

27 March 2017

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By email: [REDACTED]

Dear Minister,

### **Building Amendment (Enforcement and Other Measures) Bill 2016**

The Building Amendment (Enforcement and Other Measures) Bill 2016 (**the Bill**) was introduced by you in the Legislative Assembly on 6 December 2016 and second read in the Legislative Council on 9 March 2017. The Law Institute of Victoria's (**LIV**) comments in relation to the Bill are set out below.

#### **Practitioner Registration**

The LIV understands that the Bill introduces a new system for registration of corporations, which will allow the Victorian Building Authority (**VBA**) to commence disciplinary action, when and if required, against both the corporation and the directors who are personally registered. As such, the nominee director will be personally responsible for ensuring that the corporation complies with the Building Act 1993 and the Building Regulations 2006. The LIV considers that this is an improvement, given the current system only permits disciplinary action against the registered building practitioner.

The LIV also notes that the Bill proposes the "fit and proper" test to apply to corporations or natural persons in order to become registered building practitioners. In the LIV's view, this will allow for additional probity checks which the current system has lacked.

#### **Building Surveyors**

The LIV notes that the Bill introduces changes that will permit building surveying corporations to be appointed as the relevant building surveyor. In such circumstances, the LIV understands that a corporation will be required to ensure that the functions of a building surveyor are undertaken by either a director or employee who is registered as a building surveyor, to be known as the 'designated building surveyor'. Further, the LIV is of the understanding that the 'designated building surveyor' will be responsible for ensuring that all building surveying functions are executed pursuant to the Building Act 1993 and the Building Regulations 2006 by registered building surveyors and/or registered building inspectors as necessary. On this basis, the LIV considers that this change will facilitate the ability of building surveyors to delegate their functions and transfer their functions as necessary.

#### **Building Permit System and Levy**

The Bill proposes a system under which a building permit will not be able to be issued until the building levy has been paid to the VBA and a building permit number has been issued by the VBA. The LIV submits that the proposed changes will result in a more uniform approach to numbering of building permits, which will provide for better tracking of permits and building activity within Victoria. Additionally, there will be greater certainty around ensuring that the correct building permit levy is remitted to the VBA.

## **Section 16 – Offences Relating to Carrying Out Building Work**

The LIV is of the understanding that the proposed changes under s16 aim to clarify circumstances where an owner, builder, building practitioner, or architect will be responsible for illegal building work. However, the LIV submits that the proposed wording under s16(4) may need to be further clarified on the grounds that it could be interpreted as having a broad meaning for building practitioners or architects who are engaged to carry out building work. More specifically, s16(4) provides:

*A building practitioner or an architect who is engaged to carry out building work must ensure that a building permit in relation to the work has been issued and is in force under this Act.*

“Building Work” is defined under s3 of the Act to mean “*work for or in connection with the construction, demolition or removal of a building*”.

The LIV notes that some lawyers have already expressed the view that “*work for or in connection*” could include design work or building surveying work. Accordingly, the LIV submits that if this interpretation is correct, it may imply that a building surveyor who has been appointed to issue a building permit or an architect who has prepared the plans for a building may be found to be responsible for building work that is carried out without a building permit. The LIV queries whether this is the intent of s16(4) and, if not, it may need to be clarified by explicitly stating that “Building Work” under s16(4) does not include the design, inspection, and issuing of a permit in respect of building work.

### **New Section 16A**

The LIV understands that new s16A concerns specific exceptions to an offence under s16, that is, when a building permit was not in effect because it was suspended. The LIV notes, however, that the proposed s16A(2) states that the exception “*does not apply to the accused if the accused is an architect or a building practitioner who is engaged to carry out the building work to which the building permit applies*”. The LIV is of the view that this may require further rewording for the same reasons as identified above in relation to the definition of “Building Work” and its application to building practitioners and architects.

### **New Section 16B**

The LIV notes that the new s16B is as a result of the recent illegal demolition of the Corkman Hotel in Carlton, which was also affected by a Heritage Overlay under the relevant Planning Scheme. Further, the LIV understands that the new s16B will make it an indictable offence for illegal building work where a person knew that a building permit was required and was not in force. Such an offence carries with it a term of imprisonment of up to five years.

Despite the above, however, the LIV queries whether this is the optimum approach towards dealing with illegal building work (such as the Corkman Hotel example). In particular, the LIV submits that the proposed approach adopts more of a reactionary stance in dealing with the matter and, further, it is questionable whether the building industry is prepared or able to deal with prosecutions that involve indictable offences, in view of the seriousness of the offences. On this basis, the LIV considers that there are risks attendant upon introducing indictable offences for building related breaches.

