

# VMBSG Drainage Powers Manual



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## Part A: Overview

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### 1. Purpose of this document

- 1.1 Municipal Building Surveyors (**MBS**) are regularly called upon to exercise their enforcement powers in relation to issues that pertain to the drainage of water, whether on a building site, arising from the condition of a particular property or arising from nearby civil works. However, given that each of the MBS, Council itself and the local water authority have powers that relate to the drainage of water, it can be difficult to know when an MBS should exercise their powers and when the matter should be dealt with by Council more generally or by the local water authority.
- 1.2 This manual has been prepared to assist MBS' in understanding:
- 1.2.1 what powers they hold and in what circumstances those powers can be exercised;
  - 1.2.2 what powers are separately held by Council and in what circumstances an MBS should refer a matter to Council's engineering and/or local laws teams;
  - 1.2.3 the role and powers of the local water authority and in what circumstances the local water authority is the appropriate body to respond to a particular issue; and
  - 1.2.4 the circumstances in which an issue may simply be a dispute between private property owners which should be resolved between them without the involvement of any statutory authorities.
- 1.3 The Manual relates to the scope of MBS's functions in respect to issues arising from the flow of water from or between work sites, between private properties, from buildings or properties onto public land, or from public land onto private properties. It is not intended to apply to all statutory functions in respect to water drainage, including amongst other things, report and consent requirements, standards for carrying out drainage work, or floodplain management.
- 1.4 This document should be relied on for guidance only. The information provided in this document is general in nature, and should not be relied on as legal advice. This document does not affect the operation of any law or legal requirement.

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## Part B: Legislation, regulation and relevant powers

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### 2. Relevant legislation

2.1 This Manual considers statutory powers under:

- 2.1.1 the *Building Act* 1993 (**BA**) and regulations made under that Act;
- 2.1.2 the *Water Act* 1989 (**WA**) and regulations made under that Act;
- 2.1.3 the *Public Health and Wellbeing Act* 2008 (**PHWA**); and
- 2.1.4 the *Local Government Act* 1989 (**LGA 1989**) and *Local Government Act* 2020 (**LGA 2020**) and regulations made under those Acts.

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### 3. Building Act 1993

3.1 What powers exist under the BA in relation to water/drainage?

3.2 Under the BA:

- 3.2.1 powers are available to the VBA and MBS in relation to a building or building work that does not comply with the BA or the *Building Regulations* 2018 (**Regulations**); and
- 3.2.2 where building work is being carried out under a building permit, the relevant building surveyor (**RBS**) will have enforcement powers in respect of non-compliances in the building work with the BA, the Regulations or the building permit.

### 3.3 When should the MBS powers be used?

PROV	NATURE OF POWER	WHEN IS THE POWER ENLIVENED?	WHEN CAN IT BE USED BY THE MBS OR DELEGATE FOR A DRAINAGE PROBLEM?	EXAMPLES
102	Emergency Order	<p>Where there is a danger to life or property arising out of the condition or use or proposed use of:</p> <ul style="list-style-type: none"> <li>a building; or</li> <li>land on which building work is being carried out; or</li> <li>a place of public entertainment.</li> </ul>	<ul style="list-style-type: none"> <li>Where the water flow is significant enough to pose a danger to life or a danger to property</li> <li>Where the building is being used for a particular purpose or in a particular way that is causing the flow of water and the water flow is significant enough to pose a danger to life or a danger to property.</li> </ul>	<ul style="list-style-type: none"> <li>Changes to site levels from building work is causing rainwater to flow onto adjoining land and is undermining the footings of the adjoining building.</li> <li>Continuing heavy rains and dilapidated guttering is causing water to rapidly flow onto an adjoining building and is causing damage to the adjoining building.</li> </ul>
106	Building Notice	<p>Where:</p> <p>(a) building work contravenes the Act, Regs or the building permit; or</p> <p>(b) the use of the building or place breaches the Act or Regs; or</p> <p>(ba) safety services or equipment not maintained in accordance with the occupancy permit and Regs; or</p> <p>(c) the building or place is unfit for occupation or use as a place of public entertainment; or</p> <p>(d) the building, land or place or building work on the building, land or place is a danger to life, safety or health of any member of the public or of any person using the building, land or place or to any property.</p>	<ul style="list-style-type: none"> <li>Where there is not an urgent situation that would warrant an emergency order, but the water flow: <ul style="list-style-type: none"> <li>appears to arise from: <ul style="list-style-type: none"> <li>building work that is not compliant; or</li> <li>a non-compliant use of the building;</li> </ul> </li> <li>means the building, building site or land or place may be <ul style="list-style-type: none"> <li>unfit for occupation; or</li> <li>a danger to life, safety or health.</li> </ul> </li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Inadequate drainage installed when a townhouse was built several years ago has led to water seeping into the ground of an adjoining property and affecting it.</li> <li>A house is under construction and the guttering and downpipes are not code-compliant*</li> </ul> <p>*subject to the application of the intervention filter criteria.</p>
111	Building Order	After a Building Notice has been served and after any representations made by the owner have been considered.	Where any representations by the owner in response to the Building Notice do not satisfy the MBS/Delegate's concerns.	As above.
112	Building Order to Stop Work	<p>Where the building work:</p> <p>(a) contravenes the Act or the Regs;</p> <p>(b) is a danger to the life, safety or health of any member of the public or any person using the building, land or place or to any property; or</p> <p>(c) affects the support of any adjoining property.</p>		
113	Building Order for minor work	<p>Where:</p> <p>(a) there is work that is required by the regulations to be carried out; and</p> <p>(b) the work is of a minor nature.</p>	Where, as a result of the water flow there is a non-compliance with the BCA and there is work that would remedy that non-compliance that is 'minor' work.	Guttering on a rooftop adjacent to the boundary is out of repair and could be repaired by minor works that would ensure the guttering operates to drain rainwater into downpipes rather than to overflow onto the adjoining property.



