



## **Places of Public Entertainment Procedure**

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# THE ADMINISTRATION AND ENFORCEMENT OF PART 5 DIVISION 2 OF THE BUILDING ACT 1993 AND PARTS 11 & 12 OF THE BUILDING REGULATIONS 1994

## PURPOSE

1. To inform Council of its responsibilities under the *Building Act* 1993 (“the Act”) and in particular:
  - Part 5 Division 2 of the Act which requires, through the imposition of a fine for failure to do so, an occupancy permit to be issued in respect of using a place of public entertainment for the purpose of providing a public entertainment; and
  - Part 11 of the *Building Regulations* 2006 (“the Regulations”) which allows conditions to be imposed in occupancy permits in respect of places of public entertainment; and
  - Part 12 of the Regulations which requires occupancy permits to include conditions listing all the necessary essential safety measures and the level of performance required with respect to a place of public entertainment.
2. To assist Council in creating a policy with regard to the administration and enforcement of the Act and the Regulations that is consistent with other regulatory agencies including councils throughout Victoria.

Council is required by s 212 of the Act to administer and enforce specified parts of the Act and the whole of the Regulations within its municipal boundaries. As with many other responsibilities, Council has the ability to determine how it will carry out these functions having regard to competing obligations and limited resources.

The use of policies by Councils has long been recognised by the courts as a means of Councils determining how (due to the many responsibilities held) limited resources are to be allocated. By having an appropriate policy in place Council will both reduce its exposure to risk and provide guidance to Council officers on how the requirements in respect of Places of Public Entertainment (“POPE”) are to be administered.

## BACKGROUND

The requirements in relation to places of public entertainment became part of the Act when the building regulatory framework was reformed in 1993 and 1994.

Under the changes, places of public entertainment, open-air public venues, including non-building venues, and temporary entertainment structures, such as circus tents, temporary seating systems, temporary halls and display venues, which are previously regulated by the Health Act were brought under the building regulation legislation.

Powers were extended to the approval of building applications, including the inspection of plans and specifications and the following safety issues:

- strength, stability, protection against fire, building capacity and minimum space requirements for each person;
- prevention of obstruction of gangways passages and aisles;
- lighting, warming, cooling ventilation, drainage and sanitation;
- ingress and egress and access to and from open spaces or public thoroughfares;
- seat construction and arrangement including ergonomic issues and the ability to exit easily;

- empowerment of police or other officers to prevent entry into the building when it has reached its maximum capacity;
- sanitary conveniences; and
- public safety and convenience.

The regulations themselves set out detailed safety requirements across a broad range of matters including:

- Plans, specifications and fees;
- Suitable sites, including surrounding court depths for each of exit;
- Accommodation, seating, aisles, standing space and provisions for disabled persons.
- Exits, stairs, doors and passages in and from building, stage and grandstands;
- Ventilation and construction (including for stages) requirements;
- Dressing rooms, changing rooms, staff rooms, first aide, stage curtains, guard fences, toilet facilities;
- General repairs and condition;
- Lighting, wiring, switchboards, electric fittings and generators;
- Fire safety; safety curtains, smoke outlets, fire exits, employment of firefighters;
- Cinema projectors, spools, theatre cabins; and

## THE CURRENT LEGISLATION

Part 5 Division 2 of the Act deals with occupancy permits for places of public entertainment. There is no overt requirement under the Act that an occupancy permit be obtained but any person conducting such an entertainment, or the owner or occupier of a place of public entertainment who allows the place to be used for a public entertainment may be subject to a penalty if an occupancy permit has not been issued.

Under the Act a “public entertainment” is defined as:

*“an entertainment or meeting to which admission may ordinarily be gained by members of the public”.*

A “place of public entertainment” is defined as:

*“(a) a prescribed building or building in a prescribed class of buildings which is used or intended to be used for the purpose of providing public entertainment; or*

*(b) a prescribed place or places in a prescribed class of places –*

*i. which is enclosed or substantially enclosed; or*

*ii. to which admission can be gained by payment of money or the giving of other consideration –*

*and which is used or intended to be used for the purpose of providing public entertainment.”*

Explanations of the terms used in these definitions and other relevant terms in the Act are included in Chapters 2 and 13.

The main purpose of the Act is to provide for the regulation of building and building standards and to provide improvements in the health, safety and amenity of people who use buildings. However, as confirmed in the second reading speech, it is also intended to extend the provision of health, safety and amenity to open-air public venues including non-buildings venues and temporary entertainment structures.

The Act provides for penalties if an occupancy permit is not obtained. The Regulations specify the types of conditions that *may be* included in the permit and the types of conditions that *must be* included. Both the discretionary and mandatory conditions relate to issues of safety, in particular in relation to:

- safety officers;
- general fire safety and the use of naked flame, fireworks, explosives and shooting devices;
- evacuation procedures, barriers, passageways and exits;
- the public and unsafe areas;
- the availability and condition of public toilet facilities;
- structural safety of temporary structures; and
- essential safety measures as listed in the BCA
- Any other condition that the MBS considers would be appropriate in the circumstances.

## WHAT IS A P.O.P.E.?

1. A building greater in size than 500 square metres used or intended to be used for an entertainment or meeting for which admission may ordinarily be gained by members of the public  
OR
2. A place greater in size than 500 square metres which
  - (a) is enclosed or substantially enclosed; or
  - (b) to which admission can be gained by payment of money or other consideration which is used or intended to be used for an entertainment or meeting to which admission may be ordinarily gained by members of the public.OR
3. Prescribed P.O.P.E.S (Victorian Building Authority)

**NOTE:** An occupancy permit under Division 2 of Part 5 of the Act is required to be obtained from the Victorian Building Authority for:

Prescribed temporary structures\* being;

- a. Tents, Marquees or Booths with a floor area greater than 100 square metres;
- b. Seating stands for more than 20 people;
- c. Stages or platforms (including sky borders & sky wings) exceeding 150 square metres floor area.
- d. Pre-fabricated buildings exceeding 100 square metres other than ones placed directly on the ground surface.

If those structures do not form part of any other building other than a temporary structure or temporary building

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\* This manual is not intended to cover the requirements for prescribed temporary structures or prescribed POPEs. Circumstances may give rise to a number of Division 2 occupancy permits being required for the one event.

## Place of Public Entertainment

A place of public entertainment is defined in the s3 of the *Building Act 1993* as:

- a) *a prescribed building or building in a prescribed class of buildings which is used or intended to be used for the purpose of providing public entertainment; or*
- b) *a prescribed place or place in a prescribed class of places –*
  - i. *which is enclosed or substantially enclosed; or*
  - ii. *to which admission can be gained by payment of money or the giving of other consideration –**and which is used or intended to be used for the purpose of providing public entertainment.*

Public entertainment is defined in s3 of the *Building Act 1993* as:

*“An entertainment or meeting to which admission may ordinarily be gained by members of the public.”*

A place will be a place of public entertainment if it is:

- A building that has an area greater than 500 m<sup>2</sup> and it is used or intended to be used as a venue for a meeting or an entertainment to which the general community is permitted to attend (see para (a)).

**OR**

- A place that has an area greater than 500 m<sup>2</sup> that is used or intended to be used as a venue for a meeting or entertainment to which the general community is invited to attend without charge and it is a controlled space (by fencing, structures or natural features such that a reasonable person would see it as being an exclusive area (see para (b)(i)).

**OR**

- A place that has an area greater than 500 m<sup>2</sup> that is used or intended to be used as a venue for a meeting or entertainment to which the general community is invited to attend if they pay for their admission through a payment of money or by giving or doing of something else in return for their admission (see para (b)(ii)).

Consequently if a building is over 500 m<sup>2</sup> and is intended to be used for a public entertainment it will be controlled by the Act. For a ‘place’ to be controlled by the Act it must be over 500 m<sup>2</sup> and used for a public entertainment and it must also be either substantially enclosed or an admission fee must be charged or other consideration given in return for entry.

As paragraph (b)(ii) so clearly covers situations where members of the public are to be charged admission or required to give or do something else in return for entry, it is to be assumed that paragraph (b)(i) covers situations where no admission fee is to be charged or other consideration requested.

### **Difficulties with the definition of “enclosed or substantially enclosed”**

A summary of cases where courts had considered the meaning of enclosed was provided to participants. The conference members divided into groups and each group reviewed the relevant material and developed a definition for “enclosed or substantially enclosed”. The definitions of each group were looked at and the following definition for “enclosed or substantially enclosed” was arrived at which all conference members were satisfied with:

“A controlled space (by fencing, structures or natural features) that a reasonable person would see as being an exclusive area”.

As was discussed at the Conference, there are a number of English, Scottish and Australian cases which are useful. However, these cases look at the term “enclosed” from the point of view of determining:

- When does the general public know it is excluded;
- When does the general public know that entry will only be allowed with permission;
- When will the general public know that it is trespassing?

In looking at this term for the purpose of defining a “place of public entertainment” we are looking at situations where the owners/occupiers of the place in question are inviting the general public in to an exclusive area, rather than trying to keep them out. As discussed, para (a) of the definition “place of public entertainment” covers events that take place in buildings; para (b)(ii) covers situations where members of the public are to be charged admission or required to give or do something in return for entry to a prescribed place or prescribed class of place, and consequently, para (b)(i) covers situations where member of the public are invited to be involved in a public entertainment for which no admission fee is to be charged or other consideration requested for entry to a prescribed place or prescribed class of place (however such events will only be controlled by the definition if the entertainment is taking place in an area that is “enclosed or substantially enclosed”).

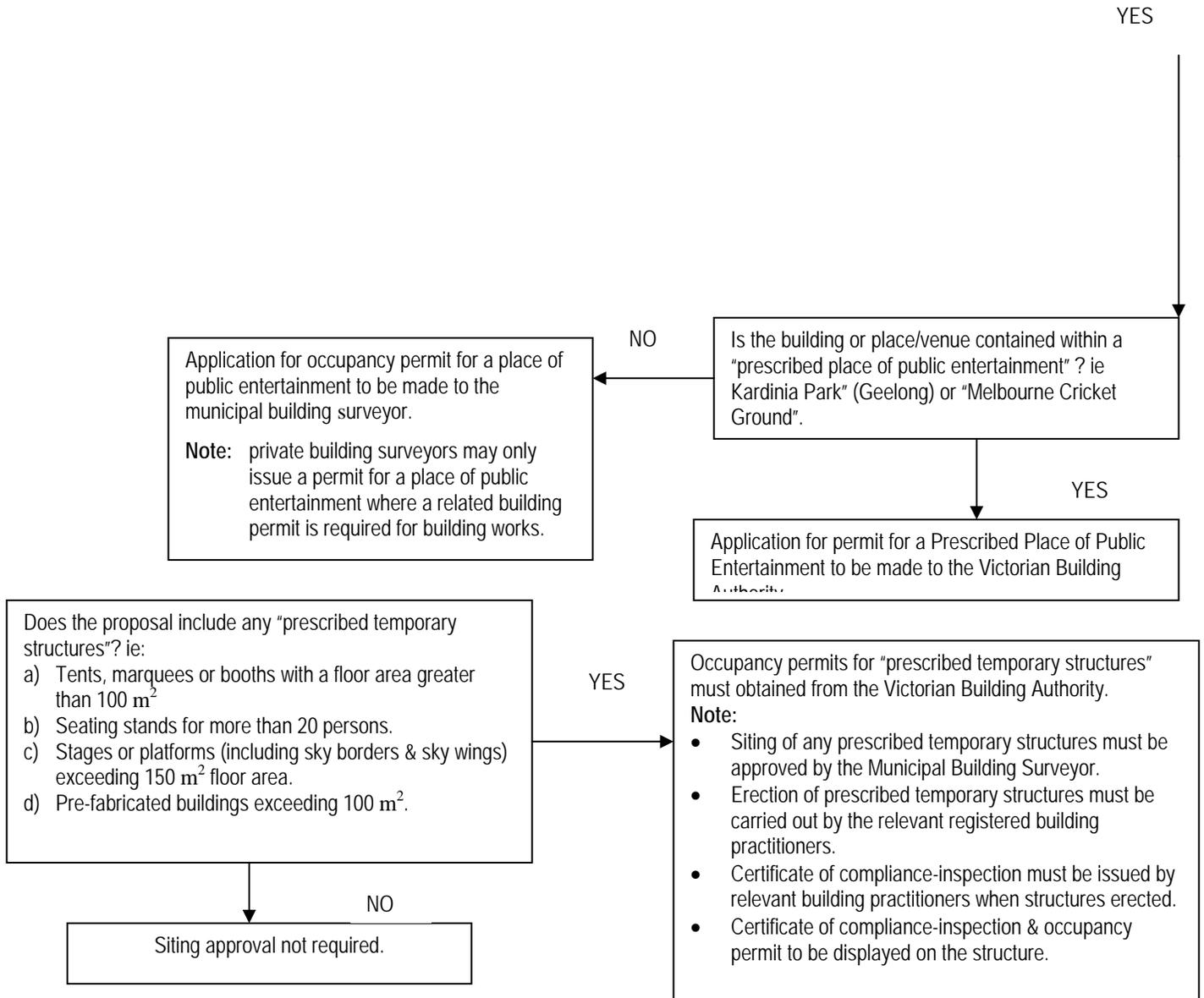
It should be noted that not all cases are clear cut and the Municipal Building Surveyor will be required to evaluate each situation on its merits.

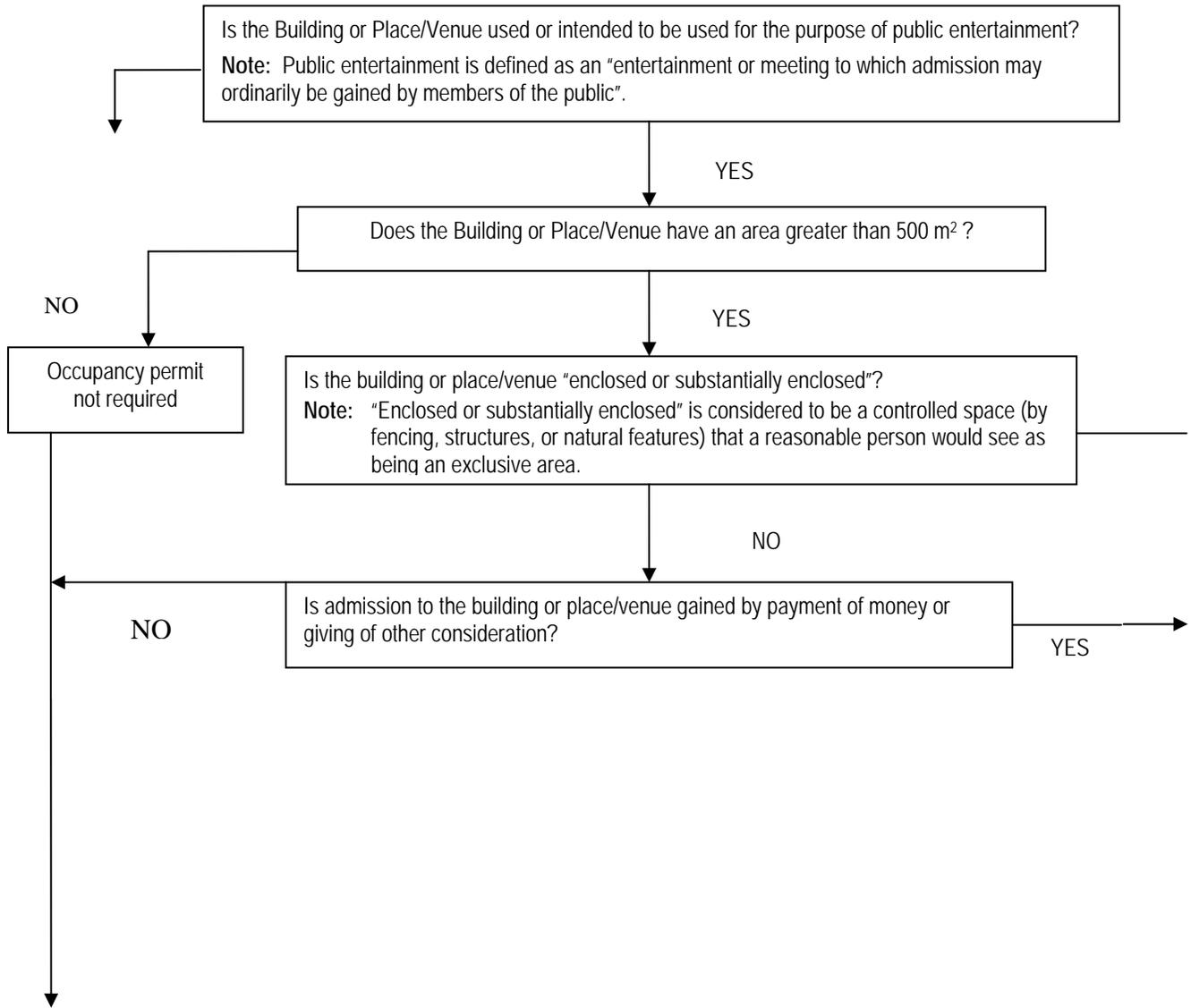
## How to Determine if an Occupancy Permit or Siting Approval is Required.

NO

Occupancy permit /siting approval not required.

YES





## **DEFINITIONS (BRIEF)<sup>1</sup>**

### **(a) Admission**

#### **In definitions “Place of Public Entertainment” (b)(ii) and “Public Entertainment”**

A process, including an action or payment, required to be completed to obtain permission to enter a place. For example, the process of entering a public entertainment may require the purchase of a ticket, or entry in a particular manner.

*Encyclopedic Australian Legal Dictionary*  
*The Macquarie Dictionary (3<sup>rd</sup> Ed)*

### **(b) Consideration / “other consideration”**

#### **In definition “place of public entertainment” (b)(ii)**

Something given or done in return for something. For example, it may include: the payment of money, the completion of the requirements of a competition or an agreement to work in exchange for admission to a public entertainment.

*Currie v Misa* (1875) LR 10 Ex 153; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847; *Australian Woollen Mills Pty Ltd v Commonwealth* (1955) 93 CLR 546

### **(c) Direct pecuniary interest**

#### **In definition “conduct”**

Definition of Conduct: *In relation to a public entertainment, means to have a **direct pecuniary interest** in the **proceeds or profits** of the entertainment.*

Where a person has a material interest, special and peculiar to that person, in the financial outcome of the proceeds or profits generated by the public entertainment.

*Dovade Pty Ltd V Westpac Banking Group* [1999] 46 NSWLR 168; *Clenae Pty Ltd V Australia & New Zealand Banking Group Ltd* [1999] VSCA 35; *Downward v Babington* [1975] VR 872; *Murray, Ex p* [1986] 2 Qd R 383

### **(d) Enclosed / Substantially enclosed**

#### **In definition “place of public entertainment” (b)(i)**

A controlled space (by fencing, structures or natural features) that a reasonable person would see as being an exclusive area<sup>2</sup>.

*Anaconda Nickel v Western Australia* (2000) 165 FLR 116; *Anaconda Nickel Ltd; Murrin Murren East Pty Ltd & Ors* [2000] NNTTA 366 (8 December 2000) (Tribunal Hearing); *Miglio v Hibberd* [1984] 1 Qd R 324; *Webb v Epstein* [1955] VLR 462 Smith J at 468; *Goodhew v Morton & Another* [1962] 2 All Er 771; *State of WA v Ward* [2000] FCA 191 (3 March 2000) Full Fed Court;

### **(e) Entertainment (public)**

#### **In definitions “Public Entertainment”**

An activity for the enjoyment, amusement, instruction or edification of a number of people.

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<sup>1</sup> Further definitions and discussion is located at Part 13

<sup>2</sup> As defined by the VMBSG at the Yarrowonga Conference December 2006

*Foxtel Management Pty Ltd v Commissioner of Taxation* (2000) 102 FCR 289; 2000 ATC 4576; (2000) 45 ATR 62; [2000] FCA 1128;

**(f) For Fee or Reward – s50**  
**In section 50**

To allow the place to be used for a public entertainment in return for a fee or commercial or financial advantage or benefit

*South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd & Ors v Charles Moore (Aust) Ltd & Ors* 139 CLR 449, 14 ALR 485, 51 ALJR 715; *Prices & Consumer Affairs, Commissioner for (SA) v Charles Moore (Aust) Ltd* 12 SASR 214; *Jackson v Crosby* (1977) 16 SASR 1; *Jackson v Crosby (No. 2)* (1979) 21 SASR 280; *Saunders v Cadman* (1990) 54 SASR 534

**(g) Meeting**  
**In definition “public entertainment”**

The coming together or gathering of more than one person.

