

Building works without a permit – addressing widespread non-compliance by builders

By Tim Beckett

1. Overview

Under the provisions of the *Building Act 2011* (**Act**), all building work requires a permit unless it is the subject of a specific exemption within the Act or *Building Regulations 2012*. In recent years, we have observed a vastly differential approach by many local government clients in response to building works being carried out without a building permit having issued prior to the commencement of those works.

While the Act provides a mechanism for retrospective approval to be obtained through the issue of a building approval certificate (**BAC**), the mere availability of retrospective approval does not negate the overarching need for building permits to be obtained prior to the commencement of building works. Instead, there should be an emphasis on ensuring that builders and contractors are properly disincentivised from commencing works pre-emptively, without the issue of a building permit.

For some local government clients, significant or persistent failures by builders – in particular, registered builders – have resulted in prosecutions being commenced under section 9 of the Act for carrying out building works without a building permit, culminating in consistent and substantial penalties being imposed in order to effect behavioural change for those builders and the wider building industry. The typical penalty range for those offences is \$5,000 – \$50,000, although higher penalties have been imposed for some particularly serious offences.

In fact, on 5 June 2026, the Joondalup Magistrates Court imposed penalties totally \$120,000 in respect of three charges under the Act, which reflects the substantial penalties that can be imposed for more serious offences of this kind. That significant penalty was imposed notwithstanding the fact that the builder fully cooperated with the local government after committing the offences and obtained retrospective approvals for all building works prior to the commencement of prosecutions.

Local governments can also take a similar approach to enforcement action against demolition contractors who commence demolition work prematurely, as carrying out demolition work without a demolition permit is an offence under section 10 of the Act.

2. The objects of the *Building Act 2011*

The preamble for the Act identifies the objects of the Act as including to provide for permits for building work and demolition

work and standards for the construction or demolition of buildings and incidental structures.

Section 9 of the Act establishes an offence in circumstances where building work is carried out without a permit unless that building work is otherwise exempt from the requirement for a permit. Section 10 of the Act establishes a corresponding offence for demolition work carried out without a demolition permit.

The purpose of the building permit process is to ensure that building work which is carried out is undertaken by persons with appropriate qualifications, complies with applicable building standards, and is consistent with other necessary approvals, such as planning approval, where required.

While a local government, in its capacity as a permit authority, is generally required to grant a building permit where a certified application is received, that application is still the subject of an assessment process to ensure that all required information is provided and to enable appropriate conditions to be imposed on any building permit that is issued.

Where an application for a building permit is defective, a local government may request further information to be provided in accordance with section 18 of the Act, to ensure that building permits are not issued in error or for building works which are not compliant with applicable legislation.

That is, while a capable and experienced builder may submit a certified application for a building permit with the expectation that a permit will issue in due course (if the application documentation is compliant and correct), there is still a need for a permit to be issued prior to commencement of building works. The permit process necessarily requires the local government to assess the application and, further, provides an opportunity for the builder to be cognisant of any conditions which may apply to the permit before works commence.

Accordingly, while we occasionally see builders treat the submission of a certified application for building permit as a *fait accompli*, there are substantive reasons for requiring that permit to be formally granted before work can commence.

3. Circumstances of offences

While we see offences committed under section 9 of the Act in a variety of circumstances, they can be largely categorised into two general classes of offending, being:

- apparent inadvertence, because the person carrying out the building work did not believe that a building permit was required for building work or otherwise believed that a building permit had already been issued; or
- a deliberate breach, arising from commerciality and/or convenience.

While the first category of offending normally presents with a lower level of moral culpability, ignorance or inadvertence does not provide an excuse to such an offence. It is the responsibility of a person carrying out building work to ensure that they understand whether a building permit is required before commencing work and, further, confirm that they have received the formal building permit before that work commences. For example, we frequently receive explanations to the effect that a building company had believed that a building permit had issued or would issue and had commenced work on the basis of that expectation, without actually seeing the permit or the conditions applicable to that permit.

The second category of offences are typically more serious, as they reflect a deliberate decision to disregard the requirement for a building permit before commencing work. In this respect, common explanations include concerns arising from the cost of delay and the availability of tradespersons or contractors or potential impacts on customer satisfaction and commercial reputation. In these cases, an intentional decision to disregard the building permit process should not be rewarded and incentivised, as it can become a matter of general practice for some builders rather than an occasion aberration.

