

M I T C H E L L



S H I R E C O U N C I L

PLANNING & ENVIRONMENT

DOCUMENT NUMBER

ESM-01

DOCUMENT TITLE

**Administration & Enforcement of the Building Act 1993 and
Building Regulations 2006 where a private building surveyor
has been appointed to carry out functions**

| DATE | CHANGE | BY | APPROVED | REVIEW |
|-------------|---------------|-----------|-----------------|---------------|
| 6/7/2004 | Initial Issue | BS | 6/7/2004 | 1/7/2007 |
| 26/6/2008 | Review | ESM | | 1/7/2010 |

**MUNICIPAL BUILDING CONTROL INTERVENTION FILTER CRITERIA
GUIDELINE**

For

**Council's Administration and Enforcement of
Parts 3,4,5,7 & 8 of the Building Act 1993 and Building Regulations 2006 in
circumstances WHERE a private building surveyor has been appointed to carry
out functions**

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HISTORY OF THE BUILDING CONTROL INTERVENTION FILTER CRITERIA

At the 2002 Annual Conference of the Victorian Municipal Building Surveyors Group Inc, the following 'Position Statement' was developed and adopted:

1. The VMBSG recognises and accepts that a private building surveyor, appointed under the Building Act, is responsible for ensuring that the Act and Regulations are complied with in respect of the building, land or place in relation to which he or she is appointed.
2. In recognising the above, the VMBSG recommends to councils that:
 - a. they determine, in general, issues regarding the above (i.e. where there has been a complaint) will be referred to the private building surveyor for action; and
 - b. in the base of imminent danger to life or property, council will take appropriate action, and
 - c. if it becomes apparent there has been a lack of action or inappropriate conduct or practice by any practitioner the matter will be referred to the BPB/BC as appropriate.
3. The VMBSG will develop:
 - a. guidelines to assist councils in developing policy when a council receives a complaint related to building work and a private building surveyor has accepted appointment and is responsible for carrying out the functions set out in section 76 of the **Building Act 1993**;

and
 - b. procedures and software specification for councils to adopt for referrals of the above to the BPB and Building Commission.

Following the conference, a working party of the VMBSG, in consultation with John Hoey of Hoey's Lawyers and the MAV developed the Filter Criteria. The 'draft' Filter Criteria was put to meetings of municipal building surveyors throughout the state for feedback and comment.

In February 2003, the 'draft' Filter Criteria was also reviewed and discussed at the 2003 LGPro Conference and enthusiastically endorsed by those participants present.

The building Control Intervention Filter Criteria is the result of input from all those persons and organisations.

THE ADMINISTRATION AND ENFORCEMENT OF PARTS 3,4,5,7 & 8 OF THE BUILDING ACT 1993 AND BUILDING REGULATIONS 2006 IN CIRCUMSTANCES WHERE A PRIVATE BUILDING SURVEYOR HAS BEEN APPOINTED TO CARRY OUT FUNCTIONS

PURPOSE

To inform Council of its responsibilities under the Building Act 1993 ("the Act") in circumstances where a private building surveyor has been appointed by or on behalf of the owner of a property to issue a building permit or carry out other functions in respect of building work being carried out or proposed to be carried out at the property.

BACKGROUND

Council is required by section 212 of the Act to administer and enforce specified parts of that Act and the whole of the *Building Regulations 2006* ("the Regulations") within its municipal district. As with many other responsibilities, Council has the ability to determine how it will carry out these functions having regard to competing obligations and limited resources.

Since the introduction of the Building Act in June 1994 property owners have had a choice between using Council services (through the municipal building surveyor) to obtain a building permit and using a private building surveyor. The building surveyor (private or municipal) who issues the building permit is generally responsible for ensuring that the building work complies with the requirements of the Act and the Regulations.

Council through the operation of section 212 of the Act retains the ability to enforce the Act and the Regulations even if a private building surveyor has been appointed. Section 212 provides as follows:

"212. Council to administer building provisions in its municipal district

(1) Except where otherwise expressly provided in this Act or the building regulations, a council is responsible for the administration and enforcement of parts 3,4,5,7 & 8 and the building regulations in its municipal district.