*Cassell v Gold Coast Publications Pty Ltd* [1984] 1 NSWLR 11

**(h) Members of the public**  
**In definition “public entertainment”**

The people who make up the community or a segment of the community and who have no special relationship with the owner or the occupier of the place.

*Lee v Evans* (1964) 1123 CLR 276; *Re: Trade Practices Commission And: J. And R. Enterprises Pty. Ltd. and Janet Rose Rowden* (1989) FED No. 23 Trade Practices 99 ALR 325; *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394; *R v Abrahams* 13 A Crim R 113 [1984] 1 NSWLR 491; 1984 WL 440778

**When will groups of people who attend a public entertainment not be members of the public?**

- If the invitation to attend is to a specific group of people only;
- If the invitation to attend is not to the community at large; or
- If the attendees have some special relationship with the owner or occupier of the building or place.

However, if it is a general invitation but only certain groups of people are interested or can afford to attend then those who do attend will be considered to be the “public”.

*Ryan v Nominal Defendant* [2005] NSWCA 59; *Mercantile Mutual Insurance Co Ltd v W Turner Pty Ltd* (1982) 1 NSWLR 728

**(i) Occupier – s50 - 52**  
**In sections 50, 50, 52 61**

A person, entity or party with the ability to exercise control over the land and permit or prohibit the entry of other persons for a certain period of time.

*Donaldson v Bottroff* [1965] SASR 145; *Wheat v E Lacon & Co Ltd* [1966] AC 552; *Bayly v Scarica* [1990] VR 731; *Fox v Warde* [1978] VR 362; *Wheat v E Lacon & Co Ltd* [1966] 1 All ER 582; *Glasgow Corpn v Johnstone* [1965] 1 All ER 730; *Heffernan and Heyward* (1985) 20 A Crim R 122

**(j) Ordinarily**  
**In definition “public entertainment”**

The common or regular way that something is done.

*Clean Investments Pty Ltd v Commissioner of Taxation* (2001) 184 ALR 314;  
*Superintendent Of Licences v Pennells And Another* (1985) 1 NSWLR 695

**(k) Proceeds or Profits**  
**In definition “conduct”**

Any money resulting from being involved in the public entertainment regardless of whether or not the money received results in a profit or a loss.

*Bond Corporation Holdings Ltd v Grace Bros Holdings Ltd* (1983) 77 FLR 24;  
*Whitfords Beach Pty Ltd v Commissioner of Taxation (Cth)* (1979) 44 FLR 312;  
*Ruhamah Property Co. Ltd. v Federal Commissioner of Taxation* (1928) 41 CLR 148; *Casimaty v Commissioner of Taxation (Cth)* (1997) 151 ALR 242

## EXAMPLES OF POSSIBLE EVENTS

Presumption that all events listed are taking place in a building or place greater than 500 m<sup>2</sup> and the general public is invited to attend . Refer to definition of “enclosed or substantially enclosed”

*Places +Buildings	Comments
* Music concerts/Festivals (even if on private land – if open to the public)	Will include free events if the place is substantially enclosed e.g. a fenced off oval where it is clear to a reasonable person that the area is an exclusive, controlled area for festival attendees.
* Rodeo	An event for which the public is generally charged an admission fee.
* Field Days	An event for which the public is generally charged an admission fee.
* Race Days	An event for which the public is generally charged an admission fee.
*+ Circus	An event for which the public is generally charged an admission fee.
*+ School & Community Fetes/Fairs	<p>Where a public entertainment takes place in a building which is at least 500m<sup>2</sup>, the building is considered to be a POPE.</p> <p>However, if it is in a place rather than within a building, it will only be a POPE if an admission fee is charged OR if the place is enclosed or substantially enclosed.</p> <p>If the areas in which the fete is taking place is fenced off or otherwise enclosed it could be a POPE.</p> <p>Is a school area substantially enclosed? Possibly as it would be clear to the general public and a reasonable person that although there may be general attendance, entry is for the purpose of attending the fete and consequently the school grounds are a controlled space and an exclusive area for the purposes of the fete.</p> <p>However, many school areas, especially public school areas, are generally accessible to the public at any time the school is not open e.g. basketball courts, football ovals and despite any fencing it is not clear to the public that it is a controlled area. Given this it is arguable such an area is not a POPE generally but perhaps it becomes so when there is a fete as there would be more of a sense of control. Added to this is the fact that the purpose of the Act and the relevant Part is the health and safety of attendees of functions and events. It is arguable that a school fete would be the type of event that the legislators intended to ensure was safely run.</p>
*+ Sports events	Where a public entertainment takes place in a building which is at least 500m <sup>2</sup> , the building is considered to be a

	POPE.  However, if it is in a place it will only constitute a POPE if an admission fee is charged OR if the place is enclosed or substantially enclosed.
+ School / Church halls/classrooms (if being used for an entertainment - including instruction - or public meetings)	Where a public entertainment takes place in a building which is at least 500m <sup>2</sup> , the building is considered to be a POPE
Council halls & Rooms (if being used for entertainment - including instruction - or public meetings)	Where a public entertainment takes place in a building which is at least 500m <sup>2</sup> , the building is considered to be a POPE
* Air Shows	An event for which the public is generally charged an admission fee.
+ Sports Stadium or clubs	Where a public entertainment takes place in a building which is at least 500m <sup>2</sup> , the building is considered to be a POPE
+ Council Meetings	Where a public entertainment takes place in a building which is at least 500m <sup>2</sup> , the building is considered to be a POPE
* Motor racing	An event for which the public is generally charged an admission fee.
+ Parliament meetings – if open to the public	Where a public entertainment takes place in a building which is at least 500m <sup>2</sup> , the building is considered to be a POPE
+ Events in shopping centres	Where a public entertainment takes place in a building which is at least 500m <sup>2</sup> , the building is considered to be a POPE
Cinemas	An event for which the public is generally charged an admission fee.
+Night club / disco	Where a public entertainment takes place in a building which is at least 500m <sup>2</sup> , the building is considered to be a POPE
+Fun parlours	Where a public entertainment takes place in a building which is at least 500m <sup>2</sup> , the building is considered to be a POPE
+ Cyber cafes	Where a public entertainment takes place in a building which is at least 500m <sup>2</sup> , the building is considered to be a POPE
+ Kids party building	Where a public entertainment takes place in a building which is at least 500m <sup>2</sup> , the building is considered to be a POPE
* Cultural event	If an admission fee is charged OR if the place is enclosed or substantially enclosed.
* Art displays	If an admission fee is charged OR if the place is enclosed or substantially enclosed.
* Drive Inns	An event for which the public is generally charged an admission fee.
* Zoo	An event for which the public is generally charged an

	admission fee.
Community meetings of various types that are open to the public to attend e.g. SOS; weight watchers;	Where a public entertainment takes place in a building which is at least 500m <sup>2</sup> , the building is considered to be a POPE
*+ Sports activity centres e.g. skating rinks, gyms, swimming pools (all indoors)	An event for which the public is generally charged an admission fee. Where a public entertainment takes place in a building which is at least 500m <sup>2</sup> , the building is considered to be a POPE
Opera or plays or pictures in the park	An event for which the public is generally charged an admission fee.
Entertainment in parks – e.g. talks by ranger (where admission is charged)	An event for which the public is generally charged an admission fee.
* Street festivals (open to public)	May be included if admission is charged OR if the festival is held in a closed off street making the area substantially enclosed.  Similar considerations to the school fete situation. Possibly such an event will be a POPE as it would be clear to the general public and a reasonable person that although there may be general attendance, entry is for the purpose of attending the festival and for the period of the festival the street(s) constitute a controlled space and an exclusive area for the temporary purpose of a festival.  However, it may be arguable that such barriers as exist are usually seen as preventing cars entering, not pedestrians and that there is no real control of the area. Given this it is arguable such an area is not a POPE.
+* Canopy walk	Unless fee or other consideration charged for entry.
* Weddings or private group events in public gardens	Not included because the function is not open to members of the public
Local street parties (for street residents only)	Not included because the function is not open to members of the public

# OCCUPANCY PERMITS

## Process Summary – Issuing an Occupancy Permit:

- Application for occupancy permit may be **by or on behalf of owner** of the place of public entertainment concerned (s53).
- Application can be made to a municipal building surveyor OR a private building surveyor (s53).
- However, the application can only be to a private building surveyor if it is in conjunction with an application for an occupancy permit under Div 1 (i.e. building work) in respect of the place of public entertainment concerned (s54).
- The procedures to be followed are set out in Schedule 2 of the Act (s54):
  - Must be in the prescribed form;
  - Building Surveyor may request more information (after which the prescribed time within which the surveyor must determine the application cases to run until the information is received);
  - The surveyor must consult with the reporting authorities if any\*
  - The Applicant may obtain a required report or consent from a reporting authority\*
- The building surveyor must not issue an occupancy permit unless the place to which the permit applies is suitable for occupation for the public entertainment or class of public entertainment for which the permit is sought (s55).
- If the occupancy permit differs from the reporting authority's report, the surveyor must notify the authority "without delay" and give the reporting authority a copy of the permit (s60).
- The **owner** of the building must notify an **occupier** of a building (not a place) of any occupancy permit in force in respect of the building: within 7 days of their occupation of the building or within 7 days of the permit being issued (whichever is the later) (s61).

**It is recommended that the applicant include with any application, an Event Management Plan in accordance with Council's Event Management Guideline and proof of compliance with those Guidelines.**

\* At the time of publication there are no reporting authorities.

## Who is required to ensure an occupancy permit has been issued?

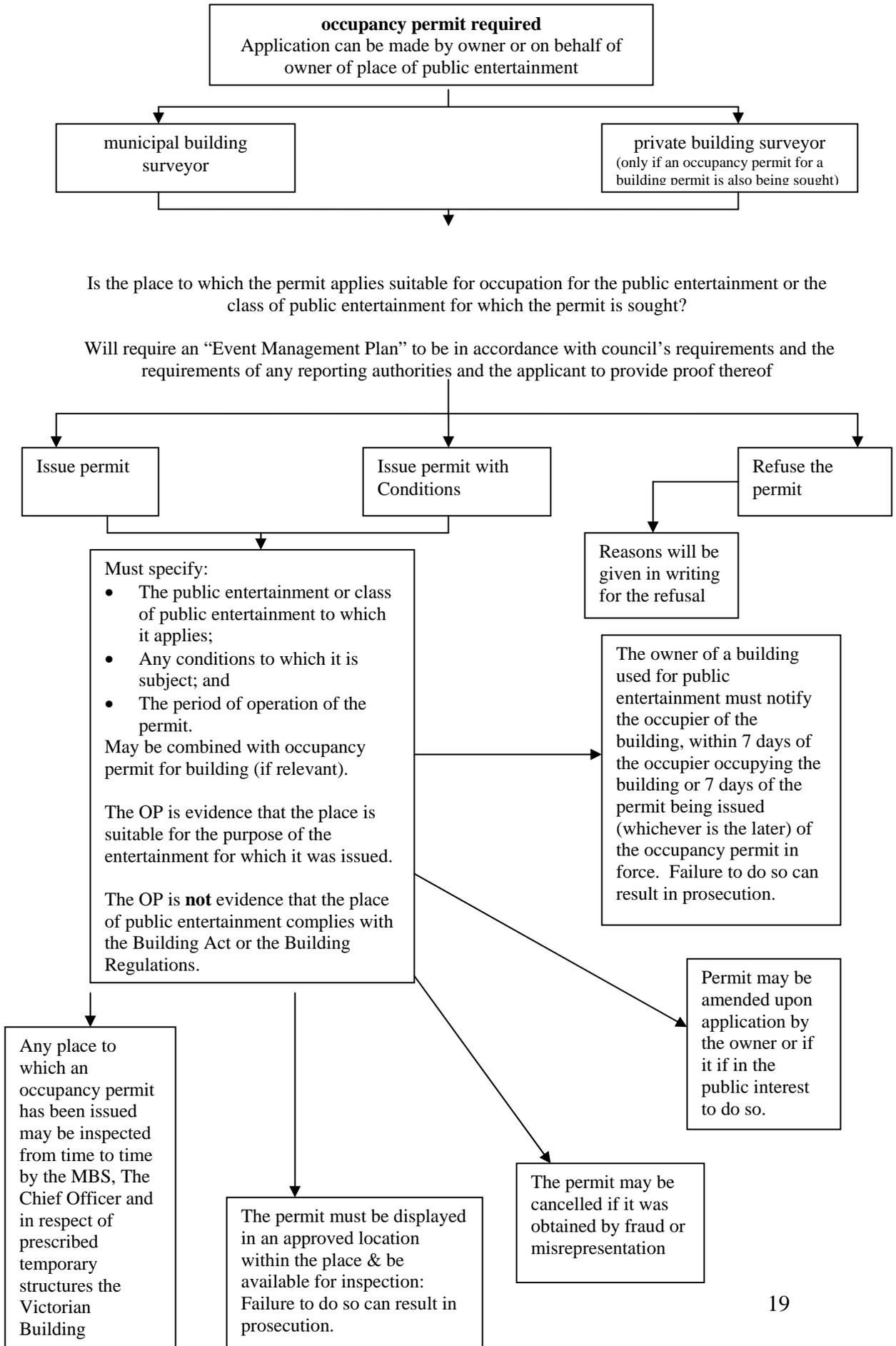
1.	Is the relevant person the owner of the place of entertainment?	No	Go to question 2 & 3		
		Yes	Go to question 3 & 5		
2.	Is the relevant person an occupier of the place of entertainment?  A person can be the owner and/or occupier AND a person conducting the entertainment. A person conducting an entertainment in a place is likely to be considered an occupier.	No	Go to question 3		
		Yes	Go to question 3 & 6		
3.	Is the relevant person conducting the entertainment?  A person can be the owner and/or occupier AND a person conducting the entertainment. A person conducting an entertainment in a place is likely to be considered an occupier.	No	Not required to ensure an occupancy permit has been issued		
		Yes	Go to question 4		
4.	Person conducting the entertainment?	Does the relevant person have a direct pecuniary interest in the proceeds or profits of the entertainment?	No	Not required to ensure an occupancy permit has been issued →	No obligation to ensure any such occupancy permit is not contravened (unless also the owner and/or occupier)
		Yes	Is required to ensure an occupancy permit has been issued. →		
5.	Owner of the place of public entertainment?	Is the owner of the place permitting it to be used for public entertainment in return for a fee or reward?	No	Not required to ensure an occupancy permit has been issued →	Even if not required to ensure an occupancy permit has been issued IS required to ensure any such occupancy permit that is issued is not contravened.
		Yes	Is required to ensure an occupancy permit has been issued.	Required to advise any occupier of a <u>building</u> of any occupancy permit in force in respect of the building.	

				➔	
6.	Occupier of the place of public entertainment	Is the occupier of the place permitting it to be used for public entertainment in return for a fee or reward?	No	Not required to ensure an occupancy permit has been issued ➔	Even if not required to ensure an occupancy permit has been issued IS required to ensure any such occupancy permit that is issued is not contravened.
			Yes	Is required to ensure an occupancy permit has been issued. ➔	

If no one:

- has a direct pecuniary interest in the proceeds or profits of the entertainment; or
- is receiving any fee or reward in return for allowing the place to be used for a place of public entertainment:

no one can be prosecuted for not having an occupancy permit



# ENFORCEMENT

## Introduction

### **Part 8 – Enforcement of Safety and Building Standards**

In a situation where a place of public entertainment is likely to cause imminent danger to life or property an emergency order can be served upon the owner and occupier, requiring them to evacuate the place, to cancel the entertainment or to immediately cease conducting the entertainment. Failure to comply with the order is a breach of section 118 which could result in prosecution.

In a situation where a place may be unfit for use as a public entertainment or it could be a danger to the life, safety or health of any member of the public or person using it, a building notice may be issued pursuant to section 106 of the Act. This process may be used when the danger is not imminent, due to the process allowing the owner time to show 'cause' as to why a building order should not be issued. If they fail to show adequate 'cause' a building order requiring certain actions may be issued pursuant to section 111 of the Act. Failure to comply with the order is also a breach of section 118 which could result in prosecution.

A municipal building surveyor may decide to use an emergency order and a building notice concurrently or separately. He/she may also use either or both of these processes in conjunction with a prosecution if the necessary elements of an offence are met.

Prior to issuing an emergency order that would require evacuation of a POPE or the cessation of the entertainment it may be necessary that the Municipal Building Surveyor obtain legal advice and consult with Victoria Police.

## **Offences**

There is no overt requirement under the Act for a person to obtain an occupancy permit for a public entertainment, however, failure to do so can, in certain circumstances result in a penalty.

Sections 49 to 51 require certain persons to be responsible for obtaining an occupancy permit as required and then ensuring any permit so issued is complied with.

Regulations 1007 and 1009 requires the owner of a place of public entertainment to ensure any current occupancy permit is displayed at an approved location and that it be available for inspection by the Municipal Building Surveyor or Chief Officer upon request.

Regulation 1217 requires owners of buildings or places built before 1994 to ensure that essential safety measures are maintained.

Regulation 1218 requires occupiers of places of public entertainment to ensure that exits and paths of travel to exits are maintained, kept readily accessible and clear of obstruction.

## Section 102 - Emergency Orders

Section		Elements	Comments
102(1)	<i>A Municipal Building Surveyor may make an emergency order under this Division, 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 ... place of public entertainment.</i>	<ul style="list-style-type: none"> <li>• Municipal Building Surveyor (“MBS”)</li> <li>• Place of public entertainment</li> <li>• Emergency order can be made</li> <li>• If MBS of the opinion that the order is necessary</li> <li>• Because there is danger to life or property arising out of the condition or use or proposed use of a place of public entertainment.</li> </ul>	<p>Section 103 provides that an emergency order can require the owner or occupier of a place of public entertainment to do one or more of the following things within a specified time or times:</p> <ul style="list-style-type: none"> <li>• Evacuate the place;</li> <li>• Not conduct nor allow the conduction of a public entertainment;</li> <li>• Immediately cease the conduction of a public entertainment;</li> <li>• Stop building work or carry out building or other work as necessary to make the building or place safe or to secure the building or place from access.</li> <li>• Prohibit the occupation of a place of public entertainment for up to 48 hours;</li> <li>• Prohibit the use of a building or place for a public entertainment for up to 48 hours</li> </ul> <p>Note: This action can be taken immediately and will remain in force until the order is complied with or it is cancelled.</p>
102(2)	<i>The MBS must cause an emergency order under sub-sec (1) to be served on the owner and the occupier of the building, land or place concerned without delay after it is made.</i>	<ul style="list-style-type: none"> <li>• To be served on owner and occupier</li> <li>• To be served without delay after it is made.</li> </ul>	<ul style="list-style-type: none"> <li>• The section requires the MBS to ensure the order is served on the owner <u>and</u> occupier immediately.</li> <li>• Failure to do so may result in the owner and/or occupier having a defence against a potential breach of s118.</li> </ul>
103(3)	<i>An emergency order must be in writing and must contain any matters required by the regulations</i>	<ul style="list-style-type: none"> <li>• Order must be in writing</li> <li>• Must contain any matters required by the regulations</li> </ul>	<ul style="list-style-type: none"> <li>• Sets out the form of the order.</li> </ul>

**Section 106 – Building Notices**

Section		Elements	Comments
106	<p><i>... a Municipal Building Surveyor may cause a building notice to be served on a owner of a ... place of public entertainment if the building surveyor is of the opinion that any one of the following circumstances exists:</i></p> <p><i>...</i></p> <p><i>(b) the use of the ... place contravenes this Act or the building regulations;</i></p> <p><i>(c) the ... place is unfit for ... use as a public entertainment;</i></p> <p><i>(d) the ... place ... or building work on the ... place is a danger to the life, safety or health of any member of the public or of any person using the ... place or to any property.</i></p>	<ul style="list-style-type: none"> <li>• Municipal Building Surveyor (“MBS”)</li> <li>• Place of public entertainment</li> <li>• Notice served on owner<sup>1</sup></li> <li>• The use of the place contravenes this Act or the building regulations;</li> <li>• The place is unfit for use as a public entertainment;</li> <li>• The place or building work on the place is a danger to the life, safety or health of any member of the public or of any person using the place or to any property.</li> </ul>	<ul style="list-style-type: none"> <li>• This section permits a MBS to serve a notice on the owner that certain aspects of a place of public entertainment contravene the act, is unfit for use as a public entertainment or is a danger to the life, safety or health of any member of the public.</li> <li>• Sub-section (d) is a very broad section which leaves it to the discretion of the MBS to determine what a danger is.</li> </ul>

<sup>1</sup> Once the building notice has been issued the owner has a period of time (to be determined by the Municipal Building Surveyor) in which to show cause as to why the occupation or use of the place for a public entertainment should not occur and/or why the place should not be evacuated or further work carried out (s108) and may make representations about the matters contained in the notice (s109).

