

This updates the previous Practice Note-2016-70 issued December 2016.

Purpose

This practice note aims to inform the relevant building surveyor (RBS), builder and owner about formal and procedural matters regarding a direction to fix (DTF) building work.

A DTF must be given if, after an inspection of building work, the RBS believes on reasonable grounds that the building work fails to comply with the *Building Act 1993* (the Act), the *Building Regulations 2018* (the Regulations) or the building permit issued in relation to the building work.

Section 37A of the Act provide for the giving of oral and written DTF by the RBS or a building surveyor or inspector authorised by the RBS to give an oral direction to fix building work on behalf of the RBS.

This practice note does not address the issuing of a DTF by an authorised person under section 37B of the Act.

Before requesting any inspection

The builder should not contact the RBS to arrange an inspection of building work until the builder is confident that the work to be inspected is compliant.

When a DTF must be given

Once an inspection has taken place and the RBS believes on reasonable grounds that the building work fails to comply with the Act, the Regulations, or the building permit issued in relation to the building work, the RBS is required under section 37A(2) of the Act to give a DTF.

This duty persists until a relevant certificate of final inspection or occupancy permit is issued even if the building permit is due to expire during the compliance period for a DTF (in which case a further permit must be sought to enable the work to continue).

Once a DTF is given, a mandatory path of escalating actions must be followed until compliance is achieved. The builder may also face the possibility of disciplinary action and prosecution for non-compliance.

Refer to the *Directions to Fix Building Work flow chart* in Appendix A below.

Exception to the duty to give a DTF

The RBS is not required to give a DTF where the RBS is of the view that this is inappropriate or impossible.

Instances where it may be considered by the RBS to be inappropriate or impossible to give a DTF include:

- the work needed to achieve compliance requires a reporting authority's report and consent;
- consultation/consideration of other parties will be required to be carried out by the owner;
- building work gives rise to an emergency situation where an emergency order is required (which can only be issued by the Municipal Building Surveyor); or
- building work gives rise to emergency protection work being required.

Where the RBS determines that it would be inappropriate or impossible to give a DTF, they must proceed to the building notice/building order process. This ensures that control is being exercised by the RBS over the matter.

Considerations for giving a DTF

Once the RBS decides to give a DTF, the RBS must determine a number of factors.

Type of DTF

The RBS should determine which type of DTF to give, i.e. oral or written. It is recommended that the RBS gives an oral DTF initially if it is reasonably possible that compliance may be achieved through giving an oral DTF. This would apply to straightforward construction matters that are easily resolved and will be inspected in the short term.

Compliance period

There is a set period of seven days for compliance with an oral DTF, following which the RBS must give the builder a written DTF if they are not satisfied that the building work complies. It is recommended that the RBS advises the builder (or person in charge of the site) of the time frame when giving an oral DTF.

When giving a written DTF, the RBS must specify the time given to the builder to comply with the DTF. A copy of the written DTF must also be given to the owner of the building or land in or on which the building work is being carried out.

The RBS may ask the builder how long it will take to complete the work directed. However, it is the responsibility of the RBS to ensure the period reasonably reflects the time required to complete the work by someone making all reasonable efforts to complete the work in a timely manner.

It is inappropriate to give a DTF with a time for compliance that clearly cannot be met. The compliance period should not be less than the appeal period (seven days under regulation 271(1)(h) of the Regulations).

Content of written DTF

A DTF can require the builder or person apparently in charge of the site to carry out work so that the building work complies or

substantially complies with the Act, the Regulations and the building permit issued in relation to the building work.

Example 1 - Replace SL72 with SL82 mesh in accordance with the approved plans. A DTF can also require the builder or person apparently in charge to stop (or cause to stop) further building work that may prevent the directed building work from being adequately inspected.

This is to prevent building work that would obscure the work that the DTF required to be altered from being re-inspected to determine whether the DTF had been complied with.

Example 2 - Do not pour concrete until re-inspection of steel reinforcement. For purposes of clarity a DTF may include reference to other documents such as drawings, computations, proprietary literature or similar documents. If the documents referenced are not documents included in the building permit, copies of the documents may be attached to the DTF.

Duties of the person who is given a DTF

The person given a DTF is under a duty to comply with (or cause compliance with) the DTF. A builder may not request or receive any payment in relation to anything done for the purpose of complying with the direction, from the owner or their agent, and may be subject to disciplinary action and/or prosecution for breach of this provision, with a maximum penalty of 50 penalty units for a natural person or 250 penalty units for a body corporate.

What happens after a DTF is given

It is recommended that the builder notify the RBS when the building work has been rectified in compliance with the DTF, so that the RBS can carry out an inspection to verify that the building work complies.

The RBS must undertake an inspection when advised by the builder that the directed building work is complete, or on expiry of the DTF to determine if the DTF has been complied with.