(2) Nothing in this section limits a council's powers to act outside its municipal district."

There is no express provision in the Act removing council's responsibilities where a private building surveyor has been appointed.

The Building Commission is a state statutory authority which has various powers under the Act to intervene in circumstances where a private building surveyor is appointed. These powers include the ability to issue directions to the private building surveyor, enforce orders made by the private building surveyor, prosecute persons for non compliance with orders issued by the private building surveyor in addition to being able to utilise all the powers that a municipal building surveyor has in certain circumstances.

The Building Practitioners Board is the registration body for persons working in the building industry. All building surveyors (both private and municipal) must be registered with that board. The building Practitioners Board is empowered to conduct

disciplinary proceedings in respect of any registered building practitioner who may have not carried out their responsibilities correctly.

The legislative framework clearly shows that responsibility for supervising private building surveyors rests with the Building Commission and the Building Practitioners Board. This responsibility includes those bodies taking appropriate action to resolve matters (and rectify any action/inaction taken by a private building surveyor that is/was contrary to the Regulations or the Act) where a private building surveyor has not carried out their work in a competent manner and to a professional standard.

Council frequently receives complaints from members of the public regarding building work that is being or has been carried out, for which a private building surveyor has been appointed. The complaints may include situations in which there is a real risk of danger to persons or property or may be regarding administrative matters or matters relating to the siting of buildings and/or structures.

The handling of these complaints can represent a significant expenditure of council resources.

Since the introduction of the private permit issuing system in July 1994, the ongoing problems associated with handling such complaints has generally been carried out by Council's municipal building surveyor and its building department on an ad hoc basis. The **Victorian Municipal Building Surveyors Group Inc** ('the VMBSG') at its 2002 conference overwhelmingly recognised the need for adopting a uniform approach across the State when dealing with complaints of that nature. As a result of that conference, the VMBSG working in consultation with the Municipal Association of Victoria ('the MAV') undertook to develop a system to classify and manage those complaints.

The Building Control Intervention Filter Criteria ('the Filter Criteria'), utilising a risk assessment matrix, identifies standardised responses to complaints from the public where a private building surveyor has been appointed. The Filter Criteria have been developed through consultation with municipal building surveyors throughout metropolitan and regional Victoria.

The Filter Criteria recognises that Council has obligations to the public with regard to dangerous situations which it can remedy or cause to be remedied. Where a danger exists and council officers are aware of that danger, a lack of action on the part of Council could result in a claim against Council if innocent persons were to suffer loss or injury. This is regardless of whether a private building surveyor is or has been appointed. In those circumstances the Filter Criteria recommends Council staff taking action to remove the danger.

The Filter Criteria also recognises that not all complaints received at council relate to dangers and many relate to matters stemming from administrative neglect or error by private building surveyors. In those circumstances the Filter Criteria recommends that the matter be referred to the private building surveyor for remedial action failing which the matter be referred to the Building Commission or Building Practitioners Board (or both) as appropriate.

In some circumstances it may be that the complaint is of a trivial or minor nature in which case the Filter Criteria may recommend merely referring it back to the private building surveyor for action.

It is anticipated that the Filter Criteria will, when adopted, streamline the complaint handling processes and provide a level of uniformity across all councils. The referral of appropriate cases to the Building Practitioners board and the building Commission will also allow those bodies to more readily carry out their functions under the Act.

RECOMMENDATIONS

1. *That Council adopts the Building Control Intervention Filter Criteria as a policy for the handling of complaints regarding building work where a private building surveyor has been appointed.*
2. *That the Policy be administered by the Municipal Building Surveyor and the Building Department.*
3. *That the Council resource the Building Department such that the policy can be properly administered.*

BUILDING CONTROL INTERVENTION FILTER CRITERIA

STEP 1 – Determine the possible consequences of the matter being complained of:

Table E1 Qualitative measures of consequence or impact

| Level | Descriptor | Example detail description |
|-------|---------------|--|
| 1 | Insignificant | No injuries, low financial loss, no detriment to health, no damage to property, siting. |
| 2 | Minor | Injury (self-treatable e.g. minor cuts or abrasions), medium financial loss, minimal detriment to health, minor damage to property |
| 3 | Moderate | Injury (medical treatment required by other), high financial loss, moderate detriment to health, moderate damage to property |
| 4 | Major | Serious non-permanent injury, major financial loss, major detriment to health, major damage to property |
| 5 | Catastrophic | Permanent injury or death, huge financial loss, irreparable damage to property. |

STEP 2 – Determine the likelihood of the event in Step 1 occurring

Table E2 Qualitative measures of likelihood

| Level | Descriptor | Description |
|-------|----------------|---|
| A | Almost certain | Is expected to occur in most circumstances |
| B | Likely | Will probably occur in most circumstances |
| C | Possible | Might occur some time |
| D | Unlikely | Could occur at some time |
| E | Rare | May occur only in exceptional circumstances |

STEP 3 – Locate the issue on the risk matrix by comparing the likelihood to the consequence

Table E3 Qualitative risk analysis matrix – level of risk

| Likelihood | Consequences | | | | |
|--------------------|--------------------|------------|---------------|------------|-------------------|
| | Insignificant 1 | Minor 2 | Moderate 3 | Major 4 | Catastrophic 5 |
| A (almost certain) | M | H | E | E | E |
| B (likely) | M | H | H | E | E |
| C (moderate) | L | M | H | H | E |
| D (unlikely) | L | L | M | H | E |
| E (rare) | L | L | M | H | H |

STEP 4 – Identify action to be taken

Table E4 Legend for Risk Analysis Matrix and Treatment

| | | | | |
|----------|---|--|---|--|
| E | Extreme risk: immediate action required | Refer to PBS without delay | Council/MBS takes immediate action to suitably reduce risk | <p>If there is evidence of conduct by any building practitioner such that a finding under section 179(1) of the Building Act 1993 could be made by the Building Practitioners Board the matter, with supporting evidence, will be referred to that Board for Inquiry.</p> <p>If there is a suspicion that any practitioner has engaged in conduct that may amount to illegal conduct or conduct as set out in section 179(1) of the Act the matter will be referred to the Building Commission for investigation.</p> <p>AND</p> <p>If it is necessary to do so for the proper administration of the Act refer the matter of RBS to the Building Commission for the exercise of its directive powers under s198 of the Building Act 1993.</p> |
| H | High risk, attention needed in reasonable time | Refer to PBS without delay | Council/MBS takes action if PBS is not taking action to suitably reduce the risk within reasonable time | |
| M | Moderate risk, treatment by PBS | Refer to PBS without delay | No other action by Council/MBS | |
| L | Low risk, manage by referral | Refer complainant to PBS without delay | No other action by Council/MBS | |

STEP 5 – Take the action as required by the matrix

RELEVANT LEGISLATION REGARDING REFERRALS

BUILDING ACT 1993

179. *Inquiry into conduct*

- (1) On an inquiry into the conduct of a registered building practitioner, the Building Practitioners Board may make any one or more of the decisions mentioned in sub-section (2) if it finds that the registered building practitioner –
- (a) is guilty of unprofessional conduct; or
 - (b) has failed to comply with this Act or the regulations; or
 - (c) has failed to comply with a determination of the Building Appeals Board or a direction of the Commission; or
 - (d) has been guilty of conduct in relation to his or her practice as a building practitioner which –
 - (i) is constituted by a pattern of conduct or by gross negligence or gross incompetence in a particular matter; and
 - (ii) shows that he or she is not a fit and proper person to practise as a building practitioner; or
 - (e) has employed or engaged to do, on his or her behalf, work of a kind that can only be done by a person registered under this Part in a particular category or class, a person who is not so registered; or
 - (f) has obtained his or her registration under this Part or any required insurance by fraud or misrepresentation; or
 - (fa) has failed to comply with a reasonable direction of an insurer in respect of the completion or rectification of defective building work or any payment to be made to the insurer in respect of the completion or rectification of defective building work in accordance with required insurance or in accordance with a guarantee under the **House Contracts Guarantee Act 1987** or has failed to comply with a direction under section 44 of the **House Contracts Guarantee Act 1987**; or
 - (fb) has failed to carry out a recommendation contained in an inspector's report under section 48 of the Domestic Building Contracts Act 1995
 - (g) Has had his or her authority to practise as a building practitioner in a place outside Victoria cancelled or suspended otherwise than for failure to renew that authority; or
 - (h) Has failed to comply with an undertaking given to the Board under this Division.