Section 111 states that at the end of this period, and after considering any representation made by the owner, the Municipal Building Surveyor can either cancel the notice or issue a building order (as relevant to POPEs):

- (a) ...
- (b) Prohibiting occupation of a place of public entertainment or its use for public entertainment;
- (c) Require the owner of a place of public entertainment to do either or both of the following things within a specified time or times:
  - i. Evacuate the ... 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.

The order remains in force until it is complied with or cancelled by the surveyor or Building Appeals Board (s117).

**Section 118 – Contravention of emergency order or building order**

<b>Section</b>	<b>Offence</b>	<b>Elements</b>	<b>Evidence Required</b>
<b>118(1)</b>	<i>A person to whom an emergency order or building order is directed must comply with that order.</i>	<ul style="list-style-type: none"> <li>• Municipal jurisdiction</li> <li>• A person<sup>1</sup></li> </ul>	<ul style="list-style-type: none"> <li>• s242 Certificate</li> <li>• Name of person or legal entity</li> <li>• Admission</li> <li>• Witnesses</li> </ul>
		<ul style="list-style-type: none"> <li>• An emergency order<sup>2</sup> or building order<sup>3</sup> has been directed to them</li> </ul>	<ul style="list-style-type: none"> <li>• Statement of MBS</li> <li>• Copy order</li> <li>• If s111 order, evidence of properly issued and served s106 building notice</li> </ul>
		<ul style="list-style-type: none"> <li>• The person failed to comply with the order</li> </ul>	<ul style="list-style-type: none"> <li>• Report of witness</li> <li>• Admission</li> </ul>
<b>118(2)</b>	<i>A person must not occupy a building, land or place in contravention of an emergency order or building order</i>	<ul style="list-style-type: none"> <li>• Municipal Jurisdiction</li> <li>• A person<sup>1</sup></li> </ul>	<ul style="list-style-type: none"> <li>• s242 Certificate</li> <li>• Name of person or legal entity</li> <li>• Admission</li> <li>• Witnesses</li> </ul>
		<ul style="list-style-type: none"> <li>• A building, land or place</li> </ul>	<ul style="list-style-type: none"> <li>• s242 Certificate</li> </ul>
		<ul style="list-style-type: none"> <li>• An emergency order<sup>2</sup> or building order<sup>3</sup> is in place</li> </ul>	<ul style="list-style-type: none"> <li>• Statement of MBS</li> <li>• Copy order</li> <li>• If s111 order, evidence of properly issued and served s106 building notice</li> </ul>
		<ul style="list-style-type: none"> <li>• The emergency order or building order states that no one is to occupy the building, land or place</li> </ul>	<ul style="list-style-type: none"> <li>• Copy order</li> </ul>
		<ul style="list-style-type: none"> <li>• The building, land or place has been occupied in contravention of the order</li> </ul>	<ul style="list-style-type: none"> <li>• Report of witness</li> <li>• Admission</li> </ul>
<b>118(3)</b>	<b>Defence:</b> <i>It is a sufficient defence to a prosecution under this section in relation to a public entertainment if the defendant satisfies the court that he or she was unaware and ought not reasonably to have been aware of the fact that the public entertainment was the subject of an emergency order under this Part.</i>	<ul style="list-style-type: none"> <li>• Defendant satisfies the court</li> </ul>	<ul style="list-style-type: none"> <li>• Onus is on the defendant to show proof</li> </ul>
		<ul style="list-style-type: none"> <li>• Defendant unaware of the emergency order in relation to the public entertainment</li> </ul>	<p><b>Rebuttal</b></p> <ul style="list-style-type: none"> <li>• Proof of service of order</li> <li>• Witness statements</li> </ul>
		<ul style="list-style-type: none"> <li>• Defendant ought not reasonably have been aware of the emergency order in relation to the public entertainment</li> </ul>	<p><b>Rebuttal</b></p> <ul style="list-style-type: none"> <li>• Proof of service of order</li> <li>• Witness statements</li> </ul>
<i>100 penalty units, in the case of a natural person</i>			

*500 penalty units, in the case of a body corporate*

<sup>1</sup> Individual or body corporate

<sup>2</sup> See emergency orders

<sup>3</sup> See building orders

**Section 49 - Public entertainment not to be conducted at place without occupancy permit**

Section	Offence	Elements	Evidence
49	<i>A person must not conduct a public entertainment in a place of public entertainment unless an occupancy permit has been issued under this Division which permits its use for the entertainment.</i>	<ul style="list-style-type: none"> <li>• Municipal Jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>• s242 Certificate</li> </ul>
		<ul style="list-style-type: none"> <li>• A Person<sup>1</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Name of person or legal entity</li> <li>• Admission</li> <li>• Witnesses</li> </ul>
		<ul style="list-style-type: none"> <li>• The person conducts<sup>2</sup> an entertainment</li> </ul>	<ul style="list-style-type: none"> <li>• Admission</li> <li>• Witnesses</li> <li>• Financial Statements</li> </ul>
		<ul style="list-style-type: none"> <li>• The entertainment is in a place of public entertainment</li> </ul>	<ul style="list-style-type: none"> <li>• Report of witness</li> <li>• Admission</li> </ul>
		<ul style="list-style-type: none"> <li>• No occupancy permit is in existence for the entertainment.</li> </ul>	<ul style="list-style-type: none"> <li>• s242 Certificate</li> </ul>
		<p><b>Possible defence</b></p> <ul style="list-style-type: none"> <li>• No direct pecuniary interest</li> </ul>	<ul style="list-style-type: none"> <li>• A person may be an accessory to an offence even if they do not have the direct pecuniary interest – Providing that person has knowledge that no occupancy permit has been obtained and they have aided and abetted or counselled and procured the public entertainment to take place at that venue.</li> </ul>
<p><i>100 penalty units, in the case of a natural person 500 penalty units, in the case of a body corporate</i></p>			

<sup>1</sup> Individual or body corporate

<sup>2</sup> The word “conduct” in relation to public entertainments has a special definition. Under the Act a person does not conduct a public entertainment unless he or she has a direct pecuniary interest in the proceeds or profits of the entertainment i.e. a material interest, special and peculiar to that person, in the financial outcome of any money resulting from being involved in the public entertainment regardless of whether or not the money received results in a loss or profit.

The Act does not state whether or not the person conducting such a public entertainment can or cannot also be the owner and/or occupier of the place of public entertainment and consequently it is possible that an owner may also be an occupier of the place and conduct the entertainment.

**Section 50 – Place not be used for public entertainment without occupancy permit**

Section	Offence	Elements	Evidence
50	<i>The owner or occupier of a place of public entertainment must not, for fee or reward, permit the place to be used for the purpose of providing public entertainment unless an occupancy permit has been issued under this Division which permits its use for the entertainment.</i>	<ul style="list-style-type: none"> <li>• Municipal Jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>• s242 Certificate</li> </ul>
		<ul style="list-style-type: none"> <li>• Owner/Occupier<sup>1</sup> of a place of public entertainment.</li> </ul>	<ul style="list-style-type: none"> <li>• Name of person owner or occupier;</li> <li>• Land title records;</li> <li>• Lease or licence;</li> <li>• s242 Certificate – rates records</li> <li>• Admission;</li> <li>• Witnesses</li> </ul>
		<ul style="list-style-type: none"> <li>• A public entertainment has taken or is to take place.</li> </ul>	<ul style="list-style-type: none"> <li>• Report of witness</li> <li>• Admission</li> </ul>
		<ul style="list-style-type: none"> <li>• The public entertainment took place in a place of public entertainment</li> </ul>	<ul style="list-style-type: none"> <li>• Report of witness</li> <li>• Admission</li> </ul>
		<ul style="list-style-type: none"> <li>• In return for permitting the entertainment to take place the owner/occupier received a fee or reward.</li> </ul>	<ul style="list-style-type: none"> <li>• Admission</li> <li>• Witnesses</li> <li>• Financial Statements</li> </ul>
		<ul style="list-style-type: none"> <li>• No occupancy permit is in existence for the entertainment.</li> </ul>	<ul style="list-style-type: none"> <li>• Council Records;</li> <li>• s242 Certificate</li> </ul>
		<p><b>Possible Defence</b></p> <ul style="list-style-type: none"> <li>• No fee or reward received by owner or occupier.</li> </ul>	<p>An owner or occupier who has not charged a fee or reward may still face proceedings as an accessory under section 49.</p>
<p><i>100 penalty units, in the case of a natural person 500 penalty units, in the case of a body corporate</i></p>			

<sup>1</sup> It is possible for a person to be both an owner and occupier. It is also possible for a person to be an owner and/or occupier and be a person who “conducts” a public entertainment.

<sup>2</sup> Alternatively, there may be a situation where the owner does not receive a reward but the occupier does or vice versa. In such a situation whichever party has received the fee or reward could be liable for a penalty if there is no occupancy permit.

**Section 51 – Use of place of public entertainment must be in accordance with permit**

<b>Section</b>	<b>Offence</b>	<b>Elements</b>	<b>Evidence</b>
<b>51</b>	<i>The owner or occupier of a place of public entertainment (other than a prescribed temporary structure) must not permit the place to be used for the purpose of providing public entertainment in contravention of the occupancy permit permitting its use for the entertainment.</i>	<ul style="list-style-type: none"> <li>• Municipal Jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>• s242 Certificate</li> </ul>
		<ul style="list-style-type: none"> <li>• A person<sup>1</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Name of person or legal entity</li> <li>• Admission</li> <li>• Witnesses</li> </ul>
		<ul style="list-style-type: none"> <li>• Owner or Occupier<sup>2</sup> of a place by that person</li> </ul>	<ul style="list-style-type: none"> <li>• Name of person owner or occupier;</li> <li>• Land title records to show ownership;</li> <li>• Any lease or licence to use;</li> <li>• S242 Certificate – rates records</li> <li>• Admission;</li> <li>• Witnesses</li> </ul>
		<ul style="list-style-type: none"> <li>• A public entertainment has taken place</li> </ul>	<ul style="list-style-type: none"> <li>• Report of witness</li> <li>• Admission</li> </ul>
		<ul style="list-style-type: none"> <li>• The public entertainment took place in a place of public entertainment</li> </ul>	<ul style="list-style-type: none"> <li>• Report of witness</li> <li>• Admission</li> </ul>
		<ul style="list-style-type: none"> <li>• The person permitted the public entertainment to take place</li> </ul>	<ul style="list-style-type: none"> <li>• Admission</li> <li>• Witnesses</li> </ul>
		<ul style="list-style-type: none"> <li>• An occupancy permit is in existence</li> </ul>	<ul style="list-style-type: none"> <li>• s242 Certificate</li> </ul>
		<ul style="list-style-type: none"> <li>• The occupancy permit was contravened.</li> </ul>	<ul style="list-style-type: none"> <li>• Report of witness</li> <li>• Admission</li> </ul>
<p><i>100 penalty units, in the case of a natural person</i>  <i>500 penalty units, in the case of a body corporate</i></p>			

<sup>1</sup> Individual or body corporate

<sup>2</sup> Regardless of who is responsible for a contravention, the owner and/or the occupier can be held liable should one occur. Unlike s50, s51 does not require the owner or occupier to be in receipt of a fee or reward in order to be liable for a contravention.

**Regulation 1007 – Display of occupancy permit at approved location**

Reg	Offence	Elements	Evidence
<p><b>1007(2)</b></p>	<p><i>An owner of a building or place of public entertainment must take all reasonable steps to ensure that a copy of any current occupancy permit in respect of that building or place is displayed and kept displayed at an approved location within the building or place</i></p>	<ul style="list-style-type: none"> <li>• Municipal Jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>• s242 Certificate</li> </ul>
		<ul style="list-style-type: none"> <li>• Owner of a place of building or public entertainment</li> </ul>	<ul style="list-style-type: none"> <li>• Name of person owner or occupier;</li> <li>• Land title records;</li> <li>• S242 Certificate – rates records;</li> <li>• Admission;</li> <li>• Witnesses.</li> </ul>
		<ul style="list-style-type: none"> <li>• An occupancy permit is in existence for the place of public entertainment.</li> </ul>	<ul style="list-style-type: none"> <li>• Council Records &amp; s242 Certificate;</li> <li>• Admission.</li> </ul>
		<ul style="list-style-type: none"> <li>• There is an approved location within the building or place for displaying a copy of the permit</li> </ul>	<ul style="list-style-type: none"> <li>• Council Records &amp; s242 Certificate;</li> <li>• Admission.</li> </ul>
		<ul style="list-style-type: none"> <li>• The permit copy is not displayed.</li> </ul>	<ul style="list-style-type: none"> <li>• Admission</li> <li>• Witnesses</li> </ul>
		<ul style="list-style-type: none"> <li>• The owner has not taken all reasonable steps to ensure a copy of the permit is displayed.</li> </ul>	<ul style="list-style-type: none"> <li>• Admission</li> <li>• Witnesses</li> </ul>
<p><i>10 penalty units</i></p>			

**Regulation 1009 – Owner to make permit available for inspection**

Reg	Offence	Elements	Evidence
1009(2)	<i>An owner of a building or place of public entertainment must ensure that a copy of any current occupancy permit is available at that building or place for inspection by the Municipal Building Surveyor or chief officer at any time on request</i>	<ul style="list-style-type: none"> <li>• Municipal Jurisdiction</li> <li>• Owner of a place of public entertainment</li> <li>• A current occupancy permit is in existence for the place of public entertainment.</li> <li>• A copy of the permit is not available for inspection upon request</li> </ul>	<ul style="list-style-type: none"> <li>• s242 Certificate</li> <li>• Name of person owner or occupier;</li> <li>• Land title</li> <li>• S242 Certificate – rates records</li> <li>• Admission;</li> <li>• Witnesses</li> <li>• Council Records &amp; s242 Certificate</li> <li>• Admission</li> <li>• Report by Municipal Building Surveyor or</li> <li>• Admission</li> </ul>
<i>10 penalty units</i>			

## Regulation 1011 – Change of Use

Reg	Offence	Elements	Evidence
1011	<i>A person must not change the use of a building or place of public entertainment unless the building or place of public entertainment complies with the requirement of these Regulations applicable to the new use.</i>	<ul style="list-style-type: none"> <li>• Municipal Jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>• 242 Certificate</li> </ul>
		<ul style="list-style-type: none"> <li>• A person<sup>3</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Name of person or legal entity.</li> <li>• Admission</li> <li>• Witnesses</li> </ul>
		<ul style="list-style-type: none"> <li>• Building or place of public entertainment</li> </ul>	<ul style="list-style-type: none"> <li>• Council Records</li> <li>• S242 Certificate</li> </ul>
		<ul style="list-style-type: none"> <li>• There is a change<sup>4</sup> of the use of that building or place of public entertainment</li> </ul>	<ul style="list-style-type: none"> <li>• Report of witness</li> <li>• Admission</li> <li>• Current occupancy permit</li> <li>• Council records as to previous use</li> </ul>
		<p><b>Defence</b> The new use of the building or place of public entertainment complies with the regulations.</p>	
<i>10 penalty points</i>			
Exception 1011(2)	<i>... the MBS (or private building surveyor) may exempt a building or place of public entertainment from compliance with any of these Regulations applicable to the new use.</i>	<p>Approval may be granted:</p> <ul style="list-style-type: none"> <li>• MBS</li> <li>• Grants exception from compliance with regulations.</li> </ul>	<ul style="list-style-type: none"> <li>• Approval may be granted notwithstanding that there will not be strict compliance with the regulations,</li> </ul>
1011(3)	<p><i>In deciding whether to grant an exception ... the MBS must take into account:</i></p> <p><i>(a) the structural adequacy of the building or place; and</i></p> <p><i>(b) the requirements necessary to make reasonable provision for (i) the amenity of the building or place and the safety and health of people using the building or place; and (ii) avoiding the spread of fire to or from any adjoining building.</i></p>	<ul style="list-style-type: none"> <li>• The approval is subject to there being no substantial adverse effect on safety from the change in use especially with regard to:</li> <li>• the structure of the building;</li> <li>• The amenity;</li> <li>• Health and safety of those using the building;</li> <li>• Prevention of fire.</li> </ul>	

<sup>3</sup> Individual or body corporate

<sup>4</sup> The regulation does not state that the person need be the owner, occupier or person who conducts an activity in the building or place of public entertainment. It simply states that the person must not change the use or they will be liable.

**Regulation 1217 Maintenance responsibility of owner of building or place constructed before 1994**

Reg	Offence	Elements	Evidence
1217	<p><i>The owner of a building or place of public entertainment must ensure that any essential safety measure required in relation to that ... place under the Act or these Regulations or any corresponding previous Act or regulations – (a) is maintained in a state which enables the essential safety measure to fulfil its purpose; and (b) is not removed from its approved location except (i) for the purpose of maintenance; or (ii) in accordance with the regulations.”</i></p>	<ul style="list-style-type: none"> <li>• Owner of a place of public entertainment</li> </ul>	<ul style="list-style-type: none"> <li>• Name of person owner or occupier;</li> <li>• Land title records;</li> <li>• s242 Certificate – rates records</li> <li>• Admission;</li> <li>• Witnesses</li> </ul>
		<ul style="list-style-type: none"> <li>• Constructed before 1 July 1994</li> </ul>	<ul style="list-style-type: none"> <li>• s242 Certificate – plans; rates notices</li> </ul>
		<ul style="list-style-type: none"> <li>• Essential safety measures are required in relation to the place</li> </ul>	<ul style="list-style-type: none"> <li>• s242 Certificate – plans, existing occupancy permits</li> <li>• Witness reports</li> </ul>
		<ul style="list-style-type: none"> <li>• The measures are not maintained to a level which allows it to fulfil its purpose</li> </ul>	<ul style="list-style-type: none"> <li>• Witness reports</li> <li>• Admissions</li> </ul>
		<ul style="list-style-type: none"> <li>• The essential safety measure has been removed from its approval location</li> </ul>	<ul style="list-style-type: none"> <li>• Witness reports</li> <li>• Admissions</li> </ul>
		<p><b>Defence</b></p> <ul style="list-style-type: none"> <li>• Removal was for maintenance</li> </ul>	<ul style="list-style-type: none"> <li>• Onus on defendant to prove</li> </ul>
		<p><b>Defence</b></p> <ul style="list-style-type: none"> <li>• Removal was in accordance with the regulations</li> </ul>	<ul style="list-style-type: none"> <li>• Onus on defendant to prove</li> </ul>
<p><i>10 penalty units</i></p>			

**Regulation 1218 Maintenance of Exits Relating to Buildings or Places of Public Entertainment**

Reg	Offence	Elements	Evidence
1218	<p><i>The occupier of a ... place of public entertainment must ensure that:</i></p> <p><i>(a) all exits; and</i></p> <p><i>(b) any paths of travel to exits; and</i></p> <p><i>(c) any paths of travel on the allotment from exits to a road – Required to be provided in relation to that ... place are maintained in an efficient condition and kept readily accessible, functional and clear of obstruction so that egress from the ... place is maintained.</i></p>	<ul style="list-style-type: none"> <li>• Occupier of a place of public entertainment</li> </ul> <hr/> <ul style="list-style-type: none"> <li>• Existence of any exits; paths of travel to exits; and any paths of travel on the allotment from exits to a road</li> </ul> <hr/> <ul style="list-style-type: none"> <li>• Failure to maintain in an efficient condition and kept readily accessible, functional and clear of obstruction so that egress from the ... place is maintained.</li> </ul>	<ul style="list-style-type: none"> <li>• Name of person owner or occupier;</li> <li>• Lease or licence;</li> <li>• s242 Certificate – rates records</li> <li>• Admission;</li> <li>• Witnesses</li> </ul> <hr/> <ul style="list-style-type: none"> <li>• s242 Certificate – plans, existing occupancy permits</li> <li>• Witness reports</li> </ul> <hr/> <ul style="list-style-type: none"> <li>• Witness reports</li> <li>• Admissions</li> </ul>
10 penalty units			

# ENFORCEMENT PROCEDURES

## *No Occupancy Permit or Breach of Occupancy Permit*

Upon becoming aware of a non compliant place of public entertainment, the Municipal Building Surveyor will make an assessment of the situation; confirm that the place is a place of public entertainment and that an occupancy permit is required or that the occupancy permit issued for the Place is not being complied with.

An inspection by an appropriate Council officer will be arranged as soon as practicable. This may or may not be in conjunction with the Chief Officer in accordance with s227E of the Act.

The Municipal Building Surveyor will then if appropriate:

- Issue an emergency order and or a building notice/building order pursuant to Part 8 of the Act; and
- Prosecute persons for any breach of the Act or the Building Regulations.

