Group of the Surveyors Interviewed

#### 6.31 Results & Discussion

The respondents were asked what age group they belonged to, and were provided with a choice of five categories. Figure 6.1 shows that whilst three respondents were forty years of age or under, ten were in the range of forty-six years and over, equating to seventy seven percent of the sample size.

The majority of these surveyors have spent considerable time in the work force, and help to provide a valuable insight into changes over time. This data gives an indication that the sample of surveyors questioned will have much life experience, and will provide integrity to the overall survey. It is interesting to note that whilst there is a considerable range in the ages of respondents, the attitudes expressed in the questionnaire and short answer question surveys are consistent across the board.

## 6.4 Surveying Experience

Following is a series of graphs and information relating to the experience of the respondents within the surveying profession.

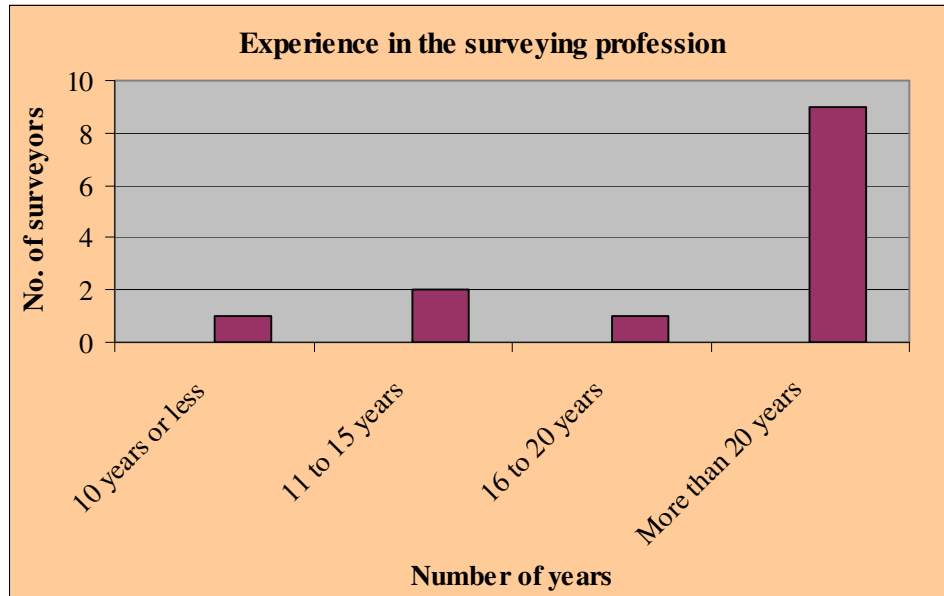


Figure 6.2 Experience Within the Surveying Profession

### 6.41 Results & Discussion

The respondents were asked about their experience within the surveying profession, and were provided with a choice of four categories. Figure 6.2 displays that whilst four respondents have been in the surveying profession for twenty years or less, nine have had more than twenty years experience.

With only one respondent having ten years or less surveying experience, this graph clearly indicates that the respondents will provide an experienced insight into the relationship between surveying and the law.

### 6.42 Experience as a Registered Surveyor

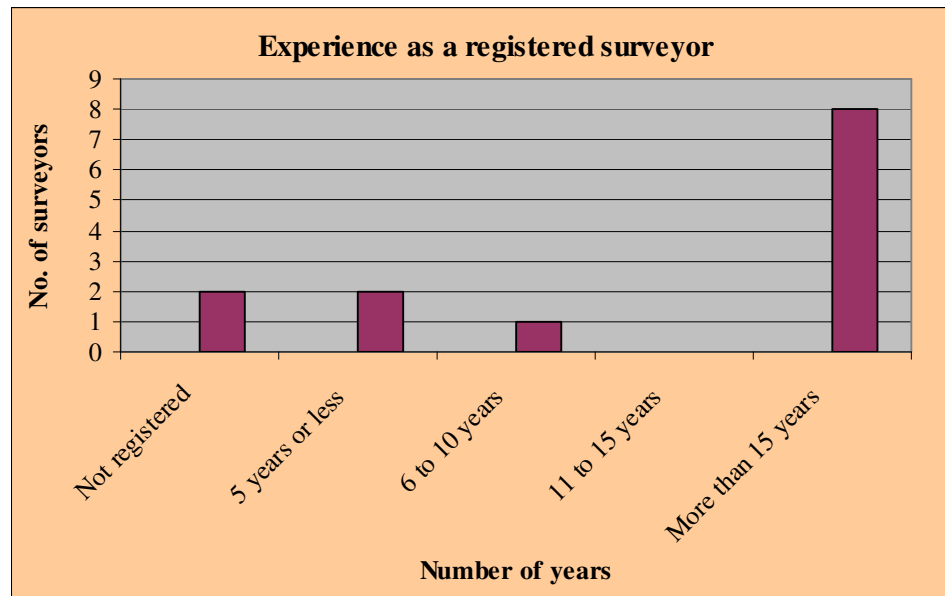


Figure 6.3 Experience as a Registered Surveyor

### 6.43 Results & Discussion

Having previously considered what is involved in becoming a professional registered surveyor, figure 6.3 demonstrates the amount of professional experience that the respondents have acquired. Sixty two percent of the surveyors questioned have been registered for more than 15 years.

This places a wealth of knowledge and experience behind the information gleaned from the questionnaire and short answer questions.



#### 6.44 Surveying Experience – Government vs. Private Practice

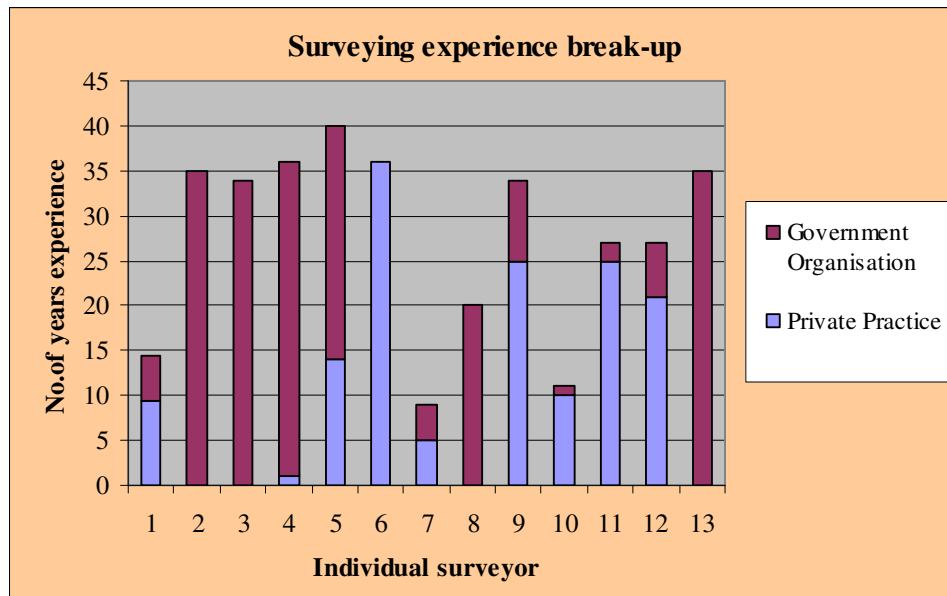


Figure 6.4 Surveying Experience – Government vs. Private Practice

#### 6.45 Results & Discussion

Figure 6.4 displays the break-up of surveying experience between the respondents. The figures display an even balance between those surveyors who have worked predominantly in the private sector, and those that have worked for a Government organisation. Several respondents have had experience in both fields of employment.