BUILDING REGULATIONS 2006

15.2 Professional standards

A registered building practitioner must –

- (a) perform his or her work as a building practitioner in a competent manner and to a professional standard;
- (b) immediately inform the client in writing if a conflict of interest arises or appears likely to arise between his or her interest as a building practitioner and that of his or her client; and
- (c) receive remuneration for his or her services as a building practitioner solely by the professional fee or other benefits specified in the contract of engagement or by the salary and other benefits payable by the building practitioner's employer.

NOTE: A finding pursuant to section 179(1) may include a finding of a failure to comply with Regulation 15.2.

SUPPORTIVE LETTERS

Letter – Referral of complainant to PBS – L – ‘Low Risk’

(Council Letterhead)

(Insert name of Complainant)
(Insert address of Complainant)

Dear

Re: Building work at (insert address)

I refer to your concerns regarding building work at the above site.

Council records disclose that a private building surveyor has been appointed in relation to that building work.

The Building Act 1993 establishes a privatised system of ensuring compliance with the relevant legislation and codes. In circumstances such as this, where a private building surveyor has been appointed, it is that private building surveyor who has powers and responsibilities which enable and obligate them to deal with the matters raised by you. I recommend therefore that you raise your concerns directly with the private building surveyor relevant to this work. The private building surveyor's details are as follows:

(Insert name and contact details of the relevant private building surveyor)

The Building Practitioners Board is the professional regulating body in respect of all building practitioners including private building surveyors. The Building Commission also has powers to oversee private building surveyors.

Any matters relating to the conduct, functions or practices of the private building surveyor or other building practitioners may also be referred to the Building Practitioner's Board and/or Building Commission (both of Level 27 Casseldon Place, 2 Lonsdale Street, Melbourne, 3000 – Ph 9285 6400, Fax 9285 6464).

Yours faithfully,

Letter – Referral of complain to PBS – M – ‘Moderate Risk’

(COUNCIL LETTERHEAD)

(Insert name of PBS)
(Insert address of PBS)

Dear

Re: Building work at (Insert address)

Council records disclose that you have accepted an appointment to carry out a private building surveyor's functions under Part 6 of the *Building Act 1993* in respect of the building/building work at the above address.

Information has been received by this office regarding (insert details of complaint).

The above matter is considered to be within the scope of your appointment and you are the appropriate person to deal with this issue and any surrounding issues.

In accordance with the *Municipal Building control Intervention Filter Criteria Policy* which has been adopted by this Council, the Municipal Building Surveyor does not intend exercising powers under the Building Act which are equally available to you. If, after a reasonable time however, it becomes evident that you have not taken appropriate action, the details of this matter may be referred to the Building Practitioner's Board and/or the Building Commission.

Yours faithfully

Copy: Owner

Copy: Complainant

Letter to complainant advising of referral to PBS – M – ‘Moderate Risk’

(COUNCIL LETTERHEAD)

(Insert name of Complainant)
(Insert address of Complainant)

Dear

Re: Building work at (insert address)

I refer to your concerns regarding building work at the above site.

Council records disclose that a private building surveyor has been appointed in relation to that building work.

The **Building Act 1993** establishes a privatised system of ensuring compliance with the relevant legislation and codes. In circumstances such as this, where a private building surveyor has been appointed, it is that private building surveyor who has powers and responsibilities which enable and obligate them to deal with matters raised by you.

I have therefore referred your concerns to the relevant private building surveyor for their action. A copy of that referral is enclosed.

The private building surveyor's details are as follows:

(Insert name and contact details of the relevant private building surveyor)

You may also wish to contact the private building surveyor directly.

