

The Building Appeals Board (BAB) and how they can assist

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These notes support the Webinar recorded with Nikki Jovicic from LookUpStrata on 2 June, 2022. [The webinar can be watched in full here.](#)

The Building Appeals Board (BAB) is an independent statutory body established under the *Building Act 1993*.

The Building Appeals Board makes decisions about matters relating to the Building Regulations, the *Building Code of Australia*, and sections of the *Building Act 1993*.

The BAB hears appeals, disputes, and requests for modifications and compliance assessments

on a weekly basis, usually sitting in panels of two or three members. Panels are made up of professionals from across the building industry, chosen based on the nature of the matter and the expertise required.

Board members include project managers, builders, building surveyors, fire safety engineers, quantity surveyors, structural and services engineers, access consultants, architects, town planners, construction lawyers and consumer experts.

The BAB's authority includes:

- appeals and disputes under Part 10 the Building Act;
- modifications to regulations that should not apply to a building or land, or apply with a variation;
- modifications to building regulations relating to access for persons with disabilities; and
- the assessment of a particular design or an element of a building complying with the Building Act.

Examples of matters heard by the BAB are –

1. Appeals from –
 - (a) Building and occupancy permits;
 - (b) Decisions of councils regarding siting matters;
 - (c) Building notices and orders;
 - (d) Directions to fix defective or non-compliant building work;
and
 - (e) Determinations as to the appropriateness of protection work.
2. Disputes relating to:
 - (a) Protection work and ancillary steps leading up to the carrying out of protection work;
 - (b) The building permit levy;
 - (c) The application of the Building Regulations; and
 - (d) The construction of party walls.
3. Applications for compensation in connection with protection work.
4. Applications that a provision of the Building Regulations does not apply to building or protection work, or applies with modification or variations; and
5. Applications that a particular design of a building or an element of a building complies with the Building Act, the Building Regulations, the Building Code of Australia, or the Australian Standards, which is relevant to alternative solutions to the total removal and replacement of external combustible cladding.

The BAB may also conduct site inspections.

A written determination some with accompanying reasons is issued to all relevant parties once the Board has made its decision.

BAB hearings are informal. They are typically held on Thursday mornings and are normally open to the public. However, since the advent of Covid, hearings have been conducted remotely via Zoom.

More recently I have chaired panels hearing applications relating to the replacement of combustible cladding on the exterior of buildings.

The most typical type of combustible cladding that I see in applications before the Board is aluminium composite panels.

The Building Code of Australia requires the external walls of a building to be non-combustible.

The Victorian Building Authority (the VBA) conducts audits of buildings across Victoria more than three stories in height, having external combustible cladding.

The VBA generally considers that all combustible cladding should be replaced by non-combustible cladding and communicates this opinion to the Municipal Building Surveyor (the MBS) of the municipality in which the building is located.

The MBS then typically issues a building notice stating that –

- The installation of combustible cladding was in contravention of the Building Regulations or the Building Code of Australia (the BCA); and
- The building is a danger to the life safety or health of the occupants of the building or any member of the public; and

requiring the building owner to show cause why the combustible cladding should be replaced.

If the owner fails to comply with the building notice, or the MBS does not accept the owner's justification for retention of combustible cladding, a building order will usually be issued requiring total removal of the combustible cladding within 60 days.

Depending on the height of the building, the cost of replacement of combustible cladding can be prohibitively expensive. Unless the developer or the builder are still in existence, if an owners corporation is the owner of the building, that cost must be borne by the lot owners.

[S160A of the Building Act](#) allows a building owner to apply to the BAB for a determination that an element of a building complies with the Building Act or the Regulations.

In particular, an owner may apply for a determination that:

- (a) The existing external combustible cladding complies with Performance Requirements CP2 and CP4 of the Building Code of Australia; or
- (b) Partial removal of combustible cladding around high-risk areas in the exterior walls of the building – from the first three levels, and around entrances, exits, windows and balconies is an acceptable alternative to total removal and replacement of the cladding

Performance Requirement CP2 concerns the spread of fire and lists the elements of a building that, to the degree necessary, avoid the spread of fire.

