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Public Health and Wellbeing Act 2008 - Guidance Manual



**Foreword**

The Municipal Association of Victoria (“**MAV**”) and the Victorian Department of Health

are pleased to provide this “Guidance Manual” (“**Manual**”) in respect of the *Public*

*Health and Wellbeing Act 2008* (Vic) (“**PHWA**”) and the Public Health and Wellbeing

Regulations 2009.

This Manual is primarily intended to be a guidance tool for authorised officers

appointed by councils for the purposes of the PHWA. However, this Manual will also

be of assistance to others within councils from time to time relating to operational

matters arising from the PHWA and the Public Health and Wellbeing Regulations

2009.

For the most part, the PHWA and the Public Health and Wellbeing Regulations 2009

operate from **1 January 2010**. From that date, the PHWA replaced the *Health Act*

*1958 (“***Health Act***”).*

The powers under the PHWA that authorised officers and councils need to be aware

of include:

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powers and procedures:

for entry onto premises;

for carrying out inspections whilst on premises; and

for activities carried out after entry;

enforcement mechanisms; and

policy requirements.

The purpose of this Manual is to assist council appointed authorised officers to

achieve a timely and smooth transition to the new legislation and to be a resource

that authorised officers can refer to after the commencement of the new legislation.

In achieving this purpose, this Manual includes information on the roles and

responsibilities of authorised officers which are applicable from **1 January 2010.**

Throughout November 2009 and December 2009, the MAV and the Victorian

Department of Health held a series of training seminars for council staff to

complement this Manual. A separate “Implementation Toolkit” to the PHWA that

contains valuable information and template material to assist councils in

implementing the necessary changes for the commencement of the PHWA, is

available from the MAV.

This Manual is only intended to relate to authorised officers appointed by councils

for the purpose of the PHWA.

The MAV would like to acknowledge the assistance of Russell Kennedy Solicitors

and the support of the Department of Health in the preparation of this Manual.

**Rob Spence**

**CHIEF EXECUTIVE OFFICER**

**MUNICIPAL ASSOCIATION OF VICTORIA**

**March 2010**

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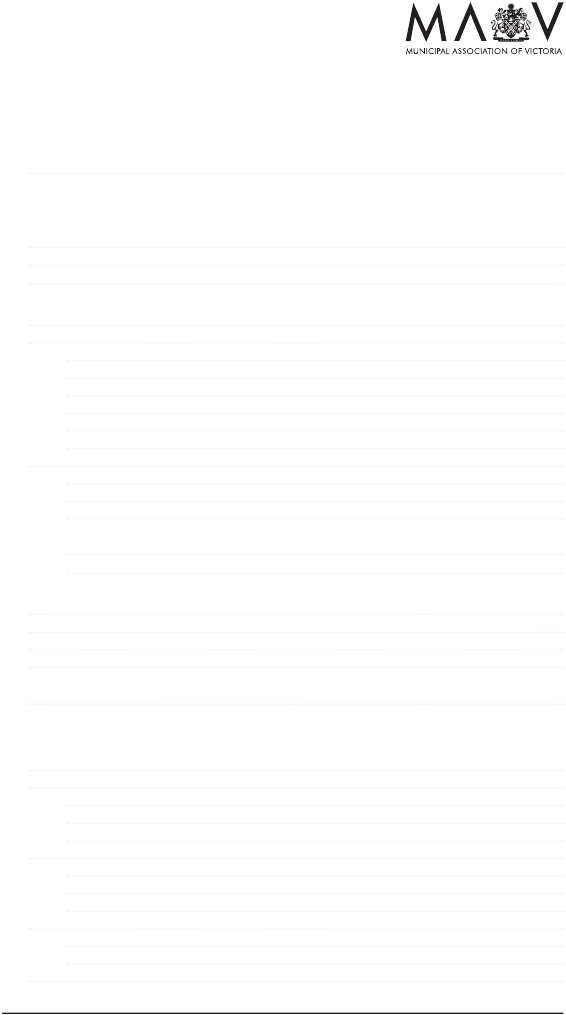
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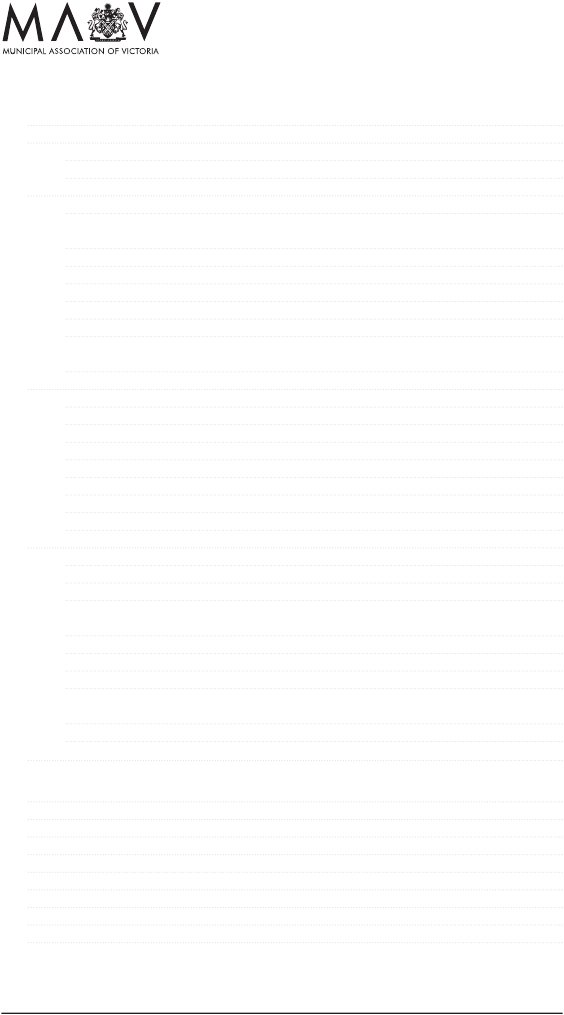
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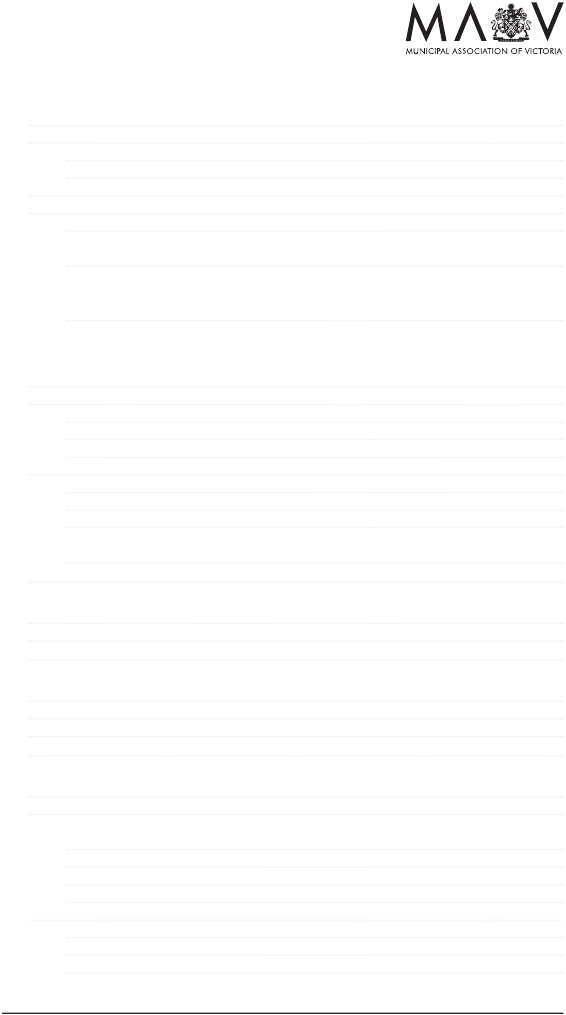
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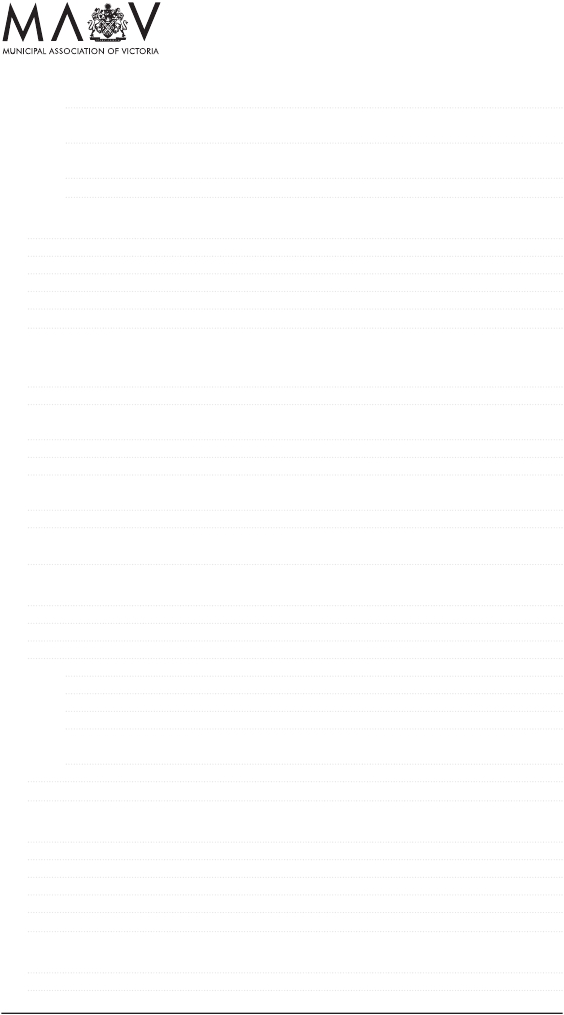
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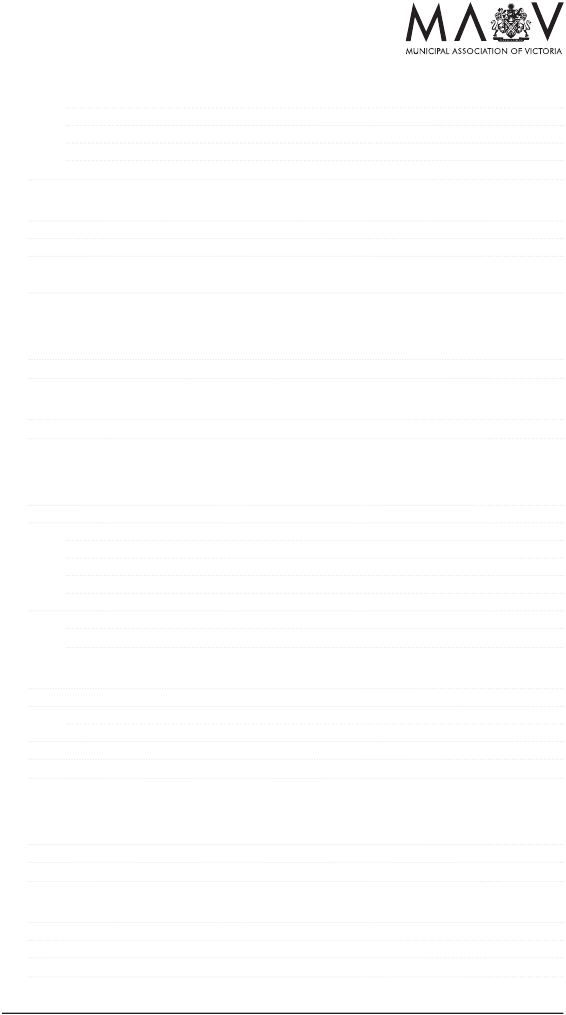
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Purpose of this Manual

**General**

This Manual is intended to be a guidance document for use by authorised officers

appointed by councils for the purposes of the PHWA.

All references in this Manual to authorised officers are therefore to council appointed

authorised officers, except where otherwise indicated.

It is intended that authorised officers use this Manual for guidance on operational

matters.

There are two types of authorised officers appointed by councils (discussed in detail

in **Chapter 3**). There are those who are appointed as an Environmental Health Officer

(“**EHO**”) and those who are not EHOs, but are appointed typically for a specific

purpose.

This Manual broadly explains all the powers and functions of authorised officers as

concerns councils in the PHWA. Authorised officers who are EHOs are entitled to

exercise all of these powers and functions. Authorised officers who are not EHOs

may only exercise those powers and functions that have been granted to them in

accordance with the terms of their appointment.

This Manual also highlights some aspects of the PHWA which are not specific

powers of authorised officers (e.g. in relation to certain enforcement provisions and

immunisation powers) but are powers and/or functions that are capable of delegation

to authorised officers.

Authorised officers (in particular non-EHOs) and other council officers reading this

Manual should exercise caution and be aware of those powers and functions

which they are capable of exercising, whether by virtue of their appointment as an

authorised officer (as an EHO or non-EHO) and/or by way of a delegation of a

relevant power or function in their favour.

Up-to-date copies of the PHWA and the Public Health and Wellbeing Regulations

2009 are available online from the Victorian Legislation and Parliamentary Documents

website http://www.legislation.vic.gov.au

**How To Use This Manual**

This Manual is divided into 7 Parts and 24 Chapters.

At the start of each Part is an explanation about the information included in the Part

and a list and more detailed explanation of the Chapters in that Part.

The “Key objectives” of each Chapter are highlighted in boxes at the start of each

Chapter in the following manner and are summarised at the start of each Part.

**Key Objectives**

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Glossary

**ACIR**

**authorised officer**

**authorized officer**

**Charter**

Australian Childhood Immunisation Register.

A council appointed authorised officer for the purposes of the

*Public Health and Wellbeing Act 2008*.

An authorized officer for the purposes of the *Food Act 1984*

and/or *Health Act 1958*.

*Charter of Human Rights and Responsibilities Act 2006* (Vic).

**Chief Health Officer** A registered medical practitioner appointed by the Secretary for

the purpose of the *PHWA*.

**EHO**

**Food Act**

**Health Act**

**Infringements Act**

**Manual**

**MAV**

**Ombudsman**

**penalty unit**

**PHWA**

**Secretary**

**VCAT**

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Environmental Health Officer.

*Food Act 1984* (Vic).

*Health Act 1958 (*Vic).

*Infringements Act 2006* (Vic).

This Guidance Manual.

Municipal Association of Victoria.

The Victorian Ombudsman.

An amount of money for an offence that is varied from time

to time, typically each financial year.

One penalty unit gazetted in the *Victoria Government Gazette*

on 15 May 2009 taking effect on 1 July 2009 is $116.82.

Please note that this amount is regularly subject to change.

*Public Health and Wellbeing Act 2008* (Vic).

Secretary to the Department of Health.

Victorian Civil and Administrative Tribunal.

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Part A: Background

Part A provides an overview of the PHWA as concerns councils and is divided into

three Chapters (1-3).

**Summary of Chapters**

Chapter 1

Chapter 2

Chapter 3

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Explains the purpose of the PHWA and the overall role and

functions of councils in public health in Victoria and how this

differs from the role and functions of the Victorian Department

of Health.

Details the key principles which must guide and influence all

decisions made and actions taken in respect of the PHWA

and how they apply to authorised officers.

Demonstrates when and how a council can appoint an

authorised officer for the purposes of the PHWA.

Explains the difference between authorised officers who are

EHOs and those who are not and the overall roles of each.

Differentiates between council appointed authorised officers and

those appointed by the Secretary to the Department of Health.

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1



Purpose and Functions

**Summary**

Explains the purpose of the PHWA and the overall role and functions of councils

in public health in Victoria and how this differs from the role and functions of the

Victorian Department of Health.

**1.1**

**What is the purpose of the PHWA?**

The PHWA and the Public Health and Wellbeing Regulations 2009 commenced on

1 January 2010.

The purpose of introducing the PHWA was to enact a new legislative scheme which

more efficiently promotes and protects ‘public health’ and ‘wellbeing’ in Victoria.

While the terms ‘public health’ and ‘wellbeing’ are not defined in the PHWA,

the following National Public Health Partnership definition is widely used:

*Public Health is the organised response by society to protect and promote*

*health, and to prevent illness, injury and disability. The starting point for*

*identifying public health issues, problems and priorities, and for designing*

*and implementing interventions, is the population as a whole, or population*

*sub-groups1.*

The term ‘wellbeing’ is variously defined to mean a physical state and/or a state

of mind of being in good health.

To this end, the PHWA and the Public Health and Wellbeing Regulations 2009 are

primarily concerned with promoting and protecting public health and wellbeing through

the management and control of various risks to public health, with a particular focus

on infectious diseases.

Councils and the Victorian Department of Health have the responsibility for the

management of public health in Victoria.

**1.2**

**What is the role and function of councils?**

Broadly, under the PHWA, the function of a municipal council is to seek to protect,

improve and promote public health within that council’s municipal district.

By way of summary, councils have specific powers and functions in relation to:

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planning for municipal public health and wellbeing;

investigating and taking steps to abate nuisances;

registering prescribed accommodation (e.g. hotels/motels, rooming houses);

registering certain business premises (e.g. tattoo parlours, beauty salons,

hairdressers);

co-ordinating and providing immunisation services;

collaborating with the Department of Health to address serious public health

collaborating with the Department of Health in relation to the investigation

of notifiable conditions (note Division 2 Part 9 Public Health and Wellbeing

Regulations 2009).

1

See http://www.dhs.vic.gov.au/nphp/publications/broch/defin.htm (accessed 29 December 2009).

2

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Council authorised officers have various investigative functions and powers, and have

direct responsibility for enforcing parts of the PHWA and the Public Health and

Wellbeing Regulations 2009.

**1.3**

**What is the role of the Department of Health?**

The Department of Health has the function of protecting, improving and promoting

public health at a Victorian State Government level and has specific powers and

functions in relation to:

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registering cooling tower systems;

issuing pest control licences;

managing and controlling infectious diseases, micro-organisms and medical

conditions; and

dealing with serious risks to public health and public health emergencies.

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2 Key Principles (Part 2 of PHWA)

**Summary**

Details the key principles which must guide and influence all decisions made and

actions taken in respect of the PHWA and how they apply to authorised officers.

**2.1**

**Overview**

A series of principles have been introduced into the PHWA. These principles should

guide every decision made pursuant to the PHWA and the Public Health and

Wellbeing Regulations 2009. These principles apply to all decision-makers including

councils (inclusive of authorised officers), the Department of Health and to courts/

tribunals interpreting and applying the law.

The failure of a decision-maker to be guided by these principles can be a basis for

the review of a decision (see **Part F** of this Manual).

**2.2**

**What are the new principles?**

There are six principles listed in the PHWA. These are the:

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**2.2.1**

principle of evidence based decision-making;

precautionary principle;

principle of primacy of prevention;

principle of accountability;

principle of proportionality; and

principle of collaboration.

**Principle of evidence based decision-making**

Section 5 of the PHWA provides that decisions as to:

(a) the most effective use of resources to promote public health and wellbeing; and

(b) the most effective and efficient public health and wellbeing interventions,

should be based on evidence available in the circumstances that is relevant and

reliable.

The purpose of this principle is to ensure that decisions are made on a rational basis,

underpinned by the best available evidence.

In practice, this principle requires decision makers to set appropriate priorities and

evaluate situations, risks and problems based on the available evidence. Actions

should not be taken where that action cannot be supported by sufficient evidence,

as it is an ineffective and inefficient use of resources.

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**2.2.2**

**The Precautionary Principle**

Section 6 of the PHWA provides that if “*a public health risk poses a serious threat,*

*lack of full scientific certainty should not be used as a reason for postponing measures*

*to prevent or control the public health risk*”.

The precautionary principle has long been applied in environmental law2 (often with

some contention) and has been extended by the PHWA to apply to decisions

concerning public health. To draw an analogy with the application of the precautionary

principle in environmental law, there is a large body of evidence that human activity

is enhancing the greenhouse effect leading to climate change. However, there is

scientific uncertainty as to the extent to which human activity is causing climate

change. In response, the precautionary principle has guided decision-makers to

take various actions to reduce or ameliorate these human activities said to cause

climate change.

At its most simplest, and in practical terms, this principle (in context of the PHWA)

means that where there is a threat to public health that poses a serious threat

(e.g. an outbreak of a new strain of an infectious disease) but there is a lack of proper

understanding about that threat (e.g. the potential impact of the threat is unknown)

the principle dictates that action to prevent or control that threat should not be delayed

until such a time as more is known about that threat. In other words, take steps to

abate the threat.

The recent outbreak of the H1N1 virus (‘human swine flu’) and the response by

decision-makers to this threat is an example of the precautionary principle being

applied to public health decision making. In this instance, there was evidence that

the virus posed a serious threat to public health, but there was uncertainty about

the extent of the threat and the spread of the virus as well as uncertainty about the

potential for the virus to mutate into other and potentially more harmful strains. In the

face of this uncertainty, decision-makers responded with a variety of measures to

contain the virus, ranging from steps to control the initial outbreak, to the development

and roll out of vaccination programs and education programs in line with national and

international pandemic control guidelines.

**2.2.3**

**Principle of primacy of prevention**

Section 7 of the PHWA states:

*(1)*

*(2)*

*The prevention of disease, illness, injury, disability or premature death*

*is preferable to remedial measures.*

*For that purpose, capacity building and other health-promotion activities*

*are central to reducing differences in health status and promoting the*

*health and wellbeing of the people of Victoria.*

This principle essentially means that if a risk to health can be prevented from

occurring in the first place, there is no need for a cure. This is akin to saying

“prevention is better than a cure” and “prevention is the best cure”.

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*See for example section 1C of the Environment Protection Act 1970 (Vic).*

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The principle goes to the heart of the PHWA, which through the various areas of

regulation (e.g. registration of premises, control of nuisances etc.) seeks to prevent

harm or risks that are likely to cause harm.

**2.2.4**

**Principle of accountability**

Section 8 of the PHWA states:

*(1)*

*(2)*

*Persons who are engaged in the administration of this Act [including*

*councils and authorised officers] should as far as is practicable ensure*

*that decisions are transparent, systematic and appropriate.*

*Members of the public should therefore be given -*

*(a)*

*(b)*

*access to reliable information in appropriate forms to facilitate*

*a good understanding of public health issues; and*

*opportunities to participate in policy and program development.*

This principle means that a decision must be made in a responsible and sensible

manner and in a way that is capable of being understood and is appropriate to the

circumstances. Decisions must be open to question and the basis for such decisions

should be made available. Members of the public must be capable of participating

in the decision-making process.

**2.2.5**

**Principle of proportionality**

Section 9 of the PHWA states:

*Decisions made and actions taken in the administration of the Act-*

*(a)*

*(b)*

*should be proportionate to the public health risk sought to be*

*prevented, minimised or controlled, and*

*should not be made or taken in an arbitrary manner.*

This principle is primarily concerned with protecting individuals from undue

encroachment of their rights.

However, when protecting against a risk to public health, if the public interest

outweighs the rights of an individual, this can justify action being taken.

For example, authorised officers have various powers of entry onto premises and

once on premises they can do a number of things such as seize things (discussed in

**Part C** of this Manual). In exercising a power of seizure, an authorised officer must

balance the public interest in seizing the thing (e.g. for use as essential evidence in

prosecution proceedings) as against the rights of the owner of the thing. If it is not

necessary for the thing to be seized, the rights of the owner of the thing should prevail.

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**2.2.6**

**Principle of collaboration**

Section 10 of the PHWA states:

*Public health and wellbeing, in Victoria and at a national and international*

*level, can be enhanced through collaboration between all levels of Government*

*and industry, business, communities and individuals.*

This principle is self explanatory and is designed to encourage different decision-

makers to work together. It recognises that managing and controlling public health and

wellbeing often goes beyond local and state borders and is something that can require

collaboration from broader stakeholders.

**2.3**

**2.3.1**

**Charter of Human Rights**

**Overview**

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (“**Charter**”) contains

a set of human rights, freedoms and responsibilities that are protected by law subject

to “*reasonable limits as can be demonstrably justified in a free and democratic society*

*based on human dignity, equality and freedom*”.

How the Charter is applicable to authorised officers is set out in section 2.3.4 below.

**2.3.2**

**How does the Charter work?**

At its most basic, the Charter works in two ways. First, Parliament needs to consider

the Charter when making new laws. In the case of the PHWA, this was done. In this

case, Parliament weighed up the provisions of the PHWA (at that stage a Bill) and

thought the powers given to the various agencies and bodies enforcing the PHWA,

such as the power to enter private premises, are necessary and appropriate when

dealing with public health.

Secondly, the Charter provides that it is unlawful for a public authority to act in a way

that is incompatible with a human right, or in making a decision, to fail to give proper

consideration to a relevant human right.

The Charter recognises that certain rights of individuals may be limited in order to

address serious threats to the health of the population or individual members of the

population. Such measures must be specifically aimed at preventing disease or injury

and must not be “arbitrary” (ie not authorised by law) or unreasonable.

In addition, the law must provide adequate safeguards and effective remedies against

illegal or abusive imposition or application of limitations on human rights. The PHWA

clearly defines the circumstances in which measures may be taken that may limit the

human rights of some individuals who, for a range of reasons, are unwilling to accept

constraints voluntarily. The PHWA also provides a range of mechanisms that enable

decisions to be reviewed.

**2.3.3**

**What are the rights protected by the Charter?**

The rights that are protected by the Charter, in summary are:

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recognition and equality before the law – no discrimination;

the right to life;

protection from torture and cruel, inhumane or degrading treatment;

freedom from forced work;

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privacy and reputation – must not be unlawfully and arbitrarily interfered with;

freedom of thought, conscience, religion and belief;

freedom of expression – the right to hold opinions without interference;

peaceful assembly and freedom of association;

protection of families and children as a group unit of society;

taking part in public life – the right to take part in public affairs;

cultural rights – people with a particular cultural, religious, racial or linguistic

background have the right to enjoy their culture; declare and practise their

religion; and use their language;

a person cannot be deprived of their property, except in accordance with

the law;

right to liberty and security – a person cannot be deprived of liberty arbitrarily,

only in accordance with the law;

persons deprived of liberty must be treated humanely;

children in the criminal process who are detained must be segregated from

all detained adults and brought to trial as quickly as possible and if convicted

be treated in a way that is appropriate for their age;

the right to a fair hearing;

rights in a criminal proceeding – the presumption of innocence, the right to be

told of the nature of the charge, the right to legal representation and the right to

a trial without delay;

right not to be tried or punished more than once for the same offence if already

convicted or acquitted; and

a person cannot be found guilty of conduct that was lawful at the time

committed.

A breach of the Charter does not give a person a right to commence legal proceedings

in its own right. A breach of the Charter is however something that can be raised in

existing legal proceedings or when a review of a decision is sought. A breach can be

relevant in complaint handling processes.

**2.3.4**

**How do these principles and the Charter apply to councils**

**and authorised officers?**

While local government councils and authorised officers must respect the rights

protected by the Charter, they have various powers to protect public health under

the PHWA which may, to some extent, limit one or more of those rights.

For example, the powers under the PHWA enable authorised officers to enter onto

private and public premises, to seize and sample things, and to take enforcement

proceedings for the protection of public health.

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All of these powers may limit Charter rights to some extent but Parliament has

considered that this limitation is appropriate, given the importance of public health,

*as long as the powers are exercised reasonably and in accordance with the* PHWA

*and any other relevant laws.*

Essentially, the Charter does not prevent authorised officers from investigating public

health issues and enforcing the PHWA, it simply requires that officers act reasonably

and within their legal power.

**2.3.5**

**How do I get a copy of the Charter?**

A copy of the Charter is available from the Victorian Equal Opportunity and Human

Rights Commission website: http://www.humanrightscommission.vic.gov.au

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3 Appointment of Authorised Officers

(Part 3, Division 4 of PHWA)

**Summary**

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**3.1**

Demonstrates when and how a council can appoint an authorised officer for

the purposes of the PHWA.

Explains the difference between authorised officers who are EHOs and those

who are not and the overall roles of each.

Differentiates between council appointed authorised officers and those

appointed by the Secretary to the Department of Health.

**Overview**

An ‘authorised officer’ for the purposes of the PHWA is defined as any one of the

following:

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a person appointed by a council to be an EHO under s. 29 of the PHWA; or

a person appointed by the Secretary to the Department of Health under

s. 30 of the PHWA; or

a person who is not an EHO who is appointed by a council under s. 224 of

the *Local Government Act 1989* subject to s. 31 of the PHWA.

A council can appoint more than one person to be an authorised officer and the same

authorised officer can be appointed by two or more councils.

Note that the PHWA does not require a council to appoint a registered medical

practitioner to be that council’s medical officer of health. However, councils may

choose to retain a medical officer for a variety of reasons including those associated

with immunisation (see further chapter 6).

**3.2**

**How is an EHO appointed by council?**

To be appointed as an EHO by a council (and therefore also become an authorised

officer under s. 29 of the PHWA), a person needs to have the qualifications or

qualifications and experience:

(a)

(b)

declared by the Secretary to the Department of Health as necessary

(as published in the *Victoria Government Gazette*); or

approved by the Secretary to the Department of Health as being equivalent

to the qualifications, or qualifications and experience declared necessary.