PROV	NATURE OF POWER	WHEN IS THE POWER ENLIVENED?	WHEN CAN IT BE USED BY THE MBS OR DELEGATE FOR A DRAINAGE PROBLEM?	EXAMPLES
121	MBS to carry out building work	Where an owner fails to carry out work required under an emergency order or building order.	<p>In any circumstance where an order has been issued and has not been complied with.</p> <p>Given resourcing constraints, this power would realistically only be used where the situation is either urgent or causing continuing significant damage and where the owner cannot be located or is incapable of carrying out the work or paying for it to be carried out.</p>	Excavations and heavy rain is causing significant water to flow onto an adjoining property. The owner and builder are refusing to comply with an Emergency Order and Council is concerned that significant damage will be caused to the adjoining property if the work in the EO is not carried out urgently.
227G	Power to obtain information or documents	<p>(a) there are grounds to suspect an offence re the carrying out of building or plumbing work; or</p> <p>(b) MBS needs to determine whether the Act or Regs have been complied with; or</p> <p>(c) to assist in the enforcement of safety of buildings and of building/plumbing standards.</p>	Where the water flow suggests that building work has not been carried out properly but there is insufficient information to determine that.	Where there is water flowing from a newly built dwelling onto an adjoining property and Council needs copies of relevant drainage drawings but they were not lodged with Council under s30 of the BA.
228E	Power to enter land to monitor compliance	<p>Where the authorised person believes on reasonable grounds that:</p> <p>(a) a person is conducting a building or plumbing business; or</p> <p>(b) a person is keeping records or documents under the Act that are relevant to compliance; or</p> <p>(c) building or plumbing work is carried out.</p>	Where the circumstances of the water flow gives rise to a reasonable belief that there is building work on the land that is causing the water flow (and where the various timing and notice requirements in s228E have been complied with).	Water is flowing into an adjoining property and it isn't clear to Council whether there is building work being carried out that is causing that water flow (such as where there is landscaping work that may not constitute building work under the BA).
228I	Power to enter a building or land open to the public, and require the production of documents and take copies of them	<p>Where:</p> <p>(1) the building or land is open to the public; and</p> <p>(2) it is necessary to determine compliance with the Act or Regs.</p>	There is water flow that appears to be emanating from a building or land that is open to the public.	Water flow appears to be coming from an adjoining property and council needs to inspect the adjoining property to ascertain whether this is the case.
234E	Power to obtain an injunction to restrain conduct that constitutes a contravention of the BA or the Regulations	<p>Where there is evidence to show a person</p> <ul style="list-style-type: none"> <li>has engaged in or is proposing to engage in conduct that would constitute a breach of the act or the regs; or</li> <li>is attempting to do so; or</li> <li>is knowingly concerned in the contravention; or</li> <li>is abetting or conspiring with or inducing another to do so.</li> </ul>	<p>The power can be used where Council has evidence that the water flow in question arises from a contravention of the Act or the Regs.</p> <p>However, this power would likely only be used where Council had reasonable grounds to believe that other more simple enforcement methods, such as a building order or the like would not be complied with.</p>	Council has some evidence to show that water flow onto an adjoining property is caused by a contravention on the subject land but the owner has told Council they will not comply with any building notices or orders issued by Council.



### 3.4 **When is work ‘building work’ for MBS enforcement purposes?**

3.5 MBS’ should be mindful that where the flow of water is caused by work being carried out on a property, the work in question must constitute ‘building work’ as that term is defined under the Act, in order for their powers to be enlivened. Building work is defined in the Act to mean ‘*work for or in connection with the construction, demolition or removal of a building*’. A ‘building’ is defined to include a ‘*structure, temporary building, temporary structure and any part of a building or structure*’.

3.6 The term ‘structure’ has not been defined in the BA, but caselaw has held that it means a thing that:

3.6.1 is constructed from a number of component parts to produce something which is different from those parts and which is of practical value;

3.6.2 is usually attached to the land on which it is erected (but this is not a necessary characteristic); and

3.6.3 has a degree of permanence<sup>1</sup>.

3.7 An MBS can issue an emergency order which is not reliant on building work being carried out where there is a danger to life or property arising out of the condition or use or proposed use of a building or place of public entertainment.

### 3.8 **Is landscaping work ‘building work’?**

3.9 Landscaping work, being work on land that includes paving, gardening and installation of garden furniture and features, does not fall within the meaning of ‘building work’ because it is not work in or in connection with the construction of a building, unless:

3.9.1 the landscaping work is carried out at the same time as the construction of a building; or

3.9.2 the work carried out includes the construction of a ‘structure’ such as a retaining wall, pergola or the like.