The Building Practitioners Board is the professional regulating body in respect of all building practitioners including private building surveyors. The Building Commission also has powers to oversee private building surveyors.

Any matters relating to the conduct, functions or practices of the private building surveyor or other building practitioners may also be referred to the Building Practitioner's Board and/or Building Commission (both of Level 27 Casseldon Place, 2 Lonsdale Street, Melbourne 3000 – Ph 9285 6400, Fax 9285 6464).

Yours faithfully,

Letter – Referral of complaint to PBS – H – ‘High Risk’

(COUNCIL LETTERHEAD)

(Insert name of PBS)
(Insert address of PBS)

Dear

Re: Building work at (insert address)

Council records disclose that you have accepted an appointment to carry out a private building surveyor’s functions under Part 6 of the **Building Act 1993** in respect of the building/building work at the above address.

Information has been received by this office regarding (insert details of complaint).

The above matter is considered to be within the scope of your appointment and you are the appropriate person to deal with this issue and any surrounding issues.

In accordance with the *Municipal Building Control Intervention Filter Criteria Policy* which has been adopted by this Council, the Municipal Building Surveyor does not at this time intend exercising powers under the Building Act which are equally available to you. If, after a reasonable time however, it becomes evident that you have not taken appropriate action, the Municipal Building Surveyor may intervene and take any necessary action under the Building Act.

In the event it is necessary for the Municipal Building Surveyor to intervene, details of this matter may be referred to the Building Practitioner’s Board and/or the Building Commission.

Yours faithfully,

Copy: Owner Copy: Complainant

Letter to complainant advising of referral to PBS – H – ‘High Risk’

(COUNCIL LETTERHEAD)

(Insert name of Complainant)
(Insert address of Complainant)

Dear

Re: Building work at (insert address)

I refer to your concerns regarding building work at the above site.

Council records disclose that a private building surveyor has been appointed in relation to that building work.

The **Building Act 1993** establishes a privatised system of ensuring compliance with the relevant legislation and codes. In circumstances such as this, where a private building surveyor has been appointed, it is that private building surveyor who has powers and responsibilities which enable and obligate them to deal with the matters raised by you.

I have therefore referred your concerns to the relevant private building surveyor for their action. A copy of that referral is enclosed.

The private building surveyor's details are as follows:

(Insert name and contact details of the relevant private building surveyor)

You may also wish to contact the private building surveyor directly.

The Building Practitioners Board is the professional regulating body in respect of all building practitioners including private building surveyors. The Building Commission also has powers to oversee private building surveyors.

Any matters relating to the conduct, functions or practices of the private building surveyor or other building practitioners may also be referred to the Building Practitioner's Board and/or Building Commission (both of Level 27 Casseldon Place, 2 Lonsdale Street, Melbourne 3000 – Ph 9285 6400, Fax 9285 6464).

In the event that the private building surveyor has not taken action in regard to your concerns within (insert time period) please advise this office accordingly.

Yours faithfully,

Letter to PBS – E – ‘Extreme Risk’

(COUNCIL LETTERHEAD)

(Insert name of PBS)
(Insert address of PBS)

Dear

Re: Building work at (insert address)

Council records disclose that you have accepted an appointment to carry out a private building surveyor's functions under Part 6 of the *Building Act 1993* in respect of the building/building work at the above address.

Information has been received by this office regarding (insert details of complaint).

I have reviewed the circumstances of this matter and am of the opinion that there is an imminent danger to life or property and as such, in accordance with the *Municipal Building Control Intervention Filter Criteria Policy*, as adopted by this Council, I have determined that it is necessary that I make an Emergency Order pursuant to section 102 of the **Building Act 1993**.

A copy is enclosed for your information.

The Emergency Order does not take away from your duties and powers with respect to the building work – however, if you are contemplating further enforcement in regards to these same issues I recommend that you consult with this office and possibly the Building Commission before doing so.