The Secretary to the Department of Health declares the qualifications necessary

for a person to be appointed as an EHO under the PHWA. These declarations

are published in the *Victoria Government Gazette* (available for download at

http://www.gazette.vic.gov.au).

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An EHO appointed under the PHWA is referred to as an ‘authorised officer’.

Authorised officers who are EHOs are entitled to exercise the full range of powers

and functions of authorised officers under the PHWA discussed in this Manual and

may further be delegated additional powers and functions (by proper instrument

of delegation) where relevant and required (e.g. issuing of enforcement notices).

**3.3**

**Can councils appoint other people to exercise powers under the PHWA?**

Councils can appoint someone who is not an EHO to be an authorised officer for the

purposes of the PHWA.

The purpose of this power is to enable councils to appoint suitable people to be

authorised officers where required. Such officers would complement the work of

EHOs. For example, a council might appoint a plumber to address a septic tank

problem, or an acoustic engineer to provide advice on a noise related nuisance

complaint, or a medical practitioner to provide advice and assistance on health

related matters.

For a non-EHO to be appointed as an authorised officer, the appointment needs to

be made by the council (or proper delegate of the council) pursuant to s. 224 of the

*Local Government Act 1989* and is subject to the requirement in s. 31 of the PHWA

that the council must be satisfied that the person is suitably qualified or trained to be

an authorised officer for the purposes of the PHWA. For example, a plumber might

be considered by a council to be suitably qualified or trained if the plumber is

registered with the relevant professional standards body, and has received appropriate

instructions about the relevant statutory powers and functions under the PHWA that

are being conferred on the plumber by the authorisation.

Councils are entitled to limit the scope of a non-EHO authorised officer’s appointment

by specifying that the person may only exercise certain functions, duties or powers

under the PHWA and/or the Public Health and Wellbeing Regulations 2009 and it can

impose conditions on that appointment. For example, in appointing a non-EHO to be

an authorised officer, the appointment might be made specific to certain premises,

for a specified period of time and/or subject to limited or specific powers and functions

under the PHWA.

Non-EHO authorised officers need to pay close attention to the terms of their

appointment as they can only exercise the powers and functions given to them by

that appointment.

**3.4**

**Can authorised officers exercise council powers?**

Certain powers under the PHWA are given to councils directly and not to authorised

officers.

If councils want to delegate their powers, they will need to do so in accordance with

the *Local Government Act 1989*.

The powers that councils may consider delegating are the:

(a)

(b)

power to issue infringement, prohibition and improvement notices; and

powers in relation to dealing with applications for registration of premises

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Note that delegations can only be made to a member of staff, therefore the person

to whom delegation is sought will need to be a staff member of the council.

**3.5**

**Appointment of authorised officers by the Secretary to the**

**Department of Health**

Under s. 30 of the PHWA, the Secretary to the Department of Health may appoint a

suitably qualified or trained person employed under Part 3 of the *Public Administration*

*Act 2004* to be an authorised officer for the purposes of the PHWA.

Authorised officers appointed by the Secretary may exercise those powers and

functions of authorised officers as concerns the parts of the PHWA relevant to the

Department of Health. Some of these powers and functions are the same as those

of council appointed authorised officers.

This Manual is intended for council appointed authorised officers and does not

therefore relate to Secretary appointed authorised officers who should seek their own

separate and appropriate guidance on the PHWA where necessary and required.

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Part B: Application: Areas Administered by Councils

Part B covers those parts of the PHWA and the Public Health and Wellbeing

Regulations 2009 that councils are responsible for enforcing in accordance with the

relevant investigation procedures and enforcement mechanisms identified in Parts C

and D of this Manual. There are four Chapters in this Part (4 – 7).

**Summary of Chapters**

Chapter 4

Chapter 5

Chapter 6

Chapter 7

> Explains the elements of nuisance and councils’ role in relation

to nuisances in their municipalities.

> Explains the steps to investigate complaints of nuisances.

> Explains the enforcement mechanisms available in respect

of nuisances and how to apply them.

> Outlines the specific types of premises that are required

to be registered under the PHWA.

> Outlines the offences capable of being committed in relation

to premises that are required to be registered.

> Sets out how to investigate whether there has been a breach

of the PHWA or the Public Health and Wellbeing Regulations

2009 in relation to premises that are required to be registered.

> Explains the enforcement mechanisms available and how they

can be effectively implemented.

> Outlines the powers and functions of councils in relation to the

coordination and provision of immunisation services and the key

differences from the Health Act.

> Outlines the type of aquatic facilities to which the Public Health

and Wellbeing Regulations 2009 apply.

> Explains the offences capable of being committed by people who

own, manage or operate these facilities.

> Outlines the role of councils in ensuring that their aquatic facilities

are in compliance.

> Explains the enforcement mechanisms available to councils

and how they can effectively implement them.

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4 Nuisance

(Division 1, Part 6 PHWA)

**Summary**

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**4.1**

Explains the elements of nuisance and councils role in relation to nuisances

in their municipalities.

Explains the steps to investigate complaints of nuisances.

Explains the enforcement mechanisms available in respect of nuisances

and how to apply them.

**Overview**

The PHWA provides that it is an offence if a person causes a nuisance or knowingly

allows a nuisance to exist on land (s. 61 PHWA).

A council has a duty under the PHWA to investigate and remedy as far as is

reasonably possible all nuisances in its municipality (ss. 60 and 62(2) PHWA).

In seeking to remedy a nuisance the council must:

1.

2.

3.

investigate the complaint; and

determine whether the alleged nuisance falls within the nuisance provisions

of the PHWA; and

if a nuisance is found to exist:

a.

b.

c.

d.

if the land is unoccupied or the owner cannot be found,

abate the nuisance on that land;

if the owner or occupier is identifiable - issue an improvement

notice or prohibition notice;

bring proceedings for an offence against the PHWA3 ; or

if the Council is of the view that the matter is best dealt with privately,

advise the person who made the complaint of any available methods

for settling the matter privately 4.

See a **checklist at the end of this chapter and Manual** for use in nuisance

complaints.

The nuisance provisions in the PHWA exist in addition and independently to any other

rights that exist under other law (e.g. the *Environment Protection Act 1970* and the

common law).

3

4

Section 197 provides a process for initiating proceedings for the offence of causing a nuisance after an

improvement or prohibition notice has been issued see 4.4.2.

It is worth noting that the Dispute Settlement Centre has free dispute resolution services, see:

http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation?

Business+Area+Profiles/JUSTICE+-+Dispute+Settlement+Centre+of+Victoria+%28About+Us%29

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**4.2**

**4.2.1**

**What is a nuisance?**

**Definitions**

The nuisance provisions in the PHWA apply to nuisances which are, or are liable

to be, dangerous to health or offensive .

Such nuisances are, but are not limited to, nuisances arising from or constituted

by any5:

(a)

(b)

(c)

(d)

(e)

(f)

(g)

premises;

water;

animals,

refuse;

noise or emission;

state, condition or activity; or

other matter or thing

which is, or is liable to be, dangerous to health or offensive .

When determining whether a nuisance is dangerous to health or offensive:

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**4.2.2**

regard must not be had to the number of persons affected or that may

be affected. Therefore, although only a few people may be affected by

a nuisance, the nuisance may still fall within the nuisance provisions

and require investigation; and

regard may be had to the degree of offensiveness.

**Is it dangerous to health?**

The term “dangerous to health” is not defined in the PHWA. However, note that

something can be dangerous to both a person’s physical health and also to their

mental health.

**4.2.3**

**Is it offensive?**

A significant difference between the Health Act and the PHWA is that the meaning

of “offensive” has been given a narrower definition in the PHWA. “Offensive” is now

defined as “*noxious or injurious to personal comfort*” rather than being “*noxious,*

*annoying or injurious to personal comfort*” [emphasis added].

The removal of the word “annoying” means that a nuisance must now be more than

solely or merely “annoying”. Something that is merely annoying is a subjective notion

associated with a person’s amenity which is something that might not actually be

harmful to health.

It is intended that matters which are merely annoying be separately dealt with through

other avenues of redress such as through local laws, the *Environment Protection Act*

*1970* (Vic) or the planning system under the *Planning and Environment Act 1987* (Vic)

or even privately between parties (which is a remedy available to councils in some

circumstances).

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See section 58 of the PHWA*.*

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The case of *McLaughlin v Halliday* [1985] VR 51 is a Victorian Supreme Court case

that considered the meaning of the term “offensive” under the nuisance provisions

of the Health Act. It can be inferred from this case that the term “offensive” requires

that some harm to health be caused. Justice Tadgell, in this case, drew a “*distinction*

*between mere refuse and rubbish on the one hand and offensive matter on the other*”

and commented that the term offensive has “*a flavour connected with human health*

*or an indication of a state of affairs not congenial to human health*”.

**4.3**

**4.3.1**

**Investigating complaints**

**Who can make a complaint?**

Any person may contact a council if they believe that a nuisance exists.

**4.3.2**

**What must council do once it receives a complaint?**

Once notified a council must investigate a complaint of nuisance.

Authorised officers may investigate nuisance complaints using their powers under

Part 9 of the PHWA (see **Part C** of this Manual).

An investigation into a complaint of a nuisance must be conducted within a reasonable

time. There is no definition of what is a “reasonable time” and this will depend on the

circumstances of each case.

Where an alleged nuisance has been notified to a council and it has not been

investigated within a reasonable time, the person who notified the council can

commence proceedings in the Magistrates’ Court in respect of the alleged nuisance

(see s. 63 PHWA*)*. If a person making a complaint to the Magistrates’ Court has

in the opinion of the Court reasonable grounds for making the complaint, the Court

can order the council to pay the costs of the person bringing the complaint.

**4.3.3**

**What if the matter is merely “annoying”?**

If a matter which is the subject of a complaint does not amount to a “nuisance”

because the council considers it is merely “annoying” rather than “offensive” or

“dangerous to health”, there is no legal obligation on the council to take any further

action beyond notifying the complainant of the outcome of the investigation. However

it could be suggested to the complainant that the matter be dealt with privately.6

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While councils (authorised officers) can form the opinion that claims are annoying, appropriate records

on this should be kept in the event of any further action. Also, it is worth noting that the Dispute

Settlement Centre has free dispute resolution services, see:

http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation?

Business+Area+Profiles/JUSTICE+-+Dispute+Settlement+Centre+of+Victoria+%28About+Us%29

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**4.4**

**4.4.1**

**Enforcement of nuisance provisions**

**What happens if council finds a nuisance exists on land?**

If a nuisance is found to exist following appropriate investigation, a council must:

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if the land is unoccupied or the owner cannot be found, abate the nuisance

on that land;

if the owner or occupier is identifiable - issue an improvement notice or

prohibition notice; and/or bring proceedings for an offence against s. 61

of the PHWA in an appropriate Magistrate’s Court7; or

if the Council is of the view that the matter is best dealt with privately,

advise the person who made the complaint of any available methods

for settling the matter privately.

Authorised officers must be delegated the power to issue an improvement notice or a

prohibition notice, but they have power to investigate alleged breaches of s. 61(1) and

initiate proceedings for a breach of s. 61 in a Magistrate’s Court.

These enforcement mechanisms, including a discussion as to who is able to exercise

them, are discussed in more detail in **Part D** of this Manual.

**4.4.2**

**Taking action in the Magistrates’ Court**

Section 197 of the PHWA provides special conditions for prosecutions when an

improvement or prohibition notice has been issued in respect of a nuisance but the

subject of the notice has not been complied with or the council considers that,

despite the fact that the nuisance may have been abated, it is likely to recur.

Section 197 is summarised in the table below and discussed in more detail in **Chapter**

**13.7** of this Manual.

**Situation in respect**

**of nuisance**

**Person served with**

**improvement notice or**

**prohibition notice has**

**not complied**

**Or**

**Person served with**

**improvement notice or**

**prohibition notice and**

**nuisance is abated**

**but council is of the**

**opinion that the**

**nuisance is likely**

**to recur.**

**Remedy**

The Magistrates’ Court on an application made

by the council:

· can summon the person to appear before

the Court;

· must if satisfied that the nuisance is likely to

recur order that the person comply with the

notice and/or carry out works to prevent the

recurrence of the nuisance.

If the Magistrates’ Court has made an order, the

council can:

· enter the land to which the order relates

and abate the nuisance and do whatever is

necessary to give effect to the order; and

· recover the costs and expenses incurred in

giving effect to the order. It is an offence for

a person not to comply with an order of the

Magistrates’ Court.

**Section**

**of Act**

s. 197

7

Section 197 provides a process for initiating proceedings for the offence of causing a nuisance after an

improvement or prohibition notice has been issued see 4.4.2.

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**4.5**

**Statutory defence to nuisance - lawful excuse**

Section 61(2) of the PHWA provides a defence to the statutory offence of causing

a nuisance.

The defence provides that a person is not guilty of the offence of knowingly allowing

or suffering a nuisance to exist on or emanate from any land owned or occupied by

that person if the person has a lawful excuse .

A lawful excuse for knowingly allowing or suffering a nuisance to exist is a separate

consideration to the lawfulness of the use or activity on the land.

Compliance with a planning permit or other standards, or an assertion of existing use

rights on land, does not provide a lawful excuse for a nuisance as these are separate

matters.

A lawful excuse in this context might be that a person was acting out of necessity,

or that there was no way for the person to control the nuisance in the circumstances.

For example, during an extreme weather event wind might blow dust from a

developing subdivision onto neighbouring properties which causes a nuisance

(dangerous to health or offensive by way of respiratory problems, eye irritation

caused). In this situation, the occupier of the property on which the nuisance

emanates may know the nuisance exists but may be unable to control or prevent the

nuisance from occurring due to factors beyond that person’s control (e.g. prevailing

weather conditions).

**4.6**

**Nuisance beyond municipal borders**

A council may investigate a nuisance outside its municipal district if that nuisance

affects that council’s municipal district (see s. 65 PHWA).

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**CHECKLIST FOR ACTIONING NUISANCE**

**Questions to ask**

Has someone made a complaint to Council regarding an alleged nuisance?

Has the authorised officer investigated the complaint?

Has the authorised officer come to a conclusion as to whether or not the

complaint results in a nuisance?

If no nuisance is found to exist, council should notify the person who made

the complaint and advise accordingly.

If a nuisance is found to exist the council can use the following methods

to try to achieve a remedy for the nuisance

**Tick box**

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If the land is unoccupied or the owner cannot be found, council can enter onto

the land and abate the nuisance.

If the owner or occupier is identifiable the council can issue an improvement

notice or prohibition notice.

If the nuisance is serious enough to warrant prosecution, the council can bring

proceedings against the person who caused the nuisance.

If council was of the view that the matter is best deal with privately, the council

can advise the person who made the complaint of any available methods for

settling the matter.

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5 Registration

(Divisions 2, 3 and 4, Part 6 PHWA)

**Summary**

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**5.1**

Outlines the specific types of premises that are required to be registered under

the PHWA.

Outlines the offences capable of being committed in relation to premises that

are required to be registered.

Sets out how to investigate whether there has been a breach of the PHWA or

the Public Health and Wellbeing Regulations 2009 in relation to premises that

are required to be registered.

Explains the enforcement mechanisms available and how they can be

effectively implemented.

**Overview**

Councils are responsible for registering certain business and accommodation

premises and for enforcing various standards and requirements relating to these

premises.

The underlying reason for these provisions is to protect public health.

In order to determine what type of accommodation and business premises need to be

registered, councils and authorised officers need to turn their minds to the definitions

and categories of accommodation and business premises set out in both the PHWA

and the Public Health and Wellbeing Regulations 2009.

**5.2**

**5.2.1**

**Prescribed accommodation**

**Definitions**

There is a three step process that councils and authorised can use in order to

determine whether particular premises are regulated as “prescribed accommodation”:

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Does it fit the definition of prescribed accommodation in s. 3(1) of the PHWA?

Does it fall within one of the classes of prescribed accommodation in the

Public Health and Wellbeing Regulations 2009?

Is it exempt under the Public Health and Wellbeing Regulations 2009?

A checklist has been provided to help work with this three step process and it can be

found in section 5.3.6 and at the end of the Manual.

**5.2.2**

**Who must register?**

The PHWA requires that the ***proprietor*** of prescribed accommodation must register

that accommodation with the local Council.

It is an offence to not register such premises.

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The term “**proprietor**” is defined in s. 3(1) of the PHWA as “*the person providing*

*the prescribed accommodation*”. Therefore, it is not necessarily the owner of the

premises, but may be, for example, a leaseholder.

**5.3**

**5.3.1**

**What is prescribed accommodation? – Step by Step**

**Step One – Does it fit the definition of prescribed accommodation?**

There are three basic types of accommodation that are defined as ‘*prescribed*

*accommodation*’ in s. 3(1) of the PHWA:

*(a)*

*(b)*

*(c)*

*any area of land which a person or persons are frequently,*

*intermittently or seasonally permitted to use for camping on payment*

*of consideration and any facilities provided on the land for the use*

*of that person or those persons;*

*any* ***premises****8 used as a place of abode, whether temporary or*

*permanent, fixed or mobile, where a person or persons can be*

*accommodated on payment of consideration;*

*any accommodation provided to an employee in accordance with*

*a term of an award governing the employment of the employee, or a*

*term of the employee’s contract of service, for use by the employee*

*during that employment or service.*

**5.3.2**

**Step Two – Does it fall within one of the classes of prescribed**

**accommodation in the regulations?**

Even if accommodation fits the definition in the PHWA, it will not be regulated under

the PHWA unless it also falls into one of the classes of prescribed accommodation

in the regulations.

The following classes of accommodation are prescribed in the Public Health and

Wellbeing Regulations *2009* and mus t be registered:

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residential accommodation;

hotels;

hostels;

student dormitories;

holiday camps; and

rooming houses.

These classes of accommodation each have their own definition which is set out in

the regulations.

**5.3.3**

**What is ‘employees’ accommodation”?**

The definition of “prescribed accommodation” in the PHWA includes accommodation

provided to an employee in the course of employment.

An example of this would be “residential accommodation” provided for shearers or

fruit pickers.

8

Also defined in s. 3(1) to include land, the whole or part of a building, tent, stall, or other structure either

permanent or temporary, a pontoon, a vehicle, a caravan or camper-trailer.

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The Public Health and Wellbeing Regulations 2009 does not specifically prescribe

any class/es of employees’ accommodation. It is possible that in the future, the

regulations will be amended to include accommodation such as “seasonal worker

accommodation”.

However, if accommodation provided by an employer falls within the definition of

one of the prescribed classes, for example “residential accommodation”, and is not

otherwise exempt, then it will be required to be registered. Each case will need to

be looked at individually.

**5.3.4**

**Table listing classes of prescribed accommodation**

The table below defines these classes of accommodation that are prescribed in

regulation 13 of the Public Health and Wellbeing Regulations 2009.

**Classes of prescribed accommodation**

**Type of**

**accommodation**

**Residential**

**accommodation**

**Definition**

Means “*any house, building, or other structure used as a place*

*of abode where a person or persons can live on payment of*

*consideratio n to the proprietor but does not include -*

*(a)*

*(b)*

*(c)*

*(d)*

*(e)*

*a hotel or motel; or*

*a hostel; or*

*a student dormitory; or*

*a holiday camp; or*

*a rooming house.”*

This definition covers among other things accommodation

provided to a person in accordance with their employment.

***Note: the requirement in the definition that some sort of***

***consideration (i.e. money but may be something else) must***

***be provided to the proprietor.***

**Hotels**

**Motels**

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Includes “*a residential hotel and any residential premises in*

*respect of which a general licence or on-premises licence is*

*granted under the Liquor Control Reform Act 1998*”.

This definition covers hotels where the primary purpose is as

an accommodation facility and hotels more commonly known

as pubs which also incorporate an accommodation component.

Not defined. Would have its common meaning being an

accommodation facility similar to a hotel intended to provide

short term accommodation for travellers.

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**Classes of prescribed accommodation**

**Type of**

**accommodation**

**Hostels**

**Student**

**dormitories**

**Definition**

Means “*any house, building or structure, whether temporary*

*or permanent, which is used primarily for the accommodation*

*of travellers”*.

Examples include youth hostels and backpackers hostels,

but not a hostel that is covered by the definition of a student

dormitory.

**Note: despite the ordinary use of the term hostel, this**

**definition may include Bed and Breakfast type**

**accommodation.**

Means “*any dormitory, student hostel, hall of residence or*

*residential college for the accommodation of students which*

*is controlled by or operated under an agreement with or*

*affiliated with -*

*(a) an institution providing educational services for children*

*of compulsory school age within the meaning of section*

*1.1.3(1) of the Education and Training Reform Act 2006*

*[i.e. a primary or secondary school]; or*

*(b) adult, community and further education services; or*

*(c) an autonomous college or adult education institution within*

*the meaning of those definitions in section 1.1.3(1) of the*

*Education and Training Reform Act 2006.*

An “autonomous college” is defined as meaning a post-

secondary education institution that is not a university, TAFE

or a provider of further education but is some other training

college that is established under Part 3.2 of the *Education*

*and Training Reform Act 2006.*

An “adult education institution” is defined as meaning Adult

Multicultural Education Services (AMES) or the Centre for Adult

Education (CAE) or an adult education institution established

under Part 3.3 of the *Education and Training Reform Act 2006*.

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**Classes of prescribed accommodation**

**Type of**

**accommodation**

**Holiday Camps**

**Rooming**

**Houses**

**Definition**

Means “*any house, building or structure, whether temporary*

*or permanent which is used for the accommodation of*

*student groups, youth groups or family groups for holiday or*

*recreational purposes*”.

***Note: the exemption discussed in Step Three below for***

***caravans and tents therefore this would not apply to***

***camping grounds or caravan parks.***

Means *“a building in which there is one or more rooms available*

*for occupancy on payment of rent in which the total number of*

*people who may occupy those rooms is not less than 4*”.

***Note: While this is the same definition that is used in the***

***Residential Tenancies Act 1997, the context of having***

***rooming houses as prescribed accommodation in the***

***PHWA relates primarily to public health, in particular***

***hygiene, prevention and control of communicable and***

***infectious diseases.***

**5.3.5**

**Step Three - Accommodation that is EXEMPT from registration**

The following accommodation is exempt from the requirement to be registered under

the PHWA.

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24

a house under the exclusive occupation of the occupier;

self contained flats under the exclusive occupation of the occupier;

temporary crisis accommodation;

health and residential services;

nursing homes;

retirement villages;

any vessel, tent or caravan; and

Premises in which, not more than 5 people who are not family members of the

proprietor are accommodated, which is premises that is not a rooming house.

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**5.3.6**

**Table listing accommodation that is exempt from registration**

The table below defines those classes of accommodation which are exempt from the

requirement to be registered.

**Accommodation EXEMPT from being registered**

**Type of**

**premises**

**A house under**

**the exclusive**

**occupation of**

**the occupier**

**Self contained**

**Definition**

Not defined, has ordinary meaning in the sense that all

residents are entitled to the full use and enjoyment of the

entire premises.

Pursuant to regulation 14, consists of a suite of rooms that

**flats under**

**the exclusive**

**occupation of**

**the occupier**

(i)

(ii)

(iii)

forms a portion or portions of a building; and

includes a kitchen, bathroom and toilet facilities; and

forms a self contained residence.

***Note: no laundry facility is needed.***

**Temporary crisis**

**accommodation**

**Health and**

**residential**

**services**

Defined in regulation 4 as meaning “*accommodation*

*provided on a non profit basis by an agency which receives*

*homelessness support from the Government of Victoria*”.

Defined in regulation 14 as being a health or residential service

within the meaning of section 3(1) of the *Residential Tenancies*

*Act 1997*, which in turn means:

*(a) a residential care service, State funded residential care*

*service, health service establishment, denominational*

*hospital or public hospital within the meaning of the Health*

*Services Act 1988; or*

*(b) premises used for an approved mental health service*

*within the meaning of the Mental Health Act 1986; or*

*(c) premises used for a residential service within the meaning*

*of the Disability Act 2006; or*

*(d) premises used for a secure welfare service within the*

*meaning of the Children, Youth and Families Act 2005; or*

*(e) premises where accommodation is provided by a service*

*agency for the purpose of delivering support services by*

*that agency to a client of that agency.*

***Note: Definitions of “service agency” and “support***

***services” are contained in the Residential Tenancies Act***

***1997 and are:***

***service agency*** means a disability service provider within the

meaning of the *Disability Act 2006 (meaning the Secretary to*

*the Department of Human Services or a body registered as a*

*disability service provider).*

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**Accommodation EXEMPT from being registered**

**Type of**

**premises**

**Health and**

**Definition**

***support services*** *means* –

**residential**

**services**

(a)

(b)

(c)

(d)

assistance with one or more of the following –

(i)

bathing, showering or personal hygiene; or

(ii)

toileting; or

(iii)

dressing or undressing; or

(iv)

meals; or

physical assistance for persons with mobility problems;

or

assistance for persons who are mobile but require some

form of supervision or assistance; or

development of independent living skills.

**Nursing homes**

**Retirement**

**Villages**

As defined within the meaning of the *National Health Act 1953*

(Cth).

Defined within the meaning of s. 3(1) of the *Retirement Villages*

*Act 1986* which means a community:

(a)

(b)

the majority of which is retired persons who are

provided with accommodation and services other than

services that are provided in a residential care facility;

and

at least one of whom, before or upon becoming a

member of the community, pays or is required to pay

an in-going contribution.

**Any house,**

**building or**

**structure to**

**which Part 4 of**

**the *Residential***

***Tenancies Act***

***1997* applies.**

**Any vessel, tent**

**or caravan**

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Part 4 of the *Residential Tenancies Act 1997* applies to caravan

parks and movable dwellings. These are defined in that Act as:

***caravan park*** means an area of land on which movable

dwellings are situated for occupation on payment of

consideration, whether or not immovable dwellings are

also situated there.

***movable dwelling*** means a dwelling that is designed to be

movable, but does not include a dwelling that cannot be

situated at and removed from a place within 24 hours.

Not defined in the regulations, have their common meaning.

***Note: In effect camping grounds and caravan parks are not***

***required to be registered.***

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**Accommodation EXEMPT from being registered**

**Type of**

**premises**

**Premises in**

**which, not more**

**than 5 people who**

**are not family**

**members of the**

**proprietor are**

**accommodated,**

**which is premises**

**Definition**

No further definition in the regulations.

Exemption essentially allows less than 6 people who are not

related to the proprietor to live in one place provided that the

place does not fall within the definition of a rooming house.

For example, this would cover family households in which

visitors are accommodated on a short or long term basis, or

family households that accommodate students on exchange.

**that is not a**

**rooming house**

**Checklist for prescribed accommodation**

**Questions to ask**

Step One

Does the accommodation

fall within the definition

of “prescribed

accommodation” in the

*PHWA*”?

Step Two

Does the accommodation

fall within one of the

classes of prescribed

accommodation in

Regulation 13 of the

Public Health and

Wellbeing Regulations

2009?

**Type of accommodation**

Any area of land which a person or persons are

frequently, intermittently or seasonally permitted

to use for camping on payment of consideration

and any facilities provided on the land for the use

of that person or those persons.

Any premises used as a place of abode, whether

temporary or permanent, fixed or mobile, where

a person or persons can be accommodated on

payment of consideration.

Any accommodation provided to an employee in

accordance with a term of an award governing

the employment of the employee, or a term of

the employee’s contract of service, for use by

the employee during that employment or service.

Residential accommodation

Hotel

Motel

Hostel

Student dormitory

Holiday camp

Rooming house

**Tick**

**Box**

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**Checklist for prescribed accommodation**

**Questions to ask**

Step Three

Is the accommodation

exempt under regulation

14 of the Public Health

and Wellbeing

Regulations 2009?

Is the accommodation

exempt because of the

number of people not

related?

Regulation 14(i) Public

Health and Wellbeing

Regulations 2009?

**Type of accommodation**

A house under exclusive occupation of

the occupier

Self contained flat under the exclusive

occupation of the occupier (consisting of suite

of rooms that forms a portion of a building and

includes kitchen, bathroom, toilet and is a self

contained residence)

Temporary crisis accommodation

Health or residential service

Nursing home

Retirement village

Caravan park or movable dwelling

Vessel, vehicle, tent or caravan

Premises in which, other than the family of

the proprietor, not more than 5 persons are

accommodated, and which is NOT a rooming

house.

**Tick**

**Box**

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**5.3.7**

**What if a proprietor fails to register their accommodation?**

The failure to register prescribed accommodation is an offence under s. 67 of

the PHWA.

Councils, and authorised officers if delegated the power, are able to issue an

infringement notice in respect of the failure to register accommodation premises.

The penalty that applies to an infringement notice for this offence is 4 penalty units

for a natural person and 10 penalty units for a body corporate.