## 6.46 Surveying Experience – Disciplines

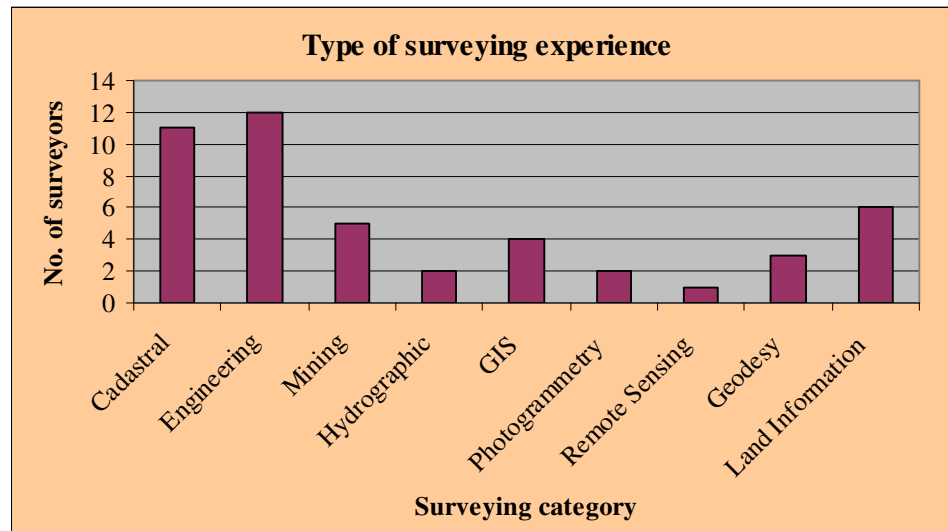


Figure 6.5 Surveying Experience – Disciplines

## 6.47 Results & Discussion

Whilst law is applicable to all surveying disciplines, it is particularly relevant to the fields of cadastral and engineering surveying, and it is in these areas that surveyor's are most likely to face litigation. Figure 6.5 shows that eighty five percent of the surveyors questioned have had experience in these two key disciplines, and it reasonable to expect that they would have had some exposure to various law and regulations relevant to the surveying profession.

## 6.5 Surveying Qualifications

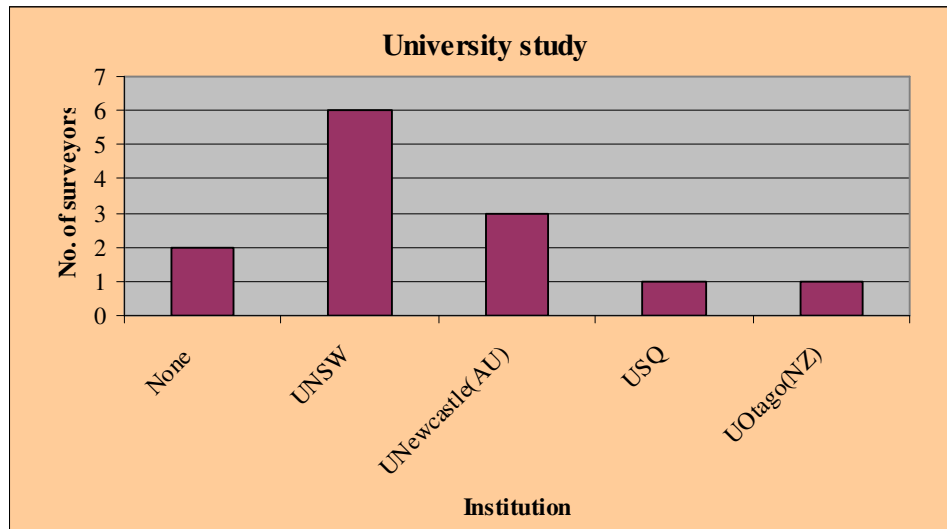


Figure 6.6 Surveying Qualifications

### 6.51 Results & Discussion

From the surveyors interviewed, eleven out of thirteen have had surveying education at University. The relevant institutions are listed on figure 6.6. As one of the criteria listed as a requirement for professionalism is tertiary study, it can be seen that the chosen sample group should provide an accurate and professional response to the research.

## 6.52 Professional Membership

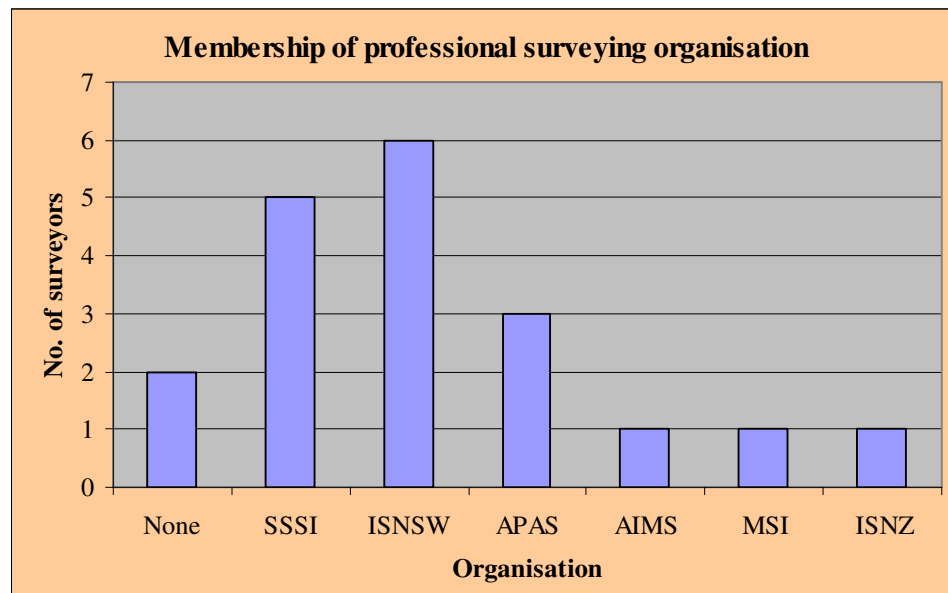


Figure 6.7 Professional Membership

## 6.53 Results & Discussion

From the surveyors interviewed, eleven out of thirteen are members of various professional surveying organisations, and some respondents are members of two or more. This bodes well for the quality of the research, and will insure an up to date opinion on the surveying issues raised in the questionnaire and interview questions.

## 6.6 Questionnaire

Following is an overview of the research questions asked, and a summary of the answers provided by the surveyors. This group of questions are taken from the questionnaire, and provides feedback on questions where the answers were almost unanimous amongst the respondents.

## **6.61 Level of Knowledge of the Law**

### **Question**

What level of knowledge do you, as a professional surveyor, have in the areas of law that affect your position?

### **Results & Discussion**

Eight respondents (sixty two percent) said they had ‘some knowledge’, and the remaining five respondents (thirty eight percent) stated that they had ‘a lot of knowledge’.

This response is interesting, in that such a high percentage of surveyors stated that they only had ‘some knowledge’. Perhaps this question could have been more specific, but it does give the interpretation that these surveyors admit that they should probably know more about the laws relating to their position.

## **6.62 Legal Action**

### **Question**

Have you, or do you know of a surveying associate who has been involved in any legal action relating to surveying?

### **Results & Discussion**

Six respondents (forty six percent) said yes and seven respondents (fifty four percent) said no.

It is concerning to note that almost half of the respondents have been involved themselves, or know of an associate that has been involved in legal action relating to surveying. This figure adds considerable weight to the proposal that we are living in a more litigious society in relation to the surveying profession. This

statistic highlights the link between law and surveying, and emphasises the need for surveyors to gain a firm understanding of law so as to avoid facing legal action.

### **6.63 Professional Indemnity or Public Liability Insurance Claim**

#### **Question**

Have you, or do you know of a surveying associate who has been involved in a professional indemnity insurance claim relating to surveying?

#### **Results & Discussion**

Only four surveyors (thirty one percent) said yes, and nine surveyors (sixty nine percent) said no.

This figure appears moderate, and is in line with current trends. Recent hefty increases in insurance premiums have resulted in a heightened awareness of the insurance industry and its impact on the surveying profession.

### **6.64 Out of Court Settlement**

#### **Question**

Have you, or do you know of a surveying associate who has settled a litigation case or insurance claim relating to surveying, out of court?

