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THE ONUS ON COUNCIL BUILDING SURVEYORS

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The drafters of the *Building Act 1993* wanted a demarcation between:

- the role of Private Building Surveyors (PBS); and
- the Council Building Surveyor (MBS).

The PBS must assume the responsibility of enforcement. Given they take the remuneration from inspections and approvals.

In some cases though the MBS (Council) retains some responsibility, even though a PBS is acting.

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Section 212(1) of the *Building Act* reads:

“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 and 8 and the building regulations in its municipal district.”

Part 3: Building Permits (eg s16)

Part 4: Inspection of Building Work

Part 5: Occupation of buildings & places of public entertainment

Part 7: Protection of adjoining property

Part 8: Enforcement of safety and building standards

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Note, however, the words “except where otherwise expressly provided...” This is a caveat.

If a PBS is appointed for the property/the works, it should not be assumed that the MBS must automatically assume responsibility if the PBS has “dropped the ball”.

If a PBS is appointed, he/she carries out the functions relevant to the building permit process. Councils are still responsible for dangerous buildings/properties and fire report matters.

Section 115 Referrals

Section 115: the PBS (as enforcer) must refer the matter to the Building Commission if someone breaches a Building Order, and take no further action under Part 8.

But under the Act, neither the BC nor the PBS can compel the Council to act on the non-compliance.

What can an MBS do?

No specific section in the Act allows the MBS to direct a PBS to take action. BUT the MBS can request an inquiry into the PBS' conduct under section 178(d).

This request would be made if the PBS was not complying with their duties under the Act. The request triggers:

- the power to refer the matter to the BC under s198;
- the BC can then direct the PBS under s198.

Exceptions to the Private/Council split

Where there is a health and safety issue arising in a Council's local area, there may be an exception the private/Council split.

Only a Council can issue an Emergency Order under part 8.

Under s122, the Minister has power to compel an MBS to take action where there is an immediate danger to life and property.

Duty of Care at Common Law

If there is a breach of the Act or Regulations, or non-compliant or unsafe building work, within a Council's local area.

If a Council is "on notice" about such a problem and the Council does nothing, there is a potential for a negligence claim.

Whether a negligence claim is possible depends on:

- the existence of loss and damage;
- the nature of the loss and damage;
- whether the cause of it is *proximate* to any act or omission of Council;
- was it foreseeable by Council that loss would flow from an action or failure to act?

How does Council liability arise?

The duty of care exists but it exists at common law, it is not created by the Building Act or Regulations.

The duty of care does not arise if the Council refuses to follow directions from the BC, for eg the BC not the Council has the onus to act on a s115 referral.

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However, the duty of care may arise if a Council is notified but does nothing. Also, s212 may come into play.

In this case the Council should take some form of action, eg

- issue an Emergency Order, or
- in appropriate circumstances (not involving health and safety) notify its refusal to act on the BC's directive.

The “Pyrenees” Case

Pyrenees Shire Council v Day: Eskimo Amber Pty Ltd v Pyrenees Shire Council [1998] HCA 3

This Decision provides a yardstick about an MBS exercising a discretion whether to act.

“In many cases where action is brought against public authorities for omission to exercise statutory powers, emphasis is placed upon:

- *the degree of danger to which the claimant is exposed by that omission;*
- *the expertise available to the authority;*
- *the opportunities of intermediate self protection; and*
- *the cost and inconvenience involved in the exercise of those powers.” (at pg 81)*

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The Court went on to say:

“In determining whether the Shire ought to have used its powers it is relevant to take into account its own estimates of the peril judged at the time at which it acquired its knowledge.... Those estimates were of a very high danger in circumstances where it would have known that most people at risk were vulnerable.” (pg 81)

Exercise of Discretion

It is therefore a question of **degree**. This means relativity i.e.

- Relative knowledge;
- Relative risk;
- Relative consequences

So whether the MBS decides to issue an Emergency Order, or a general Building Notice or Building Order, is a question of degree.

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What is the likelihood and imminence of danger to life or property, and what is the magnitude of the consequences?

If the MBS forms the view that the danger is imminent and pending, then the MBS should issue an EO, and ensure it is complied with.

Mallet to smash a Peanut?

Conversely, if an MBS was cavalier in issuing EO's, for example to evacuate a building/commercial premises when a general building order to rectify would suffice.

This could crystallise in a negligence action for compensation for lost revenue, if the EO cannot be justified.

Part 8 Enforcement of Safety and Building Standards

This Part confers authority upon municipal building surveyors to make an Emergency Order, (i.e. under Division 1) and Building Notices and Building Orders (Division 2).

Emergency Orders

These are to be issued by the MBS if he or she is of the opinion that the order is necessary because of a danger to life or property arising out of the condition or use or proposed use of a building, the land on which building work is being or is proposed to be carried out or a place of public entertainment.

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An Emergency Order can only be issued by the MBS, a private building surveyor has no power to do so.

A risk assessment needs to be done by the MBS before determining an Emergency Order is necessary.

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Building Notices are to be issued when there has been a contravention of a building permit or the Act or the building regulations in the opinion of a private or municipal building surveyor. (Akin to a 'show cause' notice).

Building Orders

Section 111 Building orders – general

A private or municipal building surveyor may require the owner of a building, land on which building work is being or is proposed to be carried out or place of public entertainment to do either or both of the following things within a specified time or times—

- i. evacuate the building, land or place;
- ii. carry out building work, protection work or other work required by the regulations or to carry out a program of that work as directed in the order.

Section 112 Building Orders to stop building work

A private or municipal building surveyor may issue a building order that requires an owner or other person to stop building work.

Section 113 Building orders for minor works

A private or municipal building surveyor may make a building order requiring building work, protection work or other work required by the regulations to be carried out without first serving a building notice if the building surveyor is of the opinion that the work required to be carried out is of a minor nature.

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Follow up of Building Orders

Never forget that an MBS or a PBS should do what is required to follow up the service of an Order. Particularly those involving health and safety aspects.

At least one local Council has a policy of always prosecuting where a Building Order or Emergency Order is served (in the Magistrates Court).

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Many of these prosecutions involve s16 breaches (work without a building permit or documents required as part of a BP). But some relate to failure to comply with an EO or BO.

An alternative contractor can be engaged to carry out the works, but how does Council recoup those monies?

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Enforcement in the Act

Section 121: If an Owner fails to carry out work in an EO or BO issued by the MBS, the MBS may cause that work to be done.

Section 123: Recovery of costs in a court of competent jurisdiction if the MBS must take any action under the division.

Section 253:

The BC or an MBS may bring proceedings in a court of competent jurisdiction for an order if there is:

- a breach or threatened breach of the Act or Regulations, or
- a notice or order that has been issued.

The court can then make:

- an order restraining a breach;
- or an order requiring building work or protection work; and
- an order requiring payment of money into court re any building work carried out by the MBS.

An application for a s253 order can be made during proceedings for an offence under the Act or Regulations.