



Local government's role in building control - An introduction for councillors

Why is local government involvement in building control important?

Victoria's building control system, established primarily through the **Building Act 1993** and **Building Regulations 2018**, aims to promote a safe built environment, a market that consumers can have confidence in, and high levels of professionalism among practitioners.

In many respects, local government is at the coalface of building regulation. Section 212 of the **Building Act** makes councils responsible for the administration and enforcement of key parts of the Act and Regulations within its municipal district. Building owners appointing private building surveyors in respect of building work does not limit the responsibilities of councils.

The Municipal Building Surveyor (MBS) appointed by council has numerous powers with which to promote and protect public safety within their municipality. These include powers to enter and inspect buildings; issue building notices, building orders, and emergency orders; require work to be carried out or buildings to be evacuated; and the issuing of infringements.

Top 5 Tips to promote effective building control in your council

- 1** Promote an organisational understanding of the different roles and responsibilities of council and their appointed MBS and the importance of the building control function
- 2** Use a risk-based lens to ensure council takes reasonable steps to fulfil its responsibilities under legislation
- 3** Ensure that the MBS is resourced sufficiently to reasonably fulfil their role. Consider collaborative arrangements with other councils, including shared resources, reciprocal delegations and authorisations of officers, etc.
- 4** Consider what building control issues are a priority in your municipality – e.g. residential swimming pools and spas, unsafe rooming houses, compliance and maintenance of essential safety measures in buildings, natural disasters, combustible cladding, hazardous material storage etc.
- 5** Develop policies that will guide and assist council in managing its responsibilities under building legislation, oversight by the Council's risk and audit committee, and empowerment of the MBS to elevate issues that need attention within the organisation

What types of building issues does local government deal with?

Illegally occupied buildings

Buildings that were built without proper approvals or not intended for their current purpose may put occupants and the public at risk.

This may include overcrowded and unsafe group accommodation, people living “off-grid” in remote areas, or improper use of warehouses to store hazardous materials.



Places of public entertainment

Certain types of large events (Places of Public Entertainment, or POPEs) require permits to ensure they are safe for the public.

This may include events such as circuses, race meetings, community fairs, and live performances. POPE permits may address issues such as siting and erection of temporary structures, fire safety, and evacuation procedures.



Disaster and emergency response

Whether a localised emergency such as a vehicle impact or building fire, or a larger natural disaster like fire or flood, the MBS has an important role to play.

The MBS may use emergency powers to require the evacuation of affected buildings or immediate work to be undertaken to protect public safety. Later, MBSs may be involved in assessing what longer-term remediation to buildings is required through issuing building orders and notices.



Swimming pools and spas

Residential swimming pools and spas in Victoria must be registered with the relevant council and a certificate of barrier compliance lodged by the owner every four years. Where no certificate is lodged, the MBS may be required to undertake enforcement action to ensure the barrier is compliant.

These requirements were introduced in Victoria in 2020, and many council building departments are working through a significant amount of work generated by their commencement.



Combustible cladding

Combustible cladding is a high-profile and highly charged issue. Through a state-wide audit, many councils have been notified of buildings within their municipality suspected of having non-compliant cladding.

While the Minister for Planning has appointed the Victorian Building Authority (VBA) as MBS for a number of the highest risk buildings, councils will need to take enforcement action to ensure other buildings identified within their municipality are safe.



Issuing building permits and responding to report and consent

An MBS may accept appointment as a relevant building surveyor for a given permit. Councils vary in their permit-issuing activity, and over 90 per cent of building permits are issued by private building surveyors.