#### **Results & Discussion**

Four surveyors (thirty one percent) said yes, and nine surveyors (sixty nine percent) said no.

Statistics suggest that Professional Indemnity and Public Liability insurance claims are on the increase in surveying. It is common for insurance companies to encourage clients to settle insurance claims out of court, and thus avoid paying costly legal fees. The results of this question are expected to increase over time.

## **6.65 WorkCover or OH&S Infringement**

### **Question**

Have you, or do you know of a surveying associate who has been involved in any WorkCover or Occupational Health & Safety (OH&S) infringement relating to surveying?

### **Results & Discussion**

Four surveyors (thirty one percent) said yes, and nine surveyors (sixty nine percent) said no.

This figure is surprising because statistics reveal that on average there are only thirty five workers compensation claims per year relating to surveyors in Australia over the last five financial years.

## **6.66 Litigious Society**

### **Question**

When asked to respond to the following statement ‘We are becoming a more litigious society over time. Yes or No?

### **Results & Discussion**

All thirteen surveyors answered yes. This provides a clear indication of the general feeling within the surveying profession, and adds to the original question posed by this dissertation.

## **6.67 Ethics & Professionalism**

### **Question**

When asked to respond to the following statement ‘Ethics and professionalism are important to surveyors. Yes or No?

## **Results & Discussion**

Twelve surveyors (ninety two percent) said yes, and one surveyor (eight percent) said no.

The one surveyor who said no is clearly out of touch with the rest of the profession. Ethical behaviour is written into the code of conduct expected by the various organisations representing surveyors in Australia, and it is quite remarkable that any professional surveyor would have this attitude.

### **6.68 Work Practices**

#### **Question**

When asked to respond to the following statement ‘Good work practices will reduce the likelihood of facing litigation. Yes or No?’

#### **Results & Discussion**

Twelve surveyors (ninety two percent) said yes, and one surveyor (eight percent) said no.

Again, the one surveyor who said no is clearly out of touch with the rest of the profession. Good work practices are the key to avoid facing litigation. Quality assurance and a rigid checking regime are of paramount importance when running a successful surveying practice.

### **6.7 Ethics & Professionalism Scenario’s**

Following are three fictitious scenarios created to test the attitudes of the respondents when facing an ethical dilemma.



### **6.71 Scenario 1**

A surveyor peg's the boundaries on a subdivision that he has been working on for the last two years. He begins to complete his plan of survey, and sends his final invoice to the client. The surveyor learns that his client is in financial difficulty, and the client starts to make excuses as to why he should not pay the surveyor. The surveyor completes the plan of survey, and has it ready for lodgement to the land titles office. What is your reaction?

### **6.72 Results & Discussion**

Four surveyors (thirty one percent) said 'Lodge the plan of survey and await payment from the client.' Eight surveyors (sixty two percent) said 'Hold onto the plan of survey and not lodge it until the client pays.' One surveyor said 'Seek legal advice with a view to suing the client for non payment.'

It was surprising that two-thirds of surveyors said that they would 'Hold onto the plan of survey and not lodge it until the client pays.'

There is no right or wrong answer here, however perhaps the most ethically responsible decision would be to 'Lodge the plan and await payment from the client'. Not doing could be considered as holding the client to ransom. In a real life scenario, an agreed milestone could be placed into a contract to avoid this situation.

### **6.73 Scenario 2**

A surveyor makes an error placing a boundary peg which is subsequently discovered after a 2 hour drive back to the office and the survey plan is lodged

immediately with the Titles Office. The peg is required to be shifted about 30mm, which 'sort of' puts it on the side of the peg. What is your reaction?

#### **6.74 Results & Discussion**

Five surveyors (thirty eight percent) said 'Reset the peg next time you are in the vicinity, which may be in a couple of week's time, with no charge to the client.'

Seven surveyors (fifty four percent) said 'Reset the peg immediately with no charge to the client.' One surveyor said 'No response required, notify the Titles Office that there is a survey plan error requiring rectification.'

Whilst the peg is close, the fact is that an error was made. It would be negligent to discover an error, and leave it in the field. Even for a short period of time. The surveyors who chose to reset the peg next time they were in the area are taking a considerable risk, and should have placed more consideration on the scenario.

#### **6.75 Scenario 3**

Your client, a licensed builder, is not happy with the service you have provided and has contacted the Institution of Surveyors. He has lodged a complaint and accused you of being unprofessional and unethical. What is your reaction?

#### **6.76 Results & Discussion**

Eleven surveyors (eighty five percent) said 'Be pro-active and contact the client to try and resolve the issue.' Two surveyors (fifteen percent) said 'Sit back and wait for the Institution to contact you.'

An important part of risk management is to maintain open communications with the client in case a dispute arises. To have the attitude of sitting back and waiting,

could give the opinion that the surveyor is not interested in the clients concerns, and could lead to an escalation in the clients reaction.

## **6.8 Interview Questions**

### **6.8.1 Question 1**

As a surveyor, what do you perceive are the main areas of law that affect the surveying profession?

#### **Responses**

Land law; Contract law; Industrial law; Consumer law; Environmental law; Planning law; Native Title law; Conveyancing Act, Real Property Act, Pipelines Act, Local Government Act; Surveying Act and Regulation; Registrar General's directions; Surveyor General's directions; Civil law and the Occupational Health & Safety Act.

Public Sector and private practice surveyors need to be familiar with different legislation, as do mine surveyors. Public sector surveyors may require knowledge of the Roads Act and Regulations, Crown Lands Act, Land Acquisition (Just Terms Compensation) Act and with National Parks legislation.

Private practice surveyors require more intimate knowledge of the Strata Titles legislation and the Dividing Fences Act.

#### **Discussion**

These responses highlight the fact that different facets of law are important to individual surveyors, and this is largely dependent on the surveying discipline that is appropriate to their field of employment and expertise.

### **6.8.2 Question 2**

In your view, do you think there is a need for surveyors to have knowledge of areas of law that affect their position? Why?

#### **Responses**

The overwhelming response to this question was yes, and the responses are summarised as follows:

Land is the most fundamental of all assets, and as land surveyors are the ones who define it, they must have a very deep knowledge of all laws relating to the definition, transfer, conveying and establishment of land parcels and interest therein.

Surveyors are professionals, and people rely on their advice. Every surveyor should know his/her responsibilities towards the client, the public and also towards the surveying profession.

#### **Discussion**

The general comments here show a good understanding of the law, and it's relevance to the work they do. One specific comment sums up the situation "Surveyors need to have a working knowledge of the areas of law that affect their position as it is an essential component of risk management. Without that knowledge, the professional surveyor is very vulnerable."

### **6.8.3 Question 3**

In your view, are there any major areas of concern relating to survey law that you think are likely to emerge in the near future? If so, what are they?

## **Responses**

Definition and re-definition of land parcels within community titles; Possessory title; Professional liability; Traceability and repeatability of GPS surveys; Plans are being released to clients in electronic formats (i.e. .dxf, .dwg, .pdf). The surveyors copyright is at stake; The Surveying Act is not strong enough in dealing with unqualified and incompetent people undertaking cadastral surveys. This is a major threat to the cadastral fabric which is a cornerstone of the State fiduciary network; Information availability; Control over integrity of data being disseminated; Intellectual Property; Accuracy of digital data, and digital record keeping; Property definition; Mean High Water Mark (Global Warming); Litigation involving surveyors, due to increased public awareness of their legal rights; Potential losses from errors, omissions or negligence.

The possibility of non-registered surveyors being allowed to carry out the work of registered surveyors. This is a distinct possibility by the profession softening the requirements/training to become a registered surveyor.

## **Discussion**

The responses to this question were quite varied, highlighting the fact that there are many legal issues concerning surveyors for the future. This also raises awareness that surveyors must remain vigilant of current and future laws and legislation to maintain their professional standing in the currently changing economic climate.

