

PRACTICE NOTE 7 - 2021

1. This practice note provides guidance in respect of proceedings concerning CEWM brought under either;
 - a. Section 142 of the Act – An appeal against a decision in relation to either a building notice and/or a building order;
 - b. Section 160 of the Act – An application for a determination that a provision of the building regulations does not apply; or applies with the modifications or variations specified in the application; or
 - c. Section 160A of the Act – An application for a determination that a particular design of a building or an element of a building complies with the Act, the building regulations or any document applied, adopted or incorporated in the building regulations.
2. This practice note should be read in conjunction with [BAB-Practice-Note-1-2019.pdf \(buildingappeals.vic.gov.au\)](#) (if considering an application under ss 160 or 160A) and [BAB Practice Note 5 \(2020 - Expert Evidence \(buildingappeals.vic.gov.au\)\)](#).
3. In any proceeding, the Board may at its discretion vary the operation of a practice note by direction or order.

4. This practice note has been approved by the Chairperson of the Building Appeals Board.

Word	Definition
Act	<i>Building Act 1993</i>
ALARP	As low as reasonably practicable
BCA	Building Code of Australia (Volumes One and Two of the National Construction Code Series)
Board	Building Appeals Board
CEWM	Combustible external wall materials
DtS	Deemed to satisfy
ESM	Essential safety measures
Expert Witness	A person who has specialised knowledge based on the person's training, study and/or experience.
NFPA	National Fire Protection Association
RAP	Risk Assessment Report
Regulations	<i>Building Regulations 2018</i>
SFAIRP	So far as is reasonably practicable

Background

5. CEWM proceedings are usually commenced because;
 - a. You have received a building notice or building order following a cladding audit and you wish to retain or partially remove the CEWM.
 - b. You have identified the existence of CEWM on the building and you want to apply to the Board for a determination that would allow some or all of the CEWM to remain on the building.

Should I be filing under ss 142, 160 or 160A of the Act?

6. There are several pathways which deal with buildings containing CEWM. Which pathway is taken will depend on whether the application:
 - a. Is an appeal of a building notice or building order.
 - b. Seeks a determination that a provision of the building regulations either does not apply or applies with a modification or variation.
 - c. Seeks a determination that a particular design of the building or an element of the building complies with the Act.
7. If you file an application seeking to appeal a building notice or building order, you are asking the Board to quash or vary the decision under appeal.

8. If you file an application under s 160 of the Act, you are asking the Board to make a determination that the relevant regulation which prohibits the use of CEWM either does not apply or applies with a modification or variation.
9. If you file an application under s 160A of the Act, you are asking the Board to make a determination that the presence of CEWM on the building complies with the relevant *Performance Requirements* under the BCA.
10. Depending on the circumstances, you may benefit from discussions with the building's insurer when considering which pathway to take.

What documents should the Applicant file?

11. Irrespective of which pathway is adopted, you should file the following documents and information with your application:
 - a. A copy of the Certificate of Title or recent title search or a Plan of Subdivision (if you are an owners corporation) confirming that you are the registered owner of the land the subject of the Application.¹
 - b. Authority to act (if a representative is acting on your behalf).²
 - c. A document specifying the nature of the proceeding, the grounds for commencing the proceeding and the relief sought.³
 - d. Copies of the Building Notice/s or Building Order/s (if any) issued by

¹ These may be obtained at the [Landata](#) website

² [Authority to Act form](#)

³ [A Statement of Contentions may be used for this purpose.](#)

- the municipal/relevant building surveyor.
- e. A copy of the Building Permit under which the CEWM was installed and subsequent Occupancy Permit (if issued).
 - f. Floor plans and elevations of the building, which are highlighted to identify the location or locations of the CEWM.
 - g. High resolution colour photographs that identify the location or locations of the CEWM.
 - h. The BCA provisions that are relevant to the appeal or application including relevant performance clauses, DtS provisions and the relevant edition of the BCA.
 - i. (In ss 160 or 160A applications only) What determination you are seeking that includes a precise description of the CEWM and its location or locations.
 - j. Expert material (see Expert Evidence section below).⁴

Directions

12. Appeals or applications made to the Board are assigned a proceeding number upon their filing. In CEWM proceedings, Directions are issued by the Board at an early stage.⁵
13. If there are other persons who may be directly affected by the outcome of the

proceeding, an order may be made to join those persons to the proceeding.

14. The Directions also set time limits for the filing of material, which may support or oppose the application before the Board.
15. Other parties may be disadvantaged if you do not comply with the time limits set out in any Directions or Orders. If you require more time to comply with any Directions or Orders, you should notify the Registrar and the other parties as soon as possible.
16. If the time limits for filing material are not strictly observed, the Board may:
- a. Decide to not have regard to the material belatedly filed; or
 - b. Decide to adjourn the hearing and order that any wasted costs (if any) of the other parties are paid by the party that has failed to comply with the time limits.