Councils, and authorised officers, are also entitled to enforce the offence of failing

to register prescribed accommodation by bringing prosecution proceedings in a

Magistrates’ Court. A penalty of 60 penalty units for a natural person and 300 penalty

units for a body corporate applies.

**5.3.8**

**What are the standards and requirements that prescribed**

**accommodation must comply with?**

The Public Health and Wellbeing Regulations 2009 contains a set of standards and

requirements that proprietors of prescribed accommodation must comply with. These

are listed and summarised in the table below. The table also notes the maximum

penalty available for prosecuting against one of the offences in the Magistrates’ Court.

The standards and requirements in the Public Health and Wellbeing Regulations 2009

apply whether or not the accommodation is registered.

Councils and authorised officers are responsible for monitoring compliance with and

enforcing these standards and requirements. **Part C** of this Manual discusses the

procedural requirements relating to how an authorised officer can monitor compliance,

and **Part D** of this Manual discusses the enforcement mechanisms that are available.

**Standards and requirements for prescribed accommodation**

**Regulation**

**Summary**

**Prosecution:**

**Notes**

**maximum penalty**

**for offence**

**17(1)**

Must comply with regulation

20 penalty units

17 in relation to the maximum

**Overcrowding** number of persons permitted

to be accommodated in each

bedroom in prescribed

accommodation.

**17(2)**

Must not permit a room in the 20 penalty units

Infringement

prescribed accommodation to

be used as a bedroom if it

has a floor area of less than

7.5 square metres.

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notice may

be issued -

penalty of 4

penalty units.

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**Standards and requirements for prescribed accommodation**

**Regulation**

**Summary**

**Prosecution:**

**Notes**

**maximum penalty**

**for offence**

**17(3)**

If persons are accommodated

in prescribed accommodation

for a period of more than 31

days, the maximum number

Enforced

pursuant to

regulation 17(1) -

20 penalty units.

See regulation

17(6) as to

how a person

is defined.

of persons permitted to

occupy a bedroom in respect

of the period after the 31st

day is:

(a) in the case of a bedroom

with a floor area of less

than 12 square metres -

one person;

(b) in the case of a bedroom

with a floor area of 12

square metres or more, 2

persons and an additional

person for every 4 square

metres of floor area

that exceeds 12 square

metres.

**17(4)**

If persons are accommodated

in prescribed accommodation,

other than a holiday camp,

for a period of 31 days or less,

Enforced

pursuant to

regulation 17(1) -

20 penalty units.

See regulation

17(6) as to

how a person

is defined.

the maximum number of

persons permitted to occupy

a bedroom is:

(a) in the case of a bedroom

with a floor area of less

than 10 square metres,

2 persons;

(b) in the case of a bedroom

with a floor area of 10

square metres or more, 3

persons and an additional

person for every 2 square

metres of floor area

that exceeds 10 square

metres.

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**Standards and requirements for prescribed accommodation**

**Regulation**

**Summary**

**Prosecution:**

**Notes**

**maximum penalty**

**for offence**

**17(5)**

Must provide at least 2 square Enforced pursuant

See regulation

metres of floor area in a

to regulation 17(1)

17(6) as to

bedroom for each person who - 20 penalty units.

is accommodated for a period

of 31 days or less (note reg

17(2).

how a person

is defined.

**17(6)**

**18**

**Maintenance**

**19(1)**

**Cleanliness**

**19(2)**

Qualifies some of the

requirements for regulation 17

in relation to what constitutes

a person and provides that:

(a) one child under the age

of 3 years is not counted

as a person;

(b) two children under the

age of 3 years are

counted as one person.

Must maintain the prescribed

accommodation and all

bedrooms, toilets, bathrooms,

laundries, kitchens, living

rooms and any common areas

provided with the

accommodation:

(a) in good working order; and

(b) in a clean, sanitary and

hygienic condition; and

(c) in a good state of repair.

In addition to the requirement

in regulation 18, must ensure

that each bedroom and any

toilet or bathroom attached to

the bedroom is cleaned after

the bedroom is vacated and

before its re-use by another

occupier.

Must ensure that all bed

linen provided with the

accommodation is changed

with clean linen:

(a) at least weekly; and

(b) after the accommodation

is vacated and before its

re-use by another occupier.

n/a

20 penalty units

20 penalty units

20 penalty units

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**Standards and requirements for prescribed accommodation**

**Regulation**

**Summary**

**Prosecution:**

**Notes**

**maximum penalty**

**for offence**

**20(1)**

**Water Supply**

**20(2)**

Must provide a continuous

and adequate supply of water

to all toilet, bathing, kitchen,

laundry and drinking water

facilities.

Must provide a continuous

20 penalty units

20 penalty units

Infringement

notice may be

issued - penalty

of 4 penalty

units.

and adequate supply of hot

water to all bathing, laundry

and kitchen facilities.

**21**

**Drinking**

**Water**

**22**

**Sewage**

Must ensure that drinking

water supplied by the

proprietor to another person

is fit for human consumption

if the drinking water was not

supplied to the proprietor by

a water supplier.

Note: a ‘water supplier’ has the

same meaning as in s. 3 of the

*Safe Drinking Water Act 2003*

which is a water licensee under

the *Water Industry Act 1994*

(Yarra Valley Water, South

East Water, City West Water),

a water authority under the

*Water Act 1989* (the rural water

authorities and Melbourne

Water), Parks Victoria, an

Alpine Resort Management

Board; or any other declared

body.

The common situation when

this regulation applies is

where water supplied to the

accommodation comes from

a rainwater tank on the

premises.

Must ensure that all sewage

and waste water is discharged:

(a) to a reticulated sewerage

system; or

(b) to a wastewater treatment

system permitted under

the *Environment Protection*

*Act 1970.*

20 penalty units

20 penalty units

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**Standards and requirements for prescribed accommodation**

**Regulation**

**Summary**

**Prosecution:**

**Notes**

**maximum penalty**

**for offence**

**23**

**Refuse**

**24**

**Refuse**

Must:

(a) provide sufficient vermin-

proof receptacles (e.g.

bins) at the prescribed

accommodation for the

collection and storage of

all rubbish; and

(b) ensure that the

receptacles are regularly

cleaned.

Must ensure that all refuse

at the prescribed

accommodation is regularly

removed by a council refuse

collection service or by a

private contractor.

20 penalty units

20 penalty units

**25**

**Toilet and**

**Bathing**

Must provide at least one

toilet, one bath or shower

and one wash basin for every

10 persons or fraction of that

number of persons occupying

20 penalty units

Infringement

notice may be

issued- penalty

of 4 penalty

units.

the accommodation.

**26(1)**

**Register**

Must keep a register

recording:

(a) the names and addresses

of persons occupying the

accommodation; and

(b) the dates of their arrival

and departure.

Note: an exemption to this

requirement is if the proprietor

is required under any other

Act or regulation to keep a

similar register- reg. 26(2).

20 penalty units

**26(3)**

Must retain the register or

similar register required to be

kept under regulation 26(1) or

(2) for at least 12 months after

the date of the last entry in

20 penalty units

Infringement

notice may be

issued- penalty

of 4 penalty

units.

the register.

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**Standards and requirements for prescribed accommodation**

**Regulation**

**Summary**

**Prosecution:**

**Notes**

**maximum penalty**

**for offence**

**27**

**Advertising**

Must not state or cause to be

stated in any advertisement,

notice or sign issued or put

up in relation to the

accommodation, that the

20 penalty units

Infringement

notice may be

issued- penalty

of 4 penalty

units.

premises were registered

or approved for any class of

accommodation other than

that set out in the certificate

of registration.

**5.4**

**Registered premises**

Section 69(1) of the PHWA provides that certain business premises must be

registered with the local council.

**5.4.1**

**What business MUST be registered?**

The business premises that must be registered are listed in s. 68 of the PHWA

and are:

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beauty therapy;

colonic irrigation;

hairdressing;

skin penetration;

tattooing; and

prescribed businesses.

These premises are defined in the table below.

Guidance from the Department of Health in relation to practices involved with the

personal care and body art industries, is available from the following website:

http://www.health.vic.gov.au/ideas/regulations/hlth\_guidelines

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**5.4.2**

**Table of business premises that MUST be registered**

**Business premises that MUST be registered**

**Type of Business**

**Beauty Therapy**

**Type of accommodation**

Means “*a procedure, not including any surgical or medical*

*procedure, intended to maintain, alter or enhance a person’s*

*appearance, including by -*

*(a)*

*(b)*

*(c)*

*(d)*

*(e)*

*facial or body treatment;*

*application of cosmetics;*

*manicure or pedicure;*

*application or mending of artificial nails;*

*epilation, including by electrolysis or hot or cold wax -*

*but does not include hairdressing, tattooing or skin penetration.*”

***Note: While a literal interpretation of the definition may***

***suggest that places such as department store beauty***

***counters could be captured, the obligation to register***

***under s69 is on “a person conducting a business of beauty***

***therapy”. Businesses which are primarily retail businesses***

***but which provide, for example, demonstrations of beauty***

***products available for sale, are not regulated under these***

***provisions.***

**Colonic Irrigation**

Means:

*(a)*

*(b)*

*a process involving the use of a fluid to cleanse the*

*colon of a person; or*

*a process involving the insertion of a tube into the colon*

*of a person for the purpose of cleansing the colon.*

**Hairdressing**

**Involving Skin**

**Penetration**

Means “*any procedure, not being a surgical or medical*

*procedure, intended to maintain, alter or enhance a person’s*

*appearance in relation to their facial or scalp hair including by*

*cutting, trimming, styling, colouring, treating or shaving hair*”.

***Note: A surgical or medical procedure is defined in s. 3(1)***

***of the PHWA as meaning a surgical or medical procedure***

***performed by a registered medical practitioner or a***

***registered nurse; or by a person under the supervision***

***of a registered medical practitioner or a registered nurse.***

Means “*any procedure performed on a living human being,*

*not being a surgical or medical procedure, involving piercing,*

*cutting, scarring, branding, scraping, puncturing or tearing*

*of their skin or mucous membrane using an instrument that*

*does not include tattooing*”.

***Note: A surgical or medical procedure is defined in s. 3(1)***

***of the PHWA as meaning a surgical or medical procedure***

***performed by a registered medical practitioner or a***

***registered nurse; or by a person under the supervision***

***of a registered medical practitioner or a registered nurse.***

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**Business premises that MUST be registered**

**Type of Business**

**Type of accommodation**

**Involving Tattooing** Means “*any process involving penetrating a person’s skin*

*for the purpose of inserting colour pigments-*

*(a)*

*(b)*

*to make a permanent mark, pattern or design on*

*the skin; or*

*to make a semi-permanent mark, pattern or design*

*on the skin including the process of applying*

*semi-permanent make-up or cosmetic tattooing”.*

**Business that**

**poses a risk to**

**public health and**

**is a business of a**

**class of business**

**prescribed for the**

**purposes of this**

**section.**

At time of writing, no such businesses are yet prescribed in the

Public Health and Wellbeing Regulations 2009.

**5.4.3**

**Business premises that are EXEMPT from being registered**

Regulation 15 of the Public Health and Wellbeing Regulations 2009 exempts certain

business premises from the need to be registered under the PHWA. These exempt

business premises are:

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dentists;

medical practitioners;

nurses;

podiatrists;

acupuncturists;

pathology services;

non-pathology analysis businesses; and

hospitals/health centres.

Mobile hairdressers and mobile beauty therapists must register their principle place of

business (for example this may be the place they store their equipment and business

records) but are exempt from the requirement to register every premises on which

they conduct their business (see 5.4.5).

The table below explains these categories of business premises which are prescribed

in regulation 15 of the Public Health and Wellbeing Regulations 2009 as being exempt

from the requirement to be registered with the relevant municipal council.

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**5.4.4**

**Table of business premises that are exempt from registration**

**Businesses EXEMPT from being registered**

**Type of Business**

**Dentists**

**Medical**

**Practitioners**

**Nurses**

**Podiatrist**

**Acupuncturist**

**Pathology Service**

**Non-pathology**

**Analysis Business**

**Hospitals/Health**

**Detail**

The practice of a person registered in the dentists’ division of

the register kept by the Dental Practice Board of Victoria

under the *Health Professions Registration Act 2005.*

The practice of a person registered as a medical practitioner

registered by the Medical Practitioners Board of Victoria under

the *Health Professions Registration Act 2005.*

The practice of a person registered as a nurse by the Nurses

Board of Victoria under the *Health Professions Registration*

*Act 2005.*

The practice of a person registered as a podiatrist by the

Podiatrists Registration Board of Victoria under the *Health*

*Professions Registration Act 2005.*

The practice of a person registered as an acupuncturist under

the *Health Professions Registration Act 2005.*

The business of a collection centre for which approval has

been granted under s. 23DNBA of the *Health Insurance Act*

*1973* (Cth).

The business of a service where human tissue, human fluids

or human body products are subjected to analysis for the

purposes of the prevention, diagnosis or treatment of disease

in human beings and that is not primarily a pathology service.

The business of a:

**Centres**

-

-

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-

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-

public hospital;

denominational hospital;

private hospital;

privately operated hospital;

public health service;

day procedure centre;

multi-purpose service; or

registered community health centre,

within the meaning of s. 3(1) of the *Health Services Act 1988.*

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**5.4.5**

**Mobile hairdressers and mobile beauty therapists**

Mobile hairdressers and mobile beauty therapists must register their “principal place

of business” but are exempt from any requirement to register *every* premises on which

they conduct their business.

This means for example that a hairdresser that goes into people’s homes and

performs hairdressing in those homes is not required to register all the homes in

which the hairdressing is conducted. However they must register a “principle place

of business”.

It is the policy of the Department of Health, as expressed in the *Health Guidelines*

*for the Personal Care and Body Art Industries9* that the residence of the hairdresser

or beauty therapist is a suitable “principal place of business” for registration purposes

as this is often the place where equipment and business records are stored.

*Note: that a similar exemption is not made for tattooists or body piercing businesses*

*as it was not considered appropriate to allow such potentially high risk activities to be*

*carried out on unregistered, and therefore unregulated, premises.*

**5.4.6**

**Checklist for registration of business premises**

**Checklist For Business Premises**

**Questions to Ask**

Does the business fall within one of

the categories in s. 68 of the PHWA?

Is the business exempt from being

registered under regulation 15 of

the Public Health and Wellbeing

Regulations 2009?

Is the business a mobile hairdresser

or mobile beauty therapist?

What is the principal place of

business of the mobile hairdresser

or mobile beauty therapist?

**Type of Business**

Beauty therapy

Colonic irrigation

Hairdressing

Skin penetration (not tattooing)

Tattooing

Dentist (registered)

Medical practitioner (registered)

Nurse (registered)

Podiatrist (registered)

Acupuncturist (registered)

Pathology service

Non-pathology analysis business

Hospital/health centre

Yes

No

**Tick**

**Box**

9

http://www.health.vic.gov.au/ideas/regulations/hlth\_guidelines

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**5.4.7**

**What if a person fails to register a business?**

The failure to register the required business premises is an offence under s. 69(1)

of the PHWA.

Councils, and authorised officers if delegated the power, are able to issue an

infringement notice in respect of the failure to register business premises. The penalty

that applies to an infringement notice for this offence is 12 penalty units for a natural

person and 10 penalty units for a body corporate.10

Councils (and authorised officers) are entitled to enforce the offence of failing to

register by bringing prosecution proceedings in the Magistrates’ Court. A penalty

of 60 penalty units for a natural person and 300 penalty units for a body corporate

applies.

**5.4.8**

**Standards and requirements**

The Public Health and Wellbeing Regulations 2009 contains a set of standards and

requirements that proprietor or occupier of business premises must comply with.

These are listed and summarised in the table below. The table also notes the

maximum penalty available for prosecuting against one of the offences in the

Magistrates’ Court.

It should be noted that these standards and requirements only apply where the

premises are in fact registered. If the premises are not registered, the only relevant

offence is the failure to register.

Councils and in particular authorised officers are responsible for monitoring

compliance with and enforcing these standards and requirements. ***Part C*** of this

Manual discusses the procedural requirements relating to how an authorised officer

can monitor compliance and ***Part D*** of this manual discusses the enforcement

mechanisms that are available.

10

Note the anomaly with regard to the penalty. The Department has indicated that the penalty for individuals

will be amended in the future but as it stands now the penalty in the regulations must be used.

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**Standards and requirements for registered premises**

**Regulation**

**Summary**

**Prosecution:**

**Notes**

**maximum penalty**

**for offence**

**28**

**Condition**

Must ensure that the premises 20 penalty units

are kept in a clean and

hygienic state.

**29(1)**

**Equipment**

**and Articles**

Must ensure that -

(a) an article intended to be

used for penetrating the

skin of a person is sterile

20 penalty units

See reg. 29(2)

for definition of

when an article

is sterilised.

at the time of use; and

(b) an article which has

penetrated the skin of a

person or is contaminated

with blood is -

(i) destroyed or disposed of

immediately in such a

manner as to prevent

the infection of any other

person; or

(ii) sterilised in accordance

with regulation 28(2) before

it is used on any other

person; and

(c) any article is clean before

it is used on a person.

**30**

**Personal**

**Hygiene**

40

Must ensure that each person 20 penalty units

in the business who is

engaged in carrying out any

hairdressing, colonic irrigation

or beauty therapy or similar

process on any other person

or any tattooing, ear piercing,

or other process involving the

penetration of the skin in a

iving human being-

(a) is in a clean condition,

including their hands; and

(b) has no exposed cuts,

abrasions or wounds -

before carrying out the

process.

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**Standards and requirements for registered premises**

**Regulation**

**Summary**

**Prosecution:**

**Notes**

**maximum penalty**

**for offence**

**31**

Must ensure that easily

accessible hand washing

20 penalty units

This is a new

requirement.

**Hand Washing** facilities are available for use

by staff.

**32(1)**

**Information**

Where a registered premises 20 penalty units

is located that provides

tattooing, ear piercing, body

piercing or any other process

involving the penetration of

the skin of a living human

being must ensure, before

such a process is provided

to a person, that written

information is provided

directly to the person about

the transmission of infectious

diseases associated with

the process.

**32(2)**

**Information**

The proprietor or occupier of

premises where a registered

premises is located that

provides tattooing, ear

piercing, body piercing or

any other process involving

20 penalty units

Old

regulations

required

information to

be *medically*

*accurate*.

the penetration of skin in a

living human being must take

reasonable steps to ensure

that the information about the

transmission of infectious

diseases provided to a person

under regulation 31(1) is not

misleading.

**33**

**Recording**

**of Client**

**Information**

The proprietor or occupier of

premises where a registered

premises is located that

provides tattooing or body

piercing must ensure that the

name and addresses of each

client is recorded and stored

at the premises for a period of

12 months following the date

of the last body piercing or

20 penalty units

This is a new

requirement.

This does not

apply to a

business that

is exempt from

the registration

requirement-

reg. 33(2).

tattooing procedure

undertaken by the client at

the premises.

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**5.5**

**What is the registration process?**

The process and requirements for registering prescribed accommodation and

business premises are contained in Division 4 of Part 6 of the PHWA.

The MAV, with the support of the Department of Health, has prepared an

‘Implementation Toolkit’ for councils, which contains template forms for registration

that councils can adapt and use. The kit is available for download from the MAV

website.

**5.5.1**

**What are the powers of authorised officers in relation to registration?**

Councils are responsible for managing applications for registration. Authorised

officers do not, by virtue of their appointment, have powers in relation to applications

for registration, but the powers and functions of councils in respect of registrations are

capable of delegation to appropriate officers within the council.

**5.5.2**

**What forms are used for applications?**

The Public Health and Wellbeing Regulations 2009 does not prescribe any forms.

It is up to each council to prepare its own forms which contain the mandatory

particulars from the PHWA and the Public Health and Wellbeing Regulations 2009.

See the Public Health and Wellbeing Act Toolkit prepared by the MAV for information

relating to the implementation of the PHWA and for draft template forms.

**5.5.3**

**How is an application made?**

An application for the issue, renewal or transfer of a prescribed accommodation or

registered premises must be made in the form approved by the council and it must

(pursuant to s. 71 of the PHWA):

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**5.5.4**

contain the information required by the council (e.g. details of the premises);

contain the prescribed particulars in the Public Health and Wellbeing

Regulations 2009 (see regulation 16); and

be lodged with the relevant fee (as determined by the council).

**What must council do before considering an application for registration?**

Before considering an application for registration, pursuant to s. 73 of the PHWA

a council (and the relevant officers) may (if appropriate):

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give an applicant a notice requiring more information (can be in the form

of a letter);

inspect the accommodation or premises;

require that alterations or improvements be made to the prescribed

accommodation or premises to ensure compliance with the PHWA

or the Public Health and Wellbeing Regulations 2009.

www.mav.asn.au

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**5.5.5**

**What can council decide in relation to an application for registration?**

Pursuant to s. 76(1) of the PHWA, a council can:

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refuse a registration;

issue a registration subject to conditions;

vary, cancel or suspend a registration;

refuse to transfer;

transfer subject to conditions;

refuse to renew; or

renew subject to conditions.

Section 76(2) of the PHWA provides that a council can make a decision in relation

to an application for registration on any one or more of the following grounds:

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**5.5.6**

the application does not comply with the PHWA or the Public Health and

Wellbeing Regulations 2009;

the registration holder has failed to comply with any condition of

the registration;

an applicant has ceased to provide accommodation or premises

that require registration;

there is a risk to the health of persons if the registration is not cancelled

or suspended or is issued, transferred or renewed; or

on any other grounds prescribed in regulations (note: no such grounds

prescribed in the Public Health and Wellbeing Regulations 2009).

**How long can premises be registered?**

Councils are able to determine the period of registration under s. 74(d) of the PHWA,

which can be for a period of up to 3 years and can differ according to the type of

registration (accommodation or registered premises), whether for the issue, renewal

or transfer, or for the type, nature or size, of the accommodation or premises.

The determination of the period of registration offered by a council is a policy decision

that the councils need to make. In making such a decision, councils (and the relevant

officers) need to be aware of the following issues (among other things):

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avoiding the decision being open to review; e.g. a decision by a council to set

differing periods of registration for two comparable premises could be open

to review on the basis of unreasonableness;

the desirability of requiring frequent/infrequent review of a registration upon

renewal, e.g. some premises may require more frequent review especially

where particularly problematic such as for some rooming houses; and

the administrative burden of handling applications; the shorter a period

of registration, the greater the administrative burden on councils for handling

renewals.

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**5.5.7**

**What conditions can be imposed on registration?**

Section 75 of the PHWA provides that the following conditions must be imposed

on registration:

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**5.5.8**

any condition imposed by council, as necessary, requiring alterations or

improvements be made to the prescribed accommodation or premises

so that they can comply with the PHWA and regulations;

that proprietors of prescribed accommodation take reasonable steps to

protect information in their register;

that business involving tattooing or body piercing take reasonable steps

to protect information in their records.

**Who must be notified of a decision to register or not register a premises?**

Where a decision about registration under s. 76(1) is made, the council must notify the

applicant or registration holder in writing of the decision and the ground or grounds on

which the decision is based. This notice can be in the form of a letter setting out these

details of the decision.

*Note: Section 77 of the PHWA provides that where a decision to refuse an application*

*for registration has been made by a delegate of a council, the decision to refuse the*

*registration is only valid if that decision is later ratified by a resolution of the council.*

**5.5.9**

**Is a registration certificate required?**

Councils are required to issue certificates of registration. A replacement certificate can

be issued if it is lost, stolen or destroyed.

**5.6**

**Can a person review a decision about their applications for registration?**

Under s. 205(2) of the PHWA, an applicant or a registration holder who is aggrieved by

a decision made by a council in relation to the issue, renewal, transfer, cancellation or

suspension of a registration is entitled, within 28 days of being notified of the decision

made by the council, to apply to the council for an internal review of that decision.

Where a review of a council’s decision is sought, the council must review the decision

and can decide to affirm, vary or revoke the decision. Councils must give written reasons

of the decision that they make on review and state to the applicant for review that they

are entitled to apply to the VCAT under s. 207(2) to have that decision further reviewed.

Councils are taken to have affirmed the decision made if the council has not determined

an application for review within 28 days of receiving the application or within the period

of time that the council and applicant agree to for the review of the decision.

Applications for review (in VCAT) must be made within 28 days of:

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notification of the decision;

notification of any council review of the decision;

receipt of a statement of reasons or a refusal to provide reasons.

The requirements and procedures for a review of decisions that are made are

discussed further in **Part F** of this Manual12.

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VCAT has also issued its own PHWA *Information Pack* available for download from:

http://www.vcat.vic.gov.au/

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6 Immunisation

**Summary**

Outlines the powers and functions of councils in relation to the provision of

immunisation services and the key differences made from the Health Act.

**6.1**

**Overview**

The role of councils in relation to the co-ordination and provision of immunisation

services to children has been re-enacted in Division 7 of Part 8 of the PHWA.

The substantial changes made by the PHWA are in relation to:

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**6.2**

the provision of and not just the co-ordination of immunisation;

a change in the meaning of when a child is considered ‘immunised’;

the use of the term ‘vaccine-preventable diseases’; and

the administration of immunisation status certificates.

**What is councils role in the provision of immunisation?**

Section 24(f) of the PHWA, provides that one of the functions of councils is:

*co-ordinating and providing immunisation services to children living*

*or being educated within the municipal district.*

This marks a change from the Health Act, which simply referred to the coordination

of immunisation and not the provision of it. The second reading speech in the PHWA

indicated that councils were already organising and providing such a service and that

the PHWA simply clarifies the role.

**6.3**

**Are doses regulated?**

The Public Health and Wellbeing Regulations 2009 does not specify the number of

doses that are required for a child to be considered to be immunised, rather regulation

80 provides that a child is considered to be immunised against a vaccine-preventable

disease if “*the child has been vaccinated for that vaccine-preventable disease*”. This is

a recognition that the number of doses required may differ according to the age of the

child or the brand of the vaccine.

**6.4**

**What are vaccine-preventable diseases?**

The PHWA refers to vaccination against a ‘vaccine-preventable disease’ as opposed

to a ‘prescribed infectious disease’. This change of terminology results in no practical

change. Vaccine-preventable diseases are listed in regulation 81 of the Public Health

and Wellbeing Regulations 2009 and are:

> Diphtheria

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Tetanus

Pertussis (Whooping Cough)

Poliomyelitis

Haemophilus influenza type b

Hepatitis B

Pneumococcal

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**6.5**

Rotavirus

Measles

Mumps

Rubella

Meningococcal C

Varicella.

**Can councils issue immunisation status certificates?**

A person authorised by a council may issue immunisation status certificate to a parent

of a child if:

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**6.6**

The parent produces for each vaccine preventable disease evidence that the

child has been immunised; or

Laboratory evidence that the child has developed a natural immunity against

a vaccine preventable disease and does not require immunisation; or

A statutory declaration by a parent that the parent believes that the child has

been immunised against the vaccine preventable disease.

A significant change made by the PHWA however is that immunisation status

certificates issued by the Australian Childhood Immunisation Register (“ACIR”)

are now acceptable as evidence of a child’s immunisation status in addition

to those issued by councils. Most immunisation status certificates will now be

issued by the ACIR rather than councils.

**What information must immunisation status certificates contain?**

Immunisation status certificates issued by councils must include references to the

PHWA and references, where applicable, to the Public Health and Wellbeing

Regulations 2009.

**6.7**

**Is there a requirement to keep records of immunisation status certificates?**

There is no requirement for councils to keep records of the immunisation status

certificates that they use due to the fact that most immunisation status certificates will

be issued by ACIR who will keep records.

Division 4 of Part 9 of the Public Health and Wellbeing Regulations 2009 relates

to immunisation and contains a number of offences, many of which relate to the

retention of immunisation status certificates by primary schools and the provision

of information by primary schools.

**6.8**

**Are there offences in relation to immunisation under the PHWA?**

Councils do not have the power to prosecute for offences in relation to immunisation

(see s. 219 of the PHWA) as this is a function of the Department of Health.

**6.9**

**What is the requirement for councils to employ a medical officer of health?**

Councils should note that although under the PHWA they are no longer required to

employ a Medical Officer of Health, they should note that Regulation 5(3) of the Drugs,

Poisons and Controlled Substances Regulations 2006 states that only nurses who are

employed by a council which employs or contracts a medical practitioner are allowed

to administer vaccines.

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7 Aquatic Facilities

(Part 6 Public Health and Wellbeing Regulations 2009)

**Summary**

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**7.1**

Outlines the type of aquatic facilities to which the Public Health and Wellbeing

Regulations 2009 apply.

Explains the offences capable of being committed by people who own,

manage or operate these facilities.

Outlines the role of councils in ensuring that aquatic facilities in their

municipalities comply with the regulations.

Explains the enforcement mechanisms available to councils and how they

can effectively implement them.