In all of these cases, if substantial building work is commenced without a building permit having first been issued, a local government should no longer grant a building permit for the subject building works if it is aware of that prior commencement. Instead, where works are commenced without a building permit, those works will need to be the subject of a retrospective approval (BAC) and a building permit may be required for the prospective works which have not yet been carried out.

Even if a BAC is granted by a local government and a building permit is obtained for the balance of the uncompleted works, that retrospective approval does not grant immunity from prosecution and does not negate any offence which has already occurred by the carrying out of building works without a permit. In that respect, local governments should also note that the limitation period for commencing a prosecution under section 9 of the Act is six years, which is important as these building works are not always immediately discovered or brought to the attention of a local government.

Local governments should also be aware that a further consequence of a prosecution being commenced for an offence under section 9 of the Act is that, while proceedings remain undetermined, a local government is prevented from granting a BAC under section 58(1)(f) of the Act. In this respect, a prosecution further disincentivises builders from committing these offences, as a prosecution may disrupt the completion of a building project.

4. The role of deterrence

In our dealings with local government clients, we have been provided with substantial anecdotal evidence that some, and perhaps many, builders have operated on the basis that it is acceptable to commence building works without having first obtained a permit, provided that approval is ultimately obtained. In fact, in some cases, builders who have committed persistent offences of this type and have been prosecuted have expressed surprise at having been prosecuted, on the basis that they have frequently commenced works without a building permit previously and never faced any consequences previously.

For local governments who have carried out a significant number of prosecutions under section 9 of the Act in recent years, we understand that they have observed some behavioural or operational change with builders in their district, as the risks of carrying out building works without a permit in those districts become more widely known, especially within the building industry.

The purpose of commencing prosecutions for most legislation administered by local governments is to establish a culture of deterrence. This includes specific deterrence, by ensuring that individual offenders are not incentivised to continue to offend, and general deterrence, by establishing a more general awareness that offences of a particular type may result in significant penalties, to prevent or reduce these offences from being committed in the first instance.

5. A measured approach

Of course, local governments have a discretion as to when prosecutions should be commenced and we understand that prosecutions will not be commenced for every offence under section 9 of the Act. In assessing when to commence prosecutions, local governments can have regard to a variety of factors, including the nature of the offence, the circumstances or reason for the offence, and the potential impact of a prosecution.

In that respect, we often reference the decision of McGrath J in ***Austrend Construction v City of Swan*** [2017] WASC 67, where the Court considered the criteria which apply to the assessment of penalties for offences under the *Planning and Development Act 2005*. While that decision related to planning legislation rather than building legislation, the Supreme Court has also noted the common features of planning and building legislation. In ***Wildan Properties Pty Ltd v City of Bunbury*** [2016] WASC 188, while the Court was dealing with an offence relating to occupancy permits rather than an offence under section 9 of the Act, Pritchard J relevantly noted the common sentencing principles that apply to building and planning offences respectively. For our prosecutions, Courts have been willing to apply the principles in ***Austrend*** to offences under section 9 of the Act.

In ***Austrend***, the Court identified the following criteria as being relevant:

- whether the breach was inadvertent or flagrant;
- whether the breach is permanent or reversible;
- the scale and impact of the breach; and
- the commerciality of the breach.

While those principles applied to the assessment of an appropriate penalty for a planning offence, they can also apply to an assessment of the seriousness of a building offence, which may inform the decision as to whether to prosecute. For example, a homeowner who erects a patio at his/her own property without knowing that a building permit is required for that work may not be assessed in the same way as a registered builder who persistently commences building works without a building permit having been issued in circumstances where there may be some financial prerogative for doing so.

The first example might be an isolated and inadvertent error, whereas the second example may represent an intentional and systemic breach where the threat of prosecution is treated as a 'risk tax', as the builder still derives an overall benefit from 'cutting corners' on the building permit application process.

Ultimately, enforcement and compliance processes should seek to prioritise prevention over cure and, in some cases, prevention will require prosecutions for specific classes of offences in order to ensure that the benefits of committing the offence do not outweigh the risks or detriment of doing so. That is the rationale behind the imposition of penalties for general deterrence. While the grant of retrospective approval may resolve a specific compliance issue in those cases, it may not address the bigger picture of effecting behavioural change within the building industry.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For any comments or questions on this article please contact Tim Beckett



(tbeckett@mcleods.com.au) or Madeline Madvad (mmadvad@mcleods.com.au).

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