

What if my works are done without development approval or don't comply with the Design and Building Practitioners Legislation?

This article provides a brief summary of the consequences which may arise if planned council works, including remedial works or renovations to a building, are undertaken without approval or otherwise do not comply with the *Design and Building Practitioners Act 2020 (DBPA)* or *Design and Building Practitioners Regulation 2021 (DBPR)* (together, the **Design and Building Practitioners Legislation**).

Consequences - EPA

The Environmental Planning and Assessment Act 1979 (**EPA**) is the primary piece of legislation concerning approvals for building works. The main breaches that may arise would be:

- Carrying out development without consent or not in accordance with consent.
 - subject to a penalty of up to 1,000 penalty units (local court maximum) [Tier 1 Max penalty] under Section 4.2(1) of the EPA.
- Carrying out prohibited development.
 - subject to a penalty of up to 1,000 penalty units (local court maximum) [Tier 1 Max penalty] under Section 4.3 of the EPA.

Note that under Section 9.57(5) of the EPA, proceedings for an offence may be commenced not later than 2 years after the offence was alleged to be committed, or, in certain instances, 2 years from when they come to the attention of the authority (9.57(5A)).

Sections 9.52, 9.53 and 9.54 of the EPA provide the maximum penalties for offences under the Act respectively for Tiers 1, 2 and 3 as follows:

Tier 1 provides for a maximum penalty:

- in the case of a corporation, of \$5 million and \$50,000 for each day the offence continues; or
- in the case of an individual, of \$1 million and \$10,000 for each day the offence continues.

Tier 2 provides for a maximum penalty:

- in the case of a corporation, of \$2 million and \$20,000 for each day the offence continues; or
- in the case of an individual, of \$500,000 and \$5,000 for each day the offence continues.

Tier 3 provides for a maximum penalty;

- in the case of a corporation, of \$1 million and \$10,000 for each day the offence continues; or

- in the case of an individual, of \$250,000 and \$2,500 for each day the offence continues.

Note also Section 9.57(3) of the EPA provides that, if proceedings are brought in the Local Court, the maximum monetary penalty that the court may impose in respect of the offence is 1,000 penalty units (\$110,000) or the maximum monetary penalty provided by the Act in respect of the offence, whichever is the lesser.

In addition to the above, Council may issue development control orders under 9.34 and Schedule 5 of the EPA. These orders are far ranging, and can include:

Item 2 Stop Work Order

To stop building work or subdivision work carried out in contravention of this Act

Item 3 Demolish Works Order

To demolish or remove a building

Item 5 Repair Order

To repair or make structural alterations to a building

Item 10 Restore Works Order

To restore premises to the condition in which they were before unlawful building or other works occurred

Consequences - Insurance

Following a review of 3 main-stream reputable strata insurance policies it was revealed that:

- illegal works are specifically addressed together with works that are installed without the appropriate planning authority;
- naturally, the insurer is not offering cover to replace such building works;
- naturally, the insurer is distancing itself from liability arising from those works, such as, public liability and the like; and
- this behaviour extends to works undertaken by the owners corporation or the owner.

Typically, schemes will have some illegal building in place and need to manage cover through disclosure at renewal time; at which point they may be directed by the insurer to take steps to remedy the situation.

For further information in respect of insurance and policy exclusions, please refer to our article, [Illegal Building Works Costs: Residential Strata Insurance – Comparative Snapshot.](#)

Consequences - Contract

Typically, standard form contracts for building works provide that:



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- the principal (i.e. owner / owners corporation) is to obtain all relevant council approvals; and
- failure to do so entitles the contractor to terminate the contract and recover damages.

Where council approvals are not obtained in respect of the works, the local Council may issue orders including those listed above under *Consequences – EPA*, such as for their removal.

The principal may seek to regularise those previously completed works with Council through an application for a building information certificate (BIC), though this will generally be issued only where Council is satisfied that the previously completed works are otherwise compliant. This can usually be evidenced by provision of certificates from their contractor / subcontractors.

Such certificates will ordinarily be required from a contractor / subcontractor – such as through a contractual mechanism – which will then enable obtaining say an occupation certificate.

In circumstances where council approval was not obtained and the principal has not received relevant certificates from their contractor / subcontractors, there may be significant difficulty in obtaining a BIC and preventing an order, such as for removal of the works, being issued by Council.

For further information in respect of matters where an owners corporation has performed non-exempt remedial works without the appropriate authority from Council or a private certifier, please refer to our article, [*Building Commissioner Shining a Spotlight on Unauthorised Remedial Building Works*](#).

Consequences – DBPA

Similarly to the operation of the EPA, there are penalties for non-compliance under the DBPA, though these are primarily directed towards design and building practitioners. The DBPA does however provide for remedial actions which may be taken against owners, or owners corporations:

- Section 89 provides for a **stop work order** if the Secretary of Fair Trading is of the opinion that the work is or is likely to be carried out in contravention of the Act and such contravention could result in significant harm or loss to the public, potential occupiers or significant damage to property.
- Section 91 provides for **applications for orders to restrain or remedy contraventions** to the Land and Environment Court by the Secretary of Fair Trading, even without demonstrating a likelihood of damage.
- Section 92 provides for **investigations and audits of practitioners** by the Secretary of Fair Trading irrespective of whether a complaint has been received. In conducting these audits, the breadth of the section suggests that the Secretary may obligate the grant of access to the property to conduct an inspection for the purposes of the section.

Consequences – By-laws

Where unauthorised works are performed within a strata scheme to the effect that they breach a by-law of the scheme, the owners corporation (or other owners, as the case may be) may seek to enforce the by-law against them.

Two commonly used options to enforce by-laws are:

- Option 1: Notice to comply under section 146 of the Strata Schemes Management Act 2015 (“SSMA”) and penalty proceedings in the NSW Civil and Administrative Tribunal for breach.
- Option 2: Mediation, Tribunal’s orders and penalty proceedings for breach of those orders.

For further information in respect of enforcement of by-laws, please refer to our article, [Enforcement of By-Laws](#).

For further information in respect of the DBPA, please refer to our article [Design and Building Practitioners Act 2020 FAQ’s](#).

To find out whether your planned works are exempt from requiring approval or complying with the Design and Building Practitioners Legislation, check out our online quiz, [Do your remedial works or renovations need to comply with the Design and Building Practitioners Act](#).

Related Articles

[A Comprehensive Guide to the Design and Building Practitioners Act 2020 – Regulation Update Exempt Development Update](#)

[Strata Renovations & Subdivisions – Exempt & Complying Development Laws may remove the need for Council Approval](#)

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