The Hearing

17. The hearing proceeds as either:
- a. A 'paper hearing', where the application is considered on the material that has been filed; or
 - b. An 'oral hearing' where the parties or their representatives appear before the Board (remotely or in-person). At the hearing, the Board is usually constituted by a panel of three Board members, one of which will be a fire safety engineer.

⁴ A further opportunity for the Applicant to file expert material is in the normal course provided pursuant to directions made by the Board as noted in the Directions section of this practice note below.

⁵ An application to fast track the proceeding is also available in appeal proceedings.

- c. You should ensure that the author of any expert report or other expert material filed with the Board is available to appear and answer questions from other parties or from the Board.

Expert Evidence

Modification applications under s 160 of the Act

- 18. If you are applying for a determination that a provision of the Regulations does not **apply to the building**, you must establish that in the particular circumstances, the provision is inappropriate.
- 19. If you are applying for a determination that a provision of the BCA should be modified or varied (for example, that it does **not apply to the CEWM**), you must establish that to do so is reasonable and not detrimental to the public interest.
- 20. In many cases, establishing that the provision of the Regulations should not apply to the use of the CEWM in question requires the Board to assess the fire safety risk associated with retaining the CEWM.
- 21. Therefore, you should file a risk assessment report ('**RAR**'), prepared by a suitably qualified fire safety engineer, to support your application.
- 22. In the RAR, the fire safety engineer must address the *Society of Fire Safety, Practice Guide for Façade/External Wall Fire Safety Design* published by Engineers Australia; *AS/NZS ISO 31000:2009 Risk management – Principles and guidelines* and Practice Note 5 – 2020 – Expert Evidence published by the Board.

- 23. The RAR must be prepared by a suitably qualified, independent, and experienced expert in fire engineering and who is:
 - a. Registered as a fire safety engineer; and
 - b. Has substantial experience in the assessment of CEWM.

- 24. Additionally, you should also file any expert report commissioned for the purposes of applying for the Building Permit, if applicable.

Expert Evidence in a s 142 appeal

- 25. If the building notice or building order is premised on a ground that the presence of the CEWM constitutes a risk to the safety of the building's occupants, you should file a RAR in support of your application.

Expert Evidence in a s 160A application

- 26. In an application for a determination under s 160A of the Act, a RAR, if undertaken, must be supplemented by a performance solution approach, which provides evidence that the relevant *Performance Requirements* under the BCA have been satisfied to the degree necessary.
- 27. A compliance assessment through a performance solution must apply the International Fire Engineering Guidelines.
- 28. A RAR, without more, will not be sufficient evidence that the relevant *Performance Requirements* under the BCA have been satisfied to the degree necessary. Each of the performance criterion set out under the relevant *Performance Requirement* must be addressed so that the Board can be satisfied that the relevant *Performance*

Requirement has been satisfied to the degree necessary.

Expert Report Methodology and Framework in respect of a risk assessment

29. In the RAR, the expert must use the ALARP or the SFAIRP approach, which addresses fire safety, occupant safety, building insurance and professional liability, and in particular the following matters -.

- a. Identify the risk assessment approach and confirm that the acceptance criteria and methodology is consistent with the approach selected.
- b. Address the -
 - i. BCA reference criteria;
 - ii. Fire safety intent and objectives;
 - iii. Owners/insurance position;
 - iv. Other reference standards/regulations.
- c. Where the building has been constructed, undertake an audit of the site and building and provide:
 - i. Colour photographs which demonstrate the building and occupant characteristics, installed fire safety measures, cladding extent and characteristics including material verification reports, ESM assessment, fire hazards and ignition sources.

- ii. Drawings for each elevation clearly showing all combustible cladding/material locations.

- d. The methodology adopted within the report, including any applicable acceptance criteria.
- e. The fire risk assessment within the following four sub-categories for each elevation or cladding location:
 - i. Internal and external ignition hazards;
 - ii. Vertical and horizontal spread potential;
 - iii. Occupant evacuation strategy and provision for egress;
 - iv. Fire brigade intervention matters.
- f. Where feasible, quantitative and qualitative analysis of fire spread for each elevation containing CEWM.
- g. The existing risk for each elevation or cladding location and within each sub-category clearly defined rankings should be used. The preferred approach can be found in the NFPA EFFECT tool which identifies rankings specific for cladding installations:
 - i. Trivial;
 - ii. Tolerable;
 - iii. Moderate;
 - iv. Substantial;

- v. Intolerable.
- h. Mitigation of the risk according to the chosen risk assessment approach and establish proposed risk mitigation solutions against the earlier rankings adopted for each elevation or cladding location and for each sub-category.
- i. Existing fire safety related variations from the BCA DtS provisions and performance solutions (as previously approved or determined in the proposed design solution) and demonstrate that the cladding does not adversely impact upon the earlier BCA DtS and performance solutions under the proposed fire safety solution and outcomes. If not, the performance solutions must be reassessed having regard to the CEWM being retained on the building.
- j. The interim and remedial works necessary to achieve the proposed risk mitigation strategy; and
- k. Clear drawings for each elevation showing all combustible cladding material locations proposed to be retained as justified through the RAR outcomes.

END OF PRACTICE NOTE