**Overview**

Part 5 of the Public Health and Wellbeing Regulations 2009 contains a set of

requirements which relate to people who own, manage or control aquatic facilities

that members of the public have access to. This includes facilities owned, managed

or operated by councils.

Regulation of public aquatic facilities is necessary because large numbers of people

use public aquatic facilities and the warm water in these facilities, without appropriate

disinfection, tend to be breeding grounds for various harmful micro-organisms that

can lead to the spread of infectious diseases.

**7.2**

**What are aquatic facilities?**

An ‘aquatic facility’ is defined in regulation 4 of the Public Health and Wellbeing

Regulations 2009 to include “*spa pools and swimming pools*”.

A ‘spa pool’ is defined as meaning:

“*an artificially constructed pool to which members of the public have access*

*which-*

*(a)*

*(b)*

*has facilities for circulating heated turbulent water; and*

*is used or intended to be used for passive recreational or therapeutic*

*bathing*”

A ‘swimming pool’ is defined as meaning:

“*an artificially constructed pool to which members of the public have access*

*which-*

*(a)*

*(b)*

*is used or intended to be used for swimming, diving, recreational or*

*therapeutic bathing, exercise, paddling or wading; or*

*is used or intended to be used as a receiving pool of a waterslide*”.

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Regulation 35 of the Public Health and Wellbeing Regulations 2009 provides that

despite regulation 4, the definition of an aquatic facility for the purpose of Part 6

of the regulations does not include:

*(a) a whirlpool bath or spa bath that is, or intended to be, emptied*

*of water after each individual use; or*

*(b) a dam, natural watercourse or ocean pool that is used for swimming; or*

*(c) a spring water pool that has a turnover rate of at least 25 per cent of*

*the entire volume of the water in the pool to waste each hour.*

**7.2.1**

**What aquatic facilities are not included in the definition?**

Household swimming pools and spa pools are not intended to be regulated by the

Public Health and Wellbeing Regulations 2009.

The regulations are intended to apply to publically accessible facilities such as:

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municipal pools and spa pools; and

privately owned pools and spa pools that are open to the public - e.g. would

include some schools and clubs where all members of the public have access

as opposed to a limited membership or class of persons; would include private

pools where general public pay for swimming lessons.

Determining whether a facility is open to which “members of the public” have access

can often be difficult to determine. Councils should seek further advice on this if at all

concerned about their functions and powers associated with aquatic facilities.

**7.2.2**

**What if an aquatic facility does not fall within the definition?**

If an aquatic facility does not fall within the definition of the regulations, then there

is no requirement on persons who own, operate or manage those facilities to comply

with the Regulations.

However, if any swimming pool or spa is suspected of posing a risk to public health

council authorised officers can use the entry provisions under the PWHA to enter the

premises where applicable. For example, if council considers that the danger may fall

within the definition of a nuisance, then the entry provisions available for nuisance

apply. Alternatively, if the council can obtains the consent of the person to enter then

they can use the section 168 powers of entry.

If consent is refused it would be appropriate to contact the Department of Health to

discuss the issue and possible avenues for addressing any risk.

**7.3**

**What standards and requirements apply to aquatic facilities?**

The table below summarises the regulations relating to aquatic facilities. The actual

Public Health and Wellbeing Regulations 2009 should be consulted for more detail.

*Note: - regulation 36 which provides that for the purposes of regulations 37 to 48,*

*an aquatic facility is deemed to be ‘open for use*’:

*(a) if any door or gate provided for access to the aquatic facility is open or*

*unlocked; and*

*(b) if there are no conspicuous signs advising users that the aquatic facility*

*is closed.*

The regulations make reference to a ‘*responsible person*’, which is defined in

regulation 4 to mean the person who “*owns, manages or controls*” the aquatic facility.

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**Aquatic Facilities**

**Regulation**

**37**

**Maintenance**

**38**

**Clarity of**

**Water**

**39**

**Treatment of**

**Water**

**40(1)**

**Microbiological**

**Quality**

**40(2)**

**Summary**

Must ensure that aquatic facility is maintained and

tested in accordance with regulations 38 to 48.

Must ensure that when an aquatic facility is

‘open for use’, the water in the aquatic facility is

maintained in a clear condition, so that the floor of

the aquatic facility or any lane marker or object on

the floor of the aquatic facility is clearly visible when

viewed from either side of the aquatic facility.

Must ensure that when an aquatic facility is open

for use that the water in the facility is treated

with chlorine or bromine based disinfectant in

accordance with the parameters set out in the

tables in this regulation.

When an aquatic facility is open for use the

microbiological standard of the water must be

maintained within the following parameters -

(a) a heterotrophic colony count less than 100

colony forming units per millilitre;

(b)

coliform bacteria is not detected in 100

millilitres;

(c)

pseudomonas aeruginosa is not detected

in 100 millilitres.

Within 24 hours of receiving a report that any

sample of water taken from an aquatic facility does

not comply with regulation 40(1) the responsible

person must ensure the following steps are taken:

(a)

the water must be shock dosed with

chlorine or bromine;

(b)

the water treatment program and

maintenance program must be reviewed;

(c)

any faults must be corrected and any

changes necessary to prevent a

re-occurrence of those faults must be

implemented;

(d)

a further sample of the water in the aquatic

facility must be taken and delivered to a

laboratory to assess compliance with

regulation 40(1).

**Penalty**

20 penalty units

20 penalty units

20 penalty units

20 penalty units

20 penalty units

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**Aquatic Facilities**

**Regulation**

**40(3)**

**41**

**Chemical**

**Summary**

If after following the procedure in 40(2) the

microbiological standard of the water fails to meet

the parameters in 40(1) the responsible person

must ensure that:

(a)

the steps in 40(2)\_ are repeated until 2

consecutive water samples taken

approximately one week apart comply with

the parameters in 40(1); or

(b)

the aquatic facility is closed until the problem

has been remedied.

When an aquatic facility is open for use the water

must be tested-

**Penalty**

20 penalty units

20 penalty units

**Testing**

(a)

(i)

(ii)

(iii)

(b)

(c)

At four hourly intervals for-

free chlorine or total chlorine (if chlorine

is used);

free bromine and total bromine (if bromine

is used);

pH;

at weekly intervals for total alkalinity;

at monthly intervals for cyanuric acid

(if used).

**42**

**Filtering**

Must ensure that when an aquatic facility is open

for use the water in the aquatic facility is effectively

filtered so that all visible extraneous matter is

removed from the water.

20 penalty units

**43**

**Temperature**

Must ensure that when an aquatic facility is open for 20 penalty units

use the water in the aquatic facility does not exceed

40 degrees Celsius.

**44**

Must ensure that when an aquatic facility is open

20 penalty units

for use the level of cyanuric acid (if used) in the

**Cyanuric Acid** water does not exceed 100mg/L.

**Level**

**45**

**Alkalinity**

**46**

**Chlorine**

Must ensure that when an aquatic facility is open

for use the total alkalinity level in the water is

maintained above 60mg/L.

Must ensure that when an aquatic facility is open

for use the combined chlorine of the water is:

(a)

at all times less than the free chlorine

residual; and

(b)

measured to be less than 1 mg/L at least

once in every 24 hours of operation.

20 penalty units

20 penalty units

50

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**Aquatic Facilities**

**Regulation**

**47**

**Infection**

**48**

**Summary**

If the Secretary to the Department of Health has

informed a responsible person that the water is

suspected or implicated as the source of infection

in a case or outbreak of Legionellosis, the

responsible person must ensure that-

(a)

a water sample is promptly taken and

delivered to a laboratory for testing and

reporting on Legionella; and

(b)

the aquatic facility is disinfected in

accordance with any reasonable directions

given by the Secretary.

Must ensure that-

**Penalty**

20 penalty units

20 penalty units

**Records**

(a)

(b)

records are kept of all tests and monitoring

required under regulation 41 and all

corrective activities undertaken in relation

to the water; and

that the records are kept at the premises

where the aquatic facility is located for 12

months from the date on which the record

was made.

**7.4**

**7.4.1**

**Council responsibilities for aquatic facilities**

**Aquatic facilities owned, managed and controlled by councils**

Not only do Councils have responsibility for ensuring that any aquatic facilities that

they own, manage or control are in compliance with the Public Health and Wellbeing

Regulations 2009, but they also have responsibility for public aquatic facilities in their

municipality generally.

Where they can, Councils therefore will use the powers in the PHWA to investigate

and ensure compliance with the requirements for aquatic facilities set out in the Public

Health and Wellbeing Regulations 2009. The Department of Health is able to provide

assistance to councils in complex situations or where an outbreak of disease has or

may occur.

**7.4.2**

**What powers of entry do councils have in relation to aquatic facilities?**

In relation to councils’ entry powers where the aquatic facility is a public facility,

an authorised officer is entitled to:

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enter an aquatic facility because it is a public place BUT only where the

authorised officer:

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is investigating whether or not there is a risk to public health; or

is seeking to manage or control a risk to public health (s. 168(1)(a)

of the PHWA); or

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>

enter an aquatic facility at any time if:

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the authorised officer believes on reasonable grounds that there may

be an immediate risk to public health; and

the entry is necessary to enable the authorised officer to investigate,

eliminate or reduce that risk (s. 169(2) of the PHWA); or

>

enter an aquatic facility at any time to investigate a possible contravention

of the PHWA or its regulations

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with the consent of the occupier (s. 169(3)(a) of the PHWA); or

with a search warrant (s. 169(3)(b) of the PHWA).

For entry into private aquatic facilities see comments made in 7.2.2 above.

The powers that authorised officers have to enter premises are discussed in more

detail in **Part C** of this Manual.

**7.4.3**

**What enforcement options are open to councils in relation to breach**

**of the Regulations by the person responsible for an aquatic facility?**

Where there is enough evidence to substantiate a breach of the regulations relating to

aquatic facilities, a council is entitled to issue an improvement notice or a prohibition

notice.

The issuing of improvement and prohibition notices in response to an aquatic facility

failing to comply with the regulations is the most appropriate mechanism to remedy

the situation. Improvement and prohibition notices provide the responsible person

the opportunity to remedy the situation in the first instance, if however, there remains

a problem these notices are enforceable and carry a penalty of up to $70,092 (for a

body corporate) if they are not complied with.

These enforcement mechanisms are discussed in more detail in **Chapter 13** of this

Manual.

*Note: that authorised officers do not have the power to issue an improvement notice*

*or a prohibition notice unless they have been delegated the power to do so by the*

*council.*

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Part C: Investigation

Part C discusses the requirements and procedures concerning entry by authorised

officers onto premises including the use of search warrants. There are five Chapters

in this Part (8 – 12).

Pursuant to Part 9 of the PHWA, authorised officers have powers to take steps to

ensure compliance with certain parts of the PHWA and Public Health and Wellbeing

Regulations 2009 and they have powers to investigate whether there is a breach of

certain parts of the PHWA or Public Health and Wellbeing Regulations 2009.

**Summary of Chapters**

Chapter 8

Chapter 9

Chapter 10

Chapter 11

Chapter 12

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>

Outlines the situations when authorised officers are entitled

to enter premises.

Outlines the procedures that authorised officers must follow

once they have established that there is a power to enter.

Outlines what authorised officers can and cannot do after

lawfully entering premises.

Outlines how to obtain and execute a search warrant.

Outlines the general powers and procedures that authorised

officers must comply with.

Outlines the ramifications of authorised officers failing to

comply with proper procedures or acting outside the scope

of their powers.

**Important note:** The powers and functions of authorised officers referred to in this

Part may be exercised by non-EHO authorised officers only where the appointment

of that authorised officer allows them to exercise any or all of these powers and

functions.

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8 Powers of Entry

**Summary**

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**8.1**

Outlines the situations when authorised officers are entitled to enter premises.

**Overview**

Authorised officers are granted specific powers to enter “premises” under Division 2 of

Part 9 of the PHWA.

An authorised officer may only enter premises in accordance with one of the powers

specifically set out in sections 168(1) and 169(1), (2) and (3) of the PHWA.

Each power of entry contains specific elements that an authorised officer must satisfy

in order to exercise that power.

In some situations facing an authorised officer, there may be an overlap between the

various powers of entry. In such situations, the authorised officer needs to determine

what is the most appropriate power of entry to exercise.

The improper exercise of a power of entry can be the basis of a challenge or a

complaint made about the authorised officer. This is discussed in more detail in **Part F**

of this Manual.

If managed correctly, authorised officers should be able to obtain timely access in all

cases to protect public health. Further, it is worth noting here that it is still an offence

to hinder or obstruct authorised officers.

**8.2**

**How do I know which power to use?**

Essentially authorised officers should be asking the following questions before

entering onto premises:

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**8.2.1**

What type of premises am I entering?

Do I have the power to enter those premises? If so under what section

of the PHWA?

Do I need the consent of the occupier?

**What type of premises am I entering?**

The first question that an authorised officer should ask before entering onto any

premises is “What type of premises am I entering?”

For example, is it private premises, public premises, prescribed accommodation

or business premises?

This question is important because different powers of entry apply to different types

of premises.

The term “premises” is defined broadly in s. 3(1) of the PHWA to include:

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*(a)*

*(b)*

*(c)*

*(d)*

*(e)*

*land (whether or not vacant)*

*the whole or any part of a building, tent, stall or other structure (whether*

*of a permanent or temporary nature)*

*a pontoon*

*a vehicle*

*a caravan or camper trailer.*

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The power to enter onto premises depends on the type of premises, but in particular,

the situation facing an authorised officer that requires entry.

**8.2.2**

**Is there power to enter onto those premises?**

After determining the type of premises sought to be entered, the authorised officer

should ask “Do I have a power to enter those premises?”.

Sections 168 and 169 of the PHWA set out the various powers of entry. In general,

authorised officers have powers to enter premises in situations that involve:

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investigating whether there is a risk to public health on any premises

(s. 168(1));

managing or controlling a risk to public health on any premises (s. 168(1));

monitoring compliance with and investigating a possible contravention of the

PHWA and the Public Health and Wellbeing Regulations 2009 in relation to

prescribed accommodation and specified businesses (s. 169(1) or 169(3)(a));

in relation to any possible contravention of the PHWA or Public Health and

Wellbeing Regulations 2009 investigating, eliminating or reducing an

immediate risk to public health on any premises (s. 169(2));

any premises any time with a search warrant (s. 169(3)(b));

any premises any time to monitor compliance with or investigate contravention

of the PHWA and Public Health and Wellbeing Regulations 2009 with consent

of occupier; and

investigating and remedying a nuisance.

The task of an authorised officer who needs to enter onto any premises is to look at

the range of powers of entry available in the PHWA and to determine what power of

entry is most suitable to use. Relevant factors to consider are:

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what is being investigated (i.e. nuisance, prescribed accommodation, business

premises, aquatic facilities);

type of premises to which entry is required (i.e. public place, private residence,

prescribed accommodation; business premises);

whether the premises is occupied;

whether consent of the occupier is needed;

whether entry is otherwise barred (in which case a search warrant may

be sought).

An authorised officer must enter onto premises in accordance with one of the

available powers of entry even if it is just for a routine inspection.

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**8.2.3**

**Who is the occupier of premises and do I need their consent?**

Entry can generally be achieved without consent and without a warrant. However,

review of the relevant provisions is essential to determine when this is possible.

Some of the powers of entry discussed in this Chapter can only be exercised where

the ‘occupier’ of the premises consents.

An ‘occupier’ in relation to premises is defined in s. 3(1) of the PHWA as meaning

“*a person who appears to be of or over 16 years of age and who is, or appears to be,*

*in control of the premises*”.

An occupier need not therefore necessarily be the owner of the premises, but can be

a tenant or some other person who has some level of control over the premises.

Control over premises includes the ability to make decisions in relation to the premises

- e.g. deciding who to allow on the premises and having the ability to manage the

premises. If somebody on premises is restricted in any way as to the decisions that

they can make concerning those premises then it is likely therefore that they are not

in control of the premises.

Whether a person is an “occupier” within the meaning of the PHWA is a judgement

call that authorised officers will need to make. The consent of an “occupier” can be

verbal or it can be written. The PHWA is silent on this. An authorised officer must not

however, coerce consent out of an occupier.

Where entry onto premises requires the consent of the occupier but that consent

is later withdrawn while on the premises, the authorised officer must leave the

premises upon the consent being withdrawn. Another power of entry, not requiring

the occupier’s consent may be available in this instance.

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**8.3**

**8.3.1**

**Powers of entry – Specific powers**

**Entry – Risk to public health – S. 168**

Section 168 of the PHWA sets out the first power of entry. In table format:

**Risk to Public Health Section 168**

Investigating a risk to public health **OR** Monitoring or controlling a risk to public health

**PUBLIC PLACE**

**Any time**

**No consent required**

**No warrant required**

**ANY OTHER PLACE**

**Any Time**

**Consent Required**

(can enter land around the

premises if reasonable to do

so for purpose of contacting

the occupier)

**No Warrant Required**

In full s. 168 states:

*(1)*

*(2)*

*(3)*

*(4)*

*An authorised officer may for the purpose of investigating whether there*

*is a risk to public health or to manage or control a risk to public health –*

*(a) enter a public place; or*

*(b) with the consent of the occupier, enter any other premises*

*including any residential premises.*

*For the purposes of subsection (1)(b), an authorised officer may in*

*seeking to obtain the consent of the occupier –*

*(a) enter land around the premises to the extent that it is*

*reasonable to do so for the purpose of contacting the occupier; or*

*(b) enter a part of the premises which the authorised officer considers*

*can be entered by a member of the public for the purpose of*

*contacting the occupier.*

*An authorised officer who enters a public place or any other premises*

*in accordance with subsection (1) may exercise any of the powers*

*specified in section 175.*

*For the purposes of this section, public place means a place, or part*

*of a place, that –*

*(a) the public is entitled to use; or*

*(b) is open to members of the public; or*

*(c) is used by the public –*

*whether or not on the payment of any money.*

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This power of entry is very broad in that it is only necessary for an authorised officer to

be investigating or managing or controlling a ‘risk to public health’.

**>**

**>**

**>**

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**What constitutes a “risk to public health”?**

What constitutes a ‘risk to public health’ is not defined in the PHWA.

A risk to public health however can broadly be classified as something that is

likely to cause injury to a person or would jeopardise the health of a person

and need not be specific to a breach or suspected breach of the PHWA or the

Public Health and Wellbeing Regulations 2009.

**What is an example of entry under this power?**

An example of entry under this section of the PHWA is where an authorised

officer might be informed by a member of the public that there are unsanitary

conditions in certain premises that are open to the public. On the basis of this

information there is not enough evidence upon which the authorised officer

can say that there is a breach or suspected breach of the PHWA or the Public

Health and Wellbeing Regulations 2009. The authorised officer may therefore

rely on the s. 168 power of entry for the purposes of investigating whether the

alleged unsanitary conditions pose a risk to public health. Upon entering the

premises, it may in fact be discovered that there is a breach or suspected

breach of the *PHWA* or the Public Health and Wellbeing Regulations 2009.

**Does this section allows entry onto private premises as well?**

This power of entry also allows entry onto any other premises (that are not

public places) but only if the occupier consents.

If an occupier does not consent, authorised officers cannot enter the premises

unless they have a search warrant or entry is available by another head

of power (namely the place is used for prescribed accommodation or for

conducting a business that is or should be registered).

*Note:- only part of a premises may be a public place. If this is the case,*

*consent to enter private premises may be required.*

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**8.3.2**

**Entry - Prescribed accommodation and business premises = 169(1)**

Section 169(1) of the PHWA sets out the second power of entry. In table format:

**Regulated Premises Section 169(1)**

Monitoring compliance with PHWA and Regulations

**AND** Investigating possible contravention in relation to

**PRESCRIBED**

**ACCOMMODATION**

**Reasonable hour of daytime**

**OR**

**Anytime premises open**

**to the public**

**No Consent Required**

**No Warrant Required**

In full this s. 169(1) states:

**SPECIFIED BUSINESS**

**(s. 68)**

**Reasonable hour of daytime**

**OR**

**Anytime premises open**

**to the public**

**No Consent Required**

**No Warrant Required**

*(1)*

*For the purposes of monitoring compliance with this Act or the*

*regulations and investigating a possible contravention of this Act or the*

*regulations, an authorised officer may enter without a warrant, at any*

*reasonable hour in the daytime or any time that the premises are open*

*to the public, any premises that an authorised officer believes is –*

*(a) used for the provision of prescribed accommodation; or*

*(b) used for conducting a business specified in section 68; or*

*(c) land on which there is a cooling tower system; or*

*(d) used for the business of a pest control operator; or*

*(e) used for conducting a brothel or escort agency; or*

*(f) used for the provision of services by a health service provider.*

**>**

**>**

**What does this section specifically relate to?**

This power of entry under s. 169(1) applies specifically to councils in relation to

prescribed accommodation and business premises that need to be registered.

The power of entry applies regardless of whether the accommodation or

business premises are registered or not.

**What does an authorised officer have to be investigating to use this**

**power of entry?**

An authorised officer must be monitoring compliance AND investigating a

possible contravention of the PHWA or the Public Health and Wellbeing

Regulations 2009 to use power.

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**>**

**8.3.3**

**What is a reasonable hour of the day?**

A reasonable hour of the daytime is not defined. However, it would have

its ordinary meaning.

**Entry - Immediate risk to public health = 169(2)**

The third power of entry is contained in s. 169(2). In table format:

**Regulated Premises Section 169(2)**

**Possible contravention of PHWA and Regulations**

**Authorised officer believes on reasonable grounds**

**That there is an IMMEDIATE risk to public health and**

**Entry is necessary to enable authorised officer to investigate,**

**eliminate or reduce the risk**

**Any Premises**

**Any Time**

**No Consent Required**

**No Warrant Required**

In full this s. 169(2) states:

In relation to any possible contravention of the Act or the regulations, an

authorised officer may, without a warrant, enter any premises at any time if –

(a) the authorised officer believes on reasonable grounds that there may

be an immediate risk to public health; and

(b) the entry is necessary to enable the authorised officer to investigate,

eliminate or reduce the risk.

**>**

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**When can this power be exercised?**

This power of entry is capable of being exercised at any time of the day or

night and is very specific as to when it can be exercised which would typically

be in an emergency situation requiring urgent action.

The entry to the premises must be necessary to investigate, eliminate or

reduce the immediate risk.

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**>**

**8.3.4**

**What is a reasonable belief?**

In this instance, the authorised officer must have a reasonable belief that there

is a risk to public health and that the risk is:

· immediate in the sense that it is imminent or occurring at that present time;

and

· associated with a possible contravention of the PHWA or Public Health and

Wellbeing Regulations 2009.

**Entry - General compliance with consent or by search warrant = 169(3)**

The fourth power of entry is contained in s. 169(3). In table format:

**Consent Section 169(3)(a)**

Monitoring compliance with the

PHWA or Regulations **OR**

Investigating possible contravention

of the PHWA or Regulations

**Any Premises**

**Any Time**

**Consent Section 169(3)(a)**

**Search Warrant**

**Any Premises**

**Any Time**

**No Consent Required**

**Consent of occupier required**

**No Warrant Required**

In full this s. 169(3) states:

*An authorised officer may enter any premises at any time –*

*(a) for the purposes of monitoring compliance with this Act or the regulations,*

*or investigating a possible contravention of this Act or the regulations, with*

*the consent of the occupier; or*

*(b) with a warrant issued under this Act.*

Section 169(3) contains two powers of entry in one.

**>**

**Entry any premises anytime with consent of occupier**

Section 169(3)(a) allows entry onto any premises at any time with the consent

of the occupier. All an authorised officer needs to do is to be monitoring

general compliance with the PHWA or Regulations OR investigating a possible

contravention of the PHWA or Regulations. It is not necessary therefore for

a breach to be suspected for this power to be used.

The constraint on this power however is that consent of the occupier is

required. Authorised officers may consider that another power of entry may

be more appropriate if consent cannot be obtained.

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**>**

**8.4**

**Entry with a search warrant**

Section 169(3)(b) allows entry onto any premises at any time with a search

warrant issued under the PHWA.

The ability of an authorised officer to obtain a search warrant can be useful

in situations where an authorised officer has difficulties obtaining entry onto

premises pursuant to one of the other powers of entry contained in the

PHWA. For example, a search warrant may be useful where the consent

of the occupier cannot be obtained or there is some other practical difficulty

with entering premises (e.g. all doors are locked etc.).

Seeking entry to premises via a search warrant should only be used in

situations where exercising this power is proportionate to the level of risk

or severity of the problem that the entry onto the premises relates to.

**Chapter 11** of this Manual discusses search warrants in more detail including

the procedure that an authorised officer must follow to obtain and execute one

of these warrants.

**Other**

In addition to the powers of entry discussed in this Chapter, authorised officers may

be granted additional powers of entry where:

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there is a risk to public health and the Chief Health Officer has given an

authorisation to an authorised officer to exercise a public health risk power; or

the Health Minister on the advice of the Chief Health Officer has declared a

state of emergency arising out of any situation causing a serious risk to public

health and the Chief Health Officer has, for the purpose of eliminating this

serious risk to public health, given authority to a council appointed authorised

officer to exercise any of the public health risk powers and any of the

emergency powers.

These situations are discussed further in **Part E** of this Manual.

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9 Procedures for Obtaining Entry

(Division 3, Part 9 PHWA)

**Summary**

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**9.1**

Outlines the procedures that authorised officers must follow once they have

established that there is a power to enter.

**Overview**

Once an authorised officer has determined that he or she has a power of entry onto

premises, the authorised officer must comply with the procedures set out, primarily,

in Division 3 of Part 9 of the PHWA before physically entering onto the premises.

The procedure for entry onto premises is designed to give the occupant the

opportunity to understand who you are and the reasons for the entry. Essentially the

occupant should understand:

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Who you are

Why you are here

What you want

there is a requirement to identify yourself and show your

identity card.

there is requirement to state that you are an authorised

officer under the PHWA and that you want to enter the

premises.

there is a requirement to give the person on the

premises an opportunity to allow your entry, therefore

you should state why you want to enter the premises.

**9.2**

**Procedural requirements**

The tables below set out the procedural requirements that an authorised officer must

follow when entering premises. Note the extra requirement to provide the execution

copy of a search warrant if one is used.

These procedures are set out in sections 166, 170, 171, 172, 173 and 174 of the

PHWA.

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**Announcement Before Entering Premises Without A Search Warrant**

**Sections 166, 171 and 172**

Before entering premises

Authorised officer MUST

Announce they are an authorised officer under the PHWA to enter the premises

AND

Give any person in the premises a reasonable opportunity to allow entry

UNLESS

It is not practicable to do so

OR

Authorised officer believes on reasonable grounds that IMMEDIATE entry is required

to ensure the health or safety of any person

OR

Authorised officer believes on reasonable grounds that IMMEDIATE entry is required

to ensure the effective exercise of the powers of the authorised officer

*Note: That the authorised officer MUST show their ID card at all times and if asked to*

*show it and he or she cannot; they cannot exercise any powers on those premises*

*and must leave the premises.*

*Note: If entry is by way of section 169(3) and the owner or occupier of the premises*

*IS NOT at the premises at the time of entry then you must leave a NOTICE OF*

*ENTRY on the premises unless the premises are abandoned, vacant or public land,*

*(see* ***Appendix 1*** *sample Notice of Entry).*

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**Announcement Before Entering Premises With A Search Warrant**

**Sections 166, 172 and 173**

Before entering premises

Authorised officer MUST

Announce they are authorised by the search warrant issued under the PHWA to

enter the premises and hand over the execution copy of the search warrant

AND

Give any person in the premises a reasonable opportunity to allow entry

UNLESS

Authorised officer believes on reasonable grounds that IMMEDIATE entry is required

to ensure the health or safety of any person

OR

Authorised officer believes on reasonable grounds that IMMEDIATE entry is required

to ensure the effective execution of the warrant is not frustrated

*Note: That the authorised officer MUST show their ID card at all times and if asked to*

*show it and he or she cannot; they cannot exercise any powers on those premises*

*and must leave the premises. You must give the execution copy of the warrant to a*

*person on the premises.*

*Note: If entry is by way of section 169(3) and the owner or occupier of the premises*

*IS NOT at the premises at the time of entry then you must leave a NOTICE OF*

*ENTRY on the premises unless the premises are abandoned, vacant or public land,*

*(see* ***Appendix 1*** *sample Notice of Entry).*

To give effect therefore to this procedure for entry, authorised officers should develop

a routine or perhaps even a script to follow. Note however the requirements for

cautioning persons under section 176 of the PHWA. Councils could consider a

combined script to aid with both of these procedures (see 10.2).

The requirements under Division 3 of Part 9 of the PHWA must be followed each time

entry is sought. A failure to follow these procedures may be challengeable (see **Part F**

of this Manual).