3.10 In addition, where the landscaping work is not carried out in conjunction with the construction of a class 1a dwelling, the requirements of regulation 77 regarding permeability are not triggered.

3.11 Accordingly, where minor landscaping work that does not fall within the meaning of ‘building work’ causes water to flow into an adjoining property, there will not be a breach of the BA or the Regulations that will enliven the MBS powers under the BA.

### 3.12 **Are ‘civil works’ building work?**

3.13 Civil works is the construction of public infrastructure, including roads, bridges, railways, carparks, drainage and other items of public use. Those items have been accepted by the courts as not constituting ‘buildings’ for the purpose of the BA. Accordingly, civil works are not work that will enliven the MBS powers under the BA.

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<sup>1</sup> O’Brien v Shire of Rosedale [1969] VR 112 at 116-7

### 3.14 **RBS powers and when they should be used**

3.15 In addition to their enforcement role, where an MBS is appointed as the relevant building surveyor (**RBS**) in respect of building work, then they will have the powers of the RBS where a water/drainage issue arises in relation to building work. Those powers include:

3.15.1 considering, at building permit application stage, whether:

- (a) the design is BCA compliant;
- (b) what the potential effect of the building work might have on adjoining properties; and
- (c) whether protection work (such as a retaining wall to prevent the erosion of soil) is required, pursuant to section 19 of the BA and r 111 of the *Building Regulations 2018* (**BR**);

3.15.2 during the course of building work, entering onto the building site and inspecting the building work pursuant to section 228D of the BA; and

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## 4. **Water Act 1989**

### 4.1 **What powers exist under the Water Act in relation to water/drainage?**

4.2 The WA confers a broad range of powers on water authorities in respect of the districts that they administer under the WA and the 'works'<sup>2</sup> that they own.

4.3 A water authority includes Melbourne Water Corporation and other metropolitan and non-metropolitan water corporations named in Schedule 1 and 1A of the WA. We use the term 'water authority' in this manual to refer to 'Authorities' for the purpose of the WA.

4.4 Notably, municipal councils are **not** water authorities for the purposes of the WA.

4.5 A function of water authorities is to construct, operate and maintain works for drainage and water supply purposes for which funding is provided to it (s 124).

4.6 Water authorities:

4.6.1 have a broad power to:

- (a) do all things that are necessary or convenient to be done in connection with the performance of its functions under the WA (s 123); and

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<sup>2</sup> Section 138 of the Water Act clarifies the circumstances in which a water authority will own 'works' for the purpose of the Water Act



#### 4.13 **Who may exercise those powers?**

Only water corporations (and their authorised officers) for the purpose of the WA may exercise powers conferred under the WA.

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### **5. Public Health and Wellbeing Act 2008**

#### 5.1 **What powers exist under the PHWA in relation to water/drainage?**

5.2 Section 61 of the PHWA provides that it is an offence for a person to cause a 'nuisance' or to allow it a nuisance to exist on or emanate from their land. The term 'nuisance' is not defined in the PHWA but it has a meaning that is accepted by courts. Something will be a 'nuisance' where a person is doing or permitting a thing that impedes another person's enjoyment of their property in a substantial and unreasonable way.

5.3 Section 58(2)(b) specifies that this includes nuisances arising from or constituted by (among other things) any water which is or is liable to be dangerous to health or offensive. Something will be 'offensive' under the PHWA where it is noxious or injurious to personal comfort.

5.4 Where a nuisance is found to exist within the PHWA definition, Council has the power to:

5.4.1 issue an Improvement Notice under section 194 of the PHWA requiring the person to remedy the contravention;

5.4.2 issue a Prohibition Notice prohibiting the carrying on of the activity causing the nuisance; or

5.4.3 where the person cannot be located, take steps to abate the nuisance under section 66.

#### 5.5 **When should those powers be used?**

5.6 The PHWA powers are appropriate to be used in circumstances where the runoff of water or drainage problems that have been complained of to Council are not caused by building work but arise from conduct or neglect on the part of a property owner, which then causes runoff or improper drainage of water onto an adjoining property.

5.7 However, Council is not empowered to act under the PHWA unless the water flow, as well as constituting a 'nuisance' is also dangerous to health or offensive. That is, the PHWA provisions are directing to ensuring that the affected person is kept physically safe and well and is not in discomfort. Where the water flow merely causes economic loss, such as damage to an adjoining owner's garden, but does not imperil their health or comfort, the PHWA provisions will not be available.

5.8 In addition, section 62 of the PHWA provides that where Council is of the opinion that the matter is better settled privately, it can advise the complainant of available methods for settling the matter privately, such as a Neighbourhood Dispute Centre.

## 5.9 **Who may exercise those powers?**

5.10 Officers from Council's Health team who hold a delegation or authorisation under the PHWA are the appropriate Council officers to exercise those powers.

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## 6. **Local Laws**

### 6.1 **What powers exist under Local Laws in relation to water/drainage?**

6.2 The relevant provisions of the LGA 2020 are Council's powers to:

6.2.1 do all things necessary or convenient to be done in connection with the performance of its role, pursuant to section 10(1);

6.2.2 make local laws for or with respect to any act, matter or thing in respect of which the Council has a function or power, pursuant to section 71(1); and

6.2.3 carry out work required under a local law where a person has failed to do so and to recover the cost of that work, pursuant to section 117(1).

