



**Minutes  
of the L G Pro Property Special Interest Group meeting  
held at Kingston Arts Centre Thursday 26 February 2009**

**Present:**

1	Garry	Bates	Bass Coast Shire Council	
2	Erica	Irving	Bass Coast Shire Council	Council's claims officer
3	Alison	Kingston	Bass Coast Shire Council	Risk Coordinator
4	Rod	Potts	Bass Coast Shire Council	
5	Jamie	Sutherland	Bass Coast Shire Council	
6	Jeanette	Blackwood	Bayside City Council	Contractor Property
7	Jurgen	Dietzsch	Bayside City Council	
8	Sally	Naughton	Bayside City Council	Leasing Coordinator
9	Bernie	Rochford	Bayside City Council	
10	Don	Quattrocchi	Brimbank City Council	
11	Steve	Ferne	Cardinia Shire Council	Manager Buildings & Facilities
12	Trevor	Kitchin	Cardinia Shire Council	
13	Danny	Verrocchi	Cardinia Shire Council	Building Management Officer
14	Fran	Pinch	East Gippsland Shire Council	Senior Property Officer
15	Neil	Adams	Frankston City Council	
16	Jacqui	Anderton	Frankston City Council	
17	Michael	Craighead	Frankston City Council	Manager Governance & Customer Relations
18	Barry	Muir	Frankston City Council	
19	Wayne	Stevens	Frankston City Council	
20	Olga	Cursio	Glen Eira City Council	Risk Management Co-ordinator
21	Martin	Kilner	Glen Eira City Council	Property Co-ordinator
22	Rob	Becker	Greater Dandenong City Council	Project Manager, Buildings
23	Rhys	Fitzpatrick	Greater Dandenong City Council	Leisure Contracts Officer
24	John	Prendergast	Greater Dandenong City Council	
25	Bruce	Rendall	Greater Dandenong City Council	Manager of City Improvement
26	Michael	Wells	Greater Dandenong City Council	Building Maintenance
27	Lindsay	Allan	Greater Geelong City Council	Manager Corporate Strategy
28	Elena	Capodicasa	Greater Geelong City Council	Project Officer, Facility Maintenance
29	Helen	D'Altera	Greater Geelong City Council	Senior Leasing Officer
30	Frank	Howard	Greater Geelong City Council	Co-ordinator Facility Maintenance
31	Jenny	Zeinstra	Greater Geelong City Council	Senior Leasing Officer
32	Ray	Baker	Hobsons Bay City Council	Team Leader Building & Parks Projects
33	Andrew	Carrick	Hobsons Bay City Council	Risk Management
34	Noel	Read	Hobsons Bay City Council	Ohs/risk Management Coordinator
35	Henry	Budz	Hume City Council	Coordinator Property And Resources
36	Ian	Sweeting	Hume City Council	Risk Management Coordinator
37	Newton	Gatoff	Kingston City Council	Property Services Co-ordinator
38	Julian	Harvey	Kingston City Council	Manager Property Services
39	Kirsten	Palfrey	Kingston City Council	Property Services Compliance Coordinator
40	Michael	Dobbie	Macedon Ranges Shire Council	
41	Bernie	Massmann	Macedon Ranges Shire Council	Buildings Maintenance Officer
42	Debbie	Pallot	Macedon Ranges Shire Council	Property Officer
43	Gary	Pascoe	Manningham City Council	
44	Jelena	Radmanic	Manningham City Council	Property Management Officer
45	Robert	Williamson	Maribyrnong City Council	

46	Miles	Davine	Monash City Council	Manager Recreation And Leisure Services
47	Justine	Edwards	Monash City Council	Co-ordinator Property Management Service
48	Rob	Ferrarin	Moreland City Council	Building Maintenance Manager
49	Andrew	MacKinnon	Moreland City Council	Manager Property Services
50	Greg	Collins	Mornington Peninsula Shire Council	Team Leader - Property Operations
51	Jim	Houlahan	Mornington Peninsula Shire Council	Team Leader Property (Strategy)
52	Kathy	Dillon	Port Phillip City Council	Manager Asset Planning
53	Toula	Kotsabouikis	Port Phillip City Council	
54	Jim	Maclean	Port Phillip City Council	Building Services
55	Jeanene	Simmons	Port Phillip City Council	Senior Property Adviser
56	Peter	Angwin	Stonnington City Council	
57	Glendon	Dickinson	Warrnambool City Council	Manager Revenue & Property
58	Peter	Jankulovski	Whitehorse City Council	Facilities Maintenance Co-ordinator
59	David	Logan	Whitehorse City Council	Manager Capital Works
60	Tony	Peak	Whitehorse City Council	
61	Stewart	Reid	Whitehorse City Council	Partner Of Julie Reid
62	Greg	Phippen	Whittlesea City Council	Senior Property Officer
63	Karen	Hayes	Yarra City Council	
64	Gordon	McVittie	Yarra City Council	Building Maintenance and Man. Coordinator
65	Craig	Stevens	Yarra City Council	
66	Paul	Usatov	Yarra City Council	Building Projects & Asset Man. Coord.