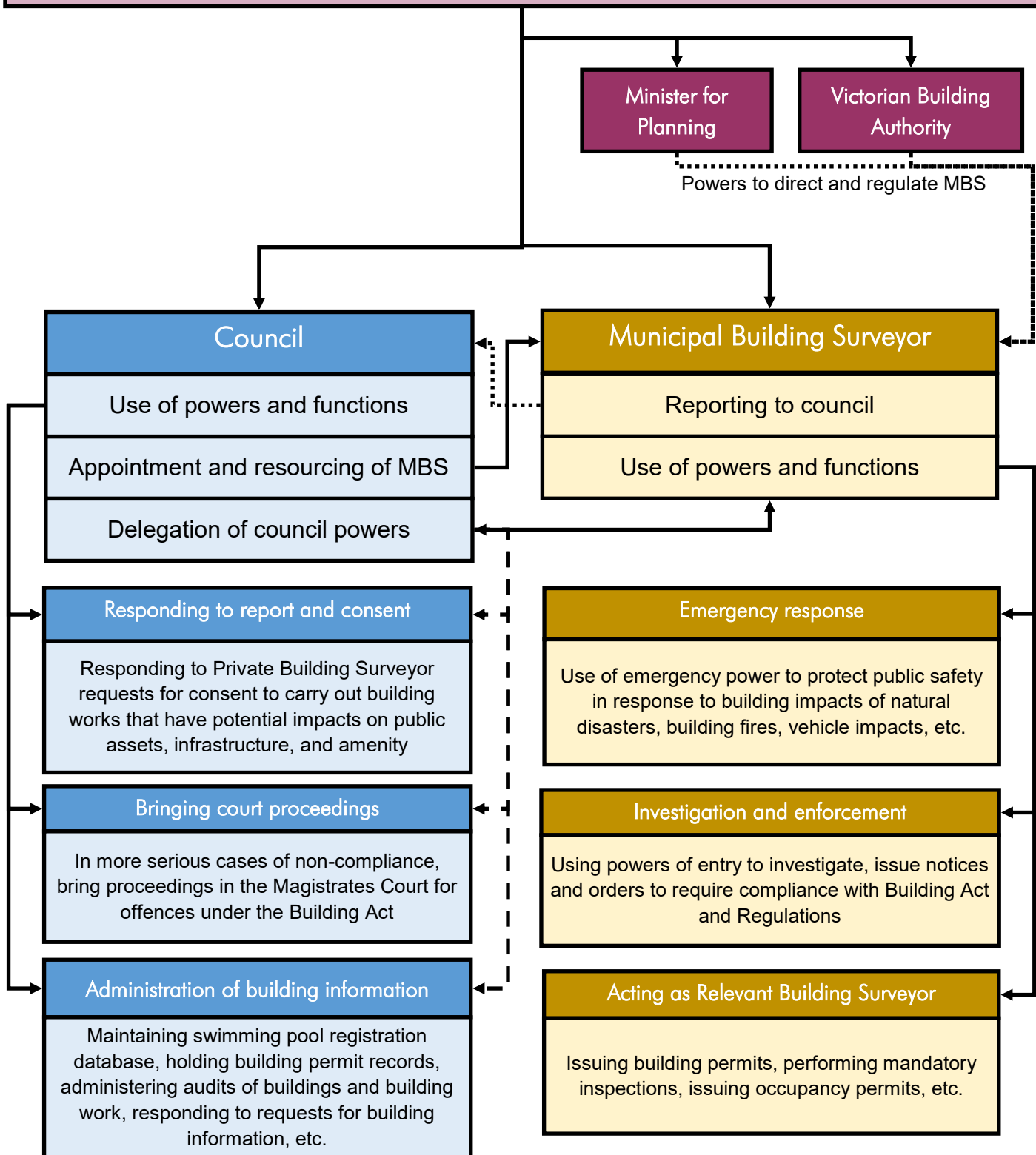
Councils also play an important role in consenting to proposed building work under a private building surveyor that may affect public assets, infrastructure, and amenity.



Overview of legislative environment

Building Act and Regulations

Legislation grants powers, functions, and responsibilities



Local government functions under the Building Act and Regulations

The MBS is a statutory position under the *Building Act*. While the MBS is appointed by council, many of the functions and powers of an MBS are statutory elements of the position rather than being delegated to them through council. This is a significant difference from the planning system, which has a far greater ability for council to be involved in day to day decisions. The legislation requires a level of independence in the decision making of the MBS to ensure unfettered consideration of the requirements of the Building Act and Regulations.