6.3 Many Councils have used their power under section 71(1) to make local laws which deal with drainage or water flow issues. Local laws which deal with this issue commonly:

6.3.1 impose a control on building work to prevent the runoff of soil or sediment into stormwater channels; and/or

6.3.2 prevent people from damaging, diverting or tapping into Council drains.

6.4 In addition, Councils may have a local law which deals with dilapidated buildings. This may be relevant where water runoff is caused by a dilapidated building.

6.5 Where a local law is breached, the law may provide for Council to issue a notice, requiring work to be carried out to rectify that breach.

### 6.6 **When should those powers be used?**

6.7 The circumstances in which a local law should be used will depend on the drafting of the law. Where the local law deals with runoff of soil or sediment from building work, this would likely cover a broader range of work than building work under the BA. That is because a local law that relates to runoff from building work will likely not rely on the definition of 'building work' in the BA, which excludes work not carried out in connection with the construction or demolition of a building.

6.8 For example, when landscaping work is carried out separately to the construction of a dwelling, it may not constitute 'building work' for the purpose of the BA because there is no 'building' that is being constructed. However, that work may constitute 'building work' under the local law, because the local law operates

separately to the BA. Careful attention should be paid to the words used in the local law, to determine whether it could apply to things like minor landscaping work for which the BA powers can't be used.

6.9 For local laws that prevent people from damaging, diverting or tapping into Council drains, the law can be used where the drainage problem has been caused by damage or changes caused to the drain by a particular person.

#### 6.10 **Who may exercise those powers?**

6.11 The powers may be exercised by Local Laws officers who hold the appropriate delegation or authorisation.

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## 7. **Local Government Act 1989**

### 7.1 **What powers exist under the LGA 1989 in relation to water/drainage?**

7.2 Section 198 of the LGA 1989 provides that, within its municipal district, all:

7.2.1 public sewers, public drains<sup>3</sup> and associated works and materials; and

7.2.2 sewers, drains and associated works and materials, which are located within a 'road' for the purpose of the LGA,

vest in the relevant Council, and are under the control and management of that Council, **except** where they vest in another municipal council, Minister, the Crown or a public body (e.g. a pipeline owned by a water authority).

7.3 In our view:

7.3.1 the vesting of drainage and sewerage assets in a Council pursuant to section 198 of the LGA 1989, and

7.3.2 the associated right for a Council to 'manage and control' those assets (which is essentially a right to carry out works in respect of those assets),

must also incorporate a legal right to access those assets to fulfil Council's function. We consider that such right is a right in the nature of an easement, and that a Council is deemed to benefit from a statutory easement in respect of those assets pursuant to section 113 of the LGA 2020.

7.4 Under section 200(1) of the LGA 1989 a Council can give an owner or occupier of any building or land a notice to carry out work for drainage of a building or land. If the work is not carried out to Council's satisfaction, Council can carry out the work and recover the costs from the owner or occupier. As set out

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<sup>3</sup> What constitutes a 'public' sewer or drain will depend upon a range of factors including (amongst other things) who constructed the asset, who maintains the asset and who owns the land in which the asset is located. This issue should be considered on a case by case basis and legal advice obtained if necessary.

below, in order to exercise this power, Council must give the owner or occupier the right to make submissions in respect of the notice.

**7.5 When should that power be used?**

7.6 Council's power under section 200(1) of the LGA is very broad. Council is empowered to issue a notice under section 200(1) where it has formed the view that work for drainage is necessary in the circumstances.

7.7 However, section 200(4) provides that a person has a right to make a submission under section 223 on any notice issued under section 200. This means that, when Council issues a notice under section 200(1) it must follow the procedure set out in section 223, which provides that Council must:

7.7.1 publish a public notice:

- (a) specifying the matter in question and sufficient details of the matter to inform the public as to the nature of the matter;
- (b) specifying the date by which submissions must be submitted (being not less than 28 days after the date of the notice);
- (c) stating that someone wishing to make a submission can indicate whether they wish to appear in person or to be represented at a meeting in relation to the submission;

7.7.2 where someone wishes to make a submission in person or by a representative:

- (a) provide an opportunity to be heard at a meeting;
- (b) fix the day, time and place of the meeting;
- (c) give reasonable notice of the meeting to each person who made a request; and

7.7.3 provide a report of the meeting to Council (if the committee who held the meeting is not responsible for making the decision).

7.8 Once Council has followed the procedure outlined above to allow an affected person to make submissions on the notice, it can then decide whether the work required in the notice should be carried out and it should notify the owner and occupier in writing of its decision.

7.9 Given the requirement to provide the opportunity for a recipient of the notice or an affected person to make submissions to Council and the requirement for Council to consider those submissions, Council's power under s 200 is not suitable in an emergency or where water flow could cause damage or loss in a short period of time. It is more appropriately used to resolve long-term drainage issues.

7.10 The obligation to comply with section 223 of the LGA 1989 also applies to any work proposed to be conducted by a Council in or upon any road, whether that work will concentrate or divert the drainage flowing on the road and discharge it or permit it to flow on, into or through, any land (section 199 of the LGA 1989).