Performance Requirement CP4 concerns safe conditions for evacuation from a building in the event of fire and must, to the degree necessary resist the spread of fire and limit the generation of smoke, heat, and any toxic gases.

Such an application needs to be supported by a report authored by a registered fire safety engineer.

The report must address how the proposed alternative solution to total removal and replacement of the combustible cladding will comply with Performance Requirements CP2 and CP4.

An application pursuant to s160A lists the building owner as Applicant and the MBS as an Interested Party. Once the application is filed with the BAB Registry, directions, and orders for the future conduct of the proceeding will be made within 2-3 weeks of commencement. In more complex matter a Directions Hearings will be convened by the Chairperson of the Board.

Having considered the documentation filed in support of the Application either 'on the papers' or at the Directions Hearing conducted by the Chairperson will –

- confirm the issues for determination by the Board;
- determine who are persons concerned that should be added as Interested Parties, which are those entities that have a direct and immediate interest in the outcome of the proceeding. This is generally the VBA and almost always the Fire Rescue Commissioner (the FRC);
- direct the Applicant to file with the Board and serve on the Respondent and the Interested Parties a document entitled a "Statement of Contentions";
- direct the Respondent and the Interested Parties to file and serve Statements of Contentions in Reply; and
- list the Application for hearing on a date in 6-7 weeks' time.

In more complex proceedings, in order for the parties to properly file and serve supporting documentation and prepare for the hearing, additional time may be provided.

The Panel hearing the application will comprise a chairperson, usually a lawyer, a fire safety engineer, and a building surveyor. The Panel will first clarify any necessary preliminary matters, and then hear evidence from the parties and any witnesses called; particularly the author of the fire safety engineering report filed and served in support of the application. The Panel members may have questions of the parties or their witnesses, and the parties may also ask questions of the witnesses. The parties are then invited to make final submissions in support or in opposition to the relief sought in the application.

The Board is not bound by any rules of evidence but is bound by the rules of natural justice, which requires the panel to afford all parties procedural fairness.

If following the conclusion of the hearing, the Panel requires further clarification of issues raised, Directions and Orders requesting the filing and serving of additional information or documentation will be issued to the parties by specified dates.

The Board's determination as to the outcome of the Application will be issued to the parties approximately 6 weeks from the hearing or compliance with any Directions and Orders.

The Determination will either –

- approve or reject the alternative solution proposed by the applicant building owner, or
- approve the application subject to conditions.

If the Board approves the application with or without conditions, a time frame for the carrying out of building works approved by the Board, a time frame or a completion date will be specified in the determination.

The Board's determinations are final and must be complied with and put into effect by all parties.

A determination can only be appealed to the Supreme Court on a point of law.

After the Board has issued its Determination, the parties are at liberty to seek an order for costs against another party to the proceeding. However, as in VCAT the Board is a “no costs” jurisdiction and Schedule 3 to the Building Act provides that each party must bear its own costs unless the Board considers that an order for costs in favour of one party against another party is justified.

The BAB website has several Practice Notes to assist parties in preparing and conducting proceedings before the Board. In relation to s160A applications, the following Practice Notes are relevant –

PN1 – Applications for Modifications and Compliance Assessments

PN5 - Expert Evidence

PN7 – Proceedings concerning Combustible External Wall Materials

These can be accessed on the Board's website at

<https://www.buildingappeals.vic.gov.au/Legislation-Practice-Notes>

In conclusion, I have endeavoured to explain you as OC managers the relatively simple, speedy, and inexpensive procedure the BAB provides for the approval of alternative solutions to the total removal and replacement of external combustible cladding.

I trust that this presentation has been of assistance to you.