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**9.3**

**Must an authorised officer leave a notice of entry?**

Section 172 of the PHWA requires that an authorised officer must leave a notice

of entry on the premises they have entered in certain circumstances. These

circumstances are if:

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entry was effected onto the premises using the power under s. 169(3) of the

PHWA (see sections 8.3.4 of this Manual);

entry was effected pursuant to s. 190(1)(c) of the PHWA (public risk power

and entry required to search for and seize any thing that is necessary for the

purpose of investigating, eliminating or reducing that risk13); or

entry was effected pursuant to s. 229 (actions to ensure compliance with

a direction, requirement or notice14);

AND the owner or occupier are not present at the time of entry

UNLESS the premises are abandoned, vacant or public land.

13

14

This is not one of the standard powers of entry for a council referred to above

This is not one of the standard powers of entry for a council referred to above

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10 After Entry Powers and Procedures

(Division 4, Part 9 of the PHWA)

**Summary**

Outlines what authorised officers can and cannot do after lawfully entering premises.

**10.1**

After:

>

>

**Overview**

determining that there is a power to enter premises; and

following the proper procedure for gaining entry,

an authorised officer must comply with the powers and procedures that are applicable

after entering premises, which are primarily contained in Division 4 of Part 9 of the

PHWA*.*

**10.2**

**What powers do authorised officers have once on the premises?**

The following table sets out the powers and procedures after an authorised officer has

gained entry onto premises.

**What You Can Do While On The Premises**

**Section 175**

ANY POWER OF ENTRY

Authorised officer can:

(a) Inspect, examine or may any enquiries

(b) Examine or inspect any thing

(including a document

(c) Bring any equipment or materials to

the premises that may be required

(d) Seize any thing (including a

document) at the premises if on

reasonable grounds:

(i) The seizure is required to

determine whether there has been

a contravention

(ii) The seized thing may be used in

evidence in a possible prosecution

(iii) The seizure is required to

minimise a risk to the health of

any person

(e) Seal a premises or a thing

(f) Take a sample of, or from, any thing, at

the premises for examination, analysis,

measurement or testing

**Section 176**

ENTRY ONLY UNDER s. 169

Authorised officer can DIRECT a person

at the premises to:

(a) Produce any document or part of a

document that is in that person’s

possession or control at the premises

(b) Operate equipment (e.g. a computer)

to access information on that

equipment

(c) Answer any questions

Before directing a person to any of the

above the authorised officer MUST:

(a) Warn the person that a refusal or

failure to comply with the direction

without reasonable excuse is an

offence

AND

(b) Inform the person that they may

refuse or fail to ANSWER ANY

QUESTIONS if answering the

questions would tend to incriminate

them

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**What You Can Do While On The Premises**

**Section 175**

(g) Analyse, measure, test any thing at

the premises with equipment brought

to the premises or already at the

premises

(h) Take any photographs or make any

audio or visual recordings at the

premises

(i) Make copies of, or take extracts from,

**Section 176**

*Note: This warning only applies to entry*

*under s. 169 and the warning needs to*

*be given each time a direction is made.*

*Note: A person is not liable to be*

*prosecuted for an offence under this*

*section if the authorised officer failed to*

*produce their identity card or failed to*

*warn the person*

any document kept at the premises

(j) Use or test any equipment at the

premises

(k) Do any other thing that is reasonably

necessary for the purpose of the

authorised officer performing or

exercising his or her functions or

powers under the PHWA or

regulations

*Note: An authorised officer can be*

*assisted by any other person to help do*

*the things under this section. No warrant*

*required.*

Again, councils may consider a script in relation to these matters particularly in relation

to warnings. This may be used together with a script when seeking entry onto the

premises.

**10.3**

**Can authorised officer seize things?**

Yes, but there are strict requirements set out in the PHWA in relation to this.

The following table sets out the provisions of the PHWA in relation to the seizure

of things from premises pursuant to the seizure power in s. 175 of the PHWA.

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**Situation**

**An authorised**

**officer has seized**

**a thing or has**

**taken a sample**

**of or from a thing**

**at the premises**

**An authorised**

**officer retains**

**possession of a**

**document seized**

**from a person**

**Document or**

**Power of Authorised Officer**

**and Procedural Requirements**

Section 177:

Authorised officer must give a receipt

in the form approved by their council to

the person in charge of the thing or the

premises from which it was taken.

The receipt must:

· identify the authorised officer’s name;

· identify the thing seized or sample

taken;

· state the reason why the thing was

seized or the sample was taken; and

· include anything else that must be

on the approved form.

If authorised officer cannot give a

receipt to a person, the authorised officer

must leave the receipt in a conspicuous

position and in a reasonably secure way

(e.g. leave in letterbox) or send the

receipt to the occupier of the premises.

**Appendix 2** is a sample receipt for a

seized thing or sample taken.

Section 178:

Authorised officer must give the person

a copy of the document seized within

21 days of seizure and the authorised

officer must certify it as being a correct

copy.

Section 179(1):

**Notes**

Does not apply to

seizure pursuant

to search warrants -

only seizure in

accordance with

s. 175.

Does not apply to

search warrants.

Does not apply to

**thing has been**

**seized, but reason**

**for its seizure no**

**longer exists**

Authorised Officer must take reasonable search warrants.

steps to return document or thing to

person it was seized from.

**Document or**

**thing has been**

**seized and has**

**not been returned**

**within 3 months**

**of seizure**

**because it is**

**still needed**

Section 179(2):

Authorised officer must take reasonable

steps to return seized document or thing

within 3 months of seizure unless:

· legal proceedings related to the

purpose for which the document

or thing was seized have been

commenced, but have not been

completed yet; or

· the Magistrates’ Court makes an order

under s. 180 extending the period for

which the document or thing can be

seized.

Does not apply to

search warrants.

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**Situation**

**Thing (including**

**a document) has**

**been seized, but:**

**· Authorised officer**

**(or council)**

**cannot find its**

**owner despite**

**reasonable**

**enquiries; or**

**· thing cannot be**

**returned to**

**owner despite**

**reasonable**

**enquiries;**

**· it is necessary to**

**retain the thing**

**to prevent a risk**

**to public health;**

**· it is necessary**

**to keep the thing**

**to prevent the**

**commission of an**

**offence against**

**the PHWA or**

**Public Health**

**and Wellbeing**

**Regulations 2009.**

**Power of Authorised Officer**

**and Procedural Requirements**

Section 180:

An Authorised Officer can apply to the

Magistrates’ Court within 3 months after

seizing a document or thing, or if an

extension has already been granted,

prior to that extension expiring, to

extend the time in which a document

or thing can be seized for a period of up

to 3 more months. The total period of

time for retaining a seized thing however

cannot exceed 12 months.

The Magistrates’ Court can order that

the seizure of a document or thing

can continue if it is necessary for

investigating a contravention of the

PHWA or Public Health or Wellbeing

Regulations 2009 or to enable the

seized thing to be used in evidence

in a proceeding.

Section 181:

The thing is forfeited to the council.

If it is necessary to keep the thing to

prevent a risk to public health, the

council must write to the owner of the

thing, telling them that they can seek

a review of the decision to forfeit the

thing, unless the owner cannot be found

despite making reasonable enquiries.

Section 182:

If a thing is forfeited in accordance with

s. 181, the council can cause the thing

to be destroyed or disposed of.

See notes below

on procedure for making application

to Magistrates’ Court.

**Notes**

See notes below

on procedure for

making application

to Magistrates’ Court.

Does not apply to

search warrants.

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**Other**

**There is a risk**

**to public health**

**and/or an**

See **Part E** of this Manual for a

discussion on when and how these

powers may be exercised.

**emergency**

**situation and**

**the Chief Health**

**Officer has given**

**an authorisation**

**to an authorised**

**officer to exercise**

**a public health**

**risk power and/or**

**an emergency**

**power.**

**Owner or occupier** See table in Chapter 9 of this Manual for

**not present-**

**section 172**

**Notice of Entry**

**requirement.**

discussion of requirements for Notice of

Entry and when it needs to be given.

**10.4**

**If a thing is seized can it be held indefinitely?**

No.

Sections 179(1) and (2) of the PHWA provides that if an authorised officer seizes a

document or other thing, the authorised officer must take reasonable steps to return

the document or thing to the person within 3 months unless proceedings have

commenced or a magistrate makes an order to extend that time.

A formal application to the Magistrates’ Court needs to be made in relation to a

request for the extension of time for the seizure of a document or thing pursuant to

s. 180. Such an application needs to be made within 3 months, or if already extended,

before the expiry of the extension. An extension can only be for 3 months and the total

period of all extensions cannot exceed 12 months.

At least 7 days prior to when an extension application is heard by the Court, notice of

the application needs to be sent to the owner of the document or thing, as described

in the application (see s. 180(3)).

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11 Search Warrants

(s. 170 of the PHWA)

**Summary**

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**11.1**

Outlines how to obtain and execute a search warrant.

**Overview**

This Chapter discusses the requirements for obtaining and executing a search

warrant.

The ability in the PHWA for an authorised officer to obtain a search warrant from

the Magistrates’ Court is a power of entry (s. 169(3)(b)) onto premises.

A search warrant may be a useful power of entry that is available to an authorised

officer, particularly in situations where the consent of an occupier cannot be obtained,

or where the purpose of exercising some other power of entry would effectively be

frustrated by exercising that power - e.g. putting someone on notice for a suspected

offence which may pose issues for obtaining necessary evidence to support the

commission of that offence.

A search warrant should only be sought where the execution of the warrant is

proportionate to the reason for why entry onto the premises is needed. Search

warrants should therefore not necessarily be used as a first resort to enter onto

premises. An authorised officer should always consider whether any of the other

powers of entry, discussed in Chapter 8 of this Manual are more appropriate.

**11.2**

**Obtaining a search warrant**

**11.2.1 What provision of the PHWA gives power to obtain a search warrant?**

Section 170 of the PHWA relates to the issuing of search warrants.

Section 170(1) sets out when a search warrant may be obtained. This section states:

A*n authorised officer may apply to a magistrate for the issue of a search*

*warrant in relation to any premises if the authorised officer believes on*

*reasonable grounds that there is, or may be within the next 72 hours,*

*a particular thing (including a document) at the premises that may afford*

*evidence of the commission of an offence against this Act or the regulations.*

**11.2.2 How do I obtain a search warrant?**

To obtain a search warrant, an authorised officer must make an application to the

Magistrates’ Court.

An application for a search warrant is made in accordance with the requirements of

Part 4, Division 3, Subdivision 5 of the *Magistrates’ Court Act 1989* and Order 3 of

the *Magistrates’ Court Criminal Procedure Rules 2009*.

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**11.2.3 What are the requirements for applying for a search warrant?**

The requirements for applying for and obtaining a search warrant are as follows:

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The authorised officer needs to believe on reasonable grounds that there is,

or may be within the next 72 hours, a particular thing (including a document)

at the premises that relates to the commission of an offence against the

PHWA or the Public Health and Wellbeing Regulations 2009; and

The application for the search warrant needs to be supported by evidence

on oath (whether in the form of an affidavit or given in person before the

Magistrates’ Court) that satisfies the magistrate issuing the search warrant

that there are in fact reasonable grounds for suspecting that there is, or may

be within the next 72 hours, a particular thing (including a document) at the

premises that may afford evidence of the commission of an offence against

the PHWA or the Public Health and Wellbeing Regulations 2009.

The general form of a search warrant is in accordance with Form 20 of the

*Magistrates’ Court Criminal Procedure Rules 2009*.

**11.2.4 What do I need to put in an application for a search warrant?**

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An application for a search warrant needs to:

· State and describe the offence(s) suspected to have been committed,

not in as much detail as a charge for a prosecution, but in enough detail

to list the relevant section of the PHWA or the Public Health and Wellbeing

Regulations 2009 and to describe what the offence is.

· Identify the premises that are to be searched by describing where the

premises are located (i.e. street address) and providing other information

as necessary to properly define the premises - e.g. where the premises

is only one building at a street address, define that building.

· Provide a description of the thing or class of things for which the search

is to be authorised. It need not describe exactly the thing that is sought in

precise detail as it may be impossible to know exactly what the thing is

until actually getting on the premises. The thing or class of things need

to relate to the offence(s) suspected of being committed. An example

might be for a suspected breach of the requirement to register prescribed

accommodation that a search is requested for all documents and records

identifying details including names and dates of any or all persons having

been accommodated or who are accommodated on the premises.

· Detail any conditions to which the warrant is subject. These are likely to be

imposed by the Court when granting the warrant.

· Provide information about whether entry is authorised to be made at any

time or during specified hours. The time for which entry onto the premises is

requested will often relate to the type of premises. It may not be appropriate

in some circumstances for a search warrant to be executed during certain

hours - e.g. in the very early hours of the morning.

· Specify a day, not later than 7 days after the warrant is issued on which the

warrant is to expire.

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· State who is to be authorised to execute the warrant (i.e. name the relevant

officer or officers).

An application for a search warrant does not need to name the person suspected of

committing the offence(s) to which it relates.

**11.3**

**Executing a search warrant**

**11.3.1 What does a search warrant allow me to do?**

A search warrant enables an authorised officer and any assistants that the authorised

officer considers necessary to:15

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break (if necessary) and enter the premises or part of the premises named

or described in the warrant;

to search for and seize the thing(s) named or described in the warrant; and

if necessary, to bring the thing or things seized before the Court so that the

matter may be dealt with before the law.

**11.3.2 Can I break and enter a premises with a search warrant?**

If it is necessary to break and enter the premises named in the warrant to search for

the thing, this enables the use of reasonable force to get past any barrier to that entry.

**11.3.3 Can I arrest someone?**

An authorised officer executing a search warrant is not authorised to arrest a person,

notwithstanding that s. 78 of the *Magistrates’ Court Act 1989* provides a power of

arrest in relation to executing a search warrant.

**11.3.4 What procedures do I have to follow before entering the premises**

**with a search warrant?**

Before executing a search warrant pursuant to s. 173 of the PHWA an authorised

officer and any assistant of the authorised officer must:

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unless

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announce that they are authorised by the search warrant under the PHWA

to enter the premises; and

give any person at the premises a reasonable opportunity to allow entry

immediate entry to the premises is required to ensure the health and safety

of a person, or to ensure that the effective execution of the warrant is not

frustrated.

**11.3.5 What if an occupier is present when I want to enter the premises?**

If an occupier or apparent occupier of the premises is present when a search warrant

is being executed, the authorised officer executing the warrant must:

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*15*

identify themselves by showing their identity card (note also requirements

of s. 166); and

give a person the execution copy of the warrant.

*Section 78 Magistrates Court Act 1989 (Vic)*

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**11.3.6 What if there is no-one on the premises when I enter with**

**a search warrant?**

The requirement in s. 172 of the PHWA for a notice of entry to be left on premises if

the owner or occupier was not present at the time applies where the power of entry

was a search warrant.

In this instance, although not specifically required, it would be good practice for the

execution copy of the search warrant to be attached to the notice of entry that is left.

**11.3.7 Can I seize things on premises I have entered with a search warrant?**

The ability of things seized by a warrant to be brought before the Magistrates’ Court so

that the matter can be dealt with before the law means that the things seized can be

used as evidence in a prosecution proceeding. It is not necessary however for the

matter to be prosecuted. Other enforcement mechanisms may be available.

The requirements in Division 4 of Part 9 of the PHWA relating to the seizure of things

(e.g. requirement in s. 177 for receipt to be given for seized thing) only apply to things

seized pursuant to s. 175 of the PHWA. For further explanation see **Chapter 10** of this

Manual.

The *Magistrates’ Court Act 1989* is silent as to when and how things seized pursuant

to a search warrant should or ought to be returned, however s. 78(6) does provide that

the Magistrates’ Court “*may direct that any article, thing or material seized under a*

*search warrant be returned to its owner, subject to any condition that the Court thinks*

*fit, if in the opinion of the Court it can be returned consistently with the interests of*

*justice*”.

It would be good practice for councils and authorised officers to return things seized

pursuant to a search warrant when they are no longer needed and at the earliest

convenience.

**11.3.8 What other powers do I have whilst on the premises?**

An authorised officer who has entered premises pursuant to a search warrant is

entitled to exercise any of the after entry powers contained in Division 4 of Part 9 of

the PHWA in addition to the powers granted by the search warrant. These powers

are discussed in more detail in **Chapter 10** of this Manual. This means for example

that an authorised officer is entitled pursuant to s. 175 to seize other items discovered

on the premises which are in addition to those authorised to be seized by the search

warrant.

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12 General Powers, Offences and Review

**Summary**

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**12.1**

Outlines the general powers and procedures that authorised officers must

comply with.

Outlines the ramifications of authorised officers failing to comply with proper

procedures or acting outside the scope of their powers.

**Overview**

In addition to the entry powers, the PHWA grants authorised officers a number of

general powers. Further, there are general procedures that authorised officers must

follow which are discussed in this Chapter.

The mandatory requirement for authorised officers to produce their identity card

is a new requirement of the PHWA.

It is recommended that all authorised officers clearly display their identity cards

on their clothing when undertaking their duties.

**12.2**

**Identity cards**

All authorised officers must be issued with an identity card.

The requirements for the content of identity cards are contained in s. 224(3) of the

*Local Government Act 1989*.

An identity card must:

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contain a photograph of the authorised officer; and

contain the signature of the authorised officer; and

be signed by the member of council staff who has the authority pursuant to

delegation to appoint the authorised officer (typically, this would be the Chief

Executive Officer).

Pursuant to s. 166 of the PHWA, an authorised officer must:

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**12.3**

physically produce their identity card for inspection before exercising any

power, unless it is not practicable to do so;

produce their identity card for inspection if asked to do so by the occupier

of any premises when exercising a power; and

immediately cease exercising a power upon being asked to show their identity

card if asked by an occupier of premises and the identity card cannot be

shown (e.g. either the identity card is not in the authorised officer’s possession

at the time of exercising the power or the authorised officer refuses to show it).

**Power to request information**

Pursuant to s. 167(1) of the PHWA, an authorised officer can request a person to

provide information that is necessary to investigate whether there is a risk to public

health or to manage or control a risk to public health. When making a request for

information under this power, an authorised officer must inform the person that he

or she can so refuse to provide that information.

This general power to request information is in addition to the powers under sections

175 and 176 of the PHWA (see **Chapter 10** of this Manual).

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**12.4**

**Entry onto residential premises- procedural limitation**

When an authorised officer has entered onto residential premises pursuant to any

power of entry that does not require a warrant16, s. 187 of the PHWA provides that the

authorised officer can only enter that part of the residential premises to which entry

is necessary to give effect to the power of entry. For example, when investigating a

nuisance on residential premises that is alleged to originate from a large shed in the

backyard of a property, it is possible that entry into the dwelling can be challenged

because it was unnecessary to enter the dwelling when nuisance is emanating solely

from the shed.

**12.5**

**Offences**

Division 5 of Part 9 of the PHWA contains the following offences relating to authorised

officers:

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**12.6**

Section 183 = A person must not without reasonable excuse hinder or obstruct

an authorised officer who is exercising a power under the PHWA or the Public

Health and Wellbeing Regulations 2009 - penalty 60 penalty units.

Section 184 = A person who is not an authorised officer must not, in any way,

hold themselves out to be (impersonate) an authorised officer - penalty 60

penalty units.

**Complaints and review**

The process whereby a person can complain about the exercise of a power of an

authorised officer and/or seek a review of a decision made (whether directly by the

authorised officer or as a direct result from the actions of the authorised officer) is

discussed in more detail in **Chapter 20** of this Manual. In summary:

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A person may complain about the exercise of power by an authorised officer

to:

· the council, who must investigate (s. 185); and

· the ombudsman, who can enquire and investigate (s. 186).

The issuing of improvement, prohibition and infringement notices are capable

of being reviewed in the Magistrates’ Court (see **Part D** of this Manual).

See **Chapter 8** of this Manual for a discussion of the powers of entry

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Part D: Enforcement Mechanisms and Procedures

Where there is a contravention of the PHWA or the Public Health and Wellbeing

Regulations 2009 it is necessary for councils to consider the range of enforcement

mechanisms that are available and to determine which mechanism is most suitable

in the circumstances.

Part D is divided into five Chapters (13 – 17).

**Summary of Chapters**

Chapter 13

Chapter 14

Chapter 15

Chapter 16

Chapter 17

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Explains when and how an improvement notice or a prohibition

notice can be issued in respect of a breach or suspected breach

of the PHWA or the Public Health and Wellbeing Regulations

2009.

Explains when and how an infringement notice is capable of

being issued in respect of an offence under the PHWA or the

Public Health and Wellbeing Regulations 2009.

Outlines the offences in the PHWA and the Public Health and

Wellbeing Regulations 2009 which councils are capable of

prosecuting in respect of a breach of in the Magistrates’ Court.

Outlines the procedure for prosecuting in the Magistrates’ Court.

Outlines the ramifications for having deficiencies in evidence,

particularly evidence that has been illegally or improperly

obtained.

Outlines proper procedures and methods for gathering evidence

to ensure the quality of that evidence.

Explains how notices (including improvement, prohibition and

infringement), orders or other documents should be properly

issued or served in accordance with the PHWA.

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13 Improvement Notices and Prohibition Notices

(s. 194 of the PHWA)

**Summary**

Explains when and how an improvement notice or a prohibition notice can be issued

in respect of a breach or suspected breach of the PHWA or the Public Health and

Wellbeing Regulations 2009.

**13.1**

**Overview**

The ability of councils to issue an improvement notice or a prohibition notice under

s. 194 of the PHWA is a new function of councils.

These notices provide an alternate mechanism by which, where practicable, the

PHWA or the Public Health and Wellbeing Regulations 2009 can be enforced without

the need for commencing (often costly) prosecution proceedings in the Magistrates’

Court.

Improvement notices and prohibition notices may be issued in relation to any

breach or likely breach of a provision of the PHWA or Public Health and Wellbeing

Regulations 2009 administered by the council (including but not exclusive to

nuisances).

**13.2**

**When can an improvement notice or prohibition notice be issued?**

In accordance with s. 194 of the PHWA a council can issue an improvement notice

or a prohibition notice if the council believes that:

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a person has contravened a provision of the PHWA or Public Health and

Wellbeing Regulations 2009 administered by the council or the Secretary17

in circumstances that mean that it is likely that the contravention is continuing

or will re-occur; or

merely that a person is likely to contravene a provision of the PHWA or

Public Health and Wellbeing Regulations 2009 administered by the Secretary

or council.

The decision to issue an improvement notice or prohibition notice must be supported

by adequate evidence, whether from the investigations of an authorised officer or

by other evidence that is capable of upholding the council’s belief that there is a

contravention or likely contravention. A lack of sufficient evidence or deficiencies in

the evidence could lead to the decision to issue a notice being overturned on review

of that decision.

**13.3**

**What is the difference between an improvement notice and**

**a prohibition notice?**

Improvement notices and prohibition notices are designed to be remedial in nature

rather than punitive.

An improvement notice can require a person to remedy a contravention or likely

contravention, or remedy the matters causing the contravention or likely contravention

within period specified by council.

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Although it is likely in practice that the Secretary should delegate various powers to council for this

to be effective.

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A prohibition notice can prohibit the carrying on of an activity altogether or the carrying

on of an activity in a specified way until a point in time when the council has certified

in writing that the contravention has ceased or that the likelihood of the contravention

occurring has passed.

A council may therefore decide to issue an improvement notice or prohibition notice

in situations where the council wants to be proactive in addressing the cause or

particular elements of the contravention or likely contravention rather than merely

seeking to punish an offender though other means (e.g. prosecution) which is not

just a remedy, but also a deterrent.

**13.4**

**Content of an improvement notice or prohibition notice - section 194(3)**

An improvement notice or a prohibition notice must:

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state the grounds on which it is issued;

specify the provision of the PHWA or Public Health and Wellbeing Regulations

2009 that the council believes has been or is likely to be contravened;

specify the actions or measures that the person is required to take and the

timeframe within which the actions or measures are to be completed;

set out the penalty for prosecution for non-compliance:

· 120 penalty units (a natural person); or

· 600 penalty units (body corporate); and

state that the issue of the improvement notice or the prohibition notice does not

affect any legal proceedings in relation to an offence under the PHWA or the

Public Health and Wellbeing Regulations 2009 which is related to the purpose

for which the notice was issued.

**Appendix 3** contains example templates of an improvement notice and a prohibition

notice. These are provided for illustration only. Councils are required to adopt the form

of notice that they use which may be based upon these examples/templates.

**13.5**

**What is the procedure for issuing an improvement and prohibition notice?**

Section 194 of the PHWA states that a council may “issue” an improvement notice or

a prohibition notice. Therefore, a staff member (e.g. an authorised officer) only has the

power to issue these notices where the council has delegated the power to that staff

officer (note s. 98 of the *Local Government Act 1989*).

Councils (and those staff members delegated the power to issue) should ensure that

improvement notices and prohibition notices are issued in a manner that properly

brings the notice to the attention of the person to whom it is intended.

The procedure for issuing is contained in s. 221 of the PHWA and includes:

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handing it directly to the person;

sending it via post or electronic communication; or

leaving it at the premises with a person who appears to be at least 16 years old.

This procedure is discussed in more detail in **Chapter 17** of this Manual.

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**13.6**

**What if a person does not comply with an improvement**

**or prohibition notice?**

Councils generally have three options when faced with non-compliance with an

improvement notice or a prohibition notice (but note special provisions for nuisances,

discussed in 13.7 below). Councils can:

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seek an injunction in the Magistrates’ Court (s. 196);

prosecute in the Magistrates’ Court for the non-compliance, which is an offence

(s. 194(4));18 or

where available, prosecute for an offence related to the subject matter for

which the notice was issued (s. 195).

An injunction, where sought, can:

(a)

(b)

compel a person to comply with an improvement notice or prohibition notice; or

restrain a person from contravening an improvement notice or a prohibition notice.

An application for an injunction should be the preferred option rather than prosecuting

for non-compliance or an offence because the process of applying for an injunction is

simpler and can result in actions leading to a desired outcome. Prosecuting is punitive

in nature (but is a significant deterrent to a breach) and may be an option that councils

consider for serious breaches.

**13.7**

**Special provisions for nuisances - section 197**

Where an improvement notice or prohibition notice is issued in respect of a nuisance,

there is a special procedure in s. 197 of the PHWA enabling a council to make a

complaint in the Magistrates’ Court where:

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a person has not complied with the improvement notice; or

although abated, in the opinion of the council, the nuisance to which the notice

relates is likely to recur.

In this instance, if the Magistrates’ Court is satisfied that the nuisance exists or is likely

to recur, the Magistrates’ Court must order that the person either:

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comply with the improvement notice or prohibition notice; or

carry out works to prevent the recurrence of the nuisance.

If the Magistrates’ Court makes one of these orders, the council is entitled to:

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enter onto the land to abate the nuisance and do whatever is necessary

to execute the order of the Court; and

recover the costs of doing so.

It is an offence for a person to fail to comply with an order made by the Magistrates’

Court under this section – penalty 120 penalty units for a natural person and 600

penalty units for a body corporate.

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Maximum penalty is 120 penalty units for a natural person and 600 penalty units for a body corporate.

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**13.8**

**Can a person issued with an improvement or prohibition notice seek**

**review of that decision?**

Yes.

A person who has been issued an improvement notice or prohibition notice can appeal

to the Magistrates’ Court within 21 days after the date of issue.

The Magistrates’ Court must reconsider the decision to issue the notice and will

consider any relevant evidence that relates to the decision to issue the notice,

including evidence from the investigative actions of authorised officers (s. 208).

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14 Infringement Notices

**Summary**

> Explains when and how an infringement notice is capable of being issued in

respect of an offence under the PHWA or the Public Health and Wellbeing

Regulations 2009.

**14.1**

**Overview**

The ability for a council to serve an infringement notice in respect of certain offences

in the PHWA and the Public Health and Wellbeing Regulations 2009 is a new power

given to councils under s. 209(2) of the PHWA.

The offences for which an infringement notice can be served are prescribed in

Schedule 8 of the Public Health and Wellbeing Regulations 2009.

For those offences where an infringement notice can be served, this is another

alternative to prosecuting for that offence. Note, however, that an infringement notice

cannot be in addition to prosecuting for an offence unless the infringement notice is

first withdrawn.

An infringement notice is also capable of being referred to the Magistrates’ Court

for review where the facts surrounding the relevant offence can be tried.

The decision to serve an infringement notice must be based on sufficient evidence

whether as a result of the investigations of an authorised officer or in accordance

with some other sound evidence.

Note that “councils” are entitled to serve infringement notices. Staff members are only

entitled to exercise the power to serve an infringement notice where this power has

been delegated to them by their council.

Infringement notices served under the PHWA are subject to the requirements of the

*Infringements Act 2006* (Vic) (“**Infringements Act**”).19

**14.2**

**When can an infringement notice be used?**

Section 209(2) of the PHWA allows a council to *serve* an infringement notice on any

person that the council has reason to believe has committed an offence against the

PHWA or Public Health and Wellbeing Regulations 2009.