### Apologies:

Peter	Gillieron	Casey City Council	Manager, Property, Rates & Valuations
Andrew	Mackintosh	Latrobe City Council	
Melissa	Lee	Yarra Ranges Shire Council	

### Welcome:

Julian Harvey welcomed all present. This is the first meeting where three Special Interest Groups have come together to discuss a topic relevant to all three areas. The three SIGs are Property, Risk and Building Assets. Julian encouraged everyone to become an LGPro member and provided an overview on the day's guest speakers and the topics to be discussed.

Julian invited John Bordignon, Manager Civic Compliance and Municipal Building Surveyor, Glen Eira City Council, to address the group.

### **John Bordignon (Manager Civic Compliance and Municipal Building Surveyor, Glen Eira City Council) – *What are Essential Services***

John spoke to the group about Essential Safety Measures. For the purposes of the Building Regulations, an essential safety measure is provided for the safety of people in a building or place of public entertainment. John then went on and explained how the term ESM has been defined in the Regulations.

All fire equipment, safety fittings or safety measures in all buildings irrespective of when they were constructed are to be maintained in a state which enables them to fulfil their purpose. The objective of the maintenance requirement is to ensure that every ESM continues to perform at the same level of operation that existed at the time of commissioning and issue of the occupancy permit.

Subdivision 1 of Part 12 of the Buildings Regulations 2006 deals with the maintenance of ESMs in buildings constructed on or after 1 July 1994.

- Registered building surveyor to include conditions on occupancy permit or certificates of final inspection which identify the ESMs in the building and the maintenance obligations attached to those measures.

Subdivision 2 outlines the maintenance of ESMs for buildings and places of public entertainment constructed before 1 July 1994.

- Owner must ensure ESM is maintained in a state which enables the ESM to fulfil its purpose.
- Level of maintenance should not be greater than that required at the time the equipment, fitting or ESM was installed.

John then went through Tables I1.1 –12 of the Building Regulations.

Council must:

- carry out maintenance in accordance with occupancy permit or determination.
- Prepare an annual essential services report (and have that report available for inspection upon 24 hours notice)
- Display in a prominent position – OP and determinations

Useful Information

Practice Note 2006-23 (Building Commission)

Essential Safety Measures Maintenance Manual (4<sup>th</sup> ed)

Julian thanked John for his presentation and after morning tea invited John Hoey & Paul Berrill from Hoey's Lawyers to address the group.

### **John Hoey & Paul Berrill (Hoey's Lawyers) – *Essential Safety Measures – Legislative Changes***

John provided an introduction. ESMs are measures in a building for the purpose of protecting people. When construction of a building or place of public entertainment is complete, the builder owner is responsible for the upkeep and maintenance of any required safety measures.

Part 12 Division 1 Subdivisions 1 and 2 of the Building Regulations 2006 govern the requirements regarding the maintenance and reporting on ESMs.

Crown land and public authorities (i.e. Council) are not bound by the Buildings Act, except for Part 12 Division 6.

- Council is bound by Parts 2-5B, 7, 9-11, 12A, the Building Regulations
- Council is not bound by Part 8 of the Act (enforcement of safety standards)
- Council may not be prosecuted for breaches of the Act.

Although Regulations cannot be enforced against Council, Minister may cause an inquiry to be held into whether a Council has been carrying out a function given to it under the Act and order the Council to carry out such function within a specified time. The Minister may also bring proceedings against a Council and recover costs.

Paul then discussed in more detail Subdivisions 1 and 2 of the Regulations

Julian thanked John and Paul for their presentation and invited Rohan Ingleton from Middletons to address the group.

### **Rohan Ingleton (Middletons) – *Considerations for Lease Documents***

Rohan provided a brief overview of the Building Regulations that deal with the maintenance of buildings and ESMs to be complied with by owners (Regulation 709, 710, Part 12 – Reg 1207, 1209, 1211, 1214-1217, 1218, 1219).

Section 251 of the Building Act

- If owner required under the Act to carry out any work or thing and the owner does not carry out the work or thing, the occupier of that building or land may carry out the work or do the thing.
- An occupier may recover any expenses incurred in carrying out the work or thing from the owner as a debt due, or, deduct those expenses from or set them off against any rent due.
- Section 251 applies despite any covenant or agreement to the contrary.