Yours faithfully,

Municipal Building Surveyor

Copy: Owner Copy: Complainant

Letter to complainant advising of Emergency Order and PS – E – 'Extreme Risk'

(COUNCIL LETTERHEAD)

(Insert name of Complainant)
(Insert address of Complainant)

Dear

Re: Building work at (insert address)

I refer to your concerns regarding building work at the above site.

Council records disclose that a private building surveyor has been appointed in relation to that building work.

The **Building Act 1993** establishes a privatised system of ensuring compliance with the relevant legislation and codes. In circumstances where a private building surveyor has been appointed, it is that private building surveyor who has responsibility to deal with matters pertaining to the building work being undertaken at the site.

In the present circumstances however, I consider that there is a danger to life or property and as such, in accordance with the *Municipal Building Control Intervention Filter Criteria Policy*, as adopted by this council, I have determined that it is necessary that I make an Emergency Order pursuant to section 102 of the *Building Act 1993*.

I have forwarded a copy of that emergency order to the private building surveyor.

The private building surveyor's details are as follows:

(Insert name and contact details of the relevant private building surveyor)

You may also wish to contact the private building surveyor directly.

The Building Practitioners Board is the professional regulating body in respect of all building practitioners including private building surveyors. The Building Commission also has powers to oversee private building surveyors.

Any matters relating to the conduct, functions or practices of the private building surveyor or other building practitioners may also be referred to the Building Practitioner's Board and/or Building Commission (both of Level 27 Casseldon Place, 2 Lansdale Street, Melbourne 3000 – Ph 9285 6400, Fax 9285 6464).

Yours faithfully,
Municipal Building Surveyor

Letter to Building Practitioners Board

(COUNCIL LETTERHEAD)

The Chairperson
Building Practitioners Board
PO Box 536E
MELBOURNE 3001

Dear Sir/Madam

Re: (Insert name of building practitioner) – Request for Inquiry

Matters have come to the attention of Council, which in the view of Council, warrant the holding of an inquiry into the conduct of (insert name of building practitioner) who is/was a registered building practitioner.

I request, pursuant to section 178(d) of the **Building Act 1993**, that the Building Practitioners Board conduct said inquiry.

I enclose a chronology of events as they concern the building practitioner in addition to a summary of what I believe are the matters complained of and copies of relevant documents.

Please do not hesitate to contact Council staff if further information and evidence is required.

I look forward to advice of the Board's decision in this matter.

Yours faithfully

CHIEF EXECUTIVE OFFICER

Letter to the Building Commission requesting an investigation into the conduct of a building practitioner

(COUNCIL LETTERHEAD)

The Manager
Practitioner Compliance
Building Commission
PO Box 536E
MELBOURNE 3001

Dear Sir/Madam

Re: (Insert name of building practitioner/s)

A matter has come to the attention of Council which indicates that the conduct of the above practitioner/s warrant/s investigation by you.

The circumstances of this matter are set out in the enclosed chronology of events and summary of Council's concerns.

I request that you investigate the above practitioners and take the appropriate enforcement action.

Please advise me in due course of the results of your investigation.

Yours faithfully,

Municipal Building Surveyor

(Insert name of council)

**Letter to the Building Commission requesting direction to PBS
under s198**

(COUNCIL LETTERHEAD)

The Building Commissioner
Building Commission
PO Box 536E
MELBOURNE 3001

Dear Sir/Madam

Re: (Insert name of PBS)
Building Surveyor Functions

A matter has come to the attention of Council which indicates that the functions of a private building surveyor under the **Building Act 1993** or *Building Regulations 2006* have not been carried out in an appropriate manner.

The circumstances of this matter are set out in the enclosed chronology of events and summary of Council's concerns.

This matter is currently a serious cause of concern.

A prompt direction to the private building surveyor by the Building Commission under section 198 of the Building Act may compel the private building surveyor involved to deal with the issue in an appropriate and timely manner. This would avoid or contain any unnecessary Council involvement and therefore enable proper administration of the private building surveyor's function.

It is therefore requested that the Building Commission review this matter and take appropriate action as a matter of urgency.

Please do not hesitate to contact Council staff if further information is required.

Yours faithfully

CHIEF EXECUTIVE OFFICER