## **Imminent Danger**

Where the Municipal Building Surveyor is of the opinion that there is an imminent danger to life or property arising out of the condition or use or proposed use of the place of public entertainment:

1. He or she may issue an emergency order pursuant to section 102 of the Building Act and may:
  - Require the place to be evacuated;
  - Prohibit occupation for up to 48 hours;
  - Require the conduct of the public entertainment to immediately cease; and
  - Require certain work be carried out to make the place safe or secure it from access.The order will require compliance to take place within [ ] days but, in accordance with s104, it will remain in force until it is complied with or cancelled by the Municipal Building Surveyor under section 105 or the Building Appeals Board under section 142.
2. The emergency order and covering letter will be in the form as set out in this Guide.
3. At the end of the time for compliance, the place will again be inspected.
4. The time for compliance under the order may be extended provided proper grounds for doing so are provided.
5. If no genuine action has been taken to comply with the order, the matter will be referred to Council's solicitor for prosecution of the person conducting the entertainment and/or the owner and/or occupier for breaches of sections 49 and/or 50 of the Building Act and enforcement through section 253 of the Building Act, being an order of the court requiring compliance. A letter in the form as set out in this Guide, will be sent to the owner advising of the referral to Council's solicitor and providing a final opportunity to comply.

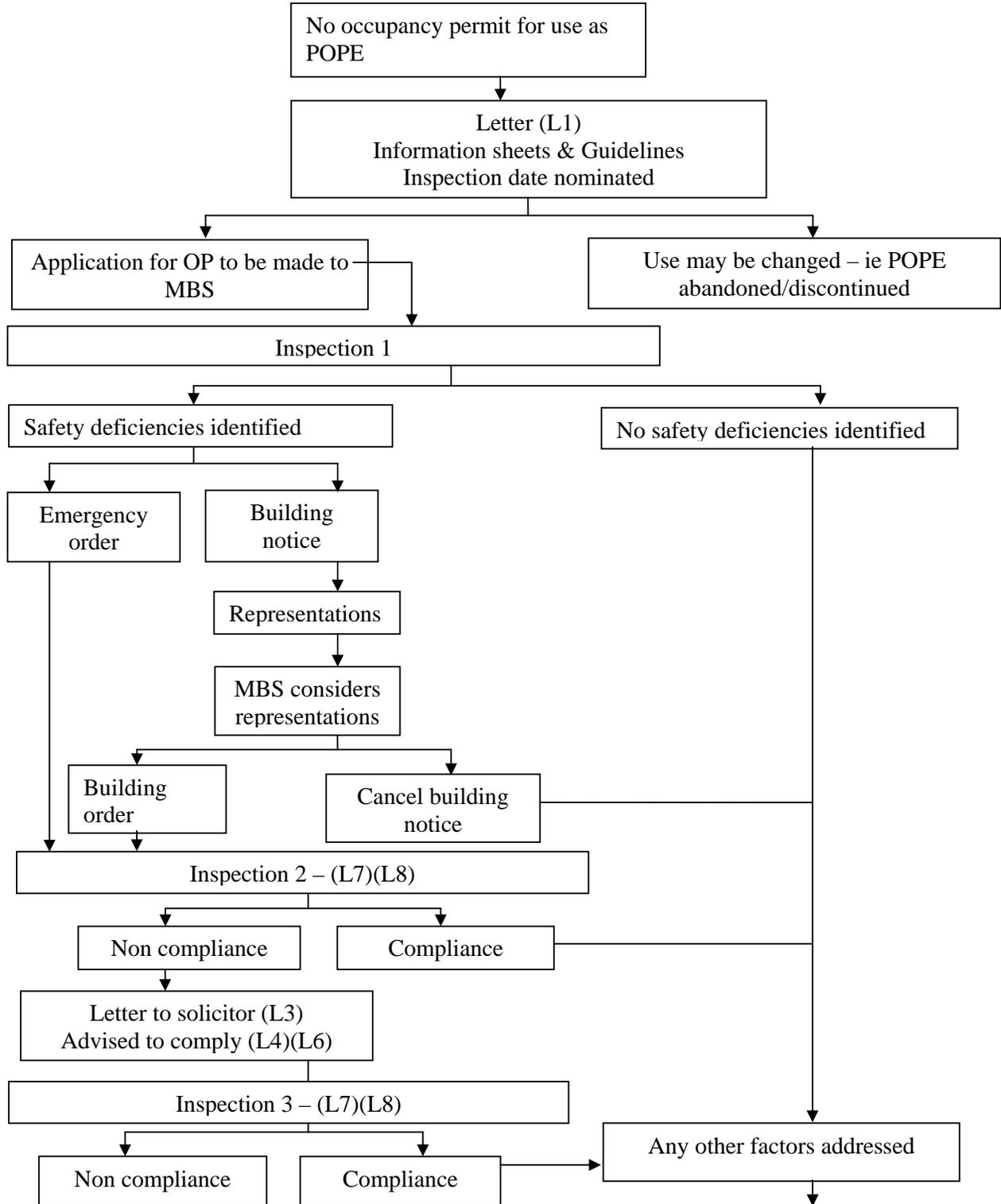
## **Non Imminent Danger**

1. Where the Municipal Building Surveyor forms the opinion that there is no imminent danger to life or property and that the matter may be dealt with through the notice and order provisions of Part 8 of the Act he/she will issue a building notice requiring the owner to 'show cause' why a building order should not be issued.
2. At the end of the show cause period the Municipal Building Surveyor may then issue and appropriate building order.
3. If any works to be done are minor a building order minor work may be issued rather than the notice and order.

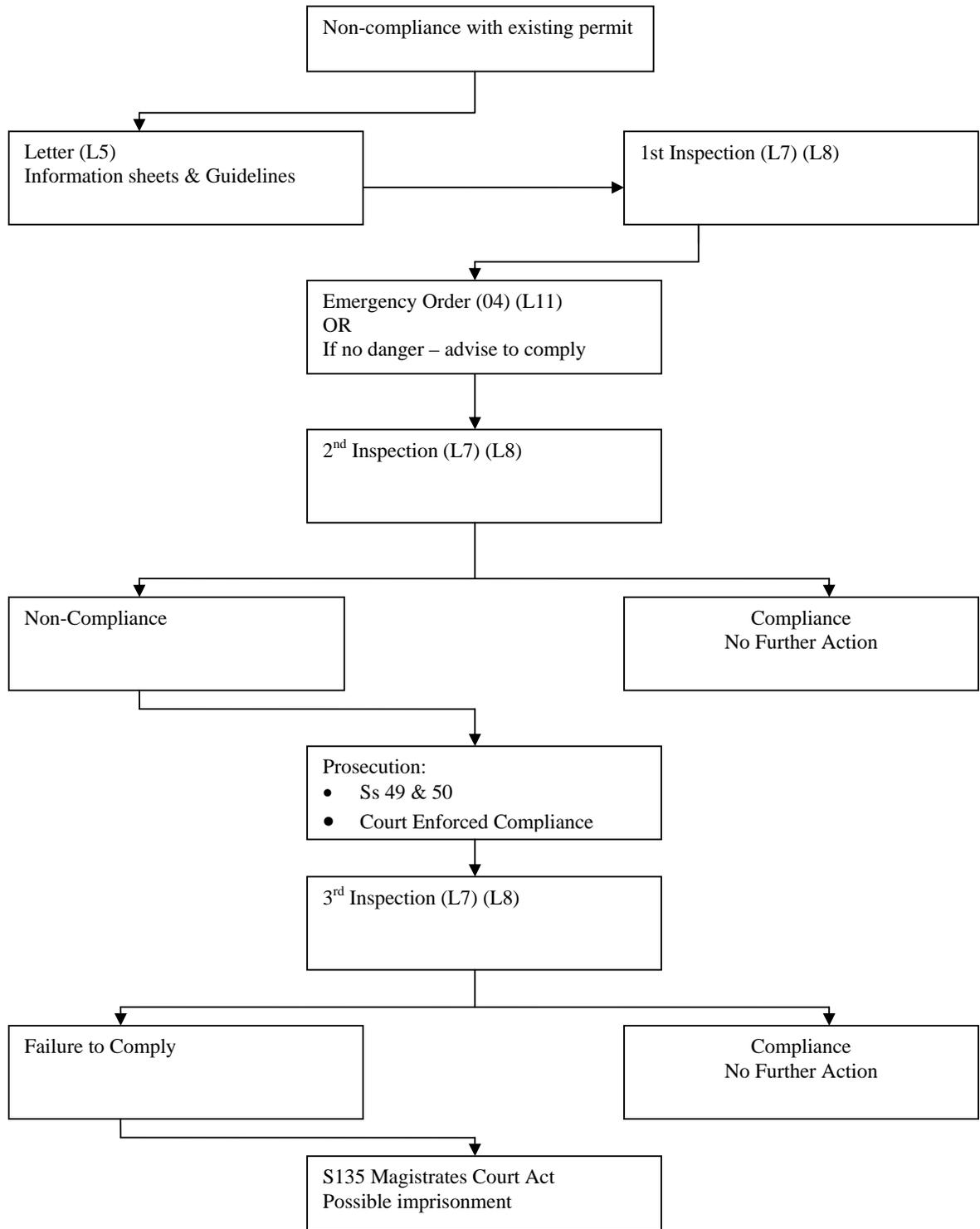
## **Prosecution**

In any situation where a place of public entertainment is operating without an occupancy permit or contrary to a requirement of an occupancy permit Council will consider whether to initiate a prosecution against offenders in addition to any enforcement action taken by the Municipal Building Surveyor under Part 8 of the Act.

Recommended enforcement procedure for places of public entertainment for which a Division 2 occupancy permit has not been issued.



Recommended administration procedure for places of public entertainment (Cont.)



# Applications to the Victorian Building Authority: Prescribed Temporary Structures & prescribed POPEs

## APPLICATIONS TO THE VICTORIAN BUILDING AUTHORITY

Prescribed structures and prescribed places of public entertainment require an occupancy permit application to be made to the Victorian Building Authority by or on behalf of the owner of the place of public entertainment concerned (s53(2)).

Prescribed temporary structures are set out in the regulations as the following structures<sup>5</sup> (other than when they form part of another building other than a temporary structure or temporary building):

- Tents, marquees or booths with a floor area greater than 100m<sup>2</sup>.
- Seating stands for more than 20 persons;
- Stages or platforms (including sky borders and stage wings) exceeding 150m<sup>2</sup> in floor area;
- Prefabricated buildings exceeding 100m<sup>2</sup> other than ones placed directly on the ground surface.

Prescribed places of public entertainment are:

- The sports grounds and spectator stands known as:
  - Kardinia Oval, Kardinia Park, Geelong;
  - Melbourne Cricket Ground, Yarra Park, East Melbourne.

The Municipal Building Surveyor is required to approve the siting of a prescribed temporary structure (s57(1)(a)).

More than one occupancy permit can be issued for a prescribed temporary structure but each occupancy permit must not be issued for a period longer than 5 years (57(2)).

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<sup>5</sup> Regulation 1104 Building Regulations 2006

[COUNCIL LETTERHEAD]

L1

[Date]

[Name]

**To the person conducting a entertainment AND the owner &/or occupier where no occupancy permit has issued**

[Address]

**Re: Place of public entertainment**

**Address: [Insert address]**

Dear [Insert Name]

It has been brought to my attention that no occupancy permit has been issued with regard to the place of public entertainment at the above address.

Under the Building Act 1993 ('the Act') persons who without an occupancy permit having been issued for a place of public entertainment:

- "conduct" a public entertainment (i.e. a person who has a material interest in the financial outcome of the proceeds or profits generated by the public entertainment);  
or
- are owners or occupiers of a place of public entertainment who, for fee or reward, permit a public entertainment to be held in that place,  
risk having an emergency order or a building notice issued against them and may be prosecuted for breaching the Act.

[Insert name of Council] is required by the Act to administer and enforce the Act and the Regulations. Council has adopted a policy to assist in making the municipality as safe as possible for people running and attending public entertainments.

In accordance with that policy it is intended that an authorised person of Council will call at the place on **[Insert day and date ]** between the hours of **[ insert time frame for attendance]**. **Please ensure that access is available at that time.**

Following the inspection, the authorised officer will determine whether or not the place is suitable for occupation for the purpose of the public entertainment which you [are currently holding */or* intend to hold]. In the event that the place is not suitable one of the following events will occur:

- an emergency order will be issued which may prevent you from conducting the public entertainment until such time as the order has been complied with and/or prohibit the use of the place for a public entertainment for at least 48 hours while you complete such work as required to ensure the place is suitable for occupation for the public entertainment and an occupation permit can be applied for and issued; or
- a building notice will be issued requiring you to show cause within 30 days as to why:
  - occupation of the place of public entertainment should not be prohibited;
  - why the use of the place of public entertainment should not be prohibited;
  - why you should not evacuate the place of public entertainment; and/or
  - why you shouldn't carry out certain works in relation to the place of public entertainment..

Failure to show adequate reasons may result in a building order requiring one or more such actions.

Council will reinspect your property at the end of the period in the relevant order to ensure that the place is suitable for occupation for a public entertainment.

Although it is an offence for you not to have had an occupancy permit in place in respect of place of public entertainment, Council may not take action against you in that regard, providing you comply with any order directed to you within the period nominated. In the event an order is issued to you requiring certain works to be carried out and it is not complied with within the required period, Council will refer the matter to its solicitor for immediate action.

Enclosed is a Facts Sheet produced by Council describing what is required and providing you with a copy of the relevant sections of the Act.

If you have any questions regarding this inspection or Council's policy please do not hesitate to contact the office of the Municipal Building Surveyor on **[insert phone]**

Yours faithfully,

[Name]  
**Municipal Building Surveyor**

[COUNCIL LETTERHEAD]

L2

[Date]

[Name]

**To a person applying for an occupancy permit, being a person conducting a public entertainment or the owner or occupier of a place of public entertainment**

[Address]

**Re: Place of public entertainment    Address: [Insert address]**

Dear [Insert Name]

Thank you for your application for an occupancy permit in respect of the above place.

[ Insert name of Council] is required by the Building Act 1993 ('the Act') to administer and enforce the Regulations. Council has adopted a policy to assist in making the municipality as safe as possible for people running and attending public entertainments.

In accordance with that policy it is intended that an authorised person of Council will call at the place on [ **Insert day and date** ] between the hours of [ **insert time frame for attendance**]. **Please ensure that access is available at that time.**

After the inspection and the consideration of any other relevant information, the Municipal Building Surveyor will determine whether or not the place is suitable for occupation for the purpose of the public entertainment and consequently whether an occupancy permit:

- should be issued.
- should be issued with conditions; or
- should be refused.

If the application is refused you will be notified of the refusal and the reasons for that refusal within [insert no. of days] days.

If a permit is granted the place may be inspected from time to time to ensure that the permit is being complied with and any failure to comply will be acted upon immediately.

Also enclosed are Information Sheets and Guidelines produced by Council describing what is required and providing you with a copy of the relevant sections of the Act.

If you have any questions regarding this application or Council's policy please do not hesitate to contact the office of the Municipal Building Surveyor on **[insert phone]**

Yours faithfully

[Name]

**Municipal Building Surveyor**

[COUNCIL LETTERHEAD]

L3

[Date]

[Solicitors details]

**Re: Place of Public Entertainment**

**[Name]**

**[Address]**

Dear [Name],

Please find enclosed brief of evidence consisting of :

- a) Copies of all correspondence to the [owner/occupier/conductor] of the place of public entertainment
- b) Copies of all correspondence from [owner/occupier/conductor] of the place of public entertainment
- c) Copy of file notes
- d) Copy of emergency order
- e) Copy of photographs (if any)
- f) Copy of occupation permit (if any)
- g) Copy of Council rate records showing [insert name] as owner of the property.

We have written to the defendant (letter attached) advising that proceedings are to be initiated and seeking [his/her] compliance within 7 days. Consequently, subject to the defendant's compliance and in accordance with Council's Place of Public Entertainment Policy you are requested to initiate prosecution proceedings against [insert name] for breaching section(s) [49 / 50 / 51] and 118 of the Building Act 1993 ('the Act').

In addition to that prosecution you are requested to apply for an order pursuant to section 253 of the Act, requiring the defendant to [comply with the occupation permit within 30 days [or] cease to operate the public entertainment until a valid permit has been obtained].

*[Chose the first option if an occupation permit exists but is not being complied with.  
Chose the second option if there has been a failure to obtain an occupancy permit altogether.]*

Yours faithfully,

[Name]

**Municipal Building Surveyor**

[COUNCIL LETTERHEAD]

L4

[Date]

[ Insert name]

[Insert address]

**Re: Place of Public Entertainment**

**Address: [Insert Address]**

Dear [Insert name],

I refer to the inspection of your property on [ insert date ].

That inspection was carried out to determine if you had as complied with the emergency order/building order issued to you on [insert date]. That order required you to:

- [Set out what the order required]

in accordance with Part 5 Div 2 of the Building Act 1993 within 30 days of the date of that order.

The inspection of your property on [insert date] discloses that you have not complied with the order.

In accordance with Council's enforcement policy regarding places of public entertainment, this matter has now been referred to Council's solicitor to commence proceedings against you in the Magistrates Court. A document outlining Council's enforcement process is enclosed for your information.

In the event that you have now complied with the emergency order / building order, please advise the office of the Municipal Building Surveyor within 7 days of the date of this letter. If no such advice is received from you the legal proceedings will automatically proceed.

Yours faithfully,

[Name]

**Municipal Building Surveyor**

[COUNCIL LETTERHEAD]

L5

[Date]

[Name] **To the owner &/or occupier or person conducting an entertainment if there has been a failure to comply with an occupancy permit**

[Address]

**Re: Place of public entertainment**

**Address: [Insert address]**

Dear [Insert Name]

It has been brought to my attention that there is a possible breach of the occupancy permit relating to the place of public entertainment at the above address.

Under the Building Act 1993 ('the Act') persons who:

- "conduct" a public entertainment (i.e. a person who has a material interest in the financial outcome of the proceeds or profits generated by the public entertainment); or
- are owners or occupiers of a place of public entertainment who, for fee or reward, permit a public entertainment to be held in that place, risk being prosecuted if they fail to comply with any requisite occupancy permit.

[ Insert name of Council] is required by the Act to administer and enforce the Regulations. Council has adopted a policy to assist in making the municipality as safe as possible for people running and attending public entertainments.

In accordance with that policy it is intended that an authorised person of Council will call at the place on [ **Insert day and date** ] between the hours of [ **insert time frame for attendance**]. **Please ensure that access is available at that time.**

Following the inspection, the Municipal Building Surveyor will determine whether or not the public entertainment is being conducted in accordance with the occupancy permit. In the event that the entertainment is not being conducted in accordance with the occupancy permit one of the following events may occur:

- an emergency order will be issued which will prevent you from conducting the public entertainment until such time as the order has been complied with and/or prohibit the use of the place for a public entertainment for at least 48 hours while you complete such work as required to ensure the occupancy permit is complied with;
- proceedings may be immediately brought pursuant to the *Building Act* 1993 in the Magistrates Court such proceedings may include a prosecution for the failure to comply with the occupancy permit in addition to any application for court orders requiring compliance.

If an emergency order is issued, a Council officer will reinspect your property at the end of the period in the relevant order to ensure that the occupancy permit is being complied with.

In the event an order is issued to you requiring certain works to be completed and it is not complied with within the required period, Council will refer the matter to its solicitor for immediate action.

A separate flow chart detailing the steps involved is enclosed for your assistance.

Also enclosed are Information Sheets and Guidelines produced by Council describing what is required and providing you with a copy of the relevant sections of the Act.

If you have any questions regarding this inspection or Council's policy please do not hesitate to contact the office of the Municipal Building Surveyor on **[insert phone]**

Yours faithfully,

[Name]  
**Municipal Building Surveyor**

**[COUNCIL LETTERHEAD]**

L6

**THE ENFORCEMENT PROCESS**

Whilst Council has no wish to commence proceedings against those who conduct public entertainments or the owners or occupiers of places of public entertainment, the failure to obtain or comply with a relevant occupancy permit or abide by the requisite safety measures could represent a significant risk to the community. As such Council, in accordance with its obligations under section 212 of the Building Act 1993, is committed to bringing about compliance and if necessary prosecuting offenders for breaching Part V Div 2 of the Act.

In addition to being prosecuted for breaches of Sections 49, 50 or 51, owners or occupiers who have also failed to comply with an emergency order or building order, may be prosecuted for that failure under section 118 of the Building Act 1993. These are criminal prosecutions which may result in the imposition by the Court of a conviction and substantial fines. The fines may be up to \$15,000.00 for a natural person and \$55,000.00 for a company.

Council's legal costs in conducting the enforcement process will also be sought from any offenders found guilty by the Court. Such legal costs could be many thousands of dollars.

