

Guidelines

Immediate Suspension of a Building Practitioner's Registration in the Public Interest

Compliance and Enforcement

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Purpose

The purpose of these Guidelines is to provide guidance to decision-makers when making a decision to immediately suspend a building practitioner's registration in circumstances where the VBA considers it is in the interests of the public to do so, pursuant to section 180A(2A) of the *Building Act 1993* (Vic) (Act).

These Guidelines solely address the immediate suspension of registrations on public interest grounds. Immediate suspension of a practitioner's registration on other grounds will continue to be managed by the Practitioner Discipline Unit and governed by the Operating Guidelines for Immediate Suspension of Registration.¹

Background

Section 180A(2A) and (2B) of the Act provide:

- (2A) *The Authority must, by written notice given to a registered building practitioner, immediately suspend the registration of the registered building practitioner if the Authority considers it is in the interests of the public to do so pending the show cause process.*
- (2B) *For the purposes of subsection (2A), matters that the Authority may have regard to in deciding whether it is in the interests of the public to immediately suspend the registration of a registered building practitioner include the following –*
 - (a) *whether the registered building practitioner is performing, has performed or has allowed others under the practitioner's control to perform building work that poses a serious risk to neighbouring properties;*
 - (b) *whether the registered building practitioner is performing, has performed or has allowed others under the practitioner's control to perform building work that poses a risk to the health and safety of persons;*
 - (c) *whether the registered building practitioner has been the subject of multiple adverse disciplinary actions by the Authority.*

These provisions commenced on 26 September 2018.² They give the VBA or its delegate the same power as the Building Practitioner's Board (BPB) previously had to suspend a practitioner's registration pending the outcome of a disciplinary inquiry if the BPB considered it in the interests of the public to do so.

The power to immediately suspend

Subsection 180A(2A) of the Act requires the VBA to immediately suspend the registration of a registered building practitioner if the VBA considers it is in the public interest to do so. This is a mandatory requirement that the VBA must comply with upon forming the view that the suspension would be in the interests of the public. Following a decision to immediately suspend a practitioner's

¹ DOC/17/297423

² Inserted into the Act by the *Building Amendment (Registration of Building Trades and Other Matters) Act 2018*

registration, the decision-maker must refer the matter to the Compliance and Enforcement Division to commence a formal show cause process (which may require investigation before disciplinary action is taken).

It is expected that the VBA will only take steps to suspend a practitioner's registration in the interests of the public where significant risks are identified requiring the VBA to intervene. Given the serious implications for the building practitioner which result from the VBA exercising its power to immediately suspend the practitioner on public interest grounds, the power to make these types of decisions has only been delegated to executive staff of the VBA.

How the VBA may determine what is in the interests of the public

The interests of the public within the VBA's legislative framework

The phrase 'in the interests of the public' is not defined for the purposes of the Act and should be read broadly. For a decision to immediately suspend a practitioner's registration to be in the 'interests of the public', the decision cannot be made solely to serve the private or personal interests of the decision-maker or a related party. Instead, the decision-maker must be able to demonstrate what public interest is being served in making the decision.

The VBA must exercise its powers within its legal and operational context and to further the purposes of the Act, which include:

- regulating building work and building standards;
- providing an efficient and effective system for administering and enforcing building and safety matters; and
- regulating building practitioners.

The reach of the VBA's regulatory remit will impact on what may amount to the 'interests of the public' when making a decision to suspend the registration of a practitioner on this basis.

Making a decision 'in the interests of the public' will include decisions made in the interests of a certain section or class of the public as well as in the interest of the entire public. The VBA and its authorised delegate may therefore make decisions on public interest grounds that best achieve the purposes of the Act and the VBA's functions in the circumstances of the particular case.

Decision making process

Decision-makers are to follow the following process to determine if it would be in the interests of the public to immediately suspend the registration of a building practitioner:

1. identify the 'public' whose interests are to be considered;
2. identify the 'interests' applicable to the decision;
3. identify matters relevant to the decision;
4. assess each public interest identified, and balance any conflicting or competing interests; and
5. decide if the immediate suspension is in the interests of the public.

These steps are described in detail below.

1. Identification of the relevant population – the 'public' whose interests are to be considered in making the decision

The decision-maker must be clear about which people or group of people is the relevant public whose interests are considered in making the decision. The public may include the interests of different sections of the public including:

- the building industry and industry groups;
- consumers and consumer groups; and
- classes of people impacted by specific practitioners (ie residents/occupants of neighbouring properties).