If directed work has been completed in accordance with the DTF

The RBS must make a record of the inspection as provided in section 35A of the Act with the information required by regulation 173.

In the case of a written DTF, it is recommended that the RBS provide written confirmation to the builder that the directed work has been completed, and provide a copy of the notification to the owner at the same time.

If directed work has not been completed, or has not been completed in accordance with an oral DTF

In the case of an oral DTF, where the directed work has not been resolved, the RBS must proceed to give a written DTF to the builder (with a copy to the owner).

If directed work has not been completed, or has not been completed in accordance with the DTF when the written DTF expires

If the compliance period for a written DTF expires and the RBS determines on re-inspection that the directed work is not in accordance with the DTF, they must give written notice to the VBA and the owner within seven days of expiry of the DTF that the builder has failed to comply with the DTF.

Notice to the VBA can be sent via email to customerservice@vba.vic.gov.au.

The RBS must then proceed to the building notice/building order process if non-compliance persists.

Revocation of a DTF

If at any time before a DTF expires the RBS is satisfied that the person given the DTF is not able to comply with the DTF, the DTF may be revoked. This must be done in writing to the builder and owner.

Examples of circumstances when it may be determined that the person given the DTF is unable to comply include:

- the builder becoming incapable of practicing due to mental or physical infirmity; or

- the building contract with the builder being terminated.

If the RBS revokes the direction they must proceed to the building notice/order process.

If the DTF is revoked before the end of the period for compliance, the DTF ceases to operate and therefore there is no expiry and no failure to comply.

Section 371 of the Act allows the RBS to revoke the DTF if a domestic building work dispute that applies to the work required by the DTF has been resolved or the dispute has been determined by VCAT.

If RBS determines it is clear the DTF will not be complied with

If at any time before a DTF expires the RBS is satisfied that the DTF will clearly not be complied with, the RBS may proceed to the building notice/order process and does not need to wait for the DTF to expire.

Examples of when the RBS might form the view that the DTF will clearly not be complied with include:

- The builder has ceased to perform their functions
- The builder has indicated that they do not intend to comply.

The DTF continues in operation until expiry. The RBS is required to notify the VBA and the owner of the failure to comply with the DTF once expired, and the builder may face disciplinary action and/or prosecution.

The RBS still has a responsibility to ensure that building work does not continue where compliance will not be achieved. A stop work order may be required to be issued against the owner and builder.

Role of the owner (Other than an owner builder)

The owner is provided with a copy of the written DTF for their information and to ensure they are aware of items that the RBS has identified that do not comply with the Act, the Regulations and the building permit issued in relation to the building work.

The DTF does not permit or require the owner to enter the building site to undertake the building work required by the DTF.

Role of the owner builder

If the owner is also named as an owner builder on the building permit, the written DTF must be given to the owner builder.

The owner builder takes on the responsibilities of the builder in complying with the DTF and building in accordance with the Act, the Regulations and the building permit.

Rights of the builder in relation to written DTF

Appeal

A builder who has been given a written DTF may appeal to the Building Appeals Board (BAB) under section 138A. The appeal must be made within seven days of the written DTF being given (refer regulation 271(1)(h) of the Regulations).

Extension

In the case of a written DTF, the builder may request the RBS to extend the period for compliance before that period ends.

Upon request by the builder the RBS or authorised person may extend the period for compliance.

In deciding whether to give an extension consideration should be given to things such as the owner's interest in achieving a timely resolution, extensions already given (if any), and whether the builder has taken all reasonable steps to complete the required work within the original compliance period.

It would be appropriate to grant an extension of time where it is reasonable to expect the builder to comply with the DTF within the extended timeframe.

If an extension is given, the RBS is required to provide written notice (for example by altering the compliance date on the written DTF) to the builder and to provide a copy to the owner.

The role of the RBS after the VBA has been notified of non-compliance with DTF

Once a written DTF has expired and has not been complied with, and the VBA and the owner have been notified, the RBS must proceed to the building notice/order process. A building notice or building order transfers compliance responsibilities and liabilities to the owner under Part 8 of the Act.

If the builder completes all building work in accordance with the building permit after the date for compliance with the DTF an Occupancy Permit or Certificate of Final Inspection can still be issued. In this situation it is recommended that the RBS notify the builder, the owner and the VBA that the DTF has been complied with.

Consequences of non-compliance with DTF

A builder who fails to comply with a written DTF may be subject to disciplinary action or prosecution. Failure to ensure that the building work is carried out in accordance with a written direction and, if required by the direction, that the building work stops, is subject to a maximum penalty of 500 penalty units for a natural person and 2500 penalty units for a body corporate.

In determining whether to take compliance or enforcement action against a practitioner the VBA follows the principles outlined in its Compliance and Enforcement Policy.

Further Information

Want to know more?

If you have a technical enquiry, please email technicalenquiry@vba.vic.gov.au or call 1300 815 127.