In addition to any prosecution, orders may also be sought from the Court requiring compliance with the emergency or building order. A failure to comply with any such Court orders could result in further fines or even imprisonment.

**IT IS CLEARLY IN YOUR INTERESTS AS A PERSON INVOLVED IN THE RUNNING OF A PUBLIC ENTERTAINMENT TO ENSURE YOU OBTAIN THE REQUISITE OCCUPANCY PERMIT AND COMPLY WITH ALL SAFETY REQUIREMENTS.**

If you require any further information on Council's enforcement policy or on the requirements of Part 5 Div 2 of the Act please contact the Building Department on **[insert phone]**

[COUNCIL LETTERHEAD]

L7

[Date]

[Name]

[Address]

**Re: Place of Public Entertainment**

**Address: [Insert address]**

Dear [Insert Name]

I refer to my previous letter advising that your property was to be inspected on **[insert day and date]**.

You have advised that this date is unsuitable for you and have requested that the inspection be conducted at another time.

I confirm that an authorised officer of Council will now attend your premises on **[insert day and date]** between the hours of **[insert times]**

If you have any questions regarding this inspection please contact the office of the Municipal Building Surveyor on **[insert phone]**

Yours faithfully,

[Name]

**Municipal Building Surveyor**

[COUNCIL LETTERHEAD]

L8  
[Date]  
[ Insert name]  
[Insert address]

**Re: Place of Public Entertainment**  
**Address: [Insert Address]**

Dear [Insert name],

I refer to the [emergency order/building order] issued to you on **[insert date of order]**.

That order required you to:

- *Set out what the order required*

with Part 5 Div 2 of the Building Act 1993 within [insert no. of days] days.

In accordance with previous advice to you, it is necessary to inspect your property again to determine if the [emergency order/building order] has been complied with. An authorised officer of Council will call at your home on **[insert day and date]** between the hours of **[insert times]**. **Please ensure that access is available at that time.**

Yours faithfully,

[Name]  
**Municipal Building Surveyor**

***[Failure to obtain occupancy permit or comply with occupancy permit resulting in  
issuing of Building Notice]***  
**[COUNCIL LETTERHEAD]**

L9

[Date]

[Insert name]

[Insert address]

**Re: Place of Public Entertainment**

**Address: [Insert Address]**

Dear [Insert name],

I refer to the inspection of your property on [insert date of 1<sup>st</sup> inspection] which was carried out as part of Council's Places of Public Entertainment Policy.

The inspection disclosed that:

- *Set out issues outlined in the building notice*

Conducting or allowing a public entertainment to be conducted on your land without an occupancy permit *[or]* failing to comply with the occupancy permit pertaining the place of public entertainment is an offence under sections [49 and 50 *[or]* 51] of the Building Act 1993 ('the Act') for which you could be prosecuted in the Magistrates Court.

In accordance with Council's policy on places of public entertainment, I enclose a building notice issued to you pursuant to section 106 of the Act. The building notice requires you to

- Show cause why ...  
*Set out what the notice requires them to do*

within XXX days.

**THIS BUILDING NOTICE ALLOWS YOU XXX DAYS TO MAKE REPRESENTATIONS AS TO WHY THE ACTIONS STIPULATED IN THE NOTICE SHOULD NOT TAKE PLACE.**

After considering the representations the Municipal Building Surveyor will determine whether or not to issue a building order. The building order may prohibit you from using the place for public entertainment, evacuate the place or carry out works. Failure to comply with the building order will result in prosecution.

A separate information sheet is enclosed detailing the enforcement process for your information.

I also enclose Council's information sheets in respect of the requirements of Part 5 Div 2 for your assistance.

I trust that the above adequately explains to you what is required of you as an [owner/occupier *[and/or]* conductor] of a place of public entertainment.

Yours faithfully,

[Name]

**Municipal Building Surveyor**

***[Failure to satisfy Council following building notice resulting in issuing of building order]***

**[COUNCIL LETTERHEAD]**

L10

[Date]

[Insert name]

[Insert address]

**Re: Place of Public Entertainment**

**Address: [Insert Address]**

Dear [Insert name],

I refer to the building notice issued to you on [insert date] and the inspection of your property on [insert date] which was carried out as part of Council's Places of Public Entertainment Policy.

The inspection disclosed that:

- *Set out the issues outlined in the building notice*

The representations failed to show why a building order should not be issued.

In accordance with Council's policy on places of public entertainment I enclose a building order issued to you pursuant to section 111 of the Building Act 1993 ('the Act'). The building order requires you to:

- *Set out what it requires them to do*

within [insert no. of days] days.

At the end of the [insert no. of days] day period an inspection will again be undertaken by an authorised officer of Council. In the event that the building order has not been complied with, the matter will be referred to Council's solicitor for the commencement of enforcement proceedings.

As previously advised, this non-compliance with the Building Act 1993 ('the Act') is an offence under sections [49 and 50 *[or]* 51 – *Insert relevant sections*] of the Act for which you could also be prosecuted in the Magistrates Court.

I trust that the above adequately explains to you what is required of you as [an owner/occupier *[and/or]* a conductor] of a place of public entertainment.

Yours faithfully,

[Name]

**Municipal Building Surveyor**

**[Letter with emergency order]  
[COUNCIL LETTERHEAD]**

L11

[Date]

[Insert name]

[Insert address]

**Re: Place of Public Entertainment**

**Address: [Insert Address]**

Dear [Insert name],

I refer to the inspection of your property on [insert date of inspection].

The inspection disclosed that:

- *Set out the issues outlined in the emergency order*

A failure to comply with the requirements of an occupancy permit or conducting a public entertainment without the requisite occupancy permit are offences under the *Building Act* 1993 ('the Act') for which you could be prosecuted in the Magistrates Court.

In accordance with Council's policy on places of public entertainment I enclose an emergency order issued to you pursuant to section 102 of the Act. The emergency order requires you to

- *Set out what it requires them to do e.g.:*

within [insert no. of days] days.

At the end of the [insert no. of days] day period an inspection will again be undertaken by an authorised officer of Council. In the event that the emergency order has not been complied with the matter will be referred to Council's solicitor for the commencement of enforcement proceedings.

A separate information sheet is enclosed detailing the enforcement process for your information.

I also enclose Council's Information sheets in respect of the requirements of Part 5 Div 2 for your assistance.

I trust that the above adequately explains to you what is required of you as an owner *[and/or]* occupier of a place of public entertainment.

Yours faithfully,

[Name]

**Municipal Building Surveyor**

**[Letter to solicitor following failure of defendant to comply with letter advising of  
proceedings being initiated]  
[COUNCIL LETTERHEAD]**

L12

[Date]

[Solicitors details]

**Re: Place of Public Entertainment**  
**[Name]**  
**[Address]**

Dear [Name],

Further to our letter dated [insert date wrote to solicitor asking them to initiate proceedings (L3)]. As advised at that time we wrote to defendant asking them to comply within 7 days or the matter would proceed.

[The defendant has not complied and consequently we ask you to proceed as instructed.

*[or]*

The defendant has now complied and consequently we ask to cease proceedings].

Yours faithfully,

[Name]  
**Municipal Building Surveyor**

# NOTICES AND ORDERS

[For use where there is no occupancy permit]

**[COUNCIL LETTERHEAD]  
BUILDING ACT 1993  
BUILDING REGULATIONS 2006**

O1

**EMERGENCY ORDER PURSUANT TO SECTION 102  
OF THE BUILDING ACT 1993**

TO THE OWNER:            *name*  
                                      *address*

TO THE OCCUPIER:        *name*  
                                      *address*

AND TO ALL OTHER PERSONS OCCUPYING OR USING  
THE PLACE OF PUBLIC ENTERTAINMENT LOCATED AT: *Property address*

**WHEREAS:**

1. I am the Municipal Building Surveyor of [ *insert name of Council* ] and I am authorised to make an emergency order pursuant to section 102 of the *Building Act* 1993 ("Act").
2. The place of public entertainment was inspected on [ *insert date* ];
3. Pursuant to section 102 of the Act, I am of the opinion that this order is necessary because of a danger to life or property arising out of the condition or use or proposed use of the place of public entertainment for the following reasons:
  - 3.1. Set out *reasons why the place is dangerous as a place of public entertainment*

**NOW THEREFORE TAKE NOTICE THAT :**

4. You are required to do the following:  
    [delete/insert as appropriate]
  - 4.1. Evacuate the place;
  - 4.2. Not conduct or allow the conducting of a public entertainment on the place;
  - 4.3. stop work or carry out other work as is necessary to make the place safe;
  - 4.4. Stop work or carry out other work as is necessary to secure the place from access.
5. The above work referred to in paragraphs [insert paragraph number(s)] is to be carried out within [ *Insert* ] days of the service of this order.
6. A building permit is/is not required in respect of the building work required by this order.

DATE :    [ *insert date* ]

[ Name ]  
***Municipal Building Surveyor***

Con't

NOTES:

1.     **Duration of Order**

An emergency order remains in force, and if amended remains in force as amended, until it is complied with or it is cancelled by the Municipal Building Surveyor or the Building Appeals Board (section 104 of the Act).

2. **Cancellation of Order**

The Municipal Building Surveyor may cancel an emergency order by written notice given to the owner and to the occupier of the building, place or land concerned if the order was made in error or the circumstances giving rise to the making of the order have changed (section 105 of the Act).

3. **Penalty for failure to comply**

A person to whom a emergency order is directed must comply with that order [penalty: 100 penalty units in the case of a natural person and 500 penalty units in the case of a body corporate (section 118(1)).





*[Building order for failure to obtain occupancy permit]*

**[COUNCIL LETTERHEAD]  
BUILDING ACT 1993  
BUILDING REGULATIONS 2006**

03

**BUILDING ORDER PURSUANT TO SECTION 111  
OF THE BUILDING ACT 1993**

TO THE OWNER:            *name*  
                                      *address*

OF THE PLACE OF PUBLIC ENTERTAINMENT LOCATED AT: *[Property address]*

**WHEREAS:**

1. I am the Municipal Building Surveyor of [ *insert name of Council* ] and I am authorised to make a building order under section 111 of the *Building Act 1993* ("Act").
2. I inspected the place on [*insert date*];
3. I have considered any representations made by the owner with respect to the matters specified in the building notice dated [*insert date of building notice*];
4. The reasons why this order is being issued are:
  - 4.1. [*insert reasons from paragraph 3 of the building notice*]

**NOW THEREFORE TAKE NOTICE THAT:**

[*delete/insert as appropriate*]

5. You are required to:
  - 5.1. Evacuate the Place;
  - 5.2. Carry out the following work:
    - 5.2.1. Insert details of work to be required (must accord with the building notice)
6. The above work is to be carried out within [*insert number of days*] of the service of this order.
7. A building permit is/is not required in respect of the work required by this order.

DATE :    [*insert date* ]

[ Name ]  
***Municipal Building Surveyor***

Con't

NOTES:

1. **Duration of Order**

A building order remains in force, and if amended remains in force as amended, until it is complied with or it is cancelled by the Municipal Building Surveyor or the Building Appeals Board (section 117 of the Act).

2. **Amendment or Cancellation of Order**

If there is a change in circumstances after the service of a building order, the owner may request the Municipal Building Surveyor to amend or cancel the order pursuant to section 116 of the Act.

3. **Penalty for failure to comply**

A person to whom a building order is directed must comply with that order [penalty: 100 penalty units in the case of a natural person and 500 penalty units in the case of a body corporate] (section 118(1)).

*[For use where there is a breach of an existing occupancy permit]*

**[COUNCIL LETTERHEAD]  
BUILDING ACT 1993  
BUILDING REGULATIONS 2006**

O4

**EMERGENCY ORDER PURSUANT TO SECTION 102  
OF THE BUILDING ACT 1993**

TO THE OWNER:            *name*  
                                      *address*

TO THE OCCUPIER:        *name*  
                                      *address*

AND TO ALL OTHER PERSONS OCCUPYING OR USING

THE PLACE OF PUBLIC ENTERTAINMENT LOCATED AT: *Property address*

**WHEREAS:**

1. I am the Municipal Building Surveyor of [*insert name of Council*] and I am authorised to make an emergency order under section 102 of the *Building Act* 1993 ("Act").
2. The place of public entertainment was inspected on [*insert date*];
3. Pursuant to section 102 of the Act, I am of the opinion that this order is necessary because of a danger to life or property arising out of the condition or use or proposed use of the place of public entertainment for the following reasons:
  - 3.1 Set out *reasons why the place is dangerous as a place of public entertainment*
1. The above are the reasons this order is being issued.

**NOW THEREFORE TAKE NOTICE THAT:**

- 5 You are required to do the following:  
[delete/insert as appropriate]
  - 5.1 Evacuate the Place;
  - 5.2 Not conduct or allow the conducting of a public entertainment on the place;
- 6 You are required to carry out the following work to make the place of public entertainment safe:
  - 6.1 *Insert what is to be required.*
- 7 The above work is to be carried out within [ *Insert* ] days of the service of this order.

8 Occupation of the Place is prohibited for 48 hours from the time of service of this order

DATE : [ insert date ]

[ Name ]

**Municipal Building Surveyor**

NOTES:

1. **Duration of Order**

An emergency order remains in force, and if amended remains in force as amended, until it is complied with or it is cancelled by the Municipal Building Surveyor or the Building Appeals Board (section 104 of the Act).

2. **Cancellation of Order**

A Municipal Building Surveyor may cancel an emergency order by written notice given to the owner and to the occupier of the building, place or land concerned if the order was made in error or the circumstances giving rise to the making of the order have changed (section 105 of the Act).

3. **Penalty for failure to comply**

A person to whom a emergency order is directed must comply with that order [penalty: 100 penalty units in the case of a natural person and 500 penalty units in the case of a body corporate (section 118(1)).



5 You are required to SHOW CAUSE within [insert number of days] days of the date of service of this notice:

5.1 Why occupation of the place of public entertainment should not be prohibited;

5.2 Why the use of the place of public entertainment should not be prohibited;

5.3 Why you should not evacuate the place of public entertainment; *and/or*

5.4 Why you should not carry out the following building work in relation to the place of public entertainment:

5.4.1 *Set out what work needs to be done to be done to remedy each of the matters set out in clause 3:*

DATED THIS [insert date]

Signed by \_\_\_\_\_

*[Name of Building Surveyor]*  
Municipal Building Surveyor  
[ ] Council  
*[Address of Council]*

Notes:

**6. Representations by Owner**

Pursuant to section 109 of the Act an owner may make representations to the Municipal Building Surveyor about the matters contained in the building notice. Any representations are to be made in writing to the Municipal Building Surveyor before the end of the “show cause” period.

**7. Cancellation of Building Notice**

Pursuant to Section 110 of the Act, the Municipal Building Surveyor may cancel a building notice if he considers it appropriate to do so after any representations made upon section 109.

**8. Building Order**

Pursuant to section 107 of the Act, the Municipal Building Surveyor may make a building order under section 111 after the end of the time allowed for making representations.

**9. Appeals to the Building Appeals Board**

Pursuant to section 142(1) of the Act an owner of a building or land, may appeal to the Building Appeals Board against a decision to serve a building notice and, failure

within a reasonable time, or refusal, to cancel a building notice. In accordance with section 146 of the Act and regulation 12.1 of the Building Regulations the prescribed appeal period is 30 days from the date of service of the building notice.

**10. Subsequent Owners**

Pursuant to Section 236 of the Act, this building notice is binding on every subsequent owner or occupier of the land.



NOTES:

1. **Duration of Order**

A building order remains in force, and if amended remains in force as amended, until it is complied with or it is cancelled by the Municipal Building Surveyor or the Building Appeals Board (section 117 of the Act).

2. **Amendment or Cancellation of Order**

If there is a change in circumstances after the service of a building order, the owner may request the Municipal Building Surveyor to amend or cancel the order pursuant to section 116 of the Act.

3. **Penalty for failure to comply**

A person to whom a building order is directed must comply with that order [penalty: 100 penalty units in the case of a natural person and 500 penalty units in the case of a body corporate] (section 118(1)).

# SUPPORT DOCUMENTS

## Letter 1

{Insert Date}

Our Ref:  
Your Ref:

Dear Sir/Madam

Thank you for your enquiry concerning the proposed *insert description* to be conducted on *insert date at insert locations*.

Further to the recent discussion, please be advised as follows:

The activities as outlined above are considered to be a “place of public entertainment” as defined in the *Building Act 1993* i.e. a *Place, greater than 500m<sup>2</sup>, which is enclosed or partially enclosed or to which admission can be gained by payment of money or other consideration and which is used or intended to be used for the purpose of providing public entertainment or a building greater than 500m<sup>2</sup> which is used or intended to be used for the purpose of providing public entertainment.*

As such, an occupancy permit for a place of public entertainment is required to be issued by the Municipal Building Surveyor.

Furthermore, any “prescribed temporary structures” being:

- tents, marquees or booths with a floor area greater than 100m<sup>2</sup>
- seating stands for more than 20 persons
- stages or platforms (including sky borders and stage wings) exceeding 150m<sup>2</sup> in floor area, or
- prefabricated buildings exceeding 10m<sup>2</sup> other than one placed directly on the ground;

must receive an occupancy permit issued by the Victorian Building Authority and be erected by Building Practitioners who are registered under the categories of:

- erector or supervisor (temporary structures) Class I – stages or seating stands or equipment platforms/towers; or
- erector or supervisor (temporary structures) Class II – special structures – tents, marquees as applicable.

**Note:** Upon completion of the erection of all “prescribed temporary structures” a Certificate must be issued by a Registered Building Practitioner in the category of Building Surveyor, Building Inspector or Supervisor (temporary structures Class I & II as appropriate) stating that all conditions within the relevant occupancy permit have been complied with following the supervision of erection of the structure.

In order to apply for an occupancy permit, it is requested that the following information and fee be provided:

- Completed application form being “Application for Occupancy Permit” (for a Place of Public Entertainment).
- A site plan showing proposed locations/number of:
  - Existing/permanent structures
  - Temporary structures (i.e. marquees, seating stands, stages and pre-fabricated buildings)
  - Toilet facilities (i.e. existing and temporary)
  - Drinking water fountains
  - Unsafe areas
  - Exits (including dimensions)
  - Overhead lighting
  - Emergency evacuation procedures
  - First aid stations
  - Fire services (i.e. hydrants, hose reels, extinguishers and fire blankets)
- An event management plan complying with Council's Event Management Guidelines with evidence of such compliance including confirmation of the performance and maintenance of fire services, details of the proposed safety officers including qualifications and an emergency management plan (as required by the event management plan).
- Permit Fee of \$[insert fee]

Should you require any further information please contact *insert officer details*.

Yours sincerely

Municipal Building Surveyor

## Letter 2

Our Ref:

Your Ref:

Dear Sir/Madam

**Re: *Insert Description*  
*At Insert Locations***

Further to your application please find attached a copy of the occupancy permit for a place of public entertainment being *insert description* to be conducted on *insert date* at *insert locations*.

In accordance with Sections 51 and 52 of the Building Act 1993 ('the Act') the owner and the occupier of a place of public entertainment or prescribed temporary structure are responsible to ensure that the relevant occupancy permit (including associated notes and conditions) is not contravened.

Under Section 61 it is the responsibility of the owner of a building to notify any occupier of the building of the existence of the occupancy permit. This must take place either within 7 days after the occupier first enters into occupation of the building or within 7 days after the occupancy permit has been issued (whichever is the later).

Furthermore, please note that in accordance with Section 63 of the Act the Municipal Building Surveyor may cause any place of public entertainment to be inspected from time to time to determine whether or not the permit and any associated notes and conditions are being complied with.

Should you require any further information please contact *insert officer details*.

Yours sincerely

Municipal Building Surveyor

## **Fact Sheet 1**

*(Insert Council Logo)*

### **FACT SHEET**

#### **Occupancy Permit for Places Of Public Entertainment (POPE)**

##### **Definition**

A “Public Entertainment” is defined as an entertainment or meeting to which admission may be ordinarily gained by members of the public ie general community is eligible to attend the entertainment or meeting.

A “Place of Public Entertainment” (POPE) is defined as:

- a building: or
- an enclosed or substantially enclosed place/venue: or
- a place or venue for which some type of admission fee (money or otherwise) is charged for entry

where the building or place has an area of greater than 500m<sup>2</sup> and is being used to provide “Public Entertainment”

##### **Requirement for Occupancy Permit**

Pursuant to sections 49 & 50 of the Building Act 1993:

- a person must not “conduct” a “Public Entertainment” in a POPE unless an occupancy permit (OP) has been issued for the venue. Note “conduct” is defined as having a direct financial interest in the proceeds or profits generated by the event.
- the owner or occupier of a POPE must not for fee or reward permit the place to be used for the purpose of providing “Public Entertainment” unless an OP has been issued for the venue.