However, an infringement notice can only be served if the Public Health and Wellbeing

Regulations 2009 provides that it can.

The offences for which an infringement notice may be served by a council, together

with the prescribed penalties, are listed in Schedule 8 of the Public Health and

Wellbeing Regulations 2009.

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See section 209(3) of the PHWA.

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The infringement offences applicable to councils are:

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**14.3**

regulation 17(2) - proprietor of prescribed accommodation permits a room

to be used as a bedroom if it has a floor area of less than 7.5 square metres

(4 penalty units);

regulation 20(1) - proprietor of prescribed accommodation fails to provide

continuous and adequate supply of water to toilet, bathing, kitchen, laundry

and drinking water facilities (4 penalty units);

regulation 25 - proprietor of prescribed accommodation fails to supply one

toilet, bath or shower and wash basin for every 10 persons or fraction of that

number of persons occupying the accommodation (4 penalty units);

regulation 27 - proprietor of prescribed accommodation states or causes to be

stated in advertising, notice or sign that the premises is registered or approved

for any class of accommodation other than that set out in the certificate of

registration (4 penalty units);

section 67 - failure to register prescribed accommodation with municipal

council (4 penalty units for natural person, 10 penalty units for body corporate);

and

section 69 - failure to register business premises that must be registered

(12 penalty units for natural person; 10 penalty units for body corporate).

**Why would councils use this procedure?**

Councils may decide to serve an infringement notice rather than prosecuting for an

offence as it is a quick and easy enforcement mechanism.

Infringement notices are punitive in nature and are designed to act as a deterrent.

If a council wants to be proactive in remedying a contravention, an improvement

notice or a prohibition notice may be more suitable.

**14.4**

**Infringements Act requirements**

**14.4.1 Is there a particular notice that should be used?**

The form of infringement notice used by a council must comply with s. 13 of the

Infringements Act and regulation 8 of the Infringements (Reporting and Prescribed

Details and Forms) Regulations 2006 (Vic).

An example/template infringement notice is included in **Appendix 4**. This is provided

for illustration only.

Councils are entitled to set their own form of infringement notice, so long as it

complies with the content requirements.

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**14.4.2 What the content requirements for infringement notices?**

The requirements are:

**Infringement Notice Requirements**

**Section 13**

***Infringements Act 2006***

An infringement notice must –

(a) be in writing and contain the

prescribed details;

(b) state that –

(i) the person is entitled to elect

to have the matter of the

infringement offence heard and

determined in the Magistrates’

Court; or

(ii) in the case of an infringement

notice served on a child, is

entitled to have the matter of

the infringement offence dealt

with by the Children's Court in

accordance with the *Children,*

*Youth and Families Act 2005*.

**Regulation 8**

**Infringements (Reporting and**

**Prescribed Deals and Forms**

**Regulations 2006)**

1) For the purposes of s. 13 of the Act,

the prescribed details which an

infringement notice must

contain are –

(a) that it is an infringement notice;

(b) the date of the infringement

notice;

(c) the name and address (if known)

of the person served with the

infringement notice or, if the

infringement notice is in respect

of an infringement offence that is

a parking infringement, the words

"the Owner";

(d) the name of the enforcement

agency;

(e) the enforcement agency

identifying reference of the

infringement notice;

(f) subject to paragraph (fa), either

the name of the issuing officer

or the enforcement agency

identifying reference of the

issuing officer;

(fa) in the case of an infringement

notice issued or served on

behalf of the Traffic Camera

Office or the Toll Enforcement

Office, the title or name of the

issuing officer;

(g) the date and approximate time

and place of the infringement

offence alleged to have been

committed;

(h) the Act or other instrument that

creates the infringement offence

and a brief description of the

infringement offence alleged to

have been committed;

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**Infringement Notice Requirements**

**Section 13**

***Infringements Act 2006***

86

**Regulation 8**

***I*nfringements (Reporting and**

**Prescribed Deals and Forms**

**Regulations 2006)**

(i) the infringement penalty;

(j) the manner in which the

infringement penalty may be paid;

(k) that the infringement penalty must

be paid by a specified due date,

being not less than 28 days from

the date of service of the

infringement notice;

(l) that failure to pay the infringement

penalty by the specified due date

may result in further enforcement

action being taken and the

incurring of further costs;

(m) that the person served with the

infringement notice, or a person

acting on that person's behalf,

may apply to have the decision

to serve the infringement notice

internally reviewed by the

enforcement agency under the

Act unless the infringement notice

is in respect of an infringement

offence to which any of the

following provisions apply –

(i) ss 89A to 89D of the Road

*Safety Act 1986*;

(ii) s. 215C of the *Transport Act*

*1983*;

(iii) ss 61A and 61BA of the

*Marine Act 1988*;

(n) that the person served with

the infringement notice may be

eligible for a payment plan under

s. 46 of the Act, unless that

person is a body corporate;

(o) that further information and

information relating to eligibility

for payment plans and applying

for internal review can be

obtained from –

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**Infringement Notice Requirements**

**Section 13**

***Infringements Act 2006***

**Regulation 8**

**Infringements (Reporting and**

**Prescribed Deals and Forms**

**Regulations 2006)**

(i) a nominated telephone number;

(ii) a designated address;

(iii) if available, the enforcement

agency's website address;

(p) any further details specifically

required to be included in relation

to an infringement offence under

any Act or other instrument which

creates the infringement offence.

*Note: Section 13(b) of the Act requires*

*that an infringement notice state that the*

*person is entitled to elect to have the*

*matter of the infringement offence heard*

*and determined in the Court and if that*

*person is a child, in the Children's Court*.

(2) If an infringement notice is in respect

of an infringement offence that is

a parking infringement, in addition

to the details required under sub-

regulation (1), the infringement notice

must contain the registered number

or other identification of the vehicle

involved in the parking infringement.

**14.4.3 How is an infringement notice served?**

An infringement notice must be served in accordance with s. 12 of the Infringements

Act and the requirements in s. 221 of the PHWA also apply.

Generally, the notice must be delivered personally to the person or be sent to the

person by post at their last known place of residence or business.

The requirements for effective service are discussed in more detail in **Chapter 17**

of this Manual.

**14.4.4 Can an infringement notice be withdrawn?**

A council can withdraw an infringement notice pursuant to s. 18 of the Infringements

Act by serving a withdrawal notice.20

An infringement notice can be withdrawn if:

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the council determines that an official warning should have been issued (see 14.5);

proceedings are to be commenced to prosecute for the offence (subject to

exceptions);

or the matter should be abandoned.

*See section 19 of the Infringements Act 2006 for the form of a withdrawal notice*

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**Withdrawal of Infringement Notices**

**Section 19**

***Infringements Act 2006***

A withdrawal notice must –

(a) be in writing and contain the

prescribed details; and

(b) state that the enforcement

agency intends to proceed in

respect of the infringement

offence by –

(i) continuing proceedings

and issuing a summons; or

(ii) issuing an official warning;

or

(iv) taking no further action; or

(v) taking any other specified

action permitted under

this Act or the Act or

other instrument which

establishes the

infringement offence.

**Regulation 8**

**Infringements (Reporting and**

**Prescribed Deals and Forms**

**Regulations 2006)**

For the purposes of s. 19(a) of the Act,

the prescribed details which a withdrawal

notice must contain are –

(a) that it is a withdrawal notice;

(b) the date of the withdrawal

notice;

(c) the name and address (if

known) of the person served

with the infringement notice;

(d) the name of the enforcement

agency;

(e) the enforcement agency

identifying reference of the

infringement notice;

(f) the date of the infringement

notice;

(g) the date and approximate time

and place of the infringement

offence alleged to have been

committed;

(h) the Act or other instrument

that creates the infringement

offence and a brief

description of the

infringement offence alleged

to have been committed;

(i) that further information may

be obtained from –

(i) a nominated telephone

number;

(ii) a designated address;

(iii) if available, the

enforcement agency's

website address;

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**Withdrawal of Infringement Notices**

**Section 19**

***Infringements Act 2006***

**Regulation 8**

**Infringements (Reporting and**

**Prescribed Deals and Forms**

**Regulations 2006)**

(j) that if the infringement penalty

and any prescribed costs have

been paid, the infringement

penalty and prescribed costs

will be refunded, unless the

person has an ongoing

payment plan in which case

Part 3 of the Infringements

Act 2006 applies.

*Note: Section 19(b) of the Act requires*

*that a withdrawal notice must state*

*how an enforcement agency intends to*

*proceed in respect of the infringement*

*offence alleged to have been committed.*

**14.4.5 What must a person do after being served with an infringement notice?**

A person served with an infringement notice has the options of:

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paying the infringement penalty prior to the due date, thus ending the matter;

electing prior to the due date of the infringement penalty to have the matter

determined in the Magistrates’ Court (Children’s Court for minors);21or

applying to the council for an internal review of the decision to serve the

infringement notice prior to the due date of the infringement penalty.22

Where at any stage the matter is referred to the Magistrates’ Court for determination,

the court will hear all evidence on the matter in a similar manner as if the matter were

prosecuted and will decide whether the offence stands. The Magistrates’ Court may

impose a higher penalty than the infringement penalty.

**Chapter 21** of this Manual discusses the review options available to a person who has

been served an infringement notice in more detail.

**14.5**

**Official warning**

As an alternative, s. 8 of the Infringements Act gives a council officer that is capable of

issuing an infringement notice the option of serving an ‘official warning’ instead of the

infringement notice if it is appropriate to do so.

An official warning must be in writing and it must contain the required particulars set

out in regulation 6 of the Infringements (Reporting and Prescribed Details and Forms)

Regulations 2006.

*21*

*22*

*Section 16 of the Infringements Act 2006.*

*Section 22 of the Infringements Act 2006.*

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**Official Warnings**

**Section 19**

***Infringements Act 2006***

(1) An issuing officer may serve a

person with an official warning rather

**Regulation 8**

**Infringements (Reporting and**

**Prescribed Deals and Forms**

**Regulations 2006)**

For the purposes of section 8(2) of the

Act, the prescribed details which an

than serve an infringement notice if – official warning must contain are –

(a) the issuing officer believes

on reasonable grounds that

a person has committed an

infringement offence; and

(b) the issuing officer is of the

opinion that in all the

circumstances it is appropriate

to serve an official warning.

(2) An official warning must be in writing

and contain the prescribed details.

(3) In making a decision under sub-

(a) that it is an official warning;

(b) the date of the official warning;

(c) the name and address (if known)

of the person served with the

official warning;

(d) the name of the enforcement

agency;

(e) the enforcement agency

identifying reference of the

official warning;

section (1), an issuing officer, other

(f)

either the name of the issuing

than a police member, must –

(a) observe any policy of the

relevant enforcement agency

in relation to the application

of official warnings in respect of

any infringement offence; and

(b) have regard to enforcement

agency guidelines made by the

relevant enforcement agency

in relation to the application

of official warnings in respect

of any infringement offence.

officer or the enforcement

agency identifying reference of

the issuing officer;

(g) the date and approximate time

and place of the infringement

offence alleged to have been

committed;

(h) the Act or other instrument that

creates the infringement offence

and a brief description of the

infringement offence alleged to

have been committed;

(4) Nothing in this section limits an

issuing officer's power to exercise

his or her discretion as to whether

to serve an infringement notice.

(i)

that further information may be

obtained from –

(i) a nominated telephone

number;

(ii) a designated address;

(iii) if available, the enforcement

agency's website.

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Some councils may have formed guidelines and policies about when an officer is

entitled to issue an official warning instead of an infringement notice.23 Where this

is applicable, a relevant officer must comply with these guidelines.

An official warning must be withdrawn if a council decides to prosecute in respect of

an offence or to issue an infringement notice. A withdrawal of an official warning must

be given in writing and it must contain the required particulars set out in regulation 7

of the Infringements (Reporting and Prescribed Details and Forms) Regulations 2006.

A decision to issue an official warning as opposed to an infringement notice would

usually only be made where the contravention is relatively minor and the warning

will be sufficient to act as a deterrent without the need for the punitive effect of an

infringement notice.

**14.6**

**Is an infringement offence a lodgeable infringement offence?**

Infringement offences in the PHWA and the Public Health and Wellbeing

Regulations 2009 are not “lodgeable infringement offences” within the meaning

of the Infringements Act 24 (formerly known as the PERIN System).

23

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Regulation 9 of the *Infringements (Reporting and Prescribed Details and Forms) Regulations 2006*

allows an ‘enforcement agency’ to set guidelines and policies on the use of official warnings and

infringement notices.

See schedules 3 and 4 of the *Infringements (General) Regulations 2006*.

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15 Prosecution

**Summary**

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**15.1**

Outlines the offences in the PHWA and the Public Health and Wellbeing

Regulations 2009 which councils are capable of prosecuting in respect of

a breach of in the Magistrates’ Court.

Outlines the procedure for prosecuting in the Magistrates’ Court.

**Overview**

This Chapter essentially sets out when councils can bring proceedings in a court for

offences against the PHWA and its regulations.

Prosecution for these offences takes place in the Magistrates’ Court.

Prosecution is the most punitive mechanism of enforcement available in the PHWA.

Therefore, other methods of enforcement may be sought to be used as a first step.

**15.2**

**What are the alternatives to prosecution?**

As an alternative to prosecution for an offence:

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the Public Health and Wellbeing Regulations 2009 prescribes the ability of a

council to issue and serve an infringement notice in respect of a few select

offences, discussed in **Chapter 14** of this Manual; or

an improvement notice or prohibition notice could be issued, discussed in

**Chapter 13** of this Manual.

Given these alternative enforcement mechanisms are readily and easily available,

councils may consider only prosecuting in respect of serious or recurrent offences

because of the time and expense involved.

*Note that pursuant to s. 195 of the PHWA, the issue of an improvement notice or*

*a prohibition notice does not affect the ability of a council to commence or continue*

*proceedings in the Magistrates’ Court for an offence against the PHWA or the Public*

*Health and Wellbeing Regulations 2009 in respect of the same matter for which the*

*notice was issued. The same however does not apply in respect of infringement*

*notices. If an infringement notice is issued, a council cannot then prosecute in respect*

*of the same situation that gave rise to the infringement notice being issued, unless the*

*infringement notice is first withdrawn.*

**15.3**

**What can councils prosecute for?**

Pursuant to s. 219 of the PHWA, a council or an authorised officer of a council is

entitled to bring proceedings against a person or corporation:

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that has committed an offence against Part 6, 9 or 10 of the PHWA or any

regulations made under these Parts of the PHWA relevant to councils (note

this does not include aquatic facilities); and

an offence relating to an improvement notice or a prohibition notice issued

by the council.

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The tables below list and summarise all the offences for which a council is entitled

to commence prosecution proceedings for a breach of the PHWA or Public Health

and Wellbeing Regulations 2009 together with information about what the maximum

penalty is.

The tables also identify the offences in respect of which an infringement notice can

be issued as an alternative to prosecution.25

**Offences in the PHWA relevant to Councils**

**Section**

**of PHWA**

**Summary of Offence**

**Maximum Penalty**

**(prosecution)**

**Infringement**

**Notice (Yes / No)**

**61**

Offence of causing a

nuisance.

Person: 120 penalty units No

Corporation:

600 penalty units

**67**

Failure to register

prescribed accommodation

that must be registered.

Person: 60 penalty units

Corporation:

300 penalty units

Yes

Person: 4

penalty units

Corporation: 10

penalty units

**69**

Failure to register business Person: 60 penalty units

Yes

premises that must be

registered.

Corporation:

300 penalty units

Person: 60 penalty units

Person: 12

penalty units

Corporation: 10

penalty units

**75**

Failure to comply with

condition of registration

Corporation:

300 penalty units

No

of accommodation or

business premises

25

Reference in these tables to “person” means a natural person, and reference to “Corporation” means

a body corporate (e.g. company or incorporated association).

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**Offences in the PHWA relevant to Councils**

**Section**

**of PHWA**

**176**

**Summary of Offence**

Failure without reasonable

excuse to comply with an

authorised officer’s

direction to:

**Maximum Penalty**

**(prosecution)**

Person: 60 penalty units

Corporation:

300 penalty units

**Infringement**

**Notice (Yes / No)**

No

· produce a document

or part of a document

located on premises;

· operate equipment to

access information from

that equipment

· answer any questions

**183**

Offence of hindering or

60 penalty units

No

obstructing an authorised

officer who is exercising

a power under the Act or

regulations.

**184**

Offence of impersonating

60 penalty units

No

or holding out to be an

authorised officer.

**193**

Offence of refusing or

failing without a reasonable

excuse to comply with a

direction given to a person

or a requirement made of

Person:

120 penalty units

Corporation:

600 penalty units

No

a person by an authorised

officer exercising under

authority a public health

risk power.

**194**

**197**

**203**

Failure to comply with an

improvement notice or a

prohibition notice.

Failure to comply with a

Magistrates’ Court order in

relation to compliance with

an improvement notice or

prohibition notice.

Offence of refusing or

failing without a reasonable

excuse to comply with a

direction given to a person

or a requirement made to

a person by an authorised

officer under authority who

is exercising an emergency

power.

Person: 120 penalty units No

Corporation:

600 penalty units

Person: 120 penalty units No

Corporation:

600 penalty units

Person: 120 penalty units No

Corporation:

600 penalty units

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**Offences in the Public Health and Wellbeing Regulations 2009 relevant to Councils**

**Reg No.**

**Summary of Offence**

**Maximum Penalty**

**Infringement**

**Notice (Yes / No)**

**12**

Failure to comply with

20 penalty units

No

direction in regulation 12(1)

in relation to mosquito

breeding.

**17(1)**

Failure to comply with

20 penalty units

No

requirements for maximum

number of persons in each

bedroom in prescribed

accommodation.

**17(2)**

A room in prescribed

accommodation must not

be used as a bedroom if

20 penalty units

Yes

4 penalty units

it has a floor area of less

than 7.5 square metres.

**18**

Failure to maintain

20 penalty units

No

prescribed accommodation

(a) in good working order;

and (b) in a clean, sanitary

and hygienic condition;

and (c) in a good state of

repair.

**19(1)**

Failure of proprietor of

20 penalty units

No

prescribed accommodation

to ensure that each

bedroom and any toilet or

bathroom is cleaned after

the bedroom is vacated for

re-use by another occupier.

**19(2)**

Failure of proprietor of

20 penalty units

No

prescribed accommodation

to ensure that all bed linen

is changed with clean linen

(a) at least weekly; and (b)

before the accommodation

is vacated for re-use by

another occupier.

**20(1)**

Failure of proprietor of

prescribed accommodation

to provide a continuous

20 penalty units

Yes

4 penalty units

and adequate supply of

water to all toilet, bathing,

kitchen, laundry and

drinking water facilities.

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**Offences in the Public Health and Wellbeing Regulations 2009 relevant to Councils**

**Reg No.**

**Summary of Offence**

**Maximum Penalty**

**Infringement**

**Notice (Yes / No)**

**20(2)**

Failure of proprietor of

20 penalty units

No

prescribed accommodation

to provide a continuous

and adequate supply of hot

water to all bathing, laundry

and kitchen facilities.

**21**

Failure of proprietor of

20 penalty units

No

prescribed accommodation

to ensure that drinking

water supplied is fit for

human consumption if

the drinking water was not

supplied to the proprietor

by a water supplier.

**22**

Failure of proprietor of

20 penalty units

No

prescribed accommodation

to ensure that all sewage

and waste water is

discharged (a) to a

reticulated sewerage

system; or (b) to an

approved septic tank

system.

**23**

Failure of proprietor of

20 penalty units

No

prescribed accommodation

to provide sufficient

vermin-proof receptacles

for collection and storage of

all rubbish; and/or to ensure

that the receptacles are

regularly cleaned

**24**

Failure of proprietor of

20 penalty units

No

prescribed accommodation

to ensure that all refuse

is regularly removed by a

refuse collection service.

**25**

Failure of proprietor of

prescribed accommodation

to provide at least one

20 penalty units

Yes

4 penalty units

toilet, one bath or shower

and one wash basin for

every 10 persons or

fraction of that number

of persons occupying that

accommodation.

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**Offences in the Public Health and Wellbeing Regulations 2009 relevant to Councils**

**Reg No.**

**Summary of Offence**

**Maximum Penalty**

**Infringement**

**Notice (Yes / No)**

**26(1)**

Failure of proprietor of

20 penalty units

No

prescribed accommodation

where not exempted to

keep a register recording

the names and addresses

of persons occupying the

accommodation and the

dates of their arrival or

departure.

**26(3)**

Failure of proprietor of

20 penalty units

No

prescribed accommodation

to retain register for at least

12 months after the last

entry in the register.

**27**

Offence of proprietor of

prescribed accommodation

stating or causing to be

20 penalty units

Yes

4 penalty units

stated in an advertisement,

notice or sign issued or put

up that the premises are

registered or approved for

a class of accommodation

that differs to that set out

in the certificate of

registration.

**28**

Failure of proprietor or

20 penalty units

No

occupier of registered

premises to ensure that

the premises are kept in

a clean, sanitary and

hygienic state.

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**Offences in the Public Health and Wellbeing Regulations 2009 relevant to Councils**

**Reg No.**

**Summary of Offence**

**Maximum Penalty**

**Infringement**

**Notice (Yes / No)**

**29**

Failure of proprietor or

20 penalty units

No

occupier of registered

premises to ensure:

(a) that an article intended

for penetrating skin is

sterile at the time of

use; and

(b) an article which has

penetrated the skin

of a person or is

contaminated with

blood is:

(i) destroyed or

disposed of

immediately in a

manner to prevent

infection of another

person; or

(ii) sterilised in

accordance with

the requirements

set out before it is

used on another

person; and

(c) any article is clean

before it is used on

another person.

**30**

Failure of the proprietor

20 penalty units

No

or occupier of registered

premises to ensure that

each person in the

business who is engaged

in carrying out any

hairdressing, colonic

irrigation, beauty therapy

or similar process or any

tattooing, ear piercing, or

other process involving skin

penetration (a) is in a clean

condition, including their

hands; and (b) has no

exposed cuts, abrasions

or wounds before carrying

out the process.

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**Offences in the Public Health and Wellbeing Regulations 2009 relevant to Councils**

**Reg No.**

**Summary of Offence**

**Maximum Penalty**

**Infringement**

**Notice (Yes / No)**

**31**

Failure of proprietor or

20 penalty units

No

occupier of registered

premises to ensure that

easily accessible hand

washing facilities are

available for use by staff.

**32(1)**

Failure of proprietor or

20 penalty units

No

occupier of registered

premises that provides

tattooing, ear piercing,

body piercing or any other

process involving the

penetration of the skin in

a living human to provide

information to the person

about the transmission of

infectious diseases before

any process is carried out.

**32(2)**

Failure of proprietor or

20 penalty units

No

occupier of registered

premises that provides

tattooing, ear piercing,

body piercing or any other

process involving the

penetration of the skin to

ensure that information

provided to a person

about the transmission

of infectious diseases is

not misleading.

**33**

Failure of proprietor or

20 penalty units

No

occupier of registered

premises that provides

tattooing or body piercing

to ensure that the name

and address of each client

is recorded and stored at

the premises for a period

of 12 months following

the date of the last body

piercing or tattooing

procedure undertaken by

the client at the premises.

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**15.4**

**What is the procedure for prosecuting in the Magistrates’ Court?**

Offences against the PHWA and the Public Health and Wellbeing Regulations 2009

are summary offences which are prosecuted as criminal matters in the Magistrates’

Court.

Below is a short summary of the general procedure for issuing prosecution

proceedings in the Magistrates’ Court. Detailed legal advice and assistance should

be sought when councils seek to prosecute for an offence.

A criminal proceeding is commenced in the Magistrates’ Court by issuing and filing

charge(s) on a charge sheet and summons with the Registrar at the appropriate

Magistrates’ Court (e.g. Ringwood, Bendigo)26.

A charge sheet is prepared by an informant (usually the investigating officer) which the

informant must sign. A charge sheet must comply with the requirements of Part 2.2 of

the *Criminal Procedure Act 2009*.

Charges must properly identify the offence alleged to have been committed and

properly name the accused.

Together with a charge sheet, a summons needs to be issued compelling the accused

to appear to answer the charge(s) at the court on a certain date and at a certain time.

Under s. 14 of the *Criminal Procedure Act 2009*, council officers as “public officials”

within the meaning of that Act, are entitled to issue a summons provided that the

charge sheet and summons is filed with the Registrar at the Magistrates’ Court within

7 days after the charge sheet is signed.

A template charge sheet and summons is provided in the Forms appended to the

*Magistrates’ Court Criminal Procedure Rules 2009*.

Proceedings need to have commenced within 12 months from the date on which the

alleged offence is said to have occurred, subject to some limited exceptions which

are set out in s. 220 of the PHWA, none of which are relevant to offences for which

councils are entitled to prosecute.

Where a council does not issue the summons, the summons needs to be issued by

the Registrar of the Magistrates’ Court.

After a summons is issued, it must be personally served on the accused in

accordance with s. 391 of the *Criminal Procedure Act 2009* which requires:

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a copy of it to be given to the accused personally; or

if the person does not accept the copy, by putting the copy down in the

person’s presence and telling the person the nature of the document; or

a copy of it to be left at the accused’s last or most usual place of residence

or business with a person who appears to be at least 16 years old.

Following service of the summons and other pre-hearing matters, the matter will

usually proceed to a hearing.

The first hearing held is a mention hearing which gives the accused the opportunity to

make an appearance either personally or through a representative and to make a plea

(guilty or not guilty of the charge).

If at this hearing the accused pleads guilty, the Magistrate can finalise the matter.

*26*

*See generally the Criminal Procedure Act 2009 for the procedure for prosecuting in the Magistrates’*

*Court*

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If however the accused pleads not guilty, the matter will proceed to a further hearing

on another date.

A contest mention hearing may be held to attempt to resolve the matter, otherwise

following these preliminary hearings, where the matter remains unresolved (i.e. the

accused pleads not guilty) it will proceed to a summary hearing which is a full hearing

where both parties are required to present their case (including all evidence in

support) and the Magistrate will make a decision.

As to guidance on proper procedures and practices for the effective gathering of

evidence for use in a prosecution, see the next Chapter of this Manual, **Chapter 16**.

**15.5**

**Can council seek reimbursement of costs in a prosecution?**

If a person is found guilty of an offence, the council is entitled to seek reimbursement

of the costs (including legal costs) incurred by the council as a result of the

contravention (s. 228 of the PHWA).

**15.6**

**Can a person appeal a decision of the Magistrates’ Court?**

A person convicted of an offence in the Magistrates’ Court is entitled to appeal that

conviction through the court system.

A person may also be able to appeal his sentence.

If this occurs, councils are advised to seek advice on these issues.

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16 Evidence

**Summary**

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**16.1**

Outlines the ramifications for having deficiencies in evidence, particularly

evidence that has been illegally or improperly obtained.

Outlines proper procedures and methods for gathering evidence to ensure

the quality of that evidence.

**Overview**

The PHWA and the Public Health and Wellbeing Regulations 2009 allow councils

to make numerous decisions, including but not limited to:

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decisions about the registration of premises; and

decisions about the range of enforcement mechanisms to implement in the

event of a breach or likely breach.

All decisions made under the PHWA or the Public Health and Wellbeing Regulations

2009 must be based upon evidence capable of supporting the decision.

Evidence must be legally obtained and it must be of a sufficient quality to effectively

enable its use.

Evidence plays a critical role in establishing a case in court when prosecuting an

offence and can be called upon when various decisions are reviewed and/or appealed.

It is of utmost importance therefore that those responsible for investigating and

obtaining evidence for the purposes of the PHWA (typically authorised officers) follow

proper practice and procedures to ensure the validity of that evidence and therefore

also the decisions upon which that evidence is based.

This Chapter highlights the ramifications of deficiencies in evidence and provides

guidance on proper procedures and methods for gathering evidence to ensure the

quality of that evidence.

**16.2**

**Deficiencies in evidence**

Deficiencies in evidence result from failures to abide by the rules of evidence.

Of most relevance to the type of evidence obtained by authorised officers under the

PHWA is the legality of that evidence.

Illegally or improperly obtained evidence is evidence obtained by an authorised officer

acting outside the scope of their powers or in breach of their powers.

Where evidence has been obtained through unlawful or improper means, courts have a

discretion whether or not to allow that evidence as being admissible in a proceeding27.

Courts will tend to disallow illegally or improperly obtained evidence where the public

interest in disallowing that evidence outweighs the use of that evidence.

The effect of evidence being rendered inadmissible is that a prosecution upon which

it depends may fail or a decision made on the basis of that evidence may be deemed

invalid on a review or appeal of that decision.

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The High Court of Australia in *R v Ireland* (1970) CLR 321 per Barwick CJ at 335 and affirmed in

*Bunning v Cross* (1978) 141 CLR 54.

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Authorised officers therefore need to ensure that when conducting investigations, they

follow proper procedure and only exercise the powers that they are entitled to exercise.