Victorian Building Authority
733 Bourke Street Docklands VIC 3008

www.vba.vic.gov.au

Oral DTF	Written DTF
<p>When given: Non-compliance is evident after completion of an inspection <u>and</u> compliance can be achieved within seven days <u>and</u> there are no factors indicating an oral DTF is inappropriate (e.g. the extent of delays already incurred in achieving compliance, a strong likelihood that the oral DTF will be ignored, the complexity or volume of work required).</p>	<p>When given: Oral DTF is not appropriate OR Oral DTF has expired and compliance has not been achieved <u>OR</u> Non-compliance is evident after completion of an inspection <u>and</u> there are factors indicating an oral DTF will not be sufficient to achieve compliance (e.g. the work cannot be completed within seven days or there is a strong likelihood that an oral DTF will be ignored)</p>
<p>Given by: RBS or building surveyor/inspector authorised by the RBS</p>	<p>Given by: RBS only</p>
<p>Given to: Builder specified in the building permit issued in relation to that building work or person who is apparently in charge of the site on which the building work is being carried out.</p>	<p>Given to: Builder specified on the building permit issued regarding the building work. A copy must also be provided to the owner.</p>
<p>Compliance period: Seven days, following which the RBS must give the builder a written DTF if the RBS is not satisfied that the building work complies.</p>	<p>Compliance period: As specified by the RBS in the written DTF. A minimum of seven days is recommended, to enable the builder to exercise their right to appeal the decision to give a written DTF to the Building Appeals Board. The compliance period must be reasonably achievable given the nature and extent of the building work required. The builder may ask the RBS to extend the period for compliance with the DTF before the DTF expires. The builder’s input may be sought but it is the responsibility of the RBS to ensure the compliance period reasonably reflects the time required by someone making all reasonable efforts to complete the work in a timely manner.</p>

Oral DTF	Written DTF
<p>Form: An oral DTF is a spoken direction to carry out building work and may be accompanied by confirmation in writing, other than the Written DTF Form. For example, an inspection report that is not accompanied by a written direction on the VBA-approved Written DTF Form may provide written confirmation of an oral DTF.</p> <p>The person giving the DTF should make it clear that an oral DTF is being formally given.</p>	<p>Form: VBA-approved Written DTF Form only.</p>
<p>Content: It is recommended that the person giving the oral DTF clearly indicates that this is an oral DTF, and that the compliance period is seven days.</p> <p>Subject matter is limited to:</p> <ul style="list-style-type: none"> - carrying out work so that the building work complies wholly or substantially with the Act, the Regulations and the building permit issued in relation to the building work, OR - carrying out work so that the building work complies wholly or substantially with the Act, the Regulations and the building permit issued in relation to the building work and stopping any further building work that may prevent the directed building work from being adequately inspected. 	<p>Content: It is mandatory to include:</p> <ul style="list-style-type: none"> - the period for compliance - information about appeal rights, and - information about rights to request an extension. <p>The VBA-approved form contains fields and/or standard text that meets these requirements.</p> <p>Subject matter is limited to:</p> <ul style="list-style-type: none"> - carrying out work so that the building work complies wholly or substantially with the Act, the Regulations and the building permit issued in relation to the building work, OR - carrying out work so that the building work complies wholly or substantially with the Act, the Regulations and the building permit issued in relation to the building work, and stopping any further building work that may prevent the directed building work from being adequately inspected.

Oral DTF	Written DTF
<p>Notification requirements: None.</p> <p>It is recommended that the RBS (or building surveyor/inspector authorised to represent them) clearly indicates to the builder (or person apparently in charge of the site) that they are giving an oral DTF, and file notes that the oral DTF has been given, and that the builder (or person apparently in charge of the site) was informed at the time that it was an oral DTF.</p>	<p>Notification requirements: RBS must give the DTF to the builder and give a copy to the owner. It is recommended that notification to the owner be provided at the same time as it is provided to the builder.</p> <p>RBS must notify the builder in writing of any extension to the compliance period or revocation of the DTF, and provide a copy of the notification to the owner. It is recommended that the copy to the owner is provided at the same time as the notification to the builder.</p> <p>It is good practice to notify the builder once the RBS has determined that the DTF has been complied with, and give a copy of the notification to the owner at the same time.</p>
<p>Monitoring: Re-inspect once advised by the builder that the directed building work is complete or on expiry to determine whether DTF has been complied with.</p>	<p>Monitoring: Re-inspect once advised by the builder that the directed building work is complete or on expiry to determine whether DTF has been complied with.</p>
<p>Consequences of non-compliance: Written DTF must be given after oral direction expires.</p>	<p>Consequences of non-compliance: RBS must give written notice of non-compliance to the owner and the VBA, within seven days of the direction expiring. The builder may face disciplinary action and/or prosecution in relation to a failure to comply with a written DTF.</p>

Appendix One

Directions to Fix Building Work Flow Chart