### **6.8.4 Question 4**

The Institution of Surveyors NSW suggests the following reasons for becoming a member:

- (a) To be part of a unified professional voice

- (b) For status and recognition amongst ones peers, the community and other professions
- (c) To join established professional networks
- (d) To access Continuing Professional Development
- (e) To participate in the continuing development of the profession
- (f) Access to the monthly magazine "Azimuth" - By Surveyors for Surveyors

Please list these in order of importance to you.

### **Responses**

Only 2 respondents had the answers exactly the same. All eleven other answers were unique.

### **Discussion**

The fact that virtually all of the respondents had these items in a different order shows that surveyors become members of professional bodies for different reasons. Some activities are more important than others depending on personal and business attitudes and requirements.

### **6.8.5 Question 5**

In your view, are clients and the general public more aware of their legal rights and more vocal in expressing them now? If so, how does this impact on you performing your duties as a surveyor?

### **Responses**

#### **Yes**

Contract and consumer law knowledge is now essential.

The general public are more aware of their right to complain (and more ready and vocal to do so), but not necessarily of their actual legal rights. They are also, for

the most part, unaware of the surveyor's legal right to enter their property under the Surveying Act. This latter lack of awareness can cause problems in situations where entry upon a property is essential. This ignorance can adversely impact on performing duties as a surveyor.

Clients and public are becoming more aware re their legal rights by the day. The surveyor has to perform his duties in a rigorous manner (professionally).

Yes, but no impact on me; Yes. We are becoming an increasingly litigious society. Increased project costs means increased losses to surveyors if something goes wrong; More information available to the public on legal issues and rights; An increase in the volume of litigation as legal firms offer "no win – no fee" advice to clients; Impact is increasing insurance premiums, greater chance of financial loss and a constant need to increase knowledge of the law.

### **Unsure**

Some clients are more aware of their rights and others not so much. It has no impact on my performance. You are always looking after your client's interests and you should always "hit" a minimum personal standard with all your plans and reports. You always have to be able to explain what you did, and why you did it, as if you were being questioned in a court of law.

No for the general public, but yes for the construction industry.

### **Discussion**

The overwhelming 'yes' response to this question highlights the importance of the surveyors role in dealing with the general public. Communications with clients and the community are becoming a more important issue over time.

### **6.8.6 Question 6**

In what ways do you find legislation useful for you in the performance of your job as a surveyor?

#### **Responses**

It is the framework within which all the work of a land surveyor is done. An authorised survey is authorised by legislation setting out limits and responsibilities and in some cases, the minimum standards.

Adherence to the OH&S Act keeps my surveyors safe and protects me against litigation.

In my job in the RTA, I check surveyors' plans prior to lodgement at LPI NSW. I use the Surveying Regulation to ensure that the plan is suitable for lodgement, so the risk of requisitions is minimized. This is most important for large government projects where timeframes are tight.

One of my other tasks is in regard to the RTA's buying or selling of land (either whole or part of a property). My contribution to this is the production of a Surveyor's Certificate (not an Ident.), which certifies for the RTA:

1. the name(s) of the person/ organisation entitled to compensation;
2. the legal description of the land;
3. the area of the land;
4. whether qualified title needs to be addressed to determine an entitlement to compensation;
5. whether limited title may be ignored for the purpose of the acquisition;
6. any encumbrances that need to be actioned or addressed (eg easements, mortgages, caveats);
7. any encumbrances that may be ignored for the purpose of the transaction.



Legislation sets the standard by which all parties must operate. In addition a working knowledge of old superseded legislation can assist in understanding how and why surveys were done in the past. For example the Survey Co-ordination Act, Public Roads Act and Surveyor Generals Directions have all set different requirements for marking of surveys over the years.

Legislation works in both ways. It protects both clients and surveyors; Provides knowledge of my standing and correct procedures; Right of access; Credibility; Provides a reference for your legal responsibilities; Provides a more professional approach when dealing with clients; Sets surveyors apart from those with some knowledge and helps reduce the likelihood of litigation.

### **Discussion**

The responses here show the value that surveyors place on Legislation as a framework or guidebook to the way in which they conduct their business. The responses appear quite positive towards the law, and its ability to provide order and structure to the surveying profession.

### **6.8.7 Question 7**

Many surveyors are of the view that they should be given some form of help in avoiding “legal trouble”. In your view, what forms of help should be given, and how should this be rolled out?

### **Responses**

Regular CPD on all legal matters including contract law, consumer law and industrial law; Most surveyors are proficient in land, planning and environmental law, but they often do not have adequate contract and engagement documentation or “defensive practice” procedures required by their PI insurer; Feedback, in the

form of case studies, from your Professional Liability Insurer is also useful; Publishing insurance claims and discipline hearings in the professional journal is important so we can all be aware of the pitfalls as well as to generate discussion; Refer to ACSIS for private surveyors; Government surveyors are protected by legislation as long as they carry out their duties in good faith and in accordance with the relevant Act and Regulation; Seminars and Workshops. It is the responsibility of professional bodies such as the Institution of Surveyors to provide such information sessions and the responsibility of the individual to attend; Agree, but unsure of how it should be rolled out; Have the Lands Dept. provide mediation without the right of private individuals to become involved unless gross negligence is established; Access to subsidised legal advice relevant to surveyors.

### **Discussion**

There are some good suggestions here, and provide scope detailing areas for future investigation and research. One popular comment amongst many of the respondents was the importance of continued professional development (CPD) points and their relevance as a useful training tool to keep surveyors informed of changes to their profession.

### **6.8.8 Question 8**

If you were to attend a seminar or workshop on surveying law, what would be the topics you would like to see covered?

### **Responses**

Adverse possession; Conventional lines; Evidence assessment; Water boundaries; Recent case law; OH&S Act & Regulation: how to address this for field surveyors; Surveying Act & Regulations; Strata and Community Title legislation;

Creation and extinguishment of easements; The History of Survey Marking in NSW; A series on: Legal Aspects of Boundary Surveying (by Hallman) including regular updates.

Regular updates on how changes to legislation affect surveying with respect to: Surveying and surveying standards; Conveyancing; Land Titles; Occupational Health and Safety; Crown Lands; Roads; Railways; Mining; Waterways; Local Government; Environmental Planning and Assessment; Heritage.

One common problem faced by surveyors is to collect fees. I think that the position of surveyors in this regard should be made clear; Digital record keeping and processing; The use of “SYDNET” in defining SCIMS coordinates; General practice; Registration of Surveyors as land agents; Private surveyors to be paid a fee every time a plan of theirs is copied; Professional indemnity; Work Cover.

### **Discussion**

A wide variety of responses here again shows that there are many legal aspects which are of interest to surveyors and suggests a willingness to learn and keep abreast of current trends in the profession.

### **6.8.9 Question 9**

Provide reasons why you think surveying has the right to be classified as a profession?

### **Responses**

Because it meets the following essential criteria:

Mastery of a body of knowledge; A barrier to entry; An element of research and CDP; An element of community service; Essentially an “arcane” activity; An element of responsibility and liability; A university degree is required for

admission (anywhere in Canada); We are self-governing under the Surveyor's Act here in Ontario; We have the sole authority to give opinion on boundary locations in Ontario.

No occupation has a “right” to be classified as a profession. Being classified as a profession is something that is bestowed upon a profession by the public. Surveying is the “forgotten” profession. It used to have a higher status in the community than it does now: the second government appointment to NSW (after the governor) in 1787 was the Surveyor-General.

Surveying has an ethos to serve the best interests of the community above service to the profession or the client, and this is accepted without question. The Institution also has a Benevolent Fund to assist surveyors and their families. The highest general education level of a surveyor is a four year degree, and this is considered to be a professional qualification.

Surveying may not have as higher profile as medicine or engineering (as there are less of us), but it is still a profession.