**16.3**

**Effective evidence gathering procedures**

In addition to obtaining evidence that is legal, it is important that the evidence that

authorised officers obtain is of a high quality as this increases the probative value

of that evidence. The notes below highlight a number of practical measures that

authorised officers (or other council officers) can employ to ensure the quality of

the evidence that they obtain.

**16.3.1 Contemporaneous notes**

Contemporaneous notes are notes that a person has taken whilst conducting an

investigation. These notes can be used when giving evidence in court. Ideally, such

notes are signed, dated and witnessed shortly after they were made.

Notes taken in an investigation should contain details of observations made, details

about times, dates, details of premises, details of conversations had with people etc.

**16.3.2 Photographs**

When conducting an investigation, authorised officers should (where appropriate)

take photographs as these can be used in evidence and referred to in statements.

Time, date, identity of the photographer, and any observations at the time should be

recorded in notes.

**16.3.3 Interviewing alleged offenders or witnesses**

When an alleged offender or a witness is interviewed, the officer conducting the

interview should make notes during the interview. The officer can invite the person

being interviewed to sign and date the notes after the interview and include a notation

stating that the notes represent a true and accurate reflection of what was said in

the interview. This will assist should the witness have to be cross-examined on the

contents of an interview.

Formal witness statements can also be prepared where necessary which can be

signed by the witness or sworn/affirmed if in the form of an affidavit.

Witness statements should be made contemporaneously because the longer the time

delay the more likely it is that a person’s recollection of facts will diminish.

**16.3.4 Exercising care when handling and storing evidence**

When things are seized or samples are taken, it is important to preserve this evidence

for its potential use in court. Care should be taken that cross-contamination of

samples does not occur.

Seized items should be appropriately labelled and stored in a safe place until they

must be returned or they are needed in court.

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**16.4**

**Proof of evidence: evidentiary certificates**

In any proceedings in the Magistrates’ Court concerning improvement notices and

prohibition notices, and proceedings in the Magistrates’ Court brought by a council

for a breach of the PHWA, the Chief Executive Officer of a council is entitled to sign

a certificate in accordance with s. 226 of the PHWA stating any of the following to be

evidence of the matter that:

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i)

(j)

a stated document has been made under the PHWA or regulations;

a stated document is a copy of a document that has been made under the

PHWA or regulations;

at a given period of time a person was or was not the holder of a registration;

on a stated day or during a stated period, a registration was or was not in force

or was or was not subject to a stated condition;

at a stated time a registration was or was not suspended;

on a stated day a registration was cancelled, varied, transferred or

surrendered;

on a stated day or during a stated period, an appointment as an authorised

officer or analyst was or was not in force for a particular person;

a stated person was given a stated notice or direction under the PHWA;

a stated requirement was made of a stated person;

a stated amount is payable under the PHWA or regulations which is payable

but has not been paid.

The ability of the Chief Executive Officer of a council to issue an evidentiary certificate

also extends to the Food Act via s. 258 of that Act.

Evidentiary certificates are a way in which proof of generally non-contentious facts,

which can be necessary in a proceeding, can be established without the need for

producing large amounts of other evidence to establish these facts.

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17 Procedure for Issuing and Service of Notices,

Orders or Other Documents

**Summary**

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**17.1**

Explains how notices (including improvement, prohibition and infringement),

orders or other documents should be properly issued or served in accordance

with the PHWA.

**Overview**

The PHWA requires various notices, orders or other documents to be either issued or

served including infringement notices, improvement notices and prohibition notices.

This Chapter outlines the various methods of service.

**17.2**

**Service of infringement notices**

Infringement notices must be served in accordance with s. 12 of the Infringements

Act which requires:

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personal delivery to the person; or

delivery by post to the person at their last known place of residence or

business; or

service by a manner of service contained in the Act which establishes the

infringement offence; (which means any of the methods of service in s. 221

of the PHWA outlined in this Chapter can apply).

See section 17.5 of this Manual for information on service using s. 221 of the PHWA.

**17.3**

**Service of official warnings**

Official warnings under the Infringements Act are served pursuant to section 162

of that Act which allows service:

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personally;

by post; or

by any other prescribed manner (Regulation 42 Infringements (General)

Regulations 2006 says it can be served by leaving it at the last or most usual

place of residence or business of the person to be served with a person who

apparently resides at or works at the residence or business; or who appears

to be not less than 18 years of age)

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**17.4**

**Withdrawal of infringement notices and official warnings**

A withdrawal of an official warning and an infringement notice must be served on the

person who also was served with the official warning.

These withdrawal notices are also served using section 162 of the Infringements

Act being service:

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**17.5**

personally;

by post; or

by any other prescribed manner (Regulation 42 Infringements (General)

Regulations 2006 says it can be served by leaving it at the last or most usual

place of residence or business of the person to be served with a person who

apparently resides at or works at the residence or business; or who appears

to be not less than 18 years of age).

**Service and procedural requirements under s. 221 PHWA**

Section 221 of the PHWA is used for service of infringement notices, improvement

notices and prohibition notices.

Pursuant to the s. 221(1) of the PHWA, any notice, order or other document can be

given or served on a person (including body corporate) by –

*(a)*

*(b)*

*(c)*

*(d)*

*giving it or serving it personally on the person; or*

*sending it by post or electronic communication to the person at the*

*person’s usual or last known place of residence or business; or*

*leaving it at the person’s usual or last known place of residence with*

*a person on the premises who is apparently at least 16 years old; or*

*leaving it at that person’s usual or last known place of business with a*

*person who is apparently employed at the premises and is apparently*

*at least 16 years old.*

Further, s. 221(3) of the PHWA provides that if a notice order or other document is

addressed to the owner or occupier of premises (being person responsible) the notice

may be served by –

(a)

(b)

delivering it or a true copy of it to a person on the premises who is

apparently at least 16 years old; or

if there is no person on the premises who can be served, by leaving

the notice on some conspicuous part of the premises (e.g. in letterbox,

or attached to main entry door).

Section 221(4) of the PHWA provides that if a notice is to be served on a person

whose name and address is not known, the notice can be served by publishing the

notice in –

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(a)

(b)

the Victoria Government Gazette; and

a newspaper circulating in Victoria three times not less than one week

apart from each time it is published.

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If there is more than one owner or occupier of premises, a notice order or other

document can be addressed as saying “and others” - s. 221(6) of the PHWA.

If service has to be on both an occupier and an owner, non service on one does

not affect the validity or service on the other – ss 221(7) and (8) of the PHWA.

In some cases, it may be necessary for the person who effected service to prepare an

affidavit of service which sets out the manner in which service was given. An affidavit

of service will also need to attach a true copy of the documents served.

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Part E: Special Powers: Risks to Public Health and Emergencies

The PHWA provides an avenue whereby in a situation where there is a serious risk to

public health or an emergency situation, the Chief Health Officer can grant additional

powers to an authorised officer for the purposes of responding to that situation.

Part E deals with the authority granted by the Chief Health Officer and contains two

Chapters (18-19).

**Summary of Chapters**

Chapter 18

Chapter 19

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>

Outlines the provisions of the PHWA concerning the powers that

an authorised officer may exercise where authority is granted by

the Chief Health Officer to exercise a public health risk power.

Outlines the provisions of the PHWA concerning the powers that

an authorised officer may exercise where authority is granted by

the Chief Health Officer to exercise an emergency power.

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18 Public Health Risk Powers

**Summary**

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**18.1**

Outlines the provisions of the PHWA concerning the powers that an authorised

officer may exercise where authority is granted by the Chief Health Officer to

exercise a public health risk power.

**Overview**

The PHWA contains new provisions for wide ranging powers (known as the “**public**

**health risk powers**”) to be granted to council appointed authorised officers (and/or

Secretary appointed authorised officers) in certain situations where there is a risk to

public health.

**18.2**

**Public Health Risk Powers**

The public health risk powers are summarised in the table below.

**Situation**

The Chief Health Officer

believes that it is necessary

to investigate, eliminate

or reduce a risk to public

health and has given

authority to a council

appointed authorised

officer to exercise one

of the public health risk

powers.

Important notes:

The Chief Health Officer

can give an authorisation to

exercise a public health risk

power verbally or in writing.

If given verbally it needs to

be confirmed in writing.

An authorisation may allow

the authorised officer to

exercise any specified or

all of the public health risk

powers.

An authorisation is only

valid for the time period

granted and is valid only

to the risk to public health

that it relates to.

**Power of Authorised Officer**

**and Procedural Requirements**

Authorised Officer can where given authority

exercise any of the following public health risk

powers

(a) close any premises for the period of time

reasonably necessary to investigate,

eliminate or reduce the risk to public

health;

(b) direct a person or group of persons to

enter, not to enter, to remain at, or to

leave, any particular premises for a period

of time that is reasonably necessary, to

investigate, eliminate or reduce the risk

to public health. The direction can only be

for a period of time up to 4 hours, but may

be extended to up to 12 hours;

(c) without a warrant, enter any premises and

search for and seize any thing that is

necessary for the purpose of investigating,

eliminating or reducing the risk to public

health, but only where the authorised

officer believes that there may be an

immediate risk to public health and the

entry is necessary to investigate, eliminate

or reduce the risk;

(d) require the provision of any information

needed to investigate, eliminate or reduce

the risk to public health after informing

the person that they may refuse or fail to

provide the information if providing the

information would tend to incriminate

them;

**Section**

**of Act**

s 189

s. 190

s. 191

s. 192

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**Situation**

An Authorised Officer in

exercising an authorised

public health risk power can

be assisted by any person.

A request for the assistance

of a police officer must

be made to the Chief

Commissioner of Police

or a delegate of the Chief

Commissioner.

**Power of Authorised Officer**

**and Procedural Requirements**

(e) require a person to provide their name and

address for the purpose of investigating,

eliminating or reducing the risk to public

health;

(f) inspect any premises where the risk

to public health may be spread if it is

necessary for the purpose of investigating,

eliminating or reducing the risk to public

health;

(g) require the cleaning or disinfection of any

premises where the risk to public health

may arise if it is necessary to do so to

eliminate or reduce the risk to public

health;

(h) require the destruction or disposal of

anything where it is necessary to eliminate

or reduce the risk to public health;

(i) direct the owner or occupier of any

premises to take any action necessary

to eliminate or reduce the risk to public

health;

(j) direct any other person to take any other

action that the authorised officer considers

is necessary to eliminate or reduce the

risk to public health;

(k) exercise any of the general enforcement

powers conferred on an authorised officer

by this Act or the regulations.

Important things to note:

(1) Before exercising any of these public

health risk powers an Authorised Officer

must, unless it is not practicable to do so,

warn the person that a refusal or failure

to comply without a reasonable excuse,

is an offence.

(2) Before exercising any of these public

health risk powers, an authorised officer

must briefly explain to any person who is

to be subject to the exercise of the power

the reason why it is necessary to exercise

the power unless it is not practicable to

do so in the particular circumstances in

which the public health risk power is to

be exercised.

**Section**

**of Act**

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**Situation**

**Power of Authorised Officer**

**and Procedural Requirements**

**Section**

**of Act**

(3) Before exercising any power of entry

given by a public health risk power,

an authorised officer must follow the

procedure for entry, especially s. 172

of the PHWA (see **Chapter 9** of this

Manual).

Where a person fails to comply with a direction or requirement given under s. 190 or

200 or an improvement notice or prohibition notice issued in respect of the exercise

of a public health risk power and/or an emergency power, the Chief Health Officer

can authorise a person or council to take the actions necessary to ensure as far as

possible that there is compliance with the direction, requirement, improvement notice

or prohibition notice (s. 229). Any reasonable costs incurred by a council in ensuring

this compliance are recoverable by the council as a debt which is charge on the land

to which it relates (s. 230).

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19 Emergency Powers

**Summary**

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**19.1**

Be familiar with the provisions of the PHWA concerning the powers that an

authorised officer may exercise where authority is granted by the Chief Health

Officer to exercise an emergency power.

**Overview**

Where there is a state of emergency that has been declared by the Victorian Health

Minister, the PHWA contains new provisions for wide ranging powers known as the

“**emergency powers**” to be granted by the Chief Health Officer to council appointed

authorised officers (and/or Secretary appointed authorised officers) in certain

situations.

**19.2**

**Emergency powers**

The emergency powers are summarised in the table below.

**Situation**

**Power of Authorised Officer**

**and Procedural Requirements**

**Section**

**of Act**

**The Minister on the advice**

Authorised officer can where authorised by the s. 198

**of the Chief Health Officer**

**has declared a state of**

**emergency arising out**

**of any situation causing**

**a serious risk to public**

**health and the Chief**

**Health Officer has for the**

**purpose of eliminating**

**this serious risk to public**

**health given authority**

**to a council appointed**

**authorised officer to**

**exercise any of the public**

**health risk powers and**

**any of the emergency**

**powers.**

Important notes

The Chief Health Officer

can, where there is a state

of emergency, give an

authorised officer the

authority to exercise the

powers verbally or in writing.

If given verbally it needs to

be confirmed in writing.

Chief Health Officer:

· exercise any or all of the **public health**

**risk powers** in s. 190 (see discussion

above in **Chapter 18**); or

· exercise any or all of the **emergency**

**powers.**

The emergency powers are that the authorised

officer can:

(a) detain any person or group of persons

in the emergency area for the amount

of time necessary to eliminate or reduce

the serious risk to public health after

explaining the reason why the detention

is necessary at the time or detention or

as soon as possible;

(b) restrict the movement of any person or

persons in the emergency area;

(c) prevent any person or group of persons

from entering the emergency area;

(d) give any other direction that is reasonably

necessary to protect public health.

s. 199

s. 200

s. 201

s. 202

s. 203

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**Situation**

An authorisation may allow

the authorised officer to

exercise any specified or

all of the public health risk

powers and/or any or all

of the emergency powers.

An authorisation is only

valid for the time period

granted and is valid only

**Power of Authorised Officer**

**and Procedural Requirements**

Important things to note:

Before exercising any of the emergency

powers, the authorised officer must, unless

it is not practicable to do so, warn a person

that a refusal or failure to comply without a

reasonable excuse is an offence.

Where a person is detained, the authorised

officer must:

**Section**

**of Act**

to the risk to public health

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allow and facilitate any reasonable

that it relates to.

An authorised officer in

exercising a power granted ·

can be assisted by any

person. A request for the

assistance of a police

officer must be made to

request for the detained person to

communicate with others;

at least once every 24 hours during

the period of time in which a person is

detained review whether the continued

detention is required to eliminate or

reduce a serious risk to public health;

the Chief Commissioner

of Police or a delegate of

the Chief Commissioner.

·

as soon as reasonably practicable give

notice in writing to the Chief Health

Officer that a person has been detained

or continues to be detained after a review

of that person’s detention. This notice

needs to state the name of the person

detained and a short statement as to why

the person has been or continues to be

detained. The Chief Health Officer will

then notify the Minister.

It is an offence for a person to refuse or fail to

comply with a direction given to that person

by an authorised officer without a reasonable

excuse.

Before exercising any power of entry given

by a public health risk power and/or or an

emergency power, an authorised officer must

follow the procedure for entry, especially

s. 172 of the PHWA (see **Chapter 9** of this

Manual).

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Part F: Review

It is essential that authorised officers (and other council officers) comply with, take

actions, and make decisions in accordance with their powers and functions. Doing

so ensures the validity and legality of those actions and decisions and helps prevent

those actions or decisions being open to question and/or challenge.

Part G contains two Chapters (20 - 21).

**Summary of Chapters**

Chapter 20

Explains:

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how and when an aggrieved person is entitled to complain

about the exercise of a power of an authorised officer -

· to a council; and

· to the State Ombudsman,

the process for how complaints are handled by councils and

the Ombudsman; and

the effect of a complaint being upheld by a council and the

Ombudsman.

Chapter 21

Explains:

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>

the specific decisions made under the PHWA and the Public

Health and Wellbeing Regulations 2009 that can be appealed

to an appellate body or by way of an internal review of the

decision; and

the ability of an aggrieved person to seek an administrative

review of a decision and the actions that councils will be

required to take in response to an application for review.

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20 Complaints About Authorised Officers

**Summary**

Explains:

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how and when an aggrieved person is entitled to complain about the exercise

of a power of an authorised officer -

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to a council; and

to the State Ombudsman;

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>

**20.1**

the process for how complaints are handled by councils and the Ombudsman;

and

the effect of a complaint being upheld by a council and the Ombudsman.

**Overview**

A person aggrieved about the actions of an authorised officer is entitled to complain

to the council who employs the authorised officer and potentially to the Ombudsman.

The ability of a person to make a complaint is central to the principle of accountability

which underpins the PHWA (see **Chapter 2** of this Manual).

The complaints handling process is just one option for a person who is aggrieved

about the actions of an authorised officer. Someone who is aggrieved by a decision

made by a council or an authorised officer may appeal that decision or seek a review

of that decision.

Where someone wishes to complain to the Ombudsman, the Ombudsman will usually

require the person to have made a complaint to the council first.

An aggrieved person is entitled to complain to a council and also, where applicable,

appeal or seek an administrative review of a decision. The Ombudsman must not

conduct an investigation into a matter, if another legal avenue of appeal is available

unless the ombudsman is of the view that it would not be reasonable to expect the

aggrieved person to resist to that remedy or right or the matter merits investigation

to avoid injustice .

Appeal and review rights of a decision are discussed in **Chapter 21** of this Manual.

**20.2**

**Complaints to councils**

**20.2.1 Can a person complain to the council?**

The PHWA has introduced formal provisions mandating a complaints handling

procedure.

Pursuant to s. 185 of the PHWA, any person can complain about the exercise of a

power by an authorised officer under the PHWA or the Public Health and Wellbeing

Regulations 2009.

In the case of council authorised officers, complaints are made directly to the council.

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*See section 13(4) of the Ombudsman Act 1973.*

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Where an authorised officer is employed by more than one council, a complaint should

be made to the relevant council.

**20.2.2 What format can a complaint be in?**

A complaint can be made in writing or on a form that a council has drafted and

approved for the purposes of handling complaints.

**20.2.3 What must council do when a complaint is received?**

When a complaint is made, the council must:

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investigate the complaint; and

provide a written report to the person who made the complaint detailing

the results of the investigation.

Individual councils are therefore required to develop processes for the handling of

complaints. To assist in developing such a process, the Victorian Ombudsman has

prepared a complaint handling guide for the Victorian public sector. This guide is

available for download at: http://www.ombudsman.vic.gov.au.

Aside from requiring councils to investigate and report to the complainant, the PHWA

does not prescribe how councils are to investigate complaints and what disciplinary

action or what responses are necessary where a complaint is upheld.

**20.2.4 What action can be taken by councils after considering a complaint?**

The range of disciplinary actions or responses that councils may take where a

complaint is upheld are varied and could include, but are not limited to:

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issuing a formal warning to the officer;

terminating the officer’s employment;

reviewing decision(s) made by the officer;

issuing an apology to the complainant;

compensating the complainant; and

reviewing processes and procedures to prevent the conduct complained about

occurring again.

Any action taken should be proportionate to the seriousness of the nature of the

complaint deemed valid and in accordance with the law.

**20.3**

**Complaints to the Ombudsman**

**20.3.1 Can a person complain to the Ombudsman?**

Yes.

The Victorian State Ombudsman is a government appointed person and body that

is set up to enquire into and investigate complaints relating to the administrative action

of public authorities.

All enquiries, investigations and actions undertaken by the Ombudsman are subject

to the powers of the Ombudsman under the *Ombudsman Act 1973*.

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**20.3.2 What power does the Ombudsman have?**

Section 186 of the PHWA provides that the Ombudsman may enquire into or

investigate:

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any action taken, or not taken by an authorised officer in that person’s capacity

as an authorised officer; and

any matter relating to such an action or inaction.

Pursuant to the *Ombudsman Act 1973*, the Ombudsman is entitled to investigate

the conduct of not only authorised officers, but any member of council staff, including

the councillors.29

The Ombudsman has the power to make findings that the administrative action taken

by a council officer:30

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appears to be contrary to law;

was unreasonable, unjust, oppressive or improperly discriminatory;

is or may be unreasonable, unjust, oppressive or improperly discriminatory

in accordance with a rule of law or an enactment (e.g. the Charter);

was for an improper purpose, or on irrelevant grounds or it took into account

irrelevant considerations;

should have been supported by reasons, but reasons were not given;

was based wholly or partly on a mistake of law or fact; or

was wrong.

Where the Ombudsman has upheld a complaint and made adverse findings, the

Ombudsman does not have the power to reverse a decision made or require a council

(or a council officer) to do anything. Rather, the Ombudsman will make a report to the

council which usually contains a series of recommendations and the Ombudsman will

consult with the council as to what action the council should agree to take. Examples

of what the Ombudsman might recommend include that:31

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the matter be referred to the council for further investigation;

action could be, and should be taken to address the effects of the action

complained about;

certain practices should be varied;

any law in accordance with which the action was taken should be varied;

any law in accordance with which the action was taken should be

reconsidered;

reasons should be given for the action;

other steps should be taken.

*See section 13(1) of the Ombudsman Act 1973.*

*Section 23(1) of the Ombudsman Act 1973.*

*Section 23(2) of the Ombudsman Act 1973.*

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*Note:*

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*the Ombudsman will usually require a person to have complained to a council*

*first; and*

*if a person has the specific right to appeal a decision made, or to seek an*

*internal review of a decision as may be the case for some decisions made*

*under the PHWA, (see* ***Chapter 21*** *of this Manual) s. 13(4) of the Ombudsman*

*Act 1973 provides that a person aggrieved by that decision cannot generally*

*complain to the Ombudsman.*

More information about the Ombudsman is available on the Ombudsman Victoria

website http://www.ombudsman.vic.gov.au.

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21 Administrative Review of Council Decisions

**Summary**

Explains:

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**21.1**

the specific decisions made under the PHWA and the Public Health and

Wellbeing Regulations 2009 that can be appealed to an appellate body

or by way of an internal review of the decision; and

the ability of an aggrieved person to seek an administrative review of a

decision and the actions that councils will be required to take in response

to an application for review.

**Overview**

This Chapter contains an overview of the ability of a person who is aggrieved by a

decision to either appeal that decision (where applicable) or to seek an administrative

review of that decision.

Specific avenues of appeal and/or review are provided in relation to:

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decisions made about registering prescribed accommodation and registered

premises;

a decision to serve an improvement notice or a prohibition notice; and

a decision to serve an infringement notice.

Often these decisions are the direct result of the actions of an authorised officer which

can be central to the grievance that a person has.

For example an authorised officer in investigating an alleged breach of one of the

standards for prescribed accommodation might have acted outside the scope of their

power when exercising a power of entry as part of an investigation. These actions

may result in a decision being made, such as a decision to suspend the registration.

In this instance a person aggrieved by that decision to suspend the registration might

appeal on the basis that the decision was incorrectly made due to the actions of the

authorised officer.

Where a specific avenue of appeal and/or review is not provided a person aggrieved

by a decision may be able to seek an administrative review of that decision.

*Note: that appealing or seeking a review of a council decision may be in addition to*

*a complaint concerning the matter that is made to the council, especially where a*

*complaints handling mechanism is provided for.*

**21.2**

**Prescribed Accommodation and Business Premises**

The PHWA provides for an internal and external review mechanism concerning

decisions made by councils in relation to the registration of prescribed accommodation

and business premises.

A person aggrieved about a decision made by a council in relation to the issue,

variation, transfer, renewal, cancellation or suspension of a registration of prescribed

accommodation or registered premises is entitled to make an application to the council

pursuant to s. 205 of the PHWA for an internal review of that decision within 28 days

of being notified of the decision.

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Where an application for internal review is made, the council is under an obligation

to review the decision. A council is deemed however to have affirmed the decision

made if it has not determined the application for review within 28 days of receiving

the application or within the period of time that the council and the applicant for

review agree to.

On an internal review, a council can:

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make a decision affirming, varying or revoking the original decision; and

if the original decision is revoked, the council can re-make the decision.

A council must give the applicant for review a written statement of reasons for the

decision made on review and notify the applicant of their right to appeal the merits

of that decision to the VCAT in accordance with s. 207 of the PHWA.

**21.2.1 VCAT review**

Section 207 of the PHWA grants an aggrieved person certain appeal rights to the

VCAT concerning a decision in relation to the issue, variation, transfer, renewal,

cancellation or suspension of a registration of prescribed accommodation or

registered premises.

Pursuant to s. 207 a person aggrieved by a decision made by a council to cancel

or suspend a registration is granted an automatic right to appeal the merits of that

decision to the VCAT. An internal review of the decision can also be sought prior to

appeal to the VCAT, however it is not mandatory.

A person aggrieved about a decision made by a council in relation to the issue,

variation, transfer or renewal of a registration must first seek an internal review of that

decision in accordance with s. 205 of the PHWA prior to appealing to the VCAT. In this

instance, an appeal to the VCAT can only be made after the person is notified of

the decision made on internal review, or the council is deemed to have affirmed the

decision if an application for review is not considered within the required timeframe.

In accordance with s. 45 of the *Victorian Civil and Administrative Tribunal Act 1998* a

person who is entitled to apply to the VCAT for a review of a decision is able to make

a request that the decision-maker provide a written statement of reasons for the

decision made. In the case of an internal review decision being appealed, a council is

under an existing obligation to provide a statement of reasons, however this section

can be relied upon by an aggrieved person who is applying for a review of a decision

to cancel or suspend a registration.

An application to the VCAT for the review of a decision must be made within 28 days

of (as applicable):

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the day on which the decision to cancel or suspend the registration was made;

or

the person being notified of their right to appeal to the VCAT following an

internal review of the decision; or

being given reasons for the decision, if requested in accordance with s. 45 of

the *Victorian Civil and Administrative Tribunal Act 1998*, or being notified of a

refusal to provide reasons where requested.

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Until a review is determined by the VCAT or unless the VCAT orders otherwise earlier

the original decision made stands32.

VCAT has developed and published the *Public Health & Wellbeing Act 2008*

*Information Pack* December 2009. It is available for download at

http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/health\_and\_privacy\_list/$file/

public\_health\_and\_wellbeing\_act\_2008\_information\_pack.pdf.

**21.3**

**Improvement notices and prohibition notices**

Pursuant to s. 208 of the PHWA, a person who has been issued an improvement

notice or a prohibition notice can appeal the decision to issue the notice to the

Magistrates’ Court within 21 days of being given the notice.

The Magistrates’ Court is obliged to -

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reconsider the decision to issue the notice;

hear evidence from the applicant for review and the council that issued the

improvement notice; and

decide whether to affirm or revoke the decision to issue of the notice.

Until the Magistrates’ Court has made its decision, the notice and any requirements

contained in that notice will stand.

**21.4**

**Infringement notices**

A person served with an infringement notice can:

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pay the infringement penalty prior to the due date, thus ending the matter;

elect prior to the due date of the infringement penalty to have the matter

determined in the Magistrates’ Court (Children’s Court for minors);33 or

seek an internal review prior to the due date of the infringement penalty.

If a person who has been served with an infringement notice has not elected to have

the matter determined by the court or to have an internal review prior to the due date

of the infringement penalty and the infringement penalty has not been paid by the due

date, a council is entitled to issue a penalty reminder notice requiring the infringement

penalty to be paid within 28 days34.

In response to a penalty reminder notice a person is entitled to elect to have the matter

determined in court.35 A further failure to pay the infringement penalty gives a council

the entitlement to apply to the Infringements Court section of the Magistrates’ Court

for an enforcement order requiring the infringement penalty to be paid.36 A person is

entitled to appeal an enforcement order in the Magistrates’ Court by seeking to have

it revoked.

If at any stage, the matter is referred to the Magistrates’ Court (Children’s Court for

minors) for determination, the court will hear evidence and determine whether the

offence has been committed as if the offence were being prosecuted. The court will

make a determination as to guilt and if guilty may impose a fine up to the maximum

allowed for the offence which may be greater than the infringement penalty that applies.

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*See section 50 of the Victorian Civil and Administrative Tribunal Act 1998.*

*Section 16 of the Infringements Act 2006.*

*See Division 4, Part 2 of the Infringements Act 2006.*

*Section 30 of the Infringements Act 2006.*

*See Part 4 of the Infringements Act 2006.*

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A request for an internal review by a council of an infringement notice is made

pursuant to s. 22 of the Infringements Act. An internal review can be requested if

the person believes that:

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the decision was contrary to law or involved a mistake of identity;

special circumstances apply to that person (e.g. they have a disability or

some form of impairment that should be taken into consideration); or

having regard to exceptional circumstances, there is a reason for the conduct

that led to the infringement notice being served, meaning it should be excused.

Where an internal review is sought a council is entitled pursuant to s. 23 of the

Infringements Act to request more information from the applicant for review. The

review must be suspended until the information is provided or until after 35 days

have lapsed.

In response to an application for an internal review of an infringement notice, a

council must:37

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review the decision; and

suspend any procedures that are in place to enforce the infringement notice

until the review is complete and the applicant for review is advised of the

outcome.