### **Regulation of Building Inspections**

The LIV understands that the Bill amends the Building Act 1993 to make it clear that mandatory building inspections must be undertaken by registered building surveyors, registered building inspectors, or others who are prescribed to perform inspections. The LIV submits that this change has a sound and well-supported basis, in addition to being well overdue. The situation of unregistered persons carrying out the functions of a building surveyor/building inspector will be eliminated.

## **Power of Entry**

The LIV notes that the Bill will provide the VBA and local councils with broader powers of entry in order to perform their statutory duties more efficiently and effectively. The LIV fully supports this improvement to the enforcement regime and powers by the statutory bodies.

The LIV queries, however, why, having regard to the powers which may be exercised by a person making an entry under the proposed s228H, an occupier of property would provide consent (especially by signing the consent form) to such entry being made.

## **Responsibility of Local Government**

The LIV understands that the Bill will amend s212 of the Building Act 1993 to make it clear that the responsibility of a council member to administer and enforce the Act and regulations in its municipality is not limited if a private building surveyor is appointed regarding a building or building work.

The LIV fully supports this well overdue amendment, on the grounds that there has been continual debate by legal practitioners and building surveyors as to precisely what councils' responsibilities are under s212 of the Act, which has resulted in varying interpretations.

The LIV also notes that there are no current court decisions specifically interpreting s212 of the Act and, therefore, there is no judicial interpretation which states to what extent council is responsible under that section. However, the LIV understands that the common law imposes a duty of care on councils to act in certain circumstances, such as:

- the leading High Court decision in *Pyrenees Shire Council v Day; Eskimo Amber Pty Ltd v Pyrenees Shire Council* [1998] HCA 3 (13 January 1998), which highlights the importance of councils exercising their statutory powers based on policy decisions which relate to what resources a council is able to provide in order to undertake those functions; and
- the Victorian Supreme Court Case (Court of Appeal) of *Moorabool Shire Council & Anor v Taitapanui & Ors* [2006] VSCA 30 and the Victorian Supreme Court case of *Toomey v Scolaro's Concrete Constructions Pty Ltd (in liq) & Ors (NO.2)* [2001] VSC279. Both cases confirm that private building surveyors have statutory obligations as well as a common law duty to ensure that buildings under their control are approved and constructed in accordance with the Act and the Regulations.

The LIV notes that the proposed amendment to s212 of the Act will clarify the role of councils, which is in line with the common law. Accordingly, if a council is aware of a building enforcement matter that falls within the jurisdiction of a private building surveyor, it will be obliged to consider, at the very least, what action, if any, it should take, based on the circumstances and danger involved.

## **Building Notice and Building Order Provisions**

The LIV notes that the Bill proposes changes that will fast-track the issuing of building notices and building orders which, among other things, include:

- allowing the option to affix the notice or order to the building; and
- eliminating the need to serve on every lot owner that is affected by an owners corporation, instead, service can be on the owners corporation.

The LIV fully supports such changes, as they will improve the enforcement regime by the statutory bodies.

## Limitations of Actions

The LIV understands that the current Building Act 1993 bars prosecution for an offence after three years from the commission of the offence.

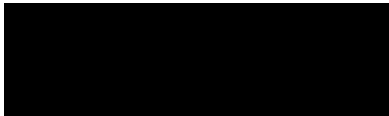
The Bill proposes, among other things, to amend s241 and also to substitute s241(7) to provide that a prosecution may be brought:

- within two years after the date on which the commission of the alleged offence came to the *attention* [emphasis added] of the relevant Council or the VBA; and
- within ten years of the commission of an alleged offence.

Whilst the LIV broadly supports these amendments, it remains unclear as to when and how the ten years will commence. That is, once the provision is adopted it will mean that the statutory bodies will generally have power to commence proceedings for an offence that was commissioned within the last ten years, in circumstances where they are currently statute barred. As such, the LIV proposes that further clarification is required in relation to how and when the ten years will commence.

I look forward to discussing this matter with you at your earliest convenience. If you have any queries, please contact me on (03) 9607 9311 or Karen Cheng, Senior Lawyer, at [KCheng@liv.asn.au](mailto:KCheng@liv.asn.au) or on (03) 9607 9522.

Yours sincerely,



**Belinda Wilson**

President

Law Institute of Victoria

Cc. **The Hon Mr David Davis**  
Shadow Minister for Planning, Local Government and Equality