Surveyors have traditionally held positions of high authority in all communities because of their technical abilities and visionary qualities. Nothing has changed. Today because surveyors have good understanding of all aspects of land, engineering and technology development they often have the skill sets required for overall management; Qualifications, attitude, history and practice.

### **Discussion**

The respondents here identify many of the criteria that make up a professional, and correctly point out the characteristics surveyors possess which enables surveying to be classed as a profession. Many of the responses tie in with the official definitions provided earlier in this dissertation.

### **6.8.10 Question 10**

In some states of Australia, details of surveyors facing disciplinary action by the relevant Board of Surveyors are placed on public record for general viewing. Do you think this should be the case in all states and why?

#### **Responses**

##### **Yes**

This kind of transparency is essential to maintaining the public's trust; It acts as a motivator to make sure you do it right the first time; For accountability.

##### **No**

NSW has chosen not to go down this path, and for good reason. BOSSI has received about 50 complaints from the public since the commencement of the Act, with about half being proven. Amongst these, there has only been one that I would class as blatantly incompetent. Others were judged in breach of the Act or Regulation for lesser discretions and I do not think it would be fair or proper to publicly record the names of these surveyors who may have only made one error of judgment in a lifetime of community service. Issues dealt with to date include:

Trespass (i.e. entering a property without giving proper notice under the Act); Gross errors; Wrongful certification on a plan (i.e. certifying the plan is accurate, or strata plan certification); Changes to a plan, after signature by owners, without consent; Timeliness resulting in financial loss by client; Boundary disputes - Practicing as a surveyor when not qualified or competent (about 25% of all complaints).

By all means publish a list of surveyors qualified and authorised to perform certain types of survey but do not air the profession's dirty laundry in public.

Everyone is prone to mistakes. I do not think that one mistake should jeopardise a career.

### **Unsure**

It is not the details of those “facing” disciplinary hearings, but rather whether the charge has been “proven”. Anonymity should apply until proven, and then information should be available to ensure to the public that licensed surveyors are accountable and the terms of that accountability.

A uniform policy should be adopted and applied across Australia.

Suspension or a fine is sufficient unless it’s a serious offence.

Only on a case by case basis and only for those matters that are serious.

### **Discussion**

The responses here are generally worlds apart. Whilst some surveyors see merit in this idea and feel that it will provide accountability and transparency, others quite strongly disagree and don’t like the idea of airing out one’s dirty laundry. It appears the states of Australia are just as divided as the surveyors questioned, because the surveying Boards in each state have a very different view on how to handle this matter.

### **6.8.11 Question 11**

What do you think are the best ways for surveyors to avoid facing litigation, or avoid having to lodge professional indemnity insurance claims?

### **Responses**

To have very clear “engagement” agreements to manage the clients expectations as to “who will do what, by when and for how much”; Practice defensively in accordance with modern QA; “Talk to your client before your client talks to the

Board” so that minor issues do not become major. Keep on the “front foot” with client communications; A professional attitude; Correct methodology; Quality control measures; Continuing education; Client communication; Comply with the Act and Regulation; Check your work and the work that you sign; Written agreed price for every job; Agreed timeframe with the client; Answer requisitions promptly; Know the difference between trespass and entry under the Act; Calibrate your instrument; Education, integrity and honesty form the basis for professionalism; Sadly the modern day grab for the almighty dollar has lead to undercutting, cost cutting and shortcutting resulting in poor quality work. Surveyors should not be afraid to charge fees which reflect the time and effort required to produce a quality product; If all surveyors applied equal diligence, the playing field would still be level and in the long term they would save on insurance claims and premiums; Know your law and thus your position, to start with; Skilled staff; Good equipment and Sound methods and checking procedures

### **Discussion**

The respondents identified some of the key methods for avoiding litigation or lodging insurance claims. These included using methods of best practice, risk managements and quality assurance as part of their daily procedures.

### **6.8.12 Question 12**

What methods do you use to maintain your professional standards as a surveyor?

### **Responses**

Staff training; Professional training; A very good job costing system to ensure job profitability; Attend all continuing education courses that are offered; Attend the regional group meetings to network with other local surveyors; Discuss small

problems with my peers before they become big problems; Membership of the Institution and adherence to its Code of Ethics; Intimate knowledge of the Surveying Act and Regulation; Learn by others' mistakes and successes; Membership of Professional Bodies & Community Bodies; Do the job in a professional manner respecting the people paying for the job and in the same time respecting the rights of third parties; Own research; I am an educator, so I have to know what I am talking about.

### **Discussion**

Most respondents expressed the importance of education and continued education as effective methods of keeping up to date with changes to the surveying profession.

### **6.8.13 Question 13**

What do you consider is the most important issue facing surveyors today?

### **Responses**

Navigating a legal minefield of constraints to deliver a high level of professional service to a client who wishes to pay a professional fee; In our jurisdiction, (the Canadian province of Ontario), it is demographics. Our numbers are shrinking as many of the surveyors commissioned in the 1950's & 1960's are retiring and/or passing away. There are not enough new, young surveyors coming into the profession to replace them. This is the biggest challenge we currently face; The future of the profession. We need to attract more people into the profession; Ever-changing technology and the demands that come therewith; Unqualified people behind surveying instruments; Digital data and record keeping; Economic; Environmental; Social; The low number of enrolments in the degree course at our



Universities is a reflection of our society's impression of the contribution the surveying profession makes; The remuneration to the surveyor is not commensurate in many cases to the study, knowledge and responsibility that the community expects of their surveyors; Automation of skills; Computing.

### **Discussion**

The surveyors interviewed identified several interesting issues confronting the profession today. Dwindling numbers of new surveyor's graduates taking up surveying as a career path was a stand-out issue concerning many of the respondents. The Canadian surveyor highlighted the fact that this is a global trend facing the profession, and is not unique to Australia.

### **6.8.14 Question 14**

Technology has revolutionised the surveying profession over the last 30 years. Please list the positives and negatives that technology has brought to the profession.

### **Positive Responses**

Measurement is now simple; Positioning is now simple; Vehicles are reliable; Work is done faster, better and more accurately; Final plans are done to a more consistent standard using CAD technology; Transcription & reading errors are eliminated by using total stations with data collectors; The positive is that technology has made the task quicker, so that not as many people are required, and not as much time is required, to undertake the same task as that which was done 30 years ago; Integration between data platforms (e.g. CAD and GIS)

### **Negative Responses**

We “stand off” and measure, and don’t often walk the boundaries; I can't think of one; Technology has made it easier for people to think they are a surveyor when they clearly are not. Anyone can press a button, but not everyone can know what the result means, or if it is right or wrong, or how to interpret it or analyse it; Maintaining control and integrity of electronic data; Intellectual Property; Loss of valuable data in hard format; Additional time using high accuracy for what should be low accuracy jobs; Increase in overheads for equipment and maintenance; Expectation of an immediate answer to what seems simple, but is actually quite complex; Reduction in skills. No need to solve problems when uploaded point coordinates are provided; Surveyors are becoming “general managers” of the cadastre.

### **Discussion**

The main focus of the positives impacts technology has brought to the surveying are concerned with speed, accuracy and efficiency in getting the job done.

The main focus of the negatives are that technology has brought a simplicity to surveying which has become detrimental to the profession in that it has given relatively unskilled people the ability to perform survey tasks.

It is important to note that not all technological change is good, and that surveyors should make their clients and the general public aware of the skills that they possess and the training they have undergone to help protect the profession into the future.

## Chapter 7 – Conclusion

### 7.1 Introduction

The aim of this dissertation was to examine cases where litigation has been taken against surveyors, and to explore the statement ‘we are living in a more litigious society’ in relation to the surveying profession. In attempting to explore this proposition, three main criteria were selected for investigation. These included:

1. Complaints, disciplinary action and tribunal hearings lodged against individual surveyors and controlled by the relevant Board of Surveyors;
2. Public liability, professional indemnity and workers compensation insurance claims relevant to surveying; and
3. A questionnaire and interview question survey of experienced members of the surveying profession.