In addition to their responsibilities as an officer of council, an MBS has a number of responsibilities under the Building Act. They may be subject to legal direction from the Minister for Planning or the VBA, and are required to comply with the Code of Conduct for Building Surveyors issued by the VBA. These directions may generally establish conduct requirements for the role of MBS, or specifically direct an individual MBS to undertake action. The *Building Act* also provides for a council or its MBS to be directed by the Minister for Planning to carry out functions provided for in the legislation.

Council	Municipal Building Surveyor
<ul style="list-style-type: none">• Responding to report and consent• Bringing court proceedings• Managing building control unit• Effectively managing building records and data• Maintaining swimming pool register• Processing requests for building information	<ul style="list-style-type: none">• Acting as a relevant building surveyor for permits• Enforcing compliance with the <i>Building Act and Regulations</i>• Investigating suspected non-compliance, including exercising powers of entry and requesting documents• Utilising emergency powers to protect public safety

What are the risks?

A number of risks can emerge where building control is not adequately supported and managed by a council. While building owners and occupiers have the primary responsibility to comply with building legislation, council and the MBS have responsibilities to administer and enforce compliance if and when issues of danger or non-compliance arise.

To protect against liabilities arising from inaction, councils should maintain policies, procedures, and a building control plan based upon risk management principles. These should be developed in consultation with and be overseen by council's audit and risk committee.

Risks to the public

Protection of the public and occupants of buildings is the primary aim of building control. Unsafe buildings or building work may pose a risk of death, injury, or property damage. It may also cause financial loss for the parties involved.

Reputational risk

The public has an expectation that government provides them protection through regulation of the built environment and building practitioners. Councils may draw significant criticism from their communities if they are perceived to not sufficiently fulfill their role.

Risk of liability

There is a risk of liability for the council if council or the MBS do not meet their regulatory responsibilities under the Building Act, resulting in a person suffering loss or damage.

Case Studies

Pyrenees v Day—High Court Decision

In 1988, following an inspection after a minor fire, a council building inspector wrote to the owner and occupier of a premises noting defects in the fireplace and that the fireplace should not be used under any circumstances until those defects were addressed due to the fire hazard they pose. Council did not undertake follow-up action after this communication.

In May 1990, and with different tenants in the property, a fire damaged both the premises and the neighbouring property. The previously identified defects were found to have contributed to the fire. The question of council's liability to the new tenant and the owner of the neighbouring property eventually reached the High Court.

The High Court ruled that council was liable for damages to both parties. The Court found the council had a duty of care to both the tenant and the owner of the property because the council had statutory powers to protect the owner and tenant, the council had inspected the premises, had actual knowledge of the danger, and a special degree of control over the safety from fire of the premises. The Court considered that the tenant and owner were vulnerable to the council exercising its statutory functions with reasonable care. Therefore, where the council had not taken further action to ensure the defects were addressed it was liable.

Coroner's findings regarding the death of Lauren Kay Harris

Lauren Kay Harris died aged three on 26 September 2008 from drowning in the swimming pool at the property her family rented. At the time of Lauren's death, the pool safety barrier was not compliant with safety standards.

The MBS of a different municipality acted as the relevant building surveyor (RBS) for the construction of the pool and the installation of the required fence in November 1995. The building permit expired in November 1997, but no final inspection nor follow-up action by the RBS was undertaken at this point. Despite this the pool was in use. Following the construction company ceasing to trade in 2004 the RBS discovered the lack of records of a final inspection and undertook an inspection.

The RBS reported issuing a Building Order for Minor Works to address non-compliance, however both the property owner and the relevant municipality deny receiving a copy. The property owner was aware of compliance issues raised during the inspection and did not take proactive steps to remedy this.

Legislation was introduced in 2019 requiring pool owners to register with their council and lodge a certificate of compliance from a registered practitioner every four years. However, this case still highlights the need for councils and MBSs to appropriately respond to information they have access to, including through their MBS acting as an RBS.

