



Tasmania

Building Regulation *Advisory Notes*

Building Standards & Regulation
Workplace Standards Tasmania

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These advisory notes are issued as and when is necessary to assist in the interpretation of Tasmanian building legislation and to keep the Industry informed of developments occurring with the Building Code of Australia and its reference documents.

Enforcement of the *Building Act 2000* where building work has been carried out without a permit

Building Surveyors' enforcement duties under section 163

Enforcement is predominately the function of the council's general manager. However, the Act also gives enforcement powers to building surveyors, which while mirroring some of those of the general manager, are differentiated in a significant way. The Act does not intend that building surveyors act as general enforcers, but rather that **when engaged** to carry out the normal statutory duties of assessment, inspection and certification under the building permit process, they are empowered to deal with any breach of the permit or its conditions. Action which exceeds the scope of the permit, such as carrying out additional building work which was not documented, assessed or covered by the building permit in force is also a matter for the building surveyor to deal with.

If a building surveyor is engaged to carry out the normal functions laid down in the Act and discovers that building work has previously been carried out without a permit, the building surveyor has a professional duty and a duty of care to deal with matter appropriately, by ensuring that the permit authority is made aware of the illegal building. The building surveyor does not have the enforcement role described in section 163 because the illegal work is not the work for which the building surveyor has been engaged.

The current practice of owners requesting a building surveyor solely to provide certification for work that has been carried out without a permit does not fall into the category of engagement as referred to in section 163; the Act does not provide for such certification unless it is as a result of a building order by the general manager under section 171. Owners who have not received the appropriate building order from a general manager but who approach a