The person responsible for conducting an internal review cannot be a person who

was involved in making the decision to serve the infringement notice that is in issue.

The internal review must be conducted within 90 days or 35 days after this time where

the council has sought more information under s. 23 of the Infringements Act. If a

council fails to comply with these time limits, the infringement notice is taken to be

withdrawn.

Where an internal review is sought on the basis that the decision to serve the

infringement notice is said to be contrary to law or involved a mistake of identity or

exceptional circumstances are claimed, a council pursuant to s. 25(1) of the

Infringements Act can, as applicable:

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confirm the decision to serve the infringement notice;

withdraw the infringement notice and serve an official warning instead;

withdraw the infringement notice altogether;

withdraw the infringement notice and refer the matter to the Magistrates’ Court

(Children’s Court for minor) for prosecution (note: procedure for prosecution

must be followed - see Chapter 15 of this Manual);

waive all or any costs associated with the infringement notice that the

complainant is liable for;

approve a payment plan; or

to do a combination of any of the above.

*Section 24 Infringements Act 2006.*

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Where an internal review is sought on the basis of a claim that special circumstances

that apply, the council pursuant to s. 25(2) of the Infringements Act can, as applicable:

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confirm the decision to serve the infringement notice, however in this instance

the matter must be referred to the Magistrates’ Court (Children’s Court for

minor) for final determination;

withdraw the infringement notice and issue a warning notice instead; or

withdraw the infringement notice altogether.

Not*e: that if a person decides to have the matter determined by the Magistrates’*

*Court (Children’s Court for minors) prior to the completion of an internal review that*

*the person has sought, the internal review is terminated.*38

**21.5**

**Review by the Supreme Court**

Where there is no specific avenue of appeal and/or review that is available to a person

who is aggrieved by a decision, that person may be able to seek an administrative

review of that decision. This is done by seeking a judicial review of that decision in

the Supreme Court.

As discussed above, the PHWA provides specific avenues of appeal and/or review for:

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decisions made about registering prescribed accommodation and registered

premises;

a decision to serve an improvement notice or a prohibition notice; and

a decision to serve an infringement notice.

Actions and decisions made by authorised officers that are not linked or associated

with one of these decisions that have been made are the types of decisions for which

judicial review may be available.

Given that there are these specific avenues of appeal and/or review which are broad

enough to cover most decisions made where grievances are likely to arise, and there

is a complaints procedure in respect of the actions of authorised officers (discussed

in **Chapter 20** of this Manual), an action for the judicial review of a decision is

therefore unlikely to arise.

A judicial review of a decision is further limited in that it is not a review of the facts

leading to decision, but rather it is a review of the way the decision was made in

terms of procedure and is only available were a ground of judicial review is made out.

In hearing an application for judicial review, the Supreme Court will not therefore

re-make the decision but may only make an order:

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quashing or setting aside the decision; and/or

referring the decision back to the decision-maker to be re-made in accordance

with the law.

*Section 27 of the Infringements Act 2006.*

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Part G: Other

Part G is divided into 3 Chapters and relates to other Parts of the PHWA not specifically

discussed elsewhere in this manual. This Part is divided into 3 Chapters (22-24).

**Summary of Chapters**

Chapter 22

Chapter 23

Chapter 24

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Sets out the arrangements for the transitional period to the

new legislation

Outlines the effect of general provisions in the PHWA.

Explains the changes made by the PHWA as part of the broader

reforms to the Food Act.

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22 Transitional Arrangements

**Summary**

Sets out the arrangements for the transitional period to the new legislation.

**22.1**

**Overview**

The PHWA and the Public Health and Wellbeing Regulations 2009 apply from

1 January 2010.

The PHWA does contain transitional provisions to aid with the transition from the

Health Act to the PHWA.

**22.2**

**Registration of prescribed accommodation and registered premises**

Any application for the registration, renewal or transfer of prescribed accommodation

or business premises *made and processed on or before 31 December 2009* must be

made under the Health Act.

Any application for the registration, renewal or transfer of accommodation or premises

*made but not processed until after 1 January 2010* must be made in accordance with

the PHWA.

Section 243(4) of the PHWA provides that any accommodation or business premises

registered before the commencement of the Act (1 January 2010) is taken to be

registered as if it were registered under the PHWA on the same terms and conditions.

After 1 January 2010 the commencement of any enforcement mechanism, including

powers of entry in relation to the registration of accommodation or premises is subject

to the provisions of the PHWA regardless of whether the registration was made under

the Health Act or the PHWA.

**22.3**

**Enforcement matters and appeals**

Section 242 and onwards deal with the transitional provisions from the Health Act to

the PHWA. Generally, all persons, things and circumstances authorised, appointed

or created by or under the Health Act or existing or continuing under the Health Act

immediately before the 1 January 2010, continue under and subject to the PHWA to

have the same status, operation and effect.

For an example: if an abatement notice was served on the 31 December 2009, it

would still be valid on and after the 1 January 2010. If a council then decided to take

action for breach of that abatement notice, however, the action would be taken under

the PHWA. However, given the wording of the PHWA transitional provisions and the

operation of the *Interpretation of Legislation Act 1984*, it is appropriate also for that

action to refer not just to the PHWA but also the Health Act. Specific advice on this

should be obtained.

There are other transitional provisions for specific circumstances and these should

be checked on an individual basis.

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23 General

**Summary**

Outlines the effect of general provisions in the PHWA.

**23.1**

**Overview**

This Chapter summarises general provisions relating to the application of the PHWA.

**23.2**

**Application to areas outside municipal districts**

Some parts of Victoria do not fall within a municipal district - e.g. alpine ski resorts.

Section 12 of the PHWA grants the Governor in Council the ability to declare in the

*Victoria Government Gazette* that a council has responsibility for enforcing the

provisions in Part 6 of the PHWA (nuisances, prescribed accommodation, registered

premises) for an area that is outside a municipal district.

A declaration made under this section can be subject to any limitations that are also

declared.

**23.3**

**Binding on the Crown**

Pursuant to s. 13 of the PHWA, the Crown is bound by the provisions of the PHWA

and the Public Health and Wellbeing Regulations 2009.

This means for example that government or State owned bodies or enterprises are

subject to the registration requirements and enforcement action can be taken against

these bodies or enterprises.

**23.4**

**Delegation of powers by the Secretary**

Pursuant to s. 19 of the PHWA, the Secretary to the Department of Health by an

instrument of delegation can delegate any power, duty or function of the Secretary

under the PHWA or the Public Health and Wellbeing Regulations 2009 to a council

or an officer of a council (including an authorised officer).

The Secretary may delegate the full range of functions and powers including:

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registration of cooling tower systems;

licensing of pest control operators; and

control over brothels and escort agencies.

The particular responsibilities of councils where a delegation of power is made should

be considered on an individual basis.

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24 Changes To The *Food Act 1984*

**Summary**

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**24.1**

Explains the changes made by the PHWA as part of the broader reforms

to the Food Act.

**Overview**

The PHWA makes some changes to the Food Act from 1 January 2010. More

significant changes to the Food Act have been made by the *Food Amendment*

*(Regulation Reform) Act 2009*, which take effect in three further stages, the first of

these being 1 July 2010. Appropriate and separate guidance in respect of these

forthcoming changes will be provided by the Department of Health.

On 12 November 2009, the Department of Health emailed a bulletin to council officers

on the implications of the changes to the Food Act made by the PHWA. Pending

further advice from the Department, councils should consult this bulletin. Further

copies of this bulletin can be obtained from fsv@dhs.vic.gov.au.

**24.2**

**Changes to the Food Act**

The table below summarises the significant changes to the Food Act made by the

PHWA*.*

**Section**

**of PHWA**

**251**

**252**

**253**

**Change Made to Food Act**

A new definition of an ‘authorized officer’39 in s. 4(1) the Food Act is

substituted with the effect that a person who is appointed by a council

to be an EHO under s. 29 of the PHWA is automatically an authorized

officer for the purposes of the Food Act.

Section 20(1) of the Food Act is substituted and replaced with new

provisions. The major change for councils is that they are entitled under

s. 224(1) of the *Local Government Act 1989* to appoint a person to be

an authorized officer for the purposes of the Food Act if a person is

suitably qualified or trained to be appointed as an authorized officer.

This new section (similar to the provisions in the PHWA) allows the

appointment of a person who is not an EHO to be an authorized officer

for the purposes of the Food Act.

Sections 20(3), 20(3A) and 20(4) of the Food Act are substituted and

replaced with new provisions.

The new provisions require authorized officers to be issued with identity

cards. This is similar to the requirements for identity cards under the

PHWA.

As is the case with the PHWA, before exercising any power under the

Food Act an authorized officer is now required to produce their identity

card for inspection.

*39*

*The Food Act 1984 contains a different spelling of authorised officer to the PHWA, spelling “authorized”*

*with a “z”.*

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**Section**

**of PHWA**

**257**

**258**

**261**

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**Change Made to Food Act**

A new s. 45AC is to be inserted in the Food Act which states that the

“*Secretary, a council, an authorized officer or a member of the police*

*force may bring proceedings for an offence under this Act*”.

This new section specifically clarifies the role of councils in enforcing

the Food Act and allows authorized officers the right to bring prosecution

proceedings.

A new s. 50AB is to be inserted in the Food Act which allows the Chief

Executive Officer of a council to sign an evidentiary certificate similar to

those capable of being prepared under the PHWA.

Section 59 of the Food Act is substituted and replaced with new

sections. The current s. 59 incorporates provisions of the Health Act

as forming part of the Food Act.

New s. 59 of the Food Act creates an offence for a person to give false

or misleading statements to the Secretary, a council or an authorized

officer.

New s. 59A of the Food Act creates an offence for destroying or

damaging records.

New s. 59B of the Food Act concerns the validity and effect of

notices, orders and other documents issued where there is an error

misdescription or irregularity.

New s. 59C of the Food Act gives the Secretary or councils the power

to take the actions necessary to ensure compliance with directions

made in relation to food premises under sections 19 or 19B of the Act,

and the Secretary or those authorised by the Secretary (likely to be

councils) the power to ensure compliance with orders under Part 7 of

the Act (eg recalls). This section also provides a mechanism by which

the Secretary and/or councils are entitled to recover reasonable costs

when ensuring compliance.

Further advice about this new power will be provided as part of

the broader guidance material on the *Food Amendment (Regulation*

*Reform) Act 2009*. This new provision will be addressed in this context

as it ties in with how the Food Act should be enforced, and changing

policies. The aim is to ensure that this new provision can be applied in

a manner that is consistent with the other changes to the Food Act that

will come into effect on 1 July 2010. The Department of Health has

recommended that councils await this advice before exercising the

power under s. 59C.

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Appendices

**Contents**

**Appendix 1** – Sample notice of entry

**Appendix 2** – Sample receipt for the seizure of a thing or a sample taken

**Appendix 3** – Sample improvement notice and prohibition notice

**Appendix 4** – Sample infringement notice

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Appendix 1: Sample Notice Of Entry

Section 172 *Public Health and Wellbeing Act 2008* (Vic)

**[COUNCIL LOGO/ID]**

**Notice Of Entry**

I,

**[name of authorised officer]**

being an authorised officer for the purposes of the *Public Health and Wellbeing Act*

*2008* (Vic) pursuant to a power under section \*169(3) / \*190(1)(c) / \*229 **[delete as**

**appropriate]** of this Act entered premises situated at:

**[insert address of premises]** on

**[date]** at

**[time]**.

Entry to these premises was for the purposes of:

**[state reason for entry]**

Whilst on the premises,

**[insert description of all things done while on the premises]**

I departed the premises at

**[insert time of departure].**

Further details of my entry onto the premises can be obtained by contacting me during

office hours at:

**[insert name of Council, contact address, contact phone/fax/email]**

**Signature of authorised officer:**

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**Date:**

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Appendix 2: Sample Receipt For The Seizure Of A Thing

Or Sample Taken

Section 172 *Public Health and Wellbeing Act 2008* (Vic)

**[COUNCIL LOGO/ID]**

**Receipt For Seized Things And Sample Taken**

**To:**

**Of:**

(name)

(address)

**I**

(name & title of officer)

**an Authorised Officer appointed by [insert name of Council], under the *Public***

***Health and Wellbeing Act 2008* (Vic) give notice that at [time] on this day:**

seized the following (including any document):

took sample(s) of/from the following:

**I seized the thing(s) and took any relevant sample because I believe that:**

the seizure is required to determine whether there has been a contravention of

the *Public Health and Wellbeing Act 2008* (Vic) or its regulations.

the seized thing may be used as evidence in a possible prosecution for a

contravention of the *Public Health and Wellbeing Act 2008* (Vic) or its regulations.

the seizure is required to minimise a risk to the health of any person.

**I took a sample of/from the thing(s) for:**

examination

analysis

measurement

testing

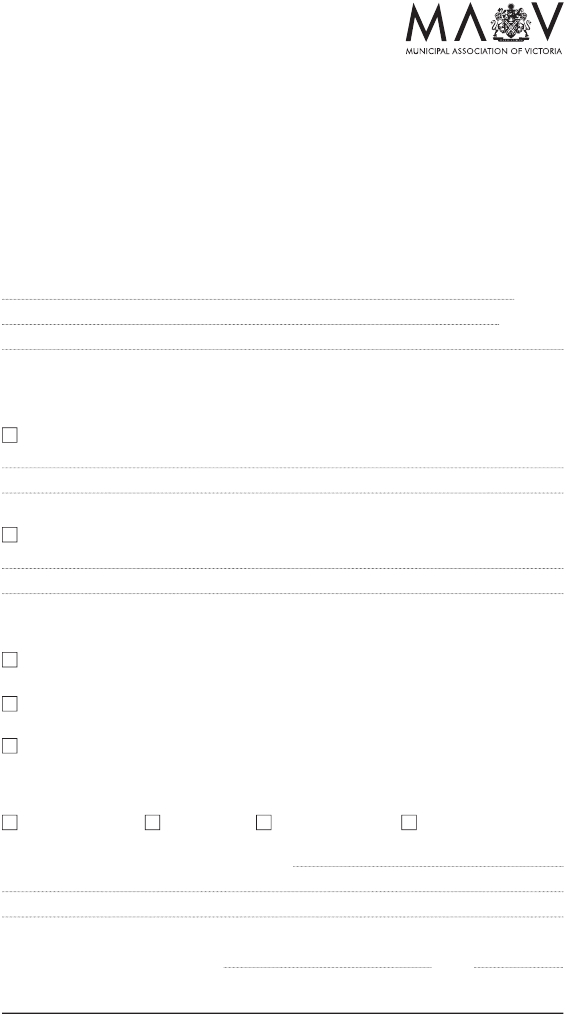
**Other reason for sample(s) taken (if any):**

**Signature of authorised officer:**

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**Date:**

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Appendix 3: Sample Improvement Notice And Prohibition

Notice Templates

Section 194 *Public Health and Wellbeing Act 2008* (Vic)

**[COUNCIL LOGO/ID]**

**Improvement Notice**

You,

(name):

have contravened

**[specify breach of section *Public Health and Wellbeing Act 2008/Relevant***

***Regulations*]** in circumstances that make it likely that the contravention is

continuing or will re-occur; or

are likely to contravene

**[section**

***Public Health and Wellbeing Act 2008/Relevant Regulations*]**

Grounds on which the issue of the Improvement Notice is based:

You are required to take the following actions/measures:

You must take the action/measures specified within

days of the date of this notice.

If you do not take the actions and measures specified, you will have contravened this

Improvement Notice and such a contravention carries a penalty of 120 units (for a

natural person) or 600 penalty units (for a corporation)

**Important Notes**

You may appeal against the issue of this Improvement Notice to the Magistrates’

Court. You must do so within 21 days after this notice is served on you. Section 208

of the *Public Health and Wellbeing Act 2008* (Vic) applies.

If you appeal against the issue of this Improvement Notice you are still required to take

the actions/measures required until the Magistrates’ Court makes a determination on

the appeal. Section 208 of the *Public Health and Wellbeing Act 2008* (Vic) applies.

The issue of this Improvement Notice does not affect any proceeding for an offence

against the *Public Health and Wellbeing Act 2008* (Vic) in connection with any matter

in respect of which this Improvement Notice is issued. Section 195 of the *Public*

*Health and Wellbeing Act 2008* (Vic) applies.

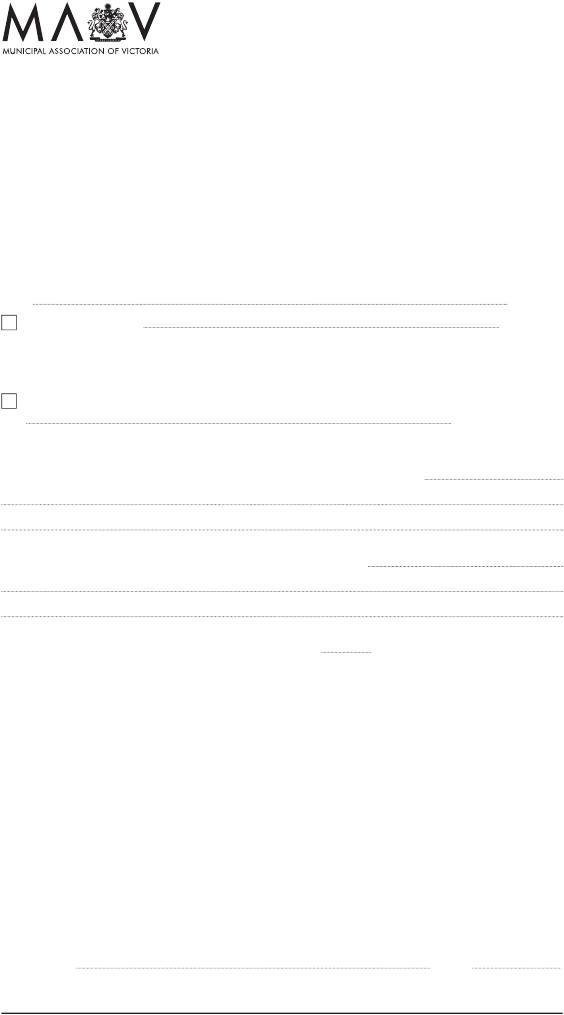
**Signature:**

**[Council Delegate]**

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**Date:**

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Section 194 *Public Health and Wellbeing Act 2008* (Vic)

**[COUNCIL LOGO/ID]**

**Prohibition Notice**

**You,**

(name):

have contravened

**[specify relevant section/regulation breached]** in circumstances that make it

likely that the contravention is continuing or will re-occur; or

are

likely

to

contravene

**[specify relevant**

**section/regulation breached]**

**Grounds on which the issue of the Prohibition Notice is based:**

**You are prohibited from:**

**Period of Prohibition:** \*Permanent/ \***[insert date or event]**

**Failing to comply with this notice carries a penalty of 120 units (for a natural**

**person) 600 penalty units (for a corporation).**

**Important Notes**

You may appeal against the issue of this Prohibition Notice to the Magistrates’ Court.

You must do so within 21 days after this notice is served on you. Section 208 of the

*Public Health and Wellbeing Act 2008* (Vic) applies.

If you appeal against the issue of this Prohibition Notice you must still comply with this

notice until the Magistrates’ Court makes a determination on the appeal. Section 208

of the *Public Health and Wellbeing Act 2008* (Vic) applies.

The issue of this Prohibition Notice does not affect any proceeding for an offence

against the *Public Health and Wellbeing Act 2008* (Vic) in connection with any matter

in respect of which this Prohibition Notice is issued. Section 195 of the *Public Health*

*and Wellbeing Act 2008* (Vic) applies.

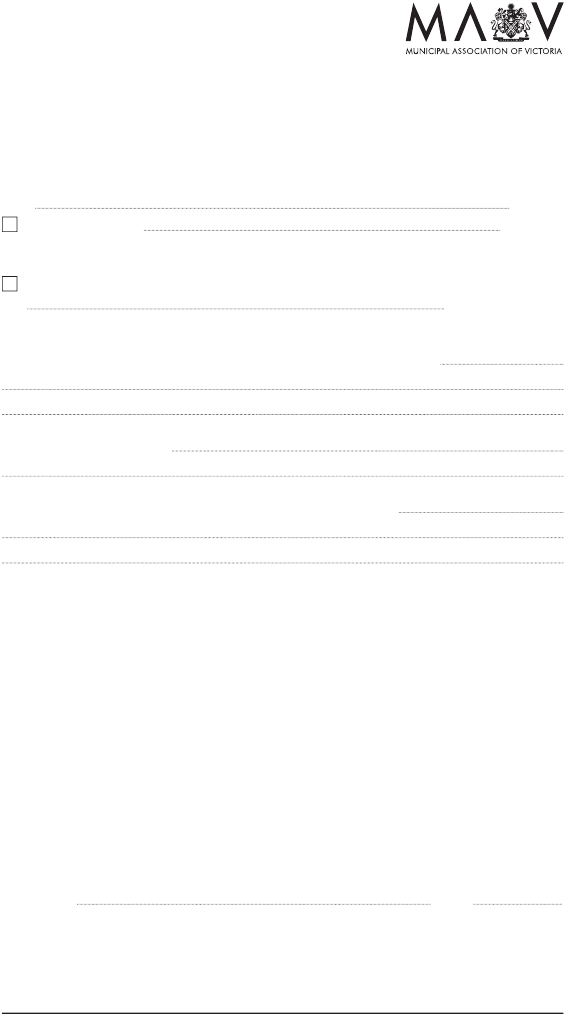
**Signature:**

**[Council Delegate]**

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**Date:**

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Appedix 4: Sample Infringement Notice Template

[Council] Reference Number:

Date of Issue:

Section 209(2) *Public Health and Wellbeing Act 2008* (Vic)

**[COUNCIL LOGO/ID]**

**Infringement Notice**

To:

Address:

**You have committed an offence under [relevant section/regulation] of**

**[The *Public Health and Wellbeing Act 2008* (Vic) / Relevant Regulations]**

**Date of Offence**

**Time of Offence**

**Location of Offence**

**Description of Offence**

**Infringement Penalty**

**Due Date**

**$ [prescribed in regulations]**

[**must be a period not less than 28 days after the**

**infringement notice has been served]**

**You must pay the infringement penalty by the due date.**

**If you do not pay the infringement penalty by the due date further enforcement**

**action may be taken against you and you may incur further costs.**

**Important Information**

***Right to have the matter determined by the Court***

You are entitled to decide to have this matter heard and determined in the

Magistrates’ Court.

If you are a child within the meaning of the *Infringements Act 2006* (Vic) you are

entitled to have this matter dealt with by the Children's Court in accordance with

the *Children, Youth and Families Act 2005* (Vic).

If you want this matter to be heard and determined by the Court you must notify

the issuing officer before the due date of the infringement penalty.

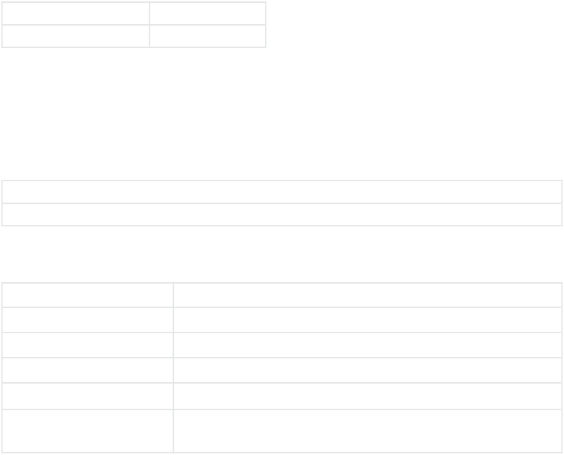
***Internal Review***

You, or a person acting on your behalf with your consent, may apply to have the

decision to serve this infringement notice on you internally reviewed.

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***Payment Plan***

You may be eligible for a payment plan under Section 46 of the *Infringements Act*

*2006* (Vic) (unless you are a body corporate). To apply for a payment plan an

application stating your reasons must be made in writing before the due date of

the infringement penalty.

***Further Information***

Further information about this infringement notice and information relating to eligibility

for payment plans and applying for an internal review can be obtained from:

**[NAME OF COUNCIL: must insert telephone number; address; and if available,**

**a website address;]**

**Issuing officer: [Name/identifying reference of issuing officer]**

**Signature**

**Payment Options**

**[The infringement notice must state the manner in which the infringement**

**penalty may be paid]**

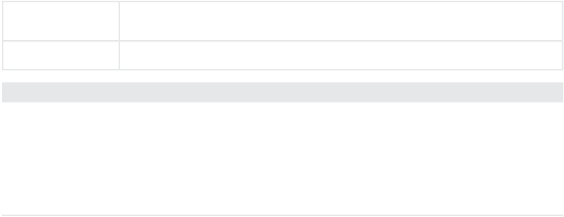
Note on template: The form of infringement notice used by a council must comply with

section 13 of the *Infringements Act 2006* (Vic) and Regulation 8 of the Infringements

(Reporting and Prescribed Details and Forms) Regulations 2006 (Vic).

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Checklists

**Contents**

**Checklist 1 =** Checklist for Actioning Nuisance

**Checklist 2 =** Checklist for Registration of Prescribed Accommodation

**Checklist 3 =** Checklist for Registration of Business Premises

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**Checklist For Actioning Nuisance**

**Questions to Ask**

Has someone made a complaint to Council regarding an alleged nuisance

Has the authorised officer investigated the complaint?

Has the authorised officer come to a conclusion as to whether or not the

complaint results in a nuisance?

If no nuisance is found to exist, council should notify the person who

made the complaint and advise accordingly.

If a nuisance is found to exist the council can use the following methods

to try to achieve a remedy for the nuisance

**Tick Box**

>

>

>

>

If the land is unoccupied or the owner cannot be found, council can

enter onto the land and abate the nuisance.

If the owner or occupier is identifiable the council can issue an

improvement notice or prohibition notice.

If the nuisance is serious enough to warrant prosecution, the council

can bring proceedings against the person who caused the nuisance.

If council was of the view that the matter is best deal with privately,

the council can advise the person who made the complaint of any

available methods for settling the matter.

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**Checklist For Registration of Prescribed Accommodation**

**Questions to Ask**

Step One

Does the accommodation

fall within the definition of

“prescribed accommodation”

in the PHWA”?

Step Two

Is the accommodation

prescribed in regulation

13 of the Public Health

and Wellbeing Regulations

2009?

Step Three

Is the accommodation

**Type of Accommodation**

Any area of land which a person or persons

are frequently, intermittently or seasonally

permitted to use for camping on payment of

consideration and any facilities provided on

the land for the use of that person or those

persons.

Any premises used as a place of abode,

whether temporary or permanent, fixed

or mobile, where a person or persons

can be accommodated on payment of

consideration.

Any accommodation provided to an

employee in accordance with a term of

an award governing the employment of

the employee, or a term of the employee’s

contract of service, for use by the employee

during that employment or service.

Residential accommodation

Hotel

Motel

Hostel

Student dormitory

Holiday camp

Rooming house

A house under exclusive occupation

of the occupier

**Tick Box**

exempt under regulation

14 of the Public Health

and Wellbeing Regulations

2009?

Self contained flat under the exclusive

occupation of the occupier (consisting of

suite of rooms that forms a portion of a

building and includes kitchen, bathroom,

toilet and is a self contained residence)

Temporary crisis accommodation

Health or residential service

Nursing home

Retirement village

Caravan park or movable dwelling

Vessel, vehicle, tent or caravan

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**Checklist For Registration of Prescribed Accommodation**

**Questions to Ask**

Is the accommodation

exempt because of the

number of people not

related?

Regulation 14(i) Public

Health and Wellbeing

Regulations 2009?

**Type of Accommodation**

Self contained flat under the exclusive

occupation of the occupier (consisting of

suite of rooms that forms a portion of a

building and includes kitchen, bathroom,

toilet and is a self contained residence)

Temporary crisis accommodation

Health or residential service

Nursing home

Retirement village

Caravan park or movable dwelling

Vessel, vehicle, tent or caravan

Premises in which, other than the family

of the proprietor, not more than 5 persons

are accommodated, and which is NOT a

rooming house.

**Tick Box**

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**Checklist For Business Premises**

**Questions to Ask**

**Type of Business**

**Tick Box**

Does the business fall within Beauty therapy

one of the categories in s. 68

of the PHWA?

Step Two

Is the accommodation

prescribed in regulation

13 of the Public Health

and Wellbeing Regulations

2009?

Colonic irrigation

Hairdressing

Skin penetration (not tattooing)

Tattooing

Dentist (registered)

Medical practitioner (registered)

Nurse (registered)

Podiatrist (registered)

Acupuncturist (registered)

Pathology service

Non-pathology analysis business

Hospital/health centre

Is the business a mobile

hairdresser or mobile beauty

therapist?

What is the principal place

of business of the mobile

hairdresser or mobile beauty

therapist?

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>

>

Yes

No

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