**Note:** These requirements bind the Crown, State & Federal Governments and their agencies.

##### **Application for Occupancy Permit**

Application for an OP must be made to the Municipal Building Surveyor by lodging an “application” form “for a Division 2 occupancy permit” with all relevant supporting documentation at least 20 working days prior to commencement of the event.

##### **Other Approvals**

Siting approvals may be required for any prescribed classes of temporary structures (marquees & prefabricated buildings greater than 100m<sup>2</sup>, stages greater than 150m<sup>2</sup>, and seating stands for more than 20 persons).

Any event held on roadways or footpaths must be approved by Councils Engineering Department and/or VicRoads as applicable. Additional fees may apply for occupation of the roadway or footpath.

##### **Fees**

[Insert Council’s Fee Structure]

##### **PLEASE NOTE:**

All relevant approvals must be obtained prior to occupying the event. Failure to comply may result in penalties and fines being issued including cancellation of the event.

For further information on any of the issues covered in this “Fact Sheet” please contact the Building Department.

## Fact Sheet 2

*(Insert Council Logo)*  
**FACT SHEET**  
**Siting Approval for Prescribed Temporary Structures**

### **Definition**

Prescribed Temporary Structures are, if those structures do not form part of, any other building other than a temporary structure or temporary building defined as:

- (a) tents, marquees or booths with a floor area greater than 100m<sup>2</sup>;
- (b) seating stands for more than 20 persons;
- (c) stages or platforms (including sky borders and stage wings) exceeding 150m<sup>2</sup> in floor area;
- (d) prefabricated buildings exceeding 100m<sup>2</sup> other than ones placed directly on the ground surface.

An occupancy permit must be obtained from the Victorian Building Authority for a prescribed temporary structure.

### **Siting Approval**

Pursuant to section 57 (1) (a) of the Building Act 1993 occupancy permits for a prescribed temporary structure may, as a condition, require the siting of the temporary structure to be approved by the Municipal building surveyor.

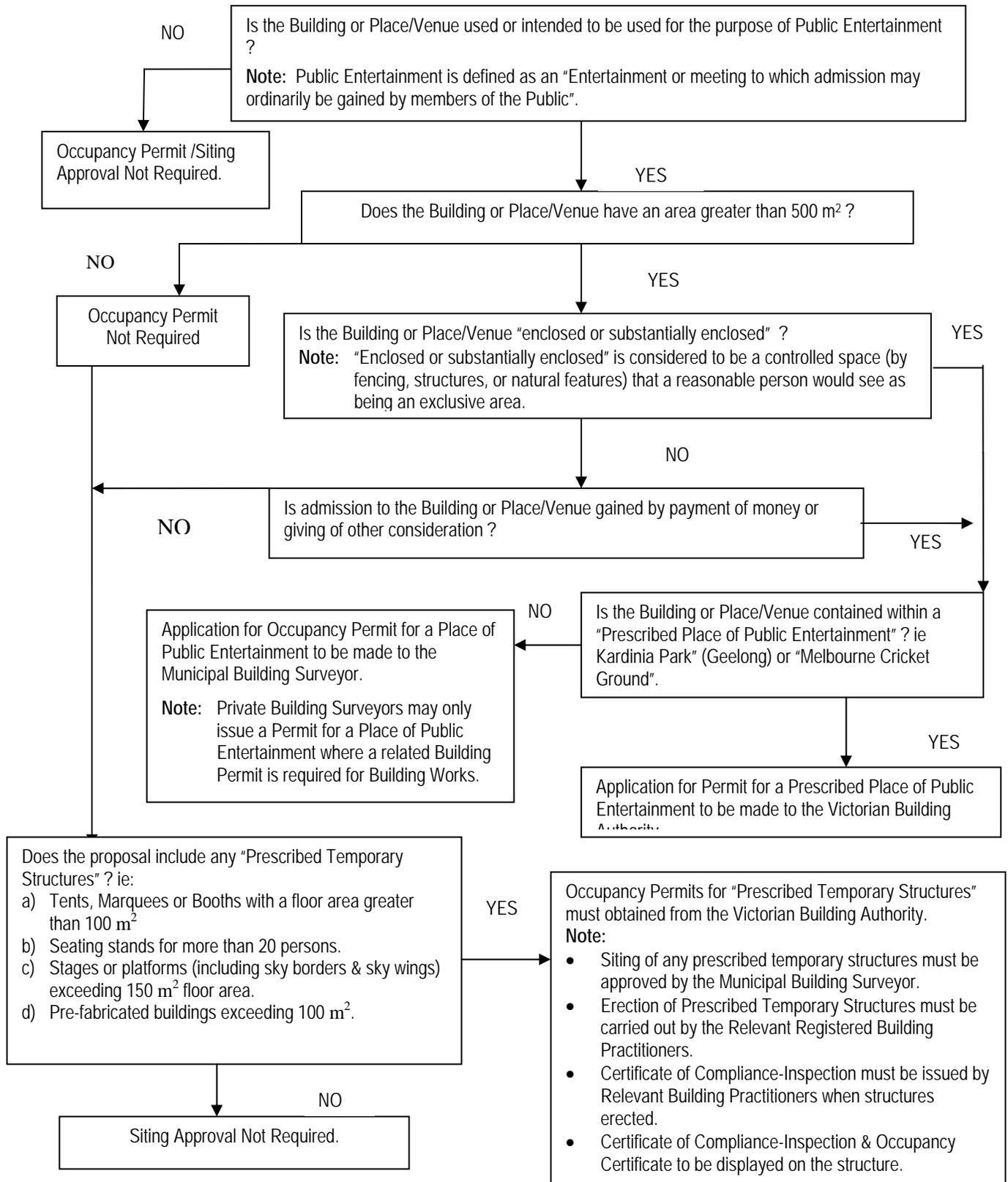
An application for Siting Approval for a Prescribed Temporary Structure **MUST** be made to Municipal Building Surveyor in sufficient time for the application to be assessed and determined. Council requires such applications to be lodged with the Building Department of Council no less than 20 working days prior to the date of the proposed erection of the structure/s

### **Other Approvals**

If the Prescribed Temporary Structure is to be within a Place of Public Entertainment it should be noted that an occupancy permit for the POPE is also required.

For further information on any of the issues covered in this "Fact Sheet" please contact the Building Department.

## How to Determine if an Occupancy Permit or Siting Approval is Required.



# FURTHER DEFINITIONS/DISCUSSION

## Definitions - Explanatory

### (a) Admission

Encyclopaedic Australian Legal Dictionary: The process of entrance or admission.

The Macquarie Dictionary (3<sup>rd</sup> Ed): 1. the act of allowing to enter; entrance afforded by permission by provision or existence of means, or by the removal of obstacles; 2. power or permission to enter: to grant a person admission. 3. the price paid for entrance, as to a theatre, etc.

**In conclusion:** It can be inferred from *Pennells* case (see “ordinarily” below) that the dictionary meaning of the word ‘admission’ is correct.

### (b) Consideration / “other consideration”

Shorter Oxford English Dictionary: Something given in payment; a reward, remuneration; a compensation. Anything regarded as recompense or equivalent for what one does or undertakes for another’s benefit; esp., in the law of contracts, ‘the thing given or done by the promise in exchange for the promise’.

The Macquarie Dictionary (3<sup>rd</sup> Ed): ... 4. a recompense for service rendered, etc.; a compensation. 5. Law in a contract or other legal transaction, the promise by which some right or benefit accrues to one party in return for which the party who receives the benefit promises or conveys something to the other. ...

Lexis Nexis: Consideration in Contract - Encyclopaedic Australian Legal Dictionary

**The price, detriment, or forbearance given as value for a promise:** *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847. ... Expressed in terms of benefit and detriment, a valuable consideration may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other: *Currie v Misa* (1875) LR 10 Ex 153 . The value of the consideration need not be adequate, but must be sufficient. Consideration may be present or future, executed (in exchange for an act) or executory (in exchange for a promise). Past consideration is no consideration. ... *Australian Woollen Mills Pty Ltd v Commonwealth* (1955) 93 CLR 546 ; [1954] ALR 453 .

**In conclusion:** Generally in order to provide consideration both parties must provide each other something, it does not have to be money. “Other consideration” could have a very broad interpretation and mean the carrying out of any action in return for entry e.g. the invitation may say “If you drive to X, you will be granted entry”. The act of driving may be sufficient “other consideration” as may entering a competition, the prize for winning which is admission to the place;

### (c) “Direct Pecuniary Interest”:

The Macquarie Dictionary 3<sup>rd</sup> Edition:

- **Direct:** ... 10. proceeding in a straight line or by the shortest course; straight; undeviating; not oblique. 11. proceedings in an unbroken line of descent; lineal, not collateral. ... 13. **without intervening agency; immediate; personal.** 14. going straight to the point; straightforward; downright.
- **Pecuniary:** 1. consisting of or given or exacted in money: *pecuniary penalties.* 2. of or relating to money: *pecuniary affairs.* 3. (of an offence, etc.) entailing a money penalty

- **Interest:** ... 5. a business, cause, or the like, which a number of persons are interested. 6. a share in the ownership of property, in a commercial or financial undertaking, or the like. 7. the right of ownership in property, commercial undertaking, etc. 8. a number or group of persons, or a party, having a common interest: *the banking interest*. 9. something in which one has an interest, as of ownership, advantage, attention, etc. 10. the relation of being affected by something in respect of advantage or detriment: *an arbitrator having no interest in the outcome*. 11. benefit or advantage: *to have one's own interest in mind*. 12. regard for one's own advantage or profit; self-interest: *rival interests*. ...

### **Pecuniary**

Encyclopaedic Australian Legal Dictionary

Consisting of or relating to money or duties which involve the handling of money.

***Dovade Pty Ltd V Westpac Banking Group [1999] 46 NSWLR 168*** Mason P, Sheller And Stein JJA CA 40805/95 8-10 December 1998, 30 April 1999

"In *Webb v The Queen* (1994) 181 CLR 41 ...[in] a footnote, Deane J explained that the expression "direct pecuniary interest", ... was used "in **the sense of an interest sounding in money or money's worth**". He cited *R v Gough* [1993] AC 646 at 673 ("pecuniary or proprietary interest"). Deane J was in dissent in *Webb*, but the appellants correctly submitted that his Honour's approach to the relevant principles was on all fours with that of the other members of the High Court."

A similar statement was made in ***Ebner V Official Trustee In Bankruptcy*** (No M131 of 1999) - (2000) 63 ALD 577 Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ

***Clenae Pty Ltd V Australia & New Zealand Banking Group Ltd [1999] VSCA 35*** Winneke P, Charles And Callaway JJA

"[33] Then in *R v Hammond* (1863) 9 LT(NS) 423 Blackburn, J said (arguendo) "**The interest to each shareholder may be less than a farthing, but still it is an interest**"."

**Cases relating to the ability of councillors to vote also looked at the issue of direct and indirect pecuniary interests**

***Downward v Babington [1975] VR 872 Gowans J***

Dealt with "direct and indirect" pecuniary interests

"The word 'interest' in itself is wide enough, and has been treated in this connexion as wide enough, to cover any material benefit or advantage or an appreciable character, whether pecuniary or otherwise, although exclusive of an interest based upon merely sentimental associations. (See *Attorney-General for Victoria v Keating* (1980) 26 LGRA 87 at pp. 91, 92).

...

The attachment of the word "pecuniary" to the word "interest" should therefore be treated as introducing a limiting factor excluding that kind of interest which cannot be described as of a "pecuniary" character.

Resort to the dictionaries discloses that the word "**pecuniary**" **has to do with money** – "**of, belonging to or having relation to money**", ... Wide as these expressions may appear to be, they cannot be extended to describe as "pecuniary" anything for which money can be obtained. The dictionary meanings do not refer even to "money's worth". But the word refers to anything that "sounds in money".

***Murray, Ex p [1986] 2 Qd R 383***

"It seems to me that this view is entirely consistent with the other authorities that I have referred to and is also consistent with the ordinary meaning of the words "pecuniary interest". As I have said, **it does not necessarily mean pecuniary advantage, and if in fact there is no advantage in money terms in it, that is quite irrelevant. The reality is that matters of money are clearly involved in the issue and it certainly constitutes an interest.**"

**Conclusion:** Although none of these cases are exactly on point they assist in making it clear that the words "direct" and "pecuniary" are limiting factors on the word "interest". Consequently a relevant interest must be special or peculiar to the person in question and be financial in nature.

#### **(d) Enclosed / Substantially enclosed**

##### **(i) Enclosed:**

Shorter Oxford English Dictionary: To surround so as to bar ingress or egress. To fence in (common land) with a view to appropriation. ... To surround, bound on all sides; to contain.

Oxford English Dictionary (Vol 3): "to surround (with walls, fences or other barriers) so as to prevent free ingress or egress".

The Macquarie Dictionary (3<sup>rd</sup> Ed): 1. To shut in; close in on all sides. 2. to surround as with a fence or wall: *to enclose land*. ...

**Webb v Epstein [1955] VLR 462** Smith J at 468. Trespass case. Was a vagabond found within the grounds of a school in an "enclosed yard, garden, or area ..."?

"The relevant dictionary meaning of the word "enclose" is to 'surround' (with walls, fences or other barriers) so as to prevent free ingress or egress' – see Oxford English Dictionary ... and I think that the word 'enclosed', as used in sec.72(13), requires that there must be a barrier of some kind along such of the boundaries of the space in question as are accessible to the public. It need not be a barrier of a kind difficult to surmount or to penetrate, but it must be something more than a mere marking of the boundaries ... [and] **convey to a reasonable man that members of the public as such were intended to be excluded and space reserved for the use of the occupier and persons authorised by him to enter or having some other special authority to do so. But I think that a barrier may, in some circumstances, satisfy this test even though it is not continuous.** For example, a gap consisting of a gate which is habitually left open, or a gap caused by damage to, or decay of, a section of the barrier, would not necessarily prevent it from being sufficient to convey that members of the public were intended to be excluded. And in the case of an ordinary suburban house I think that the existence of a gap in the front fence or wall giving access to a pathway or drive would not ordinarily prevent the premises from being "enclosed" within the meaning of the section. But, on the other hand, a gap in the barrier may be of such a nature as to prevent the test I have stated from being satisfied.

#### **Anaconda Nickel v Western Australia — (2000) 165 FLR 116**

The government party produced enough evidence to satisfy the tribunal that the relevant properties were enclosed by fencing. This was sufficient to show enclosure, so that in respect of the relevant leases, native title had been completely extinguished. The existence of a public road intersecting an otherwise enclosed area did not defeat enclosure. [at 169, 175-6]

#### **State of WA v Ward [2000] FCA 191 (3 March 2000)** Full Fed Court

Determination of Native Title. Native Title extinguished by areas that are "unenclosed or enclosed but otherwise unimproved". Discussed meaning of "enclosed".

"To 'enclose' means "(1) to shut in: close in on all sides; (2) to surround as with a fence or wall: *to enclose land...*' (*The Macquarie Concise Dictionary*, 3ed). The meaning of "enclosed" is to be ascertained having regard both to the reservation in favour of Aborigines, and the reservation in respect of the right of any person to pass over unenclosed, or enclosed but otherwise unimproved land with or without horses, stock or vehicles. ... **we think it is clear that 'unenclosed' means 'unfenced' so that entry with or without horses, stock or vehicles is unrestricted, and 'enclosed' means 'fenced'. ... the enclosed areas were sufficiently fenced or otherwise contained by natural boundaries to be 'enclosed'**".

***Goodhew v Morton & Another* [1962] 2 All Er 771**

Was a yard an "enclosed yard. The yard itself was completely surrounded by walls, buildings and fences, except at two points; at one of these a way was left open leading to a secured carriage gate on the road boundary of the site; at the other, between two buildings, a gap about twelve feet wide gave access to the rest of the site and to another secured gateway, beside which was a wicket gate which could be opened by lifting a latch. Held:

"area surrounded by walls or buildings within the precincts of a house, castle, inn, etc." n(1). To "walls or buildings" I would add "fences". Such a yard is not often found to be wholly surrounded by walls, buildings and fences so that access can be obtained only through the back door of one of the surrounding buildings. There is almost always a way into the yard, sometimes through an archway. In my view, a yard does not cease to be inclosed within the meaning of this Act because there is access from outside through spaces left between the surrounding buildings, nor is it necessary that there should be means provided of closing those spaces, such as a gate. If gates are provided, it is unnecessary that they should be kept closed. I should add that it is a question of degree whether the space in question is sufficiently surrounded by walls, buildings and fences to justify the description of an "inclosed yard", or whether the buildings or walls cover so small a part of the perimeter that the yard would more reasonably be regarded as an open yard. definitely.

***Quatromini & Another v Peck* [1972] 3 All ER 521**

"... the fences surrounding this area were in disrepair and in certain places missing, and that there was nothing like a continuous fence right around the premises of such a kind as would present any serious obstacle to those who chose to go in. On the other hand, there was in my opinion here sufficient evidence for the justices to decide that this area was enclosed, and since that is the conclusion which they reached, I would not be disposed to depart from it."

***Anaconda Nickel Ltd; Murrin Murren East Pty Ltd & Ors* [2000] NNTTA 366 (8 December 2000) (Tribunal Hearing)**

The Tribunal in this instance discussed cases in relation to the meaning of "enclosed". Some cases state that to be enclosed the area must be completely closed in, but the majority of Australian, English & Scottish cases state:

- At 155: "... whether a particular paddock is enclosed 'is a question of degree'" (MacKenna J in *Goodhew v Morton* [1962] 1 WLR 210) (*see above*);
- In relation to the unauthorised entry into an enclosed yard, garden or area the Tribunal quoted from *Webb v Epstein* [1955] VLR 462 Smith J at 468 – see case summary above:
- The Tribunal also quoted from *Miglio v Hibberd* [1984] 1 Qd R 324:  
"It is well established that before an area can be said to be enclosed there needs to be some sort of fence or barrier, but is equally well established that it does not need to be a continuous one. He then referred to *Webb v Epstein* and the view of Smith J that **the**

**barrier must be such as would convey to a reasonable person that members of the public were excluded.** Thomas J said that this test (at 327): applies a community standard (which is workable) and has been followed by Courts over many years ... where 'there are gaps in the barrier or fence, questions of degrees are bound to arise.'

And on this issue stated at [149]:

"We are of the view that the logical interpretation of *Ward* is that where there is a 'break' in a fence due to a natural barrier or by means of human intervention, the aim of which is to prevent stock movement, that it is not fatal to the existence of enclosure. ... in determining whether a particular parcel of land has been enclosed, that regard can be placed on the totality of the evidence ... We do not need to be provided with evidence that every inch of the property has been fenced or been enclosed by natural features. The Tribunal, does, however, need to be satisfied that by means of fencing, natural features or other structures the property is enclosed in practical terms. In short partial enclosure is not sufficient and even enclosure of the vast majority of a property is insufficient."

The Tribunal concluded at [164]:

"All these decisions involve penal provisions ... [however] there is a great body of judicial dicta to the effect that the question of enclosure must be looked at in a common sense fashion.. ... **An important factor in determining enclosure is whether the land in question was so enclosed by fencing, structures or natural features that it would have been clear, from an objective viewpoint, that there was not general access to the land by members of the public.** ... The vast majority of cases are to the effect that a break in fenceline, even if it allows access to members of the public [e.g. through a public road], does not necessarily result in the land not being enclosed."

**In conclusion:** Note that most of the Australian cases do not require the word "substantially" to be used in conjunction with the word "enclosed" in order for an area not completely closed in to be considered "enclosed". The main test to satisfy is whether or not a reasonable person would determine that "members of the public as such were intended to be excluded".

## **(ii) Substantially**

Shorter Oxford English Dictionary: Having weight, force, or effect; effective, thorough. ... That is such in the main; real or true for the most part.

The Macquarie Dictionary (3<sup>rd</sup> Ed): 1. of a corporeal or material nature; real or actual. 2. of ample or considerable amount, quantity, size, etc.: *a substantial amount of money*. 3. of solid character or quality; firm, stout, or strong. 4. being such with respect to essentials: *two stories in substantial agreement*.

***Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees Union (1979) 42 FLR 331; 27 ALR 367 Dean J*** (extract taken from Institute of Medical & Veterinary Science v Auld [2000] SAWCT 155

"The word substantial is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision. In the phrase 'substantial loss or damage' it can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in a relative sense or can indicate an absolute significant, quantity of size. The difficulties and uncertainties which the use of the word is liable to cause are well illustrated by the guidance given by Viscount Simon in *Palser v Grinling* [1948] AC 291 at 317 where, after holding that, in the context there under consideration, the meaning of the word was equivalent to 'considerable, solid or big', he said: 'Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances of each case ...'."