In such cases, the notice must be given to the owner and occupier of any land likely to be affected by the concentration or diversion of the drainage.

**7.11 Who may exercise these powers?**

7.12 Council officers who hold have been authorised under section 224 of the LGA 1989 to exercise Council's drainage powers under section 198 and 200.

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**8. Victorian Building Authority**

**8.1 What powers does the VBA hold in relation to water/drainage?**

8.2 The unreasonable flow of water or flooding may occasionally be caused by the non-compliant or defective work of a registered or licensed plumber, builder, or by an unregistered or unlicensed person carrying out plumbing work or building work.

8.3 The Victorian Building Authority (**VBA**) is responsible for the enforcement of plumbing laws and standards in Victoria. It has the power to, among other things:

8.3.1 issue plumbing notices and orders or rectification notices; and

8.3.2 carry out emergency plumbing work in certain circumstances.

8.4 Given resourcing constraints, the VBA is likely to only carry out emergency plumbing work where the situation is either urgent or causing continuing significant damage and where the owner cannot be located or is incapable of carrying out the work or paying for it to be carried out.

8.5 Where the drainage issue directly arises from a plumber's conduct, the unreasonable flow of water or flooding may be resolved by the VBA taking action by issuing notices and orders or by carrying out emergency plumbing work. This may occur concurrently with action by another body.

**8.6 When should those powers be used?**

8.7 It is open to the VBA to exercise those powers where the water issue is directly caused by work carried out by a licensed or registered plumber. If an MBS is of the view that the work of a plumber has caused the problem in question, they can refer the matter to the VBA for investigation and enforcement.

**8.8 Who may exercise those powers?**

These powers can only be exercised by the VBA. However, where the issue arises in the context of building work carried out under a building permit, it is still open to the RBS or to the MBS to exercise their enforcement powers to issue a written direction to fix or notices and orders. The VBA is of course also responsible for the enforcement of building laws and building standards in Victoria, and may exercise its powers where the issues arises in the context of building work.



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## **Part C: When must an authority act?**

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### **9. When must an MBS act?**

- 9.1 An MBS' powers under the BA are discretionary. That is, the MBS may exercise those powers, but is not required to. However, MBS', when put on notice of a particular issue, are required, at a minimum, to consider the issue and determine whether their powers under the BA are enlivened e.g. whether the circumstances trigger any of their enforcement powers under Part 8 of the BA.
- 9.2 If those powers are triggered, the MBS should consider:
- 9.2.1 whether to take action; and if so
  - 9.2.2 what steps should be taken under Part 8.
- 9.3 Where an MBS fails to take steps open to them, after having been put on notice of an issue, and loss or damage is subsequently sustained by another person, this could potentially constitute:
- 9.3.1 a breach of the MBS' obligations under the Code of Conduct for Building Surveyors in Victoria; or
  - 9.3.2 an event that gives rise to civil liability against Council (see Part E below).
- 9.4 Where the powers under Part 8 are not triggered, the MBS should consider whether the matter could be referred to another team within Council, on the basis that the circumstances in question could warrant action under any of a local law, the PHWA or the LGA.

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### **10. When must Council act?**

- 10.1 Generally, Councils are responsible for the following:
- 10.1.1 drainage assets located within drainage easements in favour of Council;
  - 10.1.2 public drains constructed, controlled or managed by Council;
  - 10.1.3 drainage infrastructure in road reserves, kerbs and channels (unless those assets are owned by or vested in another authority); and
  - 10.1.4 drainage issues at a local level (e.g. local roads).
- 10.2 Councils carry out some drainage functions relating to flood protection and mitigation measures at a local level, however these functions are typically shared with water authorities.
- 10.3 Council may be required to act in relation to a water or drainage issue where they are expressly conferred a power or duty to, and where no other individual or authority is required or capable to act.
- 10.4 The circumstances in which a Council should act include but are not limited to:

- 10.4.1 where a complaint relates to an asset owned by or vested in Council;
  - 10.4.2 where a complaint relates to water flowing on or from land owned or managed by the Council, or where Council benefits from an easement over such land, unless that flow of water was caused by the conduct of another person (even then, Council may decide to act to minimise risks to persons or property), particularly in circumstances where the flow of water is unreasonable and risks causing loss, damage or injury to another person or property;
  - 10.4.3 where Council, as the relevant public statutory body, has exercised a power under an Act in respect to a function under that Act, and the flow of water or drainage issue arises out of that exercise of power, particularly in circumstances where the flow of water is unreasonable and risks causing loss, damage or injury to another person or property; or
  - 10.4.4 where a Council, as the relevant public statutory body, is specified as the relevant authority for the purposes of a function, duty or power under Act.
- 10.5 Council's powers under the PHWA, any applicable local laws and the LGA 1989 are discretionary. Where it is brought to Council's attention that circumstances exist that could justify the exercise of those powers, Council should consider whether the circumstances warrant exercising any of those powers and whether Council could be exposed to civil liability should it fail to exercise its powers (see Part E below).