### 7.2 Complaints, Disciplinary Action & Tribunal Hearings

In general, complaints lodged against surveyors to the Board of Surveyors throughout Australia are showing a decreasing trend over the last ten years. There are inconsistencies with this data however as each Board categorises complaints differently, and some Boards show a lack of transparency as they do not release specific details about these complaints. Some Boards do not collect this data at all. Surveyors facing complaints may be subject to disciplinary action by the Board of Surveyors and this could be in the form of a reprimand; the imposition of a fine; the imposition of conditions on the surveyor’s licence or registration; suspension of the surveyor’s license or registration for a certain time period; cancellation of the surveyor’s license or registration or disqualifying the surveyor from being

licensed or registered permanently, for a set time period or until stipulations have been met. The severity of the penalty depends on the nature of the offence.

The resulting cases were summarised, however the number of cases were relatively few. The majority of these cases highlight examples where surveyors have breached their duty of care and were found to be negligent. The severity of the disciplinary action generally reflects the seriousness of the action taken by the Board or the tribunal.

The initial expectation prior to researching legal cases was that there would be many cases where surveyors had come into conflict with the law, however research revealed the opposite to be true, and therefore the research was expanded to include insurance.

### **7.3 Insurance**

Concerns about increasing public liability and professional indemnity insurance premiums were raised in Australia in early 2001, following the collapse of Health International Holdings (HIH) insurance company. There have been severe effects on many community groups, small businesses and professionals, including surveyors. Surveyors have faced large increases in premiums, exclusions of cover and high excesses since 2001.

The three main causes for the increase in insurance costs since 2001 are summarised as:

1. the 'hardening' of the insurance market as, after a period of underpricing and poor profitability in the mid 1990s, insurers now focus on improving profitability rather than merely increasing market share;
2. the increasing cost of claims; and

3. international influences including the withdrawal of capacity and the increasing cost of reinsurance following the destruction of New York's World Trade Centre in terrorist attacks on September 11, 2001.

Public liability and professional indemnity insurance made very large losses in the mid to late 1990's and this has been exaggerated by the removal of HIH from the insurance industry.

This situation led the research to investigate public liability, professional indemnity and workers compensation insurance claims, and the results were graphed and analysed to consider the current impact on the surveying profession.

Recent Government changes to legislation has seen an overall decrease in the number of cases lodged by surveyors relating specifically to public liability and workers compensation insurance, however professional indemnity insurance claims are still rapidly increasing and this is of concern to the surveying profession. Combined with the reasons stated above other factors are having an effect on the cost and amount of insurance claims and these include: the legal profession is encouraging action against surveyors with its no-win no-fee policy; human nature and current social trends are such that people want financial compensation when an error is made; the general public are more aware of their rights.

After analysing the data collected relating to complaints; disciplinary action; tribunal hearings and insurance, it was decided to incorporate opinions of professional surveyors into the dissertation.

## **7.4 Questionnaire & Interview Question Survey**

A questionnaire and short answer question survey was conducted with thirteen experienced members of the surveying profession.

The interviews provided an insight into many issues and concerns that surveyors have in relation to law and legislation and its impact on the profession. Specific issues highlighted by the surveyors included the need for continuing education in relation to legislation and relevant law.

Other issues included concerns about the decrease in the number of students entering the profession and an increase in the number of unqualified practitioners. The concern here is the lack of control over these practitioners, and that this will lead to an increase in litigation against the profession overall, and the flow-on effect of an increase in the cost of insurance premiums.

In conclusion there is little recent evidence of surveyors being sued directly for negligence. There is however a trend for action to be taken against surveyors through the insurance industry, when an error is made. The general public are more likely to engage a solicitor and pursue financial compensation, rather than make a complaint to the relevant Board of Surveying.

Therefore the proposition that 'we are living in a more litigious society' in relation to surveying is true, and is supported by the research data provided.

## Chapter 8 – Recommendations

### **8.1 Introduction**

Expectations placed on the modern surveyor continue to increase, and the threat of facing litigation or disciplinary action is a constant concern to surveyors. Advancement in technology and the reduced numbers of skilled practitioners entering the profession are issues that will impact on surveyors into the future.

The continuing need to produce a high quality product in a short time frame can increase the risk of making an error and place the surveyor at risk of facing disciplinary action or having to lodge an insurance claim.

The best way for surveyors to avoid facing litigation, disciplinary action and having to lodge insurance claims is to employ best work practices incorporating quality assurance principles and risk management strategies.

### **8.2 Quality Assurance**

Quality assurance is a systematic process of checking to ensure that the service being delivered meets specified requirements. A quality assurance system can increase client confidence and a survey company's credibility, to improve work processes and efficiency, and to enable a survey practice to better compete with others.

Surveyors can incorporate quality assurance principles by adopting the following attitudes: behave ethically and responsibly; act professionally in all dealings; treat

clients, associates, staff and the general public with respect at all times and apply a standardised dress code.

In relation to work practices surveyors should include; working to a standardised contract; ensure adequate data back-up; use triplicate copies of job instruction; get job instructions counter signed; have an adequate filing system; keep a record of phone calls and E-mails; respond promptly to all inquires; have a rigid checking regime; have sound procedures in place for common tasks and arrange regular staff meetings.

### **8.3 Risk Management**

Risk management involves analysing and evaluating tasks to determine the associated risk involved in complete these tasks. It requires surveyors to develop strategies and policies to ensure all survey work is conducted with the least amount of risk to the survey practice.

Education is the key to a risk management strategy for surveyors and includes; attending seminars and conferences regularly; collection of CPD points; subscription to journals to keep up to date with changes within the profession; provide continued education to junior staff and offer the opportunity for advancement once qualifications are obtained and to maintain knowledge of current law and legislation relevant to the surveyors discipline.

Strategies should also include: adopting principles set-out in the 'Disclaimer Manual' and the 'Loss Prevention Manual' produced by the Institution of



Consulting Surveyors NSW; constantly refer to the Hallman text, commonly known as ‘the cadastral surveyor’s Bible’ and other appropriate texts; provide responsible job quotes; carry appropriate insurances; employ suitably qualified staff; maintain membership to professional associations; keep the client informed and organise regular team briefs to roll-out reforms.

#### **8.4 Future Directions**

Future research from this dissertation should follow current reforms to the insurance industry and the governing bodies controlling the surveying profession. De-regulation of the profession has been touted, and the impact of this should be followed. Decreasing numbers of graduates and registered surveyors should be monitored. The impact of unqualified practitioner’s and the increasing risk of increases to litigation on the profession must be discussed. Increases in the cost of public liability, professional indemnity and workers compensation insurance is also an ongoing concern.

## List of References

ACSIS Ltd 2006, A Risk Management Manual, Copyright © Gold Seal I>P> Pty Limited, ACSIS Ltd and Indemnity Corporation Pty Limited 2006.

Australasian Legal Information Institute (AUSTLII) online database, 2009, viewed 26/10/2009, < <http://www.austlii.edu.au/>>.

Beardslee, D 2002, 'Surveyors Say', Azimuth, no 40, pp 21.

Blume, K, Gibbons, K, & Gill, M 1986, Surveyors and their Professional Liability – A Loss Prevention Manual, 3rd ed, Kwik-Kopy, St. Leonards, NSW.

Board of Surveying and Spatial Information of NSW 2009, viewed 24/08/2009, < <http://www.bossi.nsw.gov.au/>>.

Brown, A G 1993, *Law Relating to Land Boundaries & Surveying*, 2<sup>nd</sup> ed, The Association of Consulting Surveyors, Queensland.

CCH online database, 2009, viewed 26/10/2009.  
< <http://www.cch.com.au/au/default.aspx> >.

Chalkley, R 1994, *Professional Conduct: A Handbook for Chartered Surveyors*, Surveyors Holdings Ltd, London.