**Dainford v Lam (1985) 3 NSWLR 255 Powell J**

"As is apparent from the cases (*Palser v Grinling* [1948] AC 291; *Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees Union* (1979) 42 FLR 331; 27 ALR 367) the word "substantial" is one of indefinite meaning, and one which, more often than not, will take its "colour" from the context in which it is used. Although I appreciate that other minds may differ, I take the view that, by adding the word "substantially..." to a clause which would otherwise have operated if the relevant effect was anything more than just nominal, the draftsman was intending to indicate that, **before the clause could operate, the relevant effect must be shown to be of real substance.**"

**In conclusion:** The fact that the Act uses the word "substantially" before the word "enclosed" reinforces the fact that an enclosed area does not need to be completely surrounded by a wall, fence or barrier to satisfy the Act. Consequently a controlled space (by fencing, structures or natural features) that a reasonable person would see as being an exclusive area is sufficient to constitute a substantially enclosed area.

**(e) Entertainment**

The Macquarie Dictionary (3<sup>rd</sup> Ed): 1. the act of entertaining; agreeable occupation for the mind; diversion, or amusement. 2. something affording diversion or amusement, especially an exhibition or performance of some kind. 3. hospitable provision for the wants of guests.

**Foxtel Management Pty Ltd v Commissioner of Taxation (2000) 102 FCR 289; 2000 ATC 4576; (2000) 45 ATR 62; [2000] FCA 1128;**

*In relation to whether or not a television show is "an entertainment" or "an amusement":*

"[13] There is nothing unexpected in the dictionary definitions. The Macquarie Dictionary defines "entertainment" as:

"1. The act of entertaining; agreeable occupation for the mind; diversion, or amusement. 2. Something affording diversion or amusement, esp an exhibition or performance of some kind. 3. Hospitable provision for the wants of guests."

The same dictionary defines "amusement" as:"1. the state of being amused; enjoyment. 2. that which amuses; pastime; entertainment. 3. a mechanical entertainment, as a merry-go-round at a fair."

The Oxford English Dictionary includes in its definition of "entertainment" "the action of occupying (a person's) attention agreeably; interesting employment; amusement". It includes also "that which affords interest or amusement" and: "esp a public performance or exhibition intended to interest or amuse."

The Oxford English Dictionary defines amusement substantially similarly to the Macquarie Dictionary. Finally, I may mention the other dictionary definition of "entertainment" to which I was referred, that in the 6th edition of the Concise Oxford Dictionary: "entertainment n. In vbl senses; hospitality; amusement (much to my entertainment); diversions or amusements for guests etc; public performance or show."

[14] Those definitions, like the authorities to which I was referred, offer guidance, not a solution. ...

[15] That does not answer the question whether a television program is "an entertainment" or "an amusement"; and, in ordinary parlance (and I think the dictionary definitions support this; certainly they do not refute it), I do not think it is. In the unlikely event that a member of one's family said "I am going to watch an entertainment", I do not think one would immediately understand that as a statement of intention to do something which might involve no more than turning on the television set.

[16] That view of the matter gets support, I think, a sociis. The context includes - as well as entertainments and amusements - exhibitions, competitions or sporting events; and things of which there may be souvenirs as well as programs. **Each, I think, suggests something to which a number of people may go, for entertainment or amusement (or, possibly, instruction or edification): not a relatively solitary and domestic activity, such as watching television.** It follows, of course, that I would not accept a proposition, put by senior counsel for the Commissioner, that a performance even in a recording studio might be an entertainment or an amusement. “

**In conclusion:** Even though many activities may be amusing or enjoyable, this case makes it clear that an “entertainment” requires something more. It is any activity undertaken for enjoyment, amusement, instruction or edification, but to be an “entertainment” it must be for a number of people.

**(f) “for Fee or Reward”**

The Macquarie Dictionary 3<sup>rd</sup> Edition:

- **Fee** 1. a payment for services: *a doctor’s fee*. 2. A sum paid for a privilege: *an admission fee*. ... 3. a charge allowed by law for the service of a public officer.
- **Reward:** 1. something given or received in return or recompense for service, merit, hardship, etc. ... 3. to recompense or requite (a person etc) for service, merit, achievement, etc. 4. to make return for or requite (service, merit, etc); recompense

***South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd & Ors v Charles Moore (Aust) Ltd & Ors* 139 CLR 449, 14 ALR 485, 51 ALJR 715 (HCA Jul 05, 1977)**

In determining whether or not stores who provide another store with credit information on customers with the expectation of receiving similar information in return were “reporting agencies” and therefore required to comply with the *Consumer Credit Act 1972* (SA), 4 of the judges (Murphy J did not discuss this aspect) agreed that they provided the information “for fee or reward” even though no money changed hands, the word “reward” should be interpreted broadly and would include a commercial advantage. The judges stated the following:

**(Barwick CJ)** “The use in the definition of the expression “for fee or reward” ... is designed to cover the occasions when some remuneration not consisting only of a money sum is obtained by the person providing the consumer report in return for the service of doing so.

**... something done for A in the expectation of an advantage furnished by B in relation to what is done for A, may be said to have been done for reward. ... “Reward” as opposed to “fee” indicates a recompense not consisting in a money sum.” ...**

**(Gibbs J:)** “The words “fee or reward” do not, in my opinion, form one composite phrase — they are disjunctive. “Reward” is a wider word than “fee”, and is not restricted to a payment in money. Any return or recompense for a service is a reward within the ordinary meaning of the word. ... **The word “for” denotes motive or purpose; a person comes within the definition only if he furnishes consumer reports to traders for the purpose, or in the expectation, of obtaining some fee or reward.”**

**(Stephen J):** “An act may, I think, be performed “for reward” if there exists an expectation that it will be productive of some sensible advantage; that advantage need not come directly from the person deriving the immediate benefit of the act performed so long as it is the anticipated outcome of the performing of that act.

The context in which “for reward” occurs strongly suggests that the reward must be part of some commercial transaction and must involve what Bray CJ describes as some “commercially valuable benefit or advantage”. In a sense an act done “for reward” is the antithesis of the making of a gift, which Owen J spoke of in *FC of T v McPhail* (1968) 117 CLR 111 at 115–6, as occurring when in return nothing “of material advantage to the disponent” is received. When, on the contrary, something of such advantage is contemplated as being received in return the act done readily enough answers the description of being done for reward.”

**(Mason J):** “When a service is provided in the course of commercial operations, or as a matter of business or commercial practice, in the expectation, reasonably based, that a benefit will be received in consequence of the provision of the service, the service is provided “for reward”, even though there is no legal obligation to furnish it and no legal right to compel its provision. It was observed in *Albert’s Case* that services may be given for reward where the provider of the service has no power to compel the giving of a reward, eg in England the provision of a service in the expectation that a tip will be provided (see [1972] AC at 319, 325, 332–3; cf at 338). And in such a case it might be said that the expectation that a tip will be provided is not the sole or perhaps the principal reason why the service is provided.”

Stephen J & Mason J agreed with the interpretation of Bray CJ (dissenting) from the SA Supreme Court in his interpretation of “for fee & reward” ***Prices & Consumer Affairs, Commissioner for (SA) v Charles Moore (Aust) Ltd 12 SASR 214***

**(Bray CJ):** “The most comprehensive sense given to the word “reward” in the New English Dictionary, obsolete usages apart, is “a return or recompense made to, or received by, a person for some ... service or merit, or for hardship endured”. ... But I agree that the context of the *Fair Credit Reports Act* demands some limitation to such a wide meaning. ... I draw certain conclusions from *Albert’s case* referred to above which I think are of some help here: (1) I think the words “fee or reward” are not synonymous. “Reward” must have been intended to add something to “fee”. “Fee” I think means a money payment for a specific service. “Reward” I think must have a wider meaning. ...

(2) The word “for” in the expression “for fee or reward” is important. **It denotes a concept of motive or purpose.** It is not enough that a reward should in fact have followed the furnishing of a report. The report must have been furnished with the object of or in the expectation of some sort of reward as a result; cf. *Albert’s case*, per Lord Donovan at p. 319, per Viscount Dilhorne at p. 329, per Lord Pearson at p. 333. I do not, however, think that the reward must necessarily flow from the recipient of the report. I think something can be said to be furnished for reward if it is furnished to A in the expectation of a recompense from B or from one or more of B, C, D or E.

(3) It is not necessary that the report should have been furnished in pursuance of a legally binding contract. Many services are rendered in the expectation of a reward though there is no legal obligation to provide a reward. Many people render services in the expectation of tips who could not sue for them; cf. *Albert’s case* per Lord Donovan at p. 319, per Viscount Dilhorne at p. 325, per Lord Pearson at pp. 332-3. Lord Cross again took a different view-p. 338.

(4) The report must be furnished in a business context, not a merely social one. ...

Is it necessary for “reward” in the definition clause that the recompense for the services in question should be what Mr. Matheson called “something clearly tangible and quantifiable”; ... Or is it enough if it is something of commercial benefit or advantage, something of commercial value, even though not capable of being precisely quantified?  
...

**I think that the word “reward” in the definition clause means any commercially**

valuable benefit or advantage received or expected in a commercial context, even though it is not capable of precise quantification.”

**Jackson v Crosby (1977) 16 SASR 1 King J**

“Remuneration or recompense by way of goods, reciprocal services or the transfer of an interest in land would constitute “reward”.”

**Saunders v Cadman (1990) 54 SASR 534 Mullighan J**

“... the benefit given, be it in money or kind, must be a fee or reward for the doing of something by one person for another in exchange for remuneration of some form..”

**In conclusion:** “[f]or fee or reward” connotes more than mere reimbursement and is wider than a “payment for money”. It could include: any commercially valuable advantage or recompense, financially quantifiable or not, provided for and expected under a commercial like transaction.

### **(g) Meeting**

The Macquarie Dictionary (3<sup>rd</sup> Ed): 1. a coming together. 2. an assembling, as of persons for some purpose. 3. an assembly or gathering held. ...

Encyclopaedic Australian Legal Dictionary: An assembly or gathering.

**Cassell v Gold Coast Publications Pty Ltd [1984] 1 NSWLR 11 Yeldham J** citing Lord Coleridge CJ in *Sharp v Dawes (1876) 2 QB 26*

“the word ‘meeting’, prima facie, means a coming together of more than one person”.

**In conclusion:** The word meeting means “the coming together of more than one person”.

### **(h) Members of the public**

The Macquarie Dictionary (3<sup>rd</sup> Ed): “Member”: 1. each of the persons composing a society, party, community, or other body. 2. each of the persons included in the membership of a legislative body, as parliament. ...

“Public”: 1. of, relating to, or affecting the people as a whole or the community, state, or nation: *public affairs*. 2. done, made, acting, etc., for the people of community as a whole: *a public prosecutor*. 3. open to all the people: *a public meeting*. 4. relating to or engaged in the affairs or service of the community or nation: *a public official*. ...

“Community” 1. a social group of any size whose members reside in a specific locality, share government, and have a cultural and historical heritage. ... 5. similar character; agreement; identity: *community of interests*. 6. *Singaporean and Malaysian English* a group of people within a society with a shared ethnic or cultural background. ... 8. **the community** the public.

**Lee v Evans (1964) 1123 CLR 276**

The leading Australian case on what “public” means. The relevant issue was whether an invitation, randomly extended, was an “invitation to the public” to deposit or lend money for the purposes of s4(a)(1) of the Registration of Business Name Act 1928. There was no definition of what this meant in the relevant act.

Barwick CJ:

"This does not mean that it must be an invitation to all the public either everywhere, or in any particular community. How large a section of the public must be addressed in a general invitation for it to be an invitation to the public in the relevant connection must depend on the context of each particular enactment and the circumstances of each case. But within that sufficient area of the community the invitation must be general ..."

"But whether the question is whether the invitation is *ex facie* an invitation to the public or whether an invitation has become an invitation to the public by reason of the nature or extent of its issue, the basic concept is that the invitation, though maybe not universal, is general; **that it is an invitation to all and sundry of some segment of the community at large. This does not mean that it must be an invitation to all the public either everywhere, or in any particular community.** How large a section of the public must be addressed in a general invitation for it to be an invitation to the public in the relevant connexion must depend on the context of each particular enactment and the circumstances of each case. But within that sufficient area of the community the invitation must be general ..."

At p 292, Windeyer J., who dissented, said:-

"An invitation can be conveyed or communicated to the public in many ways: in writing, by a notice in the press or posted in a public place conveying an invitation to any reader: orally, by an address to a public meeting or an announcement in a public place: by handing leaflets to passers-by in a public street: by circulars sent through the post: by going indiscriminately from house to house repeating the invitation. The essence of an invitation to the public is not in the manner of its communication or in the number of the persons to whom it is communicated. **The criteria are rather, are the recipients of the invitation persons chosen at random, members that is of the general public, the public at large, all and sundry: or are they a select group to whom and to whom alone the invitation is addressed, so that if an outsider sought to respond to it he would be told that he was not one of those invited to come in.**"

***Re: Trade Practices Commission And: J. And R. Enterprises Pty. Ltd. and Janet Rose Rowden* Nos. G125 to 127, 129, 130, 132 to 138, 140 to 142 and 145 of 1989 FED No. 23 Trade Practices 99 ALR 325**

"I turn then to consider whether it was "the public" that was affected by the company's conduct. The Crown has proved to my satisfaction that the activities of the company's sales staff was sufficiently broad and extensive to establish the required public element. **The word "public" is not to be taken as meaning the world at large or the whole community. There will be a sufficient approach to the public if first, the approach is general and at random and secondly, the number of people who are approached is sufficiently large.** [followed Barwick C.J. in *Lee v Evans* (1964) 12 CLR 276 at p 285]

***Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394** (quoted in *Griffith Morgan Jones v Mortgage Acceptance Nominees*)

This case concerned alleged breaches of [ss 82](#) and [83](#) of the *Companies Act 1961* (NSW). The section referred to offers or invitations to the public. At 404 Kirby P commented:

"Clearly, it is not necessary for the issue or offer to be made to all the world in express terms ... Nor does it need to be made to the whole world in its generality, so long as it is not in terms limited so that it can be accepted only by a defined group. ... Similarly, **the fact that by its very nature, an offer is effectively only capable of being accepted by a particular group of persons does not render its character any the less an offer to the public. It is the generality of the offer which gives it the character which attracts the operation of the statute.**"

***Ryan v Nominal Defendant* [2005] NSWCA 59**

This case dealt with the words “open to or used by the public”.

Giles JA:

[At paras 4 – 6] “The words ‘open to or used by the public’ are apt to describe a factual condition consisting in any real use of the place by the public as the public ... **It may be necessary to distinguish places open to members of the public as such from places left open by the owner but obviously intended only for the use of a particular description of person**, for example, visitors to his shop or other premises. ...to determine whether the use is use by the public ... whether the use is use by a limited lass of persons not properly described as the public ... [or] **any steps taken to exclude persons from the place or any express or implied licence to the use, which may contribute to determining that the use is otherwise than by the public**”. [Is the invitation] capable of being acted upon by any member of the public”.

Santow JA:

[At para 2] *Public property to which the public are invited - ... unless the invitation is issued indiscriminately to the public at large the place will not be open to the public: Mercantile Mutual Insurance Co Ltd v W Turner Pty Ltd (1982) 1 NSWLR 728.*

[At para 87] “In *Mercantile* the words “**the public**” as used in *Scubert v Lee* seem to have been equated to “**members of the public** as such” by Glass JA (at 735). That case primarily concerned whether a marketplace was open to the public. In relation thereto, Glass JA held that the place must be “*open indifferently to any member of the public without any discrimination*”, commenting:

“I do not think that it ceased to be open to the public because only those citizens minded to buy fruit and vegetables were likely to enter. After all a public baths would not cease to be a place open to the public merely because only swimmers entered nor would a museum cease to be open to the public merely because its exhibits had an appeal to a limited class only” (at 735).

**R v Abrahams 13 A Crim R 113 [1984] 1 NSWLR 491; 1984 WL 440778**

(Quote from a decision of the Court of Appeal in Northern Ireland in *Montgomery v. Loney* [1959] N.I. 171 Lord MacDermott L.C.J.)

“... (2) ‘The public’ means the public at large or a substantial section thereof. What constitutes a substantial section for this purpose must be determined with regard to the relevant circumstances and the dominant object of the statute, namely, the protection of the public. Generally, the decision will be a matter of fact and degree, but whether the material for consideration suffices to support one view or the other is a matter of law.

(3) But those who are allowed to enter private property, not as members of the public, but for reasons **in some way personal to the individuals admitted, will not be regarded as the general public or a substantial section thereof**, and their admission will not constitute the giving of access to the public for the purposes of the definition. Pass holders entering a dock area, or employees going to work along a factory road, for example, **do not bring the definition into play because they obtain access, not as members of the public, but on the strength of a relationship between the individual and the owner or occupier concerned**. So, too, with those who visited the farm in *Harrison v. Hill* for social or business purposes. Apart from any question as to whether, as a class, they could be reckoned a significant section of the public, the invitation or permission under which they entered was in no sense addressed or given to the public. This decision marks the clear distinction existing between these visitors and those allowed to walk on the road. The latter gained access as members of the public. The former did not.”

**In conclusion:** The key words to use in interpreting the term “public” appear to be it is an invitation to all and sundry of some segment of the community at large. This does not mean

that it must be an invitation to all the public either everywhere, or in any particular community but it must be open to people at random who do not have a special relationship with the person(s) making the invitation.

**(i) Occupier  
(Owner defined in Act)**

The Macquarie Dictionary 3<sup>rd</sup> Edition:

**Occupier:** a person having the legal right to reside, or who is residing, in a house, on land, etc.

Encyclopaedic Australian Legal Dictionary

**Occupier - Real property**

**1. A person physically using or taking up a place on land. Occupation encompasses a degree of control:** *Donaldson v Bottroff* [1965] SASR 145; *Wheat v E Lacon & Co Ltd* [1966] AC 552; [1966] 1 All ER 582. However, the control need not be that of possession or ownership: *The Mayor, Councillors and Citizens of Bulong v Cohn* (1901) 3 WALR 74 . **A caretaker, resident, manager, or other person in charge of the land can be an occupier while the employer is not in occupation:** (NSW) Rural Land Protection Act 1998 s 3, Dictionary; *Bayly v Scarica* [1990] VR 731. `A mere sleeping partner' is not an occupier (*Bulong v Cohn* [1901] 3 WALR 74), nor is a boundary rider: *Palmer v Chrisp* (1908) 7 CLR 612 .

**2. A resident of premises:** *De Kuyper v Crafter* [1942] SASR 238 .

**3. A person in charge of premises by reason of office or position:** **Heffernan** (1985) 20 A Crim R 122 .

**4. A person or entity that fills a space, for example a gas company is an occupier of mains through which its gas flows:** *Gas & Fuel Corp of Victoria v City of Williamstown* [1978] VR 677; (1978) 40 LGRA 390 .

***Fox v Warde* [1978] VR 362**

“As was said in the Privy Council in the case ... *Mandrassa Anjuman Islamia of Kholwad v Municipal Council of Johannesburg*, [1962] 1 AC 500 at 504:

**‘The word ‘occupy’ is a word of uncertain meaning.** Sometimes it denotes legal possession in the technical sense, as when occupation is made the test of rateability; and it is in this sense that it is said in the rating cases that the occupation of premises by a servant, if such occupation is subservient and necessary to the service, is the occupation of his master: *r v Spurrell* [1865] LR 1 QB 72. At other times ‘occupation ‘ denotes nothing more than physical presence in a place for a substantial period of time, as where a person is said to occupy a seat or pew, or where a person who allows his horses or cattle to be in a field or to pass along a highway, is said to be the occupier of the field or highway for the purpose of s68 of the *Railway Clauses Act 1845 Dawson v Midland Ry Co* LR 8 Ex 9; *Luscombe v Great Western Ry Co.*, [1899] 2 QB 313. **Its precise meaning in any particular statute or document must depend on the purpose for which, and the context in which, it is used.**”

Generally held (head note):

“(a) The use made of premises by a defendant is one matter from which the court may infer that the defendant was an “occupier”. However mere use of a room for prostitution on one occasion, which was all that the evidence conclusively established, is insufficient to demonstrate that the person using the room is an “occupier” of that room within the meaning of the section.

(b) **The control exercised over premises by a defendant is another matter from which the Court may infer that the defendant was an “occupier”.** Although the occupation required to be shown need neither be permanent, lawful, nor exclusive of others, it must amount to more than mere transitory use. ...”

***Wheat v E Lacon & Co Ltd* [1966] 1 All ER 582**

Case sought to determine who was responsible for failing to maintain stairs in a safe manner – the owners of the premises or their manager who lived in and managed the premises? Was the manager an “occupier” for the purpose of determining responsibility to take reasonable care?