2. Identification of the 'interests' applicable to the decision

The decision-maker needs to identify the interests that will guide the exercise of the power. This will involve determining the objectives that apply to the decision, having regard to:

- the objects of the Act;
- the intention that the legislation aims to achieve;
- any directions of the Minister; and
- any policies that guide the VBA's operations, which may include the Minister's Statement of Expectations and the strategic goals of the VBA.

This step also involves identification and exclusion of matters that are not in the interests of the public, which may include matters:

- of a private nature; and
- that are in the interests of only one person rather than the public or a section of the public.

3. Identification of matters relevant to the interests of the public

The identification of the relevant interests in the previous step will direct decision-makers to relevant provisions of the Act, and the matters that the VBA may have regard to in deciding if it is in the interests of the public to immediately suspend a practitioner. These matters are whether the practitioner:

1. is performing or has allowed others under their control to perform building work that:
 - a. poses a serious risk to neighbouring properties; or
 - b. poses a risk to the health and safety of persons; or
2. has been the subject of multiple adverse disciplinary actions by the VBA.³

The matters set out in the Act are inclusive only, and do not limit the matters that the VBA may have regard to. The VBA therefore has broad discretion to consider other matters that may be in the interests of the public.

The decision-maker must also have regard to the following matters (where relevant) in determining if a building practitioner's registration should be immediately suspended in the interests of the public:

³ Section 180A(2B) of the Act

- the seriousness of any allegations made against the practitioner and whether those allegations would amount to a significant breach of the practitioner's responsibility to act in a manner expected of a competent and professional building practitioner;
- the attitude of the practitioner towards compliance with their legal obligations;
- the level of understanding that the practitioner has of their legal obligations, which may indicate a deliberate disregard for compliance;
- whether the behaviour of the practitioner indicates a disregard to health and safety;
- whether the alleged conduct poses a risk of death or serious injury to persons impacted by the conduct;
- the extent of the damage the practitioner's actions have caused;
- the likelihood that the practitioner's actions will be repeated or continued;
- whether the practitioner has been charged with or convicted of offences by other regulators, including by the police for criminal offences;
- the impact of the practitioner's behaviour on consumers;
- the damage the practitioner's action pose to the integrity of the building industry; and
- whether the practitioner is a fit and proper person.

4. Assessment and weighing of each matter and interest, including the balancing of conflicting or competing public interests.

The decision-maker must assess and weigh the importance of each public interest identified and make an assessment as to what is in the interests of the public overall. Each decision will require an evaluative factual judgement. While similar circumstances should be treated consistently, decision-makers should consider each case on its merits and against what is in the interests of the public at that point in time.

Conflicting interests may be identified, including:

- the majority views or opinions of the public;
- the views of the building industry;
- the views of any affected consumers;
- the views of the government or members of parliament;
- an objective assessment by an impartial person of the public interests likely to apply.

Decision-makers should remain aware that the public as a whole often does not have all of the information to inform their view, and the VBA may be in a better position to determine what would and would not be in the interests of a certain section of the public.

The decision-maker needs to consider the relative importance of each matter and interest identified to determine if it is in the interests of the public to suspend the registration of the building practitioner. The decision-maker must also have regard to the merit of any allegations made against the building practitioner, including the strengths of the evidence supporting any of those allegations. Decision-makers must ensure there is a reasonable basis for any decision made.

The assessment must be informed by the particular circumstances of the case and based on careful consideration of the relevant interests involved. Matters that may influence the importance of each interest include:

- the size of the section of the public whose interests may be affected;
- the lapse of time between the practitioner's conduct and the decision;
- any change in circumstances between the practitioner's conduct and the decision;
- whether the practitioner is currently engaged in building work;
- the evidence (or lack thereof) supporting any allegation; and
- whether there is an immediate risk to health and safety requiring intervention.

The purpose of the assessment is to:

- work through the competing tensions between the relevant interests; and
- come to a conclusion about whether it would be in the interests of the public to suspend the building practitioner's registration.

5. Decide if the immediate suspension of the practitioner's registration is, on balance, in the interests of the public.

The VBA may suspend a practitioner's registration in the interest of the public where the VBA *considers* that it is appropriate to do so. The Act does not specify the requisite standard of proof, however it is prudent that decision-makers have a reasonable basis for any decision (documented in contemporaneous file notes), and that the interest of the public is clearly articulated in any notice of decision.

