

## Article Information

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## **Victorian Building Authority's enhanced powers to crack down on phoenixing**

**The Victorian Building Authority (VBA) has recently been granted enhanced powers to consider a practitioner or a director of a body corporate practitioner's (applicant's) history of corporate behaviours in determining whether the applicant is a "fit and proper person" to be a registered practitioner. In doing so, the VBA has assumed a greater responsibility to protect the public against illegal phoenixing activity in the building industry.**

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These expanded powers for the VBA arise as part of the *Building and Environment Protection Legislation Amendment Act 2020* which amends the *Building Act 1993* (**the Act**).

### **The VBA's Expanded Powers**

The VBA's new powers add to the existing regulatory framework which already requires various factors to be taken into account in determining whether the practitioner is a "fit and proper person".

The most significant change is the inclusion of a financial probity requirement which means that the VBA must take into account whether the applicant (or a director of the applicant) was a director or 'influential person' of another company within the two years preceding that other company being placed into external administration for the purposes of determining whether the applicant is a 'fit and proper' person to be a registered practitioner.

An 'influential person' is defined under the Act as a person who is in a position to control or substantially influence the body corporate's conduct. This definition expressly includes CEOs and general managers but also captures anyone who gives instructions to an officer of the body corporate where the officer generally acts on those instructions, anyone who makes, or participates in making, decisions that affect the whole or a substantial part of the body corporate's business or financial standing and anyone who engages in conduct or makes representations that would cause someone else to reasonably believe the person controls, or substantially influences the body corporate's business.

In applying for registration or renewing a registration, the applicant should declare whether they were a director or "influential person" in a company in the 2 years prior to its external administration. This declaration should be supported by material explaining the person's involvement in the company during this period. Where it is found that building practitioners do have relevant ties to a company that has entered into external administration, their involvement will be assessed by way of background checks and an examination of credit history. It should be noted that the VBA may under the new amendments consider any activity which meets the relevant criteria, irrespective of when the company entered into external administration. In practical terms, this means that the VBA will be able to consider an applicant's role in a company placed into external administration within the relevant two year period irrespective of how long ago the company was actually placed into external administration.

In the event that the VBA finds that a practitioner served in the capacity as director or influential person within the two years prior to their company entering external administration, renewal or registration may be refused, or where there is a current registration, the VBA can issue a show cause notice requiring the person to justify their registration. After the show cause process is initiated, and where the VBA forms the view that the practitioner is not a fit and proper person, the VBA has no discretion and must cancel the practitioner's registration. Other disciplinary action may also be taken.

## Conclusion

The legislation would appear to strike a balance between those who have found themselves in the unfortunate situation of having to place a company of which they were a director or influential person into external administration, with the need to protect consumers from illegal phoenixing activities.

However, whether the amendments achieve that balance remains to be seen, both in its implementation by the VBA and the actual wording of the legislation.

## Key takeaways

- The VBA has been granted expanded powers to allow greater scrutiny of applicants in an endeavour to protect against practitioners exploiting corporate structures in the building industry to avoid liabilities or their professional responsibilities.
- The VBA may refuse renewal or registration, or issue a show cause notice, if an investigation shows that a building practitioner has not met the updated 'fit and proper' standard due to activity tied to a company within the two years prior to that other company entering external administration.