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## **11. When must an RBS act?**

- 11.1 An RBS is empowered to act in circumstances where the issue arises in a context of building work carried out under a building permit. Like the MBS, the RBS has a discretion as to whether they exercise certain powers. The RBS is responsible for issuing a building permit, to take action in respect of building work carried out under that permit, and to assess building work before issuing an occupancy permit or certificate of final inspection.
- 11.2 The RBS may require – through the building permit documentation – that a builder ensures water does not unreasonably flow from the building site onto adjoining property, into public areas, or that any waste or debris is washed into a drain.
- 11.3 The RBS must also consider whether protections should be put in place for the benefit of an adjoining owner to protect their property. These protections are not specifically related to the flow of water onto an adjoining property. However, protection work can include ensuring water does not unreasonably flow onto an adjoining owner's property which may result in damage to that property.
- 11.4 An RBS may also issue a direction, notice or building order where work is non-compliant. This may, in some circumstances, involve addressing water flow issues where the cause of the water flow is related to that non-compliant work.

- 11.5 It is important to note that an RBS can only act in respect of building work for which they have issued – or in limited cases, assumed responsibility of – a building permit.

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## **12. When must a water authority act?**

- 12.1 Generally, a water authority is responsible for large-scale stormwater and drainage infrastructure (e.g. major pipes, pits, creeks, rivers, flood retarding basins, wetlands and urban waterways), as compared to localised assets which are more likely to be the responsibility of municipal councils or private landowners.
- 12.2 Melbourne Water Corporation's functions also include flood protection and mitigation measures for significant rainfall events.
- 12.3 Water authorities must act in relation to a water or drainage issue where they are expressly conferred a power or duty to and where no other individual or authority is required or capable to act.
- 12.4 The express circumstances in which a water authority must act include:
- 12.4.1 where the Water Act expressly requires the water authority to act;
  - 12.4.2 where a complaint relates to a sewer, drain, easement or other asset vested in that water authority or under its control;
  - 12.4.3 where a complaint relates to water flowing on or from land or assets owned or managed by that water authority, unless that flow of water was caused or by the conduct of another person (even then, the water authority may decide to act to minimise risks to persons or property), particularly in circumstances where the flow of water is unreasonable and risks causing loss, damage or injury to another person or property;
  - 12.4.4 where the water authority has exercised a power under the Water Act in respect to a function under that Act, and the flow of water or drainage issue arises out of that exercise of power, particularly in circumstances where the flow of water is unreasonable and risks causing loss, damage or injury to another person or property; or
  - 12.4.5 where a water authority, as the relevant public statutory body, is specified as the relevant authority for the purposes of a function, duty or power under the Water Act.

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## **13. When should an issue be resolved privately by the property owners?**

- 13.1 Generally, private landowners:
- 13.1.1 are responsible for all drainage infrastructure located within their property boundary up to legal point of discharge; and

- 13.1.2 are responsible for overland flows across their property; and
- 13.1.3 should ensure that household drainage and stormwater infrastructure within the property boundary is compliant and in good working order.
- 13.2 The exceptions to these general rules is where an asset located within private property is owned or managed by Council or a water authority, or where the flows of water across private property have been caused by conduct of a Council, water authority or another third party.
- 13.3 Any dispute or other matter arising from the flow of water from a privately owned property onto or between another privately owned property, the issue should be resolved between the property owners unless the Council has caused the flow of water through its conduct. In circumstances where two ratepayers are in dispute regarding a private easement or drainage issue, a Council should carefully consider whether it is appropriate to intervene in such dispute.
- 13.4 Given that section 16(1) of the Water Act provides for the person causing the unreasonable flow of water to be liable to pay damages in respect of any economic loss caused as a result of that water flow, it is open to an aggrieved owner to bring a claim on that basis against the person causing the flow of water.
- 13.5 The powers of the MBS under the BA and the powers of Council under the PHWA, any local laws and the LGA 1989 are discretionary powers. This means that the MBS or Council is not required to exercise those powers but may do so where it is appropriate. This does not mean that Councils and MBS should simply avoid exercising their own powers where a person appears to have a private right of action. In order to properly fulfil their functions under the relevant legislation, they should, when put on notice of an issue:
- 13.5.1 consider whether or not it is appropriate to exercise their powers; and if so
- 13.5.2 how they should be exercised.
- 13.6 It is also possible for an MBS, RBS, Council or water authority to take action and for private property owners to still have recourse to a private claim against the person causing the offending water flow.

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## Part D: Delegation of powers

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### 14. When can an MBS exercise powers of Council?

- 14.1 Under the LGA 2020, it is open to councils to delegate a power, duty or function of Council (other than certain powers which can't be delegated) under the LGA or any other Act. It is accordingly possible for Council functions under the LGA or other Acts to be delegated to an MBS.
- 14.2 Whether, and to whom, powers, duties and functions are delegated is a matter for Councils to decide internally. Ordinarily, persons will be authorised or delegated to act where they have appropriate expertise and training in relation to the relevant legislation.
- 14.3 Where a power to deal with water or drainage has been delegated to more than one person, or more than one role within Council, there may need to be internal discussions or agreements as to which delegate will exercise that power, having regard to the circumstances in which the issue arises.

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### 15. Delegation by an MBS of their powers in relation to drainage

- 15.1 The role of the MBS is its own statutory position under the Building Act and an appointed MBS may by instrument delegate their own functions or authorise or appoint a person under the Building Act in respect of a number of functions under that Act.
- 15.2 It will, however, be incumbent on the MBS to exercise a power or perform a duty that is expressly vested in the MBS under the Building Act or any other Act. That power or function may be delegated, but it remains the responsibility of the office of the MBS to ensure that their statutory obligations have been discharged.