Held no because he lacked sufficient control to render him responsible. Stated that the test is as found in ***Glasgow Corpn v Johnstone* [1965] 1 All ER 730:**

“The distinction is usually shortly stated in this way: if the servant is given the privilege of residing in the house of the master as part of his emoluments the occupation is that of the servant. He is treated for occupation purposes as being in the same position as that of a tenant. If, on the other hand, **the servant is genuinely obliged by his master for the purposes of his master’s business or if it is necessary for the servant to reside in the house for the performance of his services the occupation will be that of the master.**” (as quoted by Viscount Dilhorne)

(Lord Denning) [regarding the common law definition of “occupier”] “I would say that no guidance is to be obtained from the use of the word “occupier” in other branches of the law: for its meaning varies according to the subject matter”.

...

“In Salmond on Torts (14<sup>th</sup> Edn, 1965) p. 372 it is said that **an “occupier” is “he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons”**. This definition was adopted by Roxburgh J in *Hartwell v Grayson Rollo & Clover Ltd* and by Diplock LJ in the present case. There is no doubt that a person who fulfils that test is an “occupier”. He is the person who says “come in”; but I think that that test is too narrow by far. There are other people who are “occupiers” even though they do not say ‘come in’. If a person has any degree of control over the state of the premises it is enough.”

***Heffernan and Heyward* (1985) 20 A Crim R 122 Nathan J**

Query was the policeman who was the officer in charge of the police station at the time of the offence the “occupier” of the place? The common law applied.

“The compass of the word “occupier” is most often described by the enacting words and their context.

Nathan J said that Brennan J in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 approved the quote in the *Madrasa* case (see *Fox* above). He quoted Brennan J as follows:

“Occupation for the purposes of par (d) is not necessarily exclusive occupation. It may be occupation with others, it may be as a licensee or invitee of another occupier...”.

Consequently Nathan J held that the police officer was the occupier:

“... the fact that at some other time of the day or on some other shift some other person might be in charge is not decisive. His obligation was to ensure that the public place, that is the foyer, could be used for the purpose for which it was intended, namely recourse to it by the public. If it became impossible or difficult for that to be done **he had sufficient authority on his own account to regulate the use of that space, including the power to exclude some persons.**

**In conclusion:** Looking at the context in which the words are used in the *Building Act* it is in relation to owners or occupiers who permit a place to be used for a public entertainment. Under the Division 2 Part 5 of the act neither owners or occupiers must permit a public entertainment to take place unless an occupancy permit has been issued. There may be

more than one occupier for example the council (the owner) may lease the relevant building to X who may permit Y to run a public entertainment. It is arguable that both X & Y could be occupiers.

#### **(j) Ordinarily**

The Macquarie Dictionary (3<sup>rd</sup> Ed): 1. in the ordinary cases; usually. 2. in the ordinary way. 3. to the usual extent.

**Clean Investments Pty Ltd v Commissioner of Taxation (2001) 105 FCR 248; (2001) 184 ALR 314; 2001 ATC 4068; (2001) 46 ATR 248; [2001] FCA 80;**

*Looked at whether or not goods were "ordinarily used for household purposes"*

"(at 97) I accept that **"ordinarily"** means **"commonly"** or **"regularly"**, not "principally", "exclusively" or "predominantly"

*(Hygienic Lily Ltd v Deputy Commissioner of Taxation (1987) 13 FCR 396 at 399, 400; Commissioner of Taxation v Chubb Australia Ltd (1995) 56 FCR 557 per Burchett J at 560, Hill J at 570).*

**NSW Cancer Council v Commissioner of Taxation (1999) 99 ATC 4427; (1999) 42 ATR 64; [1999] FCA 411**

"(At 4). The expression "ordinarily used" in Item 20 **means commonly or usually used, not exclusively or principally used**: *Hygienic Lily* at 399, per Gummow J; *Chubb*, at 560, per Burchett J; at 570, per Hill J. Something may be ordinarily used for one purpose and yet may also be ordinarily used for another purpose: *Chubb*, at 560."

***Superintendent Of Licences v Pennells And Another (1985) 1 NSWLR 695***

#### **In this case the court reviewed**

The definition of "public entertainment" in the Theatres and Public Halls Act, s 4(1), is as follows:

"... 'public entertainment' means entertainment to which admission may ordinarily be procured by members of the public—

- (a) upon payment of money or other consideration; or
- (b) by a ticket, programme or other device purchased for money or other consideration"

#### **Per Priestley JA:**

"...the definition of public entertainment in s 4 must accommodate a meaning of "a public entertainment" which gives to the word "ordinarily" in the definition a meaning confined to one occasion of entertainment. **Common meanings of "ordinarily" are "in the ordinary way" and "in an ordinary way". These meanings seem to me to be readily applicable to a single public entertainment.** The definition means to my mind in the case of a single entertainment one to which admission may be procured by members of the public in an ordinary way by which admission to that entertainment is procured, notwithstanding that other non-ordinary ways of admission to the entertainment are available to some people. ... "Ordinarily" is used to indicate in the case of a single occasion what is the ordinary way or what are the ordinary ways of procuring admission on that single occasion."

## Per STREET CJ.

“... In relation to the first point, that is to say, the significance of the adverb “ordinarily” in the definition of public entertainment in s 4, I should like to add some brief comments. It seems to me that the adverb is to be construed, as Priestley JA has said, as meaning in the ordinary way. **Its operation is to be determined in the context of the particular exercise of public entertainment which is in contemplation.** The question for consideration is how admission to **that** entertainment may ordinarily be procured, whether upon payment of money or in one of the other ways mentioned in the definition.

**[Or in the case of the Building Act 1993, are members of the public ordinarily able to gain admittance to that type of entertainment]**

**In conclusion:** The word ordinarily is to be given its normal meaning i.e. “commonly” or “regularly”. However, it can single entertainment (Justice Priestly in *Pennells*). What must be determined is whether admission is ‘ordinarily’ granted to the public each particular type of entertainment.

### (k) “Proceeds or Profits”

The Macquarie Dictionary 3<sup>rd</sup> Edition:

- **Proceed[s]:** ... 9. (*usually plural*) the sum derived from a sale or other transaction. 10. that which results or accrues
- **Profit[s]:** 1. (*often plural*) pecuniary gain resulting from the employment of capital in any transaction. ... 2. (*often plural*) returns, proceeds, or revenue, as from property or investments. ... 4. (*often plural*) such additional benefits as interest on capital, insurance, etc. 5. advantage; benefit; gain – *verb* ...

[Encyclopaedic Australian Legal Dictionary] **Profit:**

1. Monetary gain derived from a transaction as a result of an excess of revenues over outlays and expenses in a business enterprise: *Brandt v W G Tatham Pty Ltd* [1965] NSW 126 .

...

4. In relation to a business, generally the increase in the total assets of a business between two specific dates usually separated by an interval of a year: *Re Spanish Prospecting Co Ltd* [1911] 1 Ch 92 ; [1908-10] All ER Rep 573 . No single definition of the term ‘profit’ will fit all cases: *Bond v Barrow Haematite Steel Co* [1902] 1 Ch 353 . Profit may include a rise in value of plant or real property (*Robinson v Ashton* (1875) LR 20 Eq 25 ); it may refer to profits actually realised (*Croker v Kreeft* (1865) 13 LT 136 ) or the credit balance in the profit and loss account of each year: *Evlings v Israel and Oppenheimer Ltd* [1918] 1 Ch 101.

The cases found all related to issues of taxation but they can provide some guidance. In ***Bond Corporation Holdings Ltd v Grace Bros Holdings Ltd* (1983) 77 FLR 24** the court said that

“The word ‘profits’ also has a wide meaning; it has been said that there is no single definition of the word which will fit all cases.”

In terms of differentiating between “proceeds” and “profits” **all profits will be “proceeds” but not all “proceeds” will be profit.** For example a property is being sold. Whatever the vendors receive for the sale will be “proceeds” of the sale, however, the sale may result in a profit or a loss.

See for example:

***Whitfords Beach Pty Ltd v Commissioner of Taxation (Cth)* (1979) 44 FLR 312 Deane J** “In *Federal Commissioner of Taxation v. McClelland* (1969) 118 C.L.R. 353)) Barwick C.J. said: “**The realization of an inheritance** even though carried out systematically and in a

businesslike way to obtain the greatest sum of money it will produce **does not**, in my opinion, **make the proceeds either profit or income for the purposes of the Act.** ... The determination of the question whether the proceeds of sale of an asset should properly be seen as representing profits made in the ordinary course of what is in truth a business will not infrequently require precise definition both of the relevant business and of those activities which are comprehended within its ordinary course."

***Ruhamah Property Co. Ltd. v Federal Commissioner of Taxation (1928) 41 CLR 148***

"The principle of law is that **profits** derived directly or indirectly from sources within Australia in carrying on or carrying out any scheme of profit-making are assessable to income tax, whilst **proceeds** of a mere realization or change of investment or from an enhancement of capital are not income nor assessable to income tax (*Commissioner of Taxes v Melbourne Trust Ltd*; *Ducker v Rees Roturbo Development Syndicate*; *Commissioner of Taxation for Western Australia v Newman*; *Blockey v. Federal Commissioner of Taxation*)."

***Casimaty v Commissioner of Taxation (Cth) (1997) 151 ALR 242***

"[In] *Hudson's Bay Co v Stevens* (1909) 5 TC 424 ... The lands granted to the company upon its exercise of that right were sold by it as the occasion arose and the proceeds from those sales were applied partly in payment of dividends and partly in reduction of capital. It was held by the Court of Appeal that the **proceeds** were not **profits** or gains derived from carrying on a business of dealing in land and were not assessable to income tax."

**In conclusion:** The word "proceeds" in combination with the word "profit" connotes a broader interpretation than a return on an investment and in the context of the legislation it will probably catch all monetary income derived from the running of the public entertainment, whether or not the income received results in a profit.

## **OTHER LEGISLATION**

Ambulance Services Act 1986

Country Fire Authority Act 1958

Emergency Management Act 1986

Equipment (Public Safety) Act 1994

Environmental Protection Act 1970

Food Act 1984

Health Act 1958

Liquor Control Reform Act 1998

Metropolitan Fire Brigades Act 1958

Occupational Health and Safety Act 2004

Police Regulation Act 1958

Private Security Act 2004

Road Safety Act 1986

Safe Drinking Water Act 2003

Victoria State Emergency Service Act 2005

## List of contacts & websites

<b>Alcohol</b>	Liquor Licensing Victoria ; Consumer Affairs Victoria	www.consumer.vic.gov.au	Level 2, 452 Flinders Street, Melbourne Vic 3000 Ph: 9655 3366
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<b>Ambulance</b>	Metropolitan Ambulance Service	www.ambulance.vic.gov.au  email netcom@mas.vic.gov.au	<p>Head office: Phone: +61 3 9840 3500 Post: PO Box 2000, Doncaster, Victoria 3108 Address: 375 Manningham Road, Doncaster Fax: +61 3 9840 3583</p> <p>Standby at Public Venues</p> <p>MAS provide a number of standby services to a wide range of activities and events. Their resources at these venues are generally required to standby for the care of participants, but may also be involved in treating sick or injured members of the public.</p> <p>They also provide resources upon request to film companies, both in the capacity of standby services for performance of stunt work and to meet the needs of their on screen requirements.</p> <p>Enquiries and bookings for attendance at public venues may be made by contacting the non emergency services department on:</p> <p>Ph: 9840-3536, Fax: 9840-3584</p>
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## List of contacts & websites

	Rural Ambulance Victoria	<p><a href="http://www.rav.vic.gov.au">www.rav.vic.gov.au</a></p> <p>E-mail: <a href="mailto:rav@rav.vic.gov.au">rav@rav.vic.gov.au</a></p>	<p>OPERATIONAL SERVICES</p> <p>Emergency Planning</p> <p>RAV responds to a wide variety of emergencies on a daily basis. Planning for emergencies is an essential part of this response including emergency planning for specific major events and large facilities and community events.</p> <p>Rural Ambulance Victoria Head Office</p> <p>Locked Bag 9000 Ballarat Mail Centre VIC 3354</p> <p>Phone: (03) 5338-5000 Fax: (03) 5338-5211</p>
	St John's Ambulance	<p>Email: <a href="mailto:bookings@stjohnvic.com.au">bookings@stjohnvic.com.au</a></p> <p><a href="http://www.stjohn.org.au">www.stjohn.org.au</a></p>	<p>170 Forster Road Mount Waverley VIC 3149 Tel: (03) 8588 8588 Fax: (03) 8588 8555</p>

Emergency Management & Planning	Emergency Management Australia	<a href="http://www.ema.gov.au">www.ema.gov.au</a>	Australia Government – Attorney-General's Department
	Department of Justice Victoria  Office of the Emergency Services Commissioner	<a href="http://www.justice.vic.gov.au">www.justice.vic.gov.au</a>	Office of the Emergency Services Commissioner GPO Box 4356QQ Melbourne VIC 3001 Tel: 03 8684 7900 Fax: 03 8684 7956 Email: <a href="mailto:oesc@justice.vic.gov.au">oesc@justice.vic.gov.au</a>
	Emergency Services Telecom-	<a href="http://www.esta.vic.gov.au">www.esta.vic.gov.au</a>	Emergency Markers  The Emergency Services

## List of contacts & websites

	communications Australia		<p>Telecommunications Authority (ESTA) has introduced Emergency Markers to help create a safer Victoria.</p> <p>Emergency Markers enable Triple 0 callers to quote a reference point which the emergency operator can use to determine the exact location of the emergency and provide navigational advice to emergency services.</p> <p>Open space areas such as walking tracks, large shopping centres and sporting venues attract large numbers of people that can require swift emergency assistance. Emergency Markers will assist ESTA in pinpointing the exact location of an emergency, sending police, fire, ambulance or SES units to you faster which ultimately may save a life</p>
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<b>Environment</b>	Environment Protection Authority	<a href="http://www.epa.vic.gov.au">www.epa.vic.gov.au</a>	40 City Road, Southbank 3006 Ph: 9695 2722
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<b>Fire:</b>	Metropolitan Fire and Emergency Services Board (MFB)	<a href="http://www.mfb.org.au">http://www.mfb.org.au</a>  Email: <a href="mailto:webteam@mfb.vic.gov.au">mailto:webteam@mfb.vic.gov.au</a>	MFB Headquarters 456 Albert St, East Melbourne, Victoria 3002 Australia Telephone: +61 3 9662 2311 Fax: +61 3 9665 4244
	Country Fire Authority (CFA)	<a href="http://www.cfa.vic.gov.au">www.cfa.vic.gov.au</a>  <a href="http://www.cfa.vic.gov.au/local_government/emergency_management.htm">www.cfa.vic.gov.au/local_government/emergency_management.htm</a>	CFA Headquarters  Address: 8 Lakeside Drive Burwood East Victoria 3151 Australia Ph: 61 3 9262 8444  Fax: 61 3 9264 6200

## List of contacts & websites

			Victorian Bushfire Information Hotline Ph: 1800 240 667
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<b>Food</b>	Community Health Services	<p>Vic Government Community Health</p> <p><a href="http://www.health.vic.gov.au/communityhealth/gps/chs.htm">www.health.vic.gov.au/communityhealth/gps/chs.htm</a></p> <p>Vic Government Food Safety</p> <p><a href="http://www.health.vic.gov.au/foodsafety">http://www.health.vic.gov.au/foodsafety</a></p> <p>Food Standards Australia New Zealand</p> <p><a href="http://www.foodstandards.gov.au">http://www.foodstandards.gov.au</a></p> <p>Web Food Safety Program</p> <p><a href="http://www.foodsmart.vic.gov.au/">http://www.foodsmart.vic.gov.au/</a></p> <p>National Food Recalls Site</p> <p><a href="http://www.recalls.gov.au">http://www.recalls.gov.au</a></p> <p>Victorian Government Website</p> <p><a href="http://www.vic.gov.au/">http://www.vic.gov.au/</a></p> <p>Food Regulation Secretariat</p> <p><a href="http://www.foodsecretariat.health.gov.au/">http://www.foodsecretariat.health.gov.au/</a></p> <p>Primesafe</p> <p><a href="http://www.primesafe.vic.gov.au">www.primesafe.vic.gov.au</a></p> <p>Dairy Food Safety Victoria</p> <p><a href="http://www.dairysafe.vic.gov.au">www.dairysafe.vic.gov.au</a></p>	<p>Food Safety Unit</p> <p>Tel: (61 3) 9096 5080 Email: <a href="mailto:foodsafety@dhs.vic.gov.au">foodsafety@dhs.vic.gov.au</a></p> <p>Food Safety Hotline</p> <p>1300 364 352 (toll free business hours)</p> <p>Information Victoria</p> <p>1300 366 356</p> <p>Meat and seafood For information and complaints relating to any fresh meat abattoirs or processors, seafood and fish processors, any smallgoods manufacturers, and any butchers, chicken or seafood retailers, contact:</p> <p>Primesafe Tel: (61 3) 9685 7333 Fax: (61 3) 9696 5284 Email: <a href="mailto:enquiries@primesafe.vic.gov.au">enquiries@primesafe.vic.gov.au</a></p> <p>Dairy For information and complaints relating to any dairy product manufacturers (including ice cream), dairies, and dairy product wholesalers, contact:</p> <p>Dairy Food Safety Victoria Tel: (61 3) 9426 5999</p>
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## List of contacts & websites

			<p>Fax: (61 3) 9427 1895</p> <p>Email: <a href="mailto:info@dairysafe.vic.gov.au">info@dairysafe.vic.gov.au</a></p> <p>Food Standards Australia New Zealand The national food authority is the Food Standards Australia New Zealand, which sets national standards for food and food handling.</p> <p>Tel: (61 2) 6271 2222 Fax: (61 2) 6271 2278</p> <p>Email: <a href="mailto:info@foodstandards.gov.au">info@foodstandards.gov.au</a></p>
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<b>Safety</b>	Workcover	<a href="http://www.workcover.vic.gov.au">www.workcover.vic.gov.au</a>	
	Safety Victoria	<a href="http://www.safety.vic.gov.au">www.safety.vic.gov.au</a>	

<b>Security:</b>	Police Force	<a href="http://www.police.vic.gov.au">www.police.vic.gov.au</a>	<p>General enquiries</p> <p>Phone: (61 3) 9247 6666</p> <p>Postal Address: Victoria Police Centre 637 Flinders Street Melbourne VIC 3005 AUSTRALIA</p>
	Private Security Industry	Email: <a href="mailto:licensing@police.vic.gov.au">licensing@police.vic.gov.au</a>	Licensing Services Division is the regulating authority of the private security industry in Victoria and can provide information about licensing, forms, permits and general enquiries. Issues involving security guards, crowd controllers or investigators should be forwarded to this Division.

<b>Transport</b>	METlink	<a href="http://www.met.inkmelbourne.com.au">www.met.inkmelbourne.com.au</a>	Ph: 13 16 38
	Road Safety Awareness	<a href="http://www.police.vic.gov.au">www.police.vic.gov.au</a>	Victoria Police Centre 637 Flinders Street, Melbourne

## List of contacts & websites

	s Info Unit		Ph: 9247 5779
	Vic Roads	<a href="http://www.vicroads.vic.gov.au">www.vicroads.vic.gov.au</a>	12 Lakeside Drive, Burwood East 3151 Ph: 131 170

<b>Water</b>	Life Saving Victoria	<a href="http://www.lifesavingvictoria.com.au">www.lifesavingvictoria.com.au</a>  Email: <a href="mailto:brett.ellis@lifesavingvictoria.com.au">brett.ellis@lifesavingvictoria.com.au</a>	Emergency Management Plans  As leader in coastal risk management and water safety Life Saving Victoria can prepare location specific Emergency Management and Risk Management Plans tailored to meet individual needs.  For further information about this service please contact Brett Ellis - General Manager Life Saving Operations on (03) 9567 0027 or <a href="mailto:brett.ellis@lifesavingvictoria.com.au">brett.ellis@lifesavingvictoria.com.au</a>
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Waste Management	South Eastern Regional Waste Management Group	<a href="http://www.serwmg.com.au">www.serwmg.com.au</a>	Suite 1, 69-71 Rosstown Road, Carnegie 3163  Ph: 9569 3982
	Visy Recycling	<a href="http://www.visy.com.au">www.visy.com.au</a>	Ph: 1300 368 479
	Sustainability Victoria (Formerly EcoRecycle)	<a href="http://www.sustainability.vic.gov.au">www.sustainability.vic.gov.au</a>	Level 2, 478 Albert Street, East Melbourne 2002  Ph: 1800 353 233 or 9639 3322