Coroner's findings regarding the deaths of Leigh Sinclair and Christopher Alan Giorgi

Leigh Sinclair and Christopher Alan Giorgi died on 1 October 2006 when a fire ignited in the unregistered rooming house they were residing in. The relevant council had previously conducted inspections and found evidence of numerous regulatory problems, including non-compliance with the building legislation.

The Coroner found that the council had failed to successfully administer relevant and sometimes complex legislation. The danger which resulted from that failure coupled with catastrophic events led the Coroner to recommend significant changes to the practices of Consumer Affairs Victoria as well as legislative changes.

Coroner's findings regarding the death of Robert James Alexander Angus Anstice

Robert James Alexander Angus Anstice died on 19 September 2015 when a fire ignited in his home, which was a converted shed. Mr Anstice had occupied the home for the past 16 years without the required planning or building approvals to do so.

The Coroner highlighted the potential for council to better integrate information across the organisation to inform their regulatory response. In this case, it was suggested valuation processes for the purpose of rating may have led council to determine illegal occupation of the building was occurring. This specific observation may have less relevance now with the move to a centralised valuation service through the office of the Valuer General.

Further information

Municipal Association of Victoria—<https://www.mav.asn.au/>

The Municipal Association of Victoria (MAV) is the legislated peak body for Victorian local government. The MAV represents the interests of local government, helps build council capacity and provides advice and support to councils.

The MAV provides insurance to local government through the Liability Mutual Insurance (LMI) scheme. At the time of writing all 79 Victorian councils are members of the LMI scheme which provides coverage for public liability and professional indemnity, including for employees of council such as building surveyors.

Advocacy and insurance information as well as contact details for relevant inquiries can be found on the MAV member's extranet.

Victorian Building Authority—<https://www.vba.vic.gov.au/>

The Victorian Building Authority (VBA) is the principal regulator for building and plumbing in Victoria. The VBA's work helps ensure that all Victorians live and work in a quality built environment.

The VBA contributes to public health, safety and amenity by overseeing compliance with regulations, legal requirements and professional standards. The VBA protects communities, empowers consumers and encourages continuous improvement across the building and plumbing industries. They place consumers at the centre of what they do and take action against those who do not meet the standards required to protect the community.

The VBA monitors and enforces building standards, registers practitioners and performs critical inspection and audit work of construction sites and buildings that potentially contain high-risk combustible cladding and defects.

Victorian Municipal Building Surveyors Group—<https://www.vmsg.com.au/>

The Victorian Municipal Building Surveyors Group (VMBSG) is an association committed to good building control and regulation at a local government level in Victoria. The VMBSG operates under its statement of purpose and the rules of the incorporated association. The Statement of Purpose of the VMBSG provides the following principles:

- In the public interest promote the necessary standards, key actions and functions of municipal building surveyors and councils with relation the role of local government in building control.
- Ensure that councils and municipal building surveyors benefit and develop from the existence of the group.
- To advocate in the interests of local government, municipal building surveying and building control.
- Cultivate high professional standards with training, education and an appropriate level of consistency.
- Work effectively with other organisations for the betterment of building control.

Other Resources

Current Ministerial Orders issued by the Minister for Planning are available on the VBA website—

<https://www.vba.vic.gov.au/building/regulatory-framework/ministerial-orders>

There are a number of articles addressing public authority duty of care using *Pyrenees v Day* as an example—

<https://www.google.com/search?q=pyrenees+v+day>

Swimming pool registration and inspection requirements, including a guide for councils and practitioners—

<https://www.vba.vic.gov.au/consumers/swimming-pools>

Victoria's state-wide cladding audit and information on combustible cladding in general—

<https://www.vba.vic.gov.au/cladding/audit>

The building section of the Department of Environment, Land, Water, and Planning, responsible for building policy in Victoria—

<https://www.planning.vic.gov.au/building-policy/building-policy>