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## **Part E: Civil liability considerations**

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### **16. How civil liability for the flow of water is decided under the WA**

16.1 Under section 16(1) of the WA, where:

16.1.1 there is a flow of water from the land of a person onto any other land;

16.1.2 the flow is not reasonable; and

16.1.3 the water causes injury, damage to property or economic loss;

then the person who caused the flow is liable to pay damages to that other person. The same reasoning applies in section 16(2) of the WA in relation to interfering with the reasonable flow of water.

16.2 Whether the flow of water is reasonable or not is determined having regard to all of the circumstances but including a range of factors set out in s20 of the WA.

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### **17. When will Council owe a duty of care and to whom?**

17.1 Under the WA, Council may be liable under section 16 of the WA where its actions cause an unreasonable flow of water or where it interferes with the reasonable flow of water.

17.2 However, where Council did not cause the water flow or interfere with the reasonable flow of the water, but is more generally involved in assessing and responding to a complaint from a property owner, its liability is very limited. Section 17 operates to exclude civil liability for injury, damage or loss caused by water, other than via a claim under section 16.

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## Part F: Case examples

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### 18. Case scenario 1 – Building work, water flowing into neighbouring property

**Example 1: building work is being carried out under a building permit, and there is water flowing into a neighbouring property.**

- 18.1 *MBS:* Where the water flow is sufficiently serious that it is posing a danger to life or property arising from the water flow, the MBS may act immediately to issue an Emergency Order.
- 18.2 *RBS:* Whether the water flow does not warrant an Emergency Order, then the RBS is the first point of contact to enforce any requirements under the building permit, the BA or the Building Regulations.
- 18.3 Where the RBS is not available or has not taken action to address the issue (taking into account the intervention filter criteria), the MBS may take enforcement action under Part 8 of the BA.

**Example 2: building work is being carried out without a building permit, and there is water flowing into a neighbouring property.**

- 18.4 *MBS:* If the work is 'building work' within the meaning of the BA, then MBS may exercise their powers under Part 8 of the BA in respect of the building work.
- 18.5 *Council:* where the water flow meets the test under the PHWA of being a 'nuisance' which is either 'dangerous to health' or 'offensive', an improvement notice could be issued under the PHWA. Alternatively, a notice may be able to be issued under a local law, where a local law prohibits that flow of water. The LGA section 200 notice procedure is unlikely to be helpful in this scenario, given the requirements to allow submissions to be put by persons affected by a notice issued under that section.
- 18.6 *Privately between owners:* If the work is not building work for which the MBS may take action under the BA or Building Regulations or under where the other Council powers can't be appropriately utilised, the unreasonable flow of water should be resolved between private owners. This may be the case, for example, where there is minor landscaping work being carried out, or having been carried out, and water is flowing to another property as a result.
- 18.7 *VBA:* Where the water flow is caused by non-compliant or defective plumbing work, the matter can also be referred to the Victorian Building Authority, but the MBS or private owners may still need to address the issue to prevent water continuing to flow between properties.

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### 19. Case scenario 2 – Civil works, impact on adjacent properties

**Example: the construction of civil works, such as the construction of a road or creation or diversion of a waterway, which is causing water to impact upon adjacent properties.**

- 19.1 *Council*: Where the work is being carried out by Council, it will be responsible for the water affecting any adjacent properties.
- 19.2 *Relevant water authority*: Where the work is carried out by or on behalf of the water authority (being a water corporation, catchment management authority or water management authority), that water authority will be responsible for the water affecting any adjacent properties.
- 19.3 *Relevant water authority*: Where the work is carried out by a civil contractor on behalf of a water authority and that work affects the works or any waterway or drainage course vested in the authority, that water authority will be responsible for those works.
- 19.4 *Privately between owners*: Where the work is carried out by a civil contractor on private or Crown land on behalf of an owner and the flow of water affects an adjacent property, then the relevant owner will be responsible for the water affecting the adjacent property.

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## 20. Case scenario 3 – Deterioration of existing dwelling, water runoff

**Example: a private building has become dilapidated, causing water to damage the building or surrounding property or land.**

- 20.1 *MBS*: In circumstances where a building appears to be abandoned, or where an owner is unresponsive, the municipal building surveyor can exercise their powers under the Building Act where the building poses a danger to life, safety or health of any member of the public or of any person using the building or land or poses a danger to any property. The municipal building surveyor can cause work to be carried out in certain circumstances.
- 20.2 *Council*: Council may take action for under a local law, where there is a local law relating to dilapidated buildings. This may be appropriate where the building is not so dilapidated that it could be described as being a ‘danger to life, safety or health’ for the purpose of the BA. Alternatively, where the water flow constitutes a nuisance that is dangerous to health or offensive, the PHWA provisions may be used.
- 20.3 *Privately between owners*: Where the water is flowing unreasonably onto an adjoining property the unreasonable flow of water from a dilapidated building should be resolved between private owners.