With the exception of Regulation 1218 (occupier to comply) – the owner is responsible for compliance with ESMS. This means the owner is responsible for compliance, even if the owner attempts to pass on responsibility for compliance to the tenant.

“Owner” is defined as the owner of the land on which a building is situated.

Therefore, where the building has been built by the tenant, Council as owner of the land, will be responsible for compliance with ESMS, despite any lease provision to the contrary.

Rohan then discussed a relevant case – *Chen v Panmure Hotel Pty Ltd [2007] VCAT 2464 (31 December 2007)*

- Tenant leased hotel from Landlord.
- Under the lease, the Tenant was required to comply with all laws and regulations, except structural works.
- Issue concerned installation of hard wire smoke alarms, exits and emergency procedures for the hotel.
- VCAT determined that under the lease:
  - the smoke detectors were not structural and therefore Tenant responsible.
  - exits involved carrying out structural works and therefore Landlord responsibility.
  - Compliance with emergency procedures were responsibility of Tenant.
- VCAT determined that although smoke detectors and emergency procedures were Tenant responsibility under the lease, section 251 of the Building Act meant that the obligation was on the Landlord (as owner), therefore VCAT did not make an order against the Tenant (to do so would have meant that the Tenant carry out the works and recover the cost from the Landlord)
- Result of VCATs decision – although the lease attempted to impose certain conditions on the Tenant, the Tenant was released from those obligations due to the operation of section 251.
- Also note section 52 of the Retail Leases Act.

Rohan discussed issues in lease drafting – need to ensure that the tenant is required to carry out all works required to ensure the premises comply with the Building Regulations, if tenant fails to do so, it will be a breach of an essential term and give landlord right to terminate the lease. If the landlord is required under the Regulations to incur any expense as result of tenant activities (i.e. change in use) then this would give landlord right to terminate the lease at its option.

Lease cannot require a tenant to pay expenses to the landlord, this is prohibited by section 251 of the Act, but lease can give the landlord right to terminate the lease for breach by the tenant, or to terminate the lease because the landlord is required to incur an expense.

Another possibility is to have directors provide indemnity to the landlord for any expense incurred by the landlord in complying with any building regulations which arise due to the tenant's use.

Julian thanked Rohan for his interesting and helpful presentation and invited Fergus Chisholm, Manager Buildings and Properties, Glen Eira City Council to address the group.

**Fergus Chisholm (Manager Buildings and Properties, Glen Eira City Council) – *Managing ESMS in Leased Buildings***

95% of Glen Eira's leases are current and Council has adopted a community leasing policy that has assisted in achieving this target.

Fergus discussed how Glen Eira has approached dealing with ESM compliance and their tenants – notify the tenants, hold annual lease inspections which identifies the risks, builds a rapport with their community tenants, allows Council officers to inspect the building for ESMs. Glen Eira have had an overwhelming positive response from the tenants in ensuring ESM compliance.

Some lessons learned: include:

- having an adopted Council community leasing policy to provide framework
- qualified building practitioner attends annual lease inspections with property officer who can identify the ESMs
- giving tenants reasonable notice

Fergus gave a few examples on some issues / problems faced with various tenants and ESMs:

- bolt on exit doors preventing safe egress from building
- lack of fighting equipment and appropriate equipment
- equipment not tagged and tested
- path of travel blocked by locked gates

Julian thanked Fergus for his presentation.

After lunch the panel then discussed questions asked from the group.

One pertinent question which was raised and discussed was whether councils, as committees of management of Crown land, are responsible for ESM compliance.

Subsequent legal advice has confirmed that:

The *Building Act* states that the owner for the purposes of essential safety measures on Crown land is:

- (a) for land managed or controlled by a committee of management (COM), the Minister administering the *Crown Land (Reserves) Act 1976*, and
- (b) for any other Crown land, the Minister or public authority that manages or controls that land.

Although the *Building Act* makes the Minister responsible for compliance with EMS where Council is appointed as COM, for all practical purposes the Council (as COM) is appointed to manage, improve, maintain and control the land. The *Crown Land (Reserves) Act* makes COMs responsible for the safety of persons on Crown land or occupying or using any building (or part thereof) on Crown land. Therefore Councils as COM should ensure that ESMs are met.

If Council is the public authority that manages or controls the land then it will be responsible for the ESM as owner. If the Council is not the owner but occupies the building as lessee or licensee, it will be responsible for OH&S requirements and any enforcement orders under Part 8 of the *Building Act*.

It should also be noted that a number of the obligations in relation to ESMs overlap with obligations under the *Occupational Health and Safety Act*, so if councils have control or management of any building owned by the Crown, it will also need to ensure safety is provided in accordance with the Act.

Meeting closed 1.50 pm