Demonstrating the basis of the decision

A decision to immediately suspend a practitioner's registration in the public interest is subject to review by VBA internal review or by VCAT.⁴ When making a decision to immediately suspend a registration, the VBA must ensure that there are full and defensible reasons for doing so.

A properly documented decision will support the credibility of the decision-maker and the decision-making process and will help to ensure that there was adequate rigour in the assessment process by illustrating the basis for the decision.

Where the VBA makes a decision to immediately suspend a practitioner's registration in the interests of the public, it must give the practitioner a written notice within 5 days of making the decision.⁵ The written notice must state:

- the decision;
- the grounds of the decision;
- the period of the suspension; and
- that the practitioner may apply to VCAT for review of the decision.⁶

Decision making and delegations

Delegation of powers

Given the serious consequences for a building practitioner arising from the decision to immediately suspend the practitioner's registration on public interest grounds, this power has only been delegated

⁴ Sections 184, 186(3), Building Act

⁵ Section 180A(5).

⁶ Section 180A(4).

to senior executives of the VBA, including the Chief Executive Officer (**CEO**), Executive Director Operations, Executive Director Corporate Governance and Major Projects and Director Compliance and Enforcement.

Escalation of matters in the interests of the public

VBA staff must ensure that matters or behaviour of building practitioners posing a significant risk to the public are brought to the immediate attention of one of the above executives for consideration of whether suspension of registration in the interests of the public is appropriate. Matters of significance may be identified in the following ways:

1. complaints received from consumers;
2. matters observed during an inspection by VBA inspectors, compliance auditors or plumbing inspectors;
3. matters raised during the course of an investigation, an interview or during the course of oral submissions;
4. matters identified in a file review of a completed matter referred for prosecution or disciplinary action; or
5. correspondence or feedback received from the building practitioner, other building practitioners, industry bodies or other stakeholders.

Matters with the following characteristics may require escalation:

6. action placing any person at risk of significant physical, financial or reputational harm;
7. conduct giving rise to a significant public concern;
8. deliberate disregard for the law;
9. a person or company with a history of compliance issues;
10. a systemic or industry wide compliance failure;
11. a request for action from the VBA's Commissioners or CEO; and
12. a decision which may acquire precedential value.

All VBA staff are expected to read these Guidelines and adhere to them. In particular, staff from the following Divisions need to be alert that information they come across in their day to day activities may warrant the preparation of an executive brief to one of the delegates for them to consider whether the immediate suspension of a building practitioner is in the public interest:

- Enquiries, Inspections and Complaints;
- Compliance and Enforcement;
- Research and Review;

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- Audit;
- Technical and Regulation; and
- Governance and Major Projects

Once a matter is escalated, the relevant delegate must apply the considerations set out in these Guidelines before deciding to immediately suspend a building practitioner's registration.

Actions following suspension

The purpose of the suspension under section 180A(2A) of the Act is expressed to be used 'pending the show cause process', the decision-maker must therefore ensure that following a decision to immediately suspend a building practitioner on public interest grounds, the matter is referred to the Compliance and Enforcement Division for a comprehensive investigation to determine if further disciplinary action is appropriate.

A suspension imposed under section 180A(2A) takes effect when the notice of immediate suspension is given to the building practitioner.

The following relevant sections of the Operating Guidelines for the Immediate Suspension of Registrations⁷ will apply to decisions made in accordance with these Guidelines:

- Notice of immediate suspension and written reasons;
- Service of notice of decision;
- Period of registration suspension;
- Consequences of registration suspension;
- Immediate suspension and show cause process;
- Review and appeal rights; and
- Disciplinary register.

Notification requirements

Where the decision-maker is not the CEO, the decision-maker must brief the CEO before finalising a decision to immediately suspend a practitioner under this Guideline. The decision-maker must brief the CEO on the factual circumstances and considerations informing the decision.

Availability of Internal review

Internal review of a decision to immediately suspend a practitioner's registration in the interests of the public is not available where the decision-maker is the CEO.⁸

Internal review of decisions made by the Executive Director Operations, Executive Director Corporate Governance and Major Projects or the Director Compliance and Enforcement may be conducted by a

⁷ [DOC/17/297423](#)

⁸ Section 185(1).

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person appointed to conduct an internal review who holds a position equivalent or of a more senior position to the decision-maker.⁹

An application for internal review will not stay the operation of a decision to immediately suspend a practitioner's registration pending the outcome of that review.¹⁰

⁹ Section 185A.

¹⁰ Section 185(7).