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## 21. Case scenario 4 – Landscaping works, water runoff

**Example: landscaping work that does not constitute ‘building work’ under the BA is being carried out which results in water flowing into a neighbouring property (whether due to a lack of permeable surfaces or because the landscaping simply results in the water being channelled that way).**

- 21.1 *MBS*: If the work is ‘building work’ under the BA, and the water flow is sufficiently serious as to pose a danger to life or property, the MBS could issue an Emergency Order. The MBS’ remaining powers are not triggered.



- 21.2 *Council:* Where the work could constitute building work for the purpose of any local law prohibiting runoff, the local law provision could be utilised. Alternatively, where the water runoff caused by the landscaping constitutes a nuisance that is dangerous to health or offensive, the PHWA provisions could be utilised.
- 21.3 *Privately between owners:* Where both parties are private owners, the unreasonable flow of water could be resolved privately, via a claim or by a dispute resolution mechanism.

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## 22. Case scenario 5 –Stormwater or drainage is changed or disrupted

**Example: A stormwater or drainage channel runs along a property boundary. It is subsequently changed or disrupted as the result of a property development and causes or threatens to cause water run-off into private or public property.**

- 22.1 *Relevant water authority:* By notice in writing to the owner or occupier, may require the owner or occupier or the other public statutory body (with the consent of the Minister) to remove anything obstructing or interfering with the flow of water in the drainage course, carry out any works that are reasonably necessary to control the flow, or maintain any structure or works in so as not to obstruct or interfere with the flow.
- 22.2 *Relevant water authority:* May take action to enforce the requirements of the Water Act where the works obstruct a waterway.
- 22.3 *RBS:* Where the change or obstruction is caused by building works under a building permit, the relevant building surveyor is the first point of contact to enforce any requirements under the building permit, the BA or the Building Regulations.
- 22.4 *MBS:* Where the relevant building surveyor is not available or has not taken action to address the issue, the municipal building surveyor may take action pursuant to its powers under the Building Act and regulations.
- 22.5 Where the change or obstruction is caused by civil works, rather than work carried out under a building permit:
- 22.5.1 *Council:* Where the work is being carried out by Council, it will be required to take action in respect of water flowing into adjacent properties.
- 22.5.2 *Relevant water authority:* Where the work is carried out by or on behalf of the water authority, being a water corporation, catchment management authority or water management authority.
- 22.5.3 *Relevant water authority:* Where the work is carried out by a civil contractor that affects the works or any waterway or drainage course vested in the authority.

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## **23. Case scenario 6 – Property boundary amendments**

**Example: A stormwater or drainage channel or easement which runs along a property boundary is subsequently disrupted after Council or Crown land is sold off.**

- 23.1 *Relevant water authority:* By notice in writing to the owner or occupier, may require the owner or occupier or the other public statutory body (with the consent of the Minister) to remove anything obstructing or interfering with the flow of water in the drainage course, carry out any works that are reasonably necessary to control the flow, or maintain any structure or works in so as not to obstruct or interfere with the flow.
- 23.2 *Relevant water authority:* May take action to enforce the requirements of the Water Act where the works obstruct a waterway or easement which vests in the authority.
- 23.3 *Council:* May take action to enforce the requirements of the Water Act where the works obstruct a waterway or easement which vests in the Council. Alternatively, it may issue a notice under section 200 of the LGA requiring work to be carried out to rectify the drainage.

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## Part G: Glossary of terms

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### 24. Terms used in this manual

*Building Act* or *BA* means the *Building Act* 1993 (Vic)

*Building Regulations* or *BR* means the *Building Regulations* 2018 (Vic)

*Council* means a local council within the meaning of the LGA 1989 or LGA 2020

*ILA* means the *Interpretation of Legislation Act* 1984 (Vic)

*LGA 1989* means the *Local Government Act* 1989 (Vic)

*LGA 2020* means the *Local Government Act* 2020 (Vic)

*Manual* means this drainage powers manual

*MBS* means municipal building surveyor as defined under the Building Act

*Plumbing Regulations* means the *Plumbing Regulations* 2018 (Vic)

*Private owners* means the owners of land where the land is not owned by the Crown, Council, or other public body

*RBS* means relevant building surveyor as defined under the Building Act

*Relevant water authority* means: a water corporation; a catchment management authority; a floodplain management authority; a Minister administering the Water Act; or a Council as the case may be, depending on whom a power, duty or function is conferred or in whom a drain, drainage course, waterway, easement, asset or other thing is vested under the Water Act or any other Act

*VMBSG* means the Victorian Municipal Building Surveyors Group Inc.

*Water Act* or *WA* means the *Water Act* 1989 (Vic)

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## **Part H: List of Water Corporations**

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### **25. Water Corporations who are 'water authorities'**

Barwon Region Water Corporation

Central Gippsland Region Water Corporation

Central Highlands Region Water Corporation

Coliban Region Water Corporation

East Gippsland Region Water Corporation

Gippsland and Southern Rural Water Corporation

Goulburn Valley Region Water Corporation

Goulburn-Murray Rural Water Corporation

Grampians Wimmera Mallee Water Corporation

Greater Western Water Corporation

Lower Murray Urban and Rural Water Corporation

Melbourne Water Corporation

North East Region Water Corporation

South East Water Corporation

South Gippsland Region Water Corporation

Wannon Region Water Corporation

Westernport Region Water Corporation

Yarra Valley Water Corporation