Connor, C 2009, 'Russell Island (Morgan) Inquiry finally unlocked', Combined Island Association Inc, vol. 4 no. 2.

Copyright Act 1968 section 183 (NSW) *The Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004*

Curdie, J K 1973, *Foreword to Legal Aspects of Boundary Surveying as apply in New South Wales*, New Century Press Pty. Ltd. Sydney.

De Lange, J 1991, *A Disclaimer Manual for Surveyors*, 1<sup>st</sup> edn., The Association of Consulting Surveyors, Australia.

Duhaime Legal Dictionary online database, 2009, viewed 20/10/2009, < <http://www.duhaime.org/>>.

Enemark, S & Higgins, M 2006, 'The global agenda, its relevance to the Asia-Pacific Region and the role the International Federation of Surveyors', Proceedings of the fifth Trans Tasman Survey conference and the second Queensland Spatial Industry conference, Cairns Australia, pp.18-23

George Szirom v. Surveyors Board of Victoria [1995] VSC 184; [1995] VICSC 184 (18 August 1995), viewed 20/10/2009,

< <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VICSC/1995/184.html?query=zirom>>.

Hallman, F 1973, *Legal Aspects of Boundary Surveying as apply in New South Wales*, New Century Press Pty. Ltd. Sydney.

Haly, A, 2005, 'Do Disclaimers Work?' Position, no 18, pp, 42.

Hein online database, 2009, viewed 26/10/2009, <<http://www.caul.edu.au/datasets/hein.html>>.

Jones, A, Rowe, C and Kentish, P 1999, 'Cadastral Reform', Surveying and Mapping, ICSM Discussion Paper.

Jones, T 2009, 'Surveyors and Lawyers working closer together', Survey Quarterly, 58, pp 8-9.

Kearsley, AHW 2007, 'Professionals and Professionalism in Surveying and Spatial Information Essential, Desirable or Superfluous?' Strategic Integration of Surveying Services, no, 13-17.

Keen, J E 1996, *Land Surveying Law*, 2<sup>nd</sup> edn., Land Surveyor's Workshops, Spruce Pine, North Carolina, USA.

King, G, Keohane, R.O, and Verba, S (2009), *Scientific Inference in Qualitative Research*, viewed 25/07/2009, <<http://press.princeton.edu/chapters/s5458.html>>.

Land Surveyors Licensing Board of Western Australia, 2009, viewed 26/10/2009, < <http://www.lslb.wa.gov.au/>>.

Land Surveyors Licensing Board of Western Australia v. Neale [2007] WASAT 309 (30 November 2007), viewed 20/10/2009, <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/WASAT/2007/309.html?query=surveyors%20and%20negligence>>.

Land Surveyors Licensing Board of Western Australia v. Neale [2007] WASAT 176 (5 July 2007), viewed 20/10/2009, <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/WASAT/2007/176.html?query=surveyors%20and%20negligence>>.

Lawbook Online database, Copyright © 2009 Thomson Reuters (Professional) Australia Limited, viewed 26/10/2009, <<http://subscriber.lawbookco.com.au/ThomsonNXT4/Errors.aspx?sc=403&ec=12&site=1>>.

Law Council of Australia, 2000. *Federal Professional Standards Legislation*, The Commonwealth Minister for Financial Services and Regulation, Canberra, Australia, pp.5

<[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=01EC7CC5-1C23-CACD-22A6-F7997F2BF64D&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=01EC7CC5-1C23-CACD-22A6-F7997F2BF64D&siteName=lca)>.

Legal online database, 2009, viewed 26/10/2009,

<<http://www.legalonline.vic.gov.au/>>.

LexisNexis AU database, Copyright © 2009 LexisNexis, a division of Reed Elsevier Inc. viewed 26/10/2009,

<<http://www.swin.edu.au/lib/database/linking/lexisnexisau.htm>>.

Macquarie Dictionary Online, Copyright © Macmillan Publishers Australia viewed 26/10/2009,

<<http://www.macquarieonline.com.au/dictionary.html>>.

Marler, I & Fergusson, R 1999. *'Insurance'*, *Measure & Map*, no.3 pp. 20-21.

Marler, I G (Chairman and Managing Director) 2002, Letter Re: *Inquiry into the impact of Public Liability and Professional Indemnity Insurance cost increases*, The Senate Economic Reference Committee, Canberra, pp.3

<<http://www.aph.gov.au/SEnate/committee/economics.../sub027.doc>>.

McLeod, B and Hayward, P 2003, *'The Future of the Surveying Profession in NSW'*, *Azimuth* vol 5. no 41, pp32-33.

Miller, R 2009, *'Australian High Court rules in favour of surveyors copyright'*, *Survey Quarterly*, 58, pp16.

Oxford English Dictionary Online database, Copyright © Oxford University Press 2009. Macquarie Dictionary Online, Copyright © Macmillan Publishers Australia, viewed 26/10/2009,

<[http://try.alot.com/tb/dictionary/dictionary\\_magnify\\_en\\_gb.php?aff\\_id=googUK&camp\\_id=735](http://try.alot.com/tb/dictionary/dictionary_magnify_en_gb.php?aff_id=googUK&camp_id=735)>.

Powers, J 2002, *'A Way Forward'*, *Measure & Map*, no.2

Professions Australian, 2005, viewed 19/07/2009

<<http://www.professions.com.au/member.html>>.

Ristevski, JA & Williamson, IP 2001, *'The Reform of Statutory Regulations Relating to the Surveying Profession'*, *The Journal of the Institution of Surveyors Australia INC*, vol.47, no1, pp 6.

Shuttleworth, M, (2008). *Quantitative research design*, viewed 27/07/2009,

<<http://www.experiment-resources.com/quantitative-research-design.html#ixzz0N4SWzkYP>>.

Surveyors Registration Board of Victoria, 2009, viewed 26/10/2009, <<http://www.surveyorsboard.vic.gov.au/>>, and <[http://www.surveyorsboard.vic.gov.au/Disciplinary%20Hearings/13%20web%20notice\\_s23-05\\_muldowneyj.pdf](http://www.surveyorsboard.vic.gov.au/Disciplinary%20Hearings/13%20web%20notice_s23-05_muldowneyj.pdf)>.

Surveying Act 2002 (NSW)

Surveying Regulation 2006 (NSW)

The Legal Aid Website (2009), Duty of care, Professional Negligence, viewed 14/07/2009, <<http://www.legalaid.qld.gov.au/Legal+Information/Living+in+the+community/Duty+of+care/Negligence+duty+of+care+and+loss.htm#negligence>>.

Trade Practices Act 1974 (NSW)

The Institution of Surveyors NSW incorporated (2009), viewed 20/10/2009, <<http://www.isansw.org.au>>.

The Senate – Economics References Committee – Review of Public Liability and Professional Indemnity Insurance <[http://www.aph.gov.au/SEnate/committee/economics\\_ctte/completed\\_inquiries/2002-04/publib\\_insur/report/report.pdf](http://www.aph.gov.au/SEnate/committee/economics_ctte/completed_inquiries/2002-04/publib_insur/report/report.pdf)>.

The Fair Trading Amendment Bill 1994 (NSW)

The Trade Practices Amendment (Personal Injuries and Death) Bill 2004 (NSW)

The Workers Compensation Amendment Bill 2008 (NSW)

Workers Compensation Act 1987 (NSW)

Wikipedia Free encyclopaedia database online, 2009, viewed 20/10/2009, <[http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page)>.

Williamson, IP and Grant, DM 1999, United Nations- FIG Bathurst Declaration on Land Administration for Sustainable Development: *'Development and Impact'*, FIG XXII International Congress. Melbourne Australia.

WorkCover, New South Wales, 2009, viewed 26/10.2009, <<http://www.cch.com.au/au/default.aspx>>.

