

Considering ‘incidental structures’ under the Building Act 2011

By Tim Beckett

Implementation of the *Building Act 2011*

On 2 April 2012, the *Building Act 2011* (**Act**) came into effect, replacing the previous building regime set out in the *Local Government (Miscellaneous Provisions) Act 1960* (**LGMP Act**). The commencement of the Act established a very different process for local governments (or permit authorities) to determine applications for building approval, as responsibility for assessing applications devolved from local governments and towards private building certifiers.

Inevitably, there were some teething problems with the implementation of the new legislation – see, for example, the decision of the Supreme Court in *Chan v City of Subiaco* [2017] WASC 134, which confirmed there is a limitation as to the ongoing effect of building licence conditions imposed prior to the commencement of the Act. While certain issues have been clarified by decisions of the Supreme Court and the State Administrative Tribunal, a number of apparent anomalies remain.

For example, the Act no longer contains mechanisms for dealing with uncompleted buildings, which were previously the subject of section 409(a) of the now repealed Part XV of the LGMP Act. While those particular discrepancies sometimes can be overcome through the use of other powers and provisions under the Act or other legislation, a substantive issue remains unresolved – whether a local government or permit authority can take enforcement action in relation to a structure which is not an ‘incidental structure’.

Definition of ‘building work’

The Act purports to define ‘building work’ in an expansive manner but, ultimately, building work necessarily must relate to works affecting ‘a building or an incidental structure’. While the Act provides for various ancillary powers and processes relating to matters other than the construction or demolition of a building or an incidental structure, the definition of ‘building work’ is central to the enforcement provisions of the Act.

The obligation to obtain a building permit under section 9 of the Act only arises in respect of ‘building work’. Similarly, the power to serve a building order under section 110 of the Act only arises in the context of ‘building work’ or matters relating to ‘a building or incidental structure’.

Importantly, ‘building work’ does not encompass the construction, erection, or alteration of a ‘structure’ which does not fit within the definition of an ‘incidental structure’.

The Act defines ‘incidental structure’ as follows:

‘Incidental structure means a structure attached to or incidental to a building and includes -

- *a chimney, mast, swimming pool, fence, free-standing wall, retaining wall or permanent protection structure; and*
- *a part of a structure'.*

While that definition appears to be extremely wide-ranging, the definition is qualified by limiting its application to a 'structure' which must be 'a structure attached to or incidental to a building'. In our view, any plain reading of that definition would require that, at the very least, an 'incidental structure' can only exist if there is a 'building' on the same parcel of land. It could be further argued that the purpose of the incidental structure must also somehow relate to that building in order to be 'incidental' to it. However, we expect that, in that regard, it should be sufficient that the relevant structure simply exists on the same parcel of land as a building.

While the Act, somewhat curiously, does not contain a definition for the central concept of a 'building', definitions contained in other legislation and general judicial consideration of the concept of a 'building' would indicate that a building is an enclosed structure, which typically includes a roof and walls. By implication, the types of structures which are included in the definition of 'incidental structure' would appear to be consistent with that interpretation. On a plain reading of the Act, it is apparent that certain structures will not fall within the definition of a 'building' or an 'incidental structure', which gives rise to substantial concerns relating to the enforcement of the Act in respect of those structures.

Enforcement issues

As noted above, the obligation to obtain a building permit under section 9 of the Act does not arise in respect of a structure which is not a building or an incidental structure. While many such structures might be exempt by reference to the exemptions set out in the *Building Regulations 2012* in any event, there will clearly be instances where a structure of significant size may not constitute building work because it is not a building or an incidental structure that is attached or incidental to a building.

The State Administrative Tribunal has previously considered the question as to whether the 'building' to which a structure may be incidental is required to have been carried out in order for that definition to apply. In *Jones and Building Services Board [2015] WASAT 51*, the Tribunal stated:

"... it will be a matter of fact and degree in each case as to whether or not it can be said that an incidental structure, such as a retaining wall, is incidental to a building. It clearly is so when a building permit is applied for in respect of the construction of both a building and retaining walls at the same time. We do not consider that retaining walls can be said to be incidental to a non-existent building which has not yet been designed".

That is, a structure cannot be incidental to a building which has not yet been designed or which is not, for example, the subject of an application for approval.

Therefore, that decision may have the effect of causing works such as subdivisional retaining walls to become 'incidental structures', provided there is clear evidence that the works will be incidental to buildings proposed or contemplated to be erected on the subject land.

In other cases, a structure may be erected on land in circumstances where there is no building contemplated for that land.

For example, a developer may erect a large advertising hoarding or billboard on a vacant lot in connection with a subdivision, without there being any immediate intention for the erection of a building on that land. In that event, the billboard would not be a 'building' or an 'incidental structure' and therefore would not be building work at all.

Accordingly, that would obviate the need for a building permit to be obtained for the work. However, the greater concern is that, even if that structure was considered to be structurally unsound or otherwise unsafe, the enforcement powers set out in section 110 of the Act would not apply either. That is, a local government cannot give a building order in relation to a structure which is dangerous or unsafe unless that structure can be characterised as a building or incidental structure.

In our view, it is extremely unlikely that the Act was intended to operate in such a way, as the Act is designed to regulate building work being carried out in a safe and proper manner. We do not expect that Parliament intended that potentially substantial structures may be exempt from the requirement for prospective approval and, even more worryingly, be exempt from any enforcement powers, even if that structure is unsafe.

In some cases, there may be other opportunities for local governments to pursue enforcement action in relation to building projects of that kind, as there may be other matters, such as planning or health, that give rise to enforcement options for local governments.

However, we remain concerned that the Act does not properly require prospective building oversight for particular classes of work or allow a local government to take appropriate action in respect of a structure which may present a danger to the general public, but which does not constitute a building or incidental structure.

Legislative Review

We are aware that local governments have already raised this matter with the Building Commission and we are hopeful that the matter will be addressed to give effect to what we anticipate would have been intended by Parliament.

In the interim, if any local governments have any concerns as to the proper implementation of its enforcement powers in circumstances of this kind, we are happy to assist further to provide alternatives for compliance.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this Update please contact Tim Beckett by email to tbeckett@mcleods.com.au.

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