# Appendix A

University of Southern Queensland

Appendix A

FACULTY OF ENGINEERING AND SURVEYING

**ENG4111/4112 Research Project**  
**PROJECT SPECIFICATION**

FOR: **Anthony Patrick SMITH**

TOPIC: SURVEYING AND THE LAW – A STUDY OF LITIGATION  
AGAINST SURVEYORS AND INVESTIGATION OF THE  
CAUSE AND EFFECT OVER THE LAST DECADE

SUPERVISOR: Mr. Shane Simmons, Senior Lecturer (Surveying), USQ

ENROLMENT: ENG4111 – S1, E, 2009  
ENG4112 – S2, E, 2009

PROJECT AIM: To examine various cases where litigation has been taken against  
Surveyors and to investigate litigation over the last decade.

PROGRAMME: (Issue B, 20<sup>th</sup> April 2009)

1. Research, document and summarise various legal proceedings that have been pursued through the courts and insurance society that relate to Surveying.
2. Research and investigate the relationship between the role and expectations placed on the modern Surveyor, and explore the effect of these expectations relevant to the law.
3. Analyse how decisions made as a professional Surveyor can impact upon you and your client.
4. Numerically and graphically illustrate the amount of litigation faced by the Surveying profession in recent times.
5. Suggest recommendations on how to reduce litigation against professional Surveyors.

*As time permits:*

6. Research methods of risk assessment and loss prevention for Surveyors.

AGREED A.P. Smith (student) Shane Simmons (supervisor)

Date: 20/4/2009

Date: 11/5/2009

Assistant Examiner: Handwritten signature 29/5/09

# Appendix B

Research conducted by Mr Anthony P Smith – August 2009

*Surveying and the law: A study of surveyors and their legal knowledge with implication on the legal responsibilities of surveyors.*

QUESTIONNAIRE (Please tick the appropriate boxes)

1. How long have you been in the surveying profession?

- 10 years or less
- 11 to 15 years
- 16 to 20 years
- more than 20 years

2. During this time, how many years did you spend in the field?

- 5 years or less
- 6 to 10 years
- 11 to 15 years
- more than 15 years

3. How long have you been a registered surveyor?

- not registered
- 5 years or less
- 6 to 10 years
- 11 to 15 years
- more than 15 years

4. Please indicate the type of organisation you have worked in, and the time period.

- Private practice \_\_\_\_\_ years
- Government \_\_\_\_\_ years

5. Please indicate the types of surveying and/or spatial sciences you have worked in.

- Cadastral
- Engineering
- Mining
- Hydrographic
- GIS
- Photogrammetry
- Remote Sensing
- Geodesy
- Land Information Management

6. Did you study surveying at University?

- yes
- no

If yes, please state the name of the University?

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7. Which of the following age groups are you in?

- 40 or below
- 41 to 45
- 46 to 50
- 51 to 55
- 56 or above

8. Have you ever held a management or leadership position outside of the surveying profession?

- yes
- no

If yes, please give brief details:

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---



9. What level of knowledge do you, as a professional surveyor, have in the areas of law that affect your position?

- no knowledge
- some knowledge
- a lot of knowledge

10. How familiar are you with the Surveying Act 2002 and the Surveying Regulation 2006?

- not familiar because I do not refer to them
- moderately familiar because I do refer to them
- very familiar and I know much of them off by heart

11. Have you, or do you know of a surveying associate who has been involved in any legal action relating to surveying?

- yes
- no

12. Have you, or do you know of a surveying associate who has been involved in a professional indemnity insurance claim relating to surveying?

- yes
- no

13. Have you, or do you know of a surveying associate who has settled a litigation case or insurance claim relating to surveying, out of court?

- yes
- no

14. Have you, or do you know of a surveying associate who has been involved in any WorkCover or OH&S infringement relating to surveying?

- yes
- no

15. Are you a member of a professional surveying organisation/s?

- yes
- no

If yes, please give brief details:

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Please respond to the following statements:

16. We are becoming a more litigious society over time.

- true
- false
- undecided

17. The overall expectations placed on the modern surveyor are increasing over time.

- true
- false
- undecided

18. Ethics and professionalism are important to surveyors.

- true
- false
- undecided

19. Good work practices will reduce the likelihood of facing litigation.

- true
- false
- undecided

20. A surveyor peg's the boundaries on a subdivision that he has been working on for the last two years. He begins to complete his plan of survey, and sends his final invoice to the client. The surveyor learns that his client is in financial difficulty, and the client starts to make excuses as to why he should not pay the surveyor. The surveyor completes the plan of survey, and has it ready for lodgement to the land titles office. What is your reaction?

- Lodge the plan of survey and await payment from the client.
- Hold onto the plan of survey and not lodge it until the client pays.
- Lodge the plan of survey with missing or incorrect information on it, knowing that a requisition will be raised by the land titles office and the plan will ultimately come back to the surveyor.
- Seek legal advice with a view to suing the client for non payment.
- Hire a debt collector to harass the client into paying.

21. A surveyor makes an error placing a boundary peg which is subsequently discovered after a 2 hour drive back to the office and the survey plan is lodged immediately with the Titles Office. The peg is required to be shifted about 30mm, which 'sort of' puts it on the side of the peg. What is your reaction?

- Reset the peg next time you are in the vicinity, which may be in a couple of week's time, with no charge to the client.
- No response required, the boundary corner is still on the peg and satisfies the requirements for marking boundaries pursuant to the Act.
- Reset the peg immediately with no charge to the client.
- No response required, notify the Titles Office that there is a survey plan error requiring rectification.
- Reset the peg immediately and charge the client including travel time.

22. Your client, a licensed builder, is not happy with the service you have provided and has contacted the Institution of Surveyors. He has lodged a complaint and accused you of being unprofessional and unethical. What is your reaction?

- Be pro-active and contact the client to try and resolve the issue.
- Sit back and wait for the Institution to contact you.
- Contact the builders licensing board, and make a counter complaint.
- Seek legal advice with a view to suing the client for defamation.
- Contact your surveying associates, and warn them not to do any work for this builder.

# Appendix C

Research conducted by Mr Anthony P Smith – August 2009

*Surveying and the law: A study of surveyors and their legal knowledge with implication on the legal responsibilities of surveyors.*

## Interview Questions for Surveyors

1. As a surveyor, what do you perceive are the main areas of law that affect the surveying profession?
  
2. In your view, do you think there is a need for surveyors to have knowledge of areas of law that affect their position? Why?
  
3. In your view, are there any major areas of concern relating to survey law that you think are likely to emerge in the near future? If so, what are they?
  
4. The Institution of Surveyors NSW suggests the following reasons for becoming a member:
  - (a) To be part of a unified professional voice
  - (b) For status and recognition amongst ones peers, the community and other professions
  - (c) To join established professional networks
  - (d) To access Continuing Professional Development
  - (e) To participate in the continuing development of the profession
  - (f) Access to the monthly magazine "Azimuth" - By Surveyors for Surveyors

Please list these in order of importance to you.

5. In your view, are clients and the general public more aware of their legal rights and more vocal in expressing them now? If so, how does this impact on you performing your duties as a surveyor?
  
6. In what ways do you find legislation useful for you in the performance of your job as a surveyor?
  
7. Many surveyors are of the view that they should be given some form of help in avoiding "legal trouble". In your view, what forms of help should be given, and how should this be rolled out?
  
8. If you were to attend a seminar or workshop on surveying law, what would be the topics you would like to see covered?

9. Provide reasons why you think surveying has the right to be classified as a profession?
  
10. In some states of Australia, details of surveyors facing disciplinary action by the relevant Board of Surveyors are placed on public record for general viewing. Do you think this should be the case in all states and why?
  
11. What do you think are the best ways for surveyors to avoid facing litigation, or avoid having to lodge professional indemnity insurance claims?
  
12. What methods do you use to maintain your professional standards as a surveyor?
  
13. What do you consider is the most important issue facing surveyors today?
  
14. Technology has revolutionized the surveying profession over the last 30 years. Please list the positives and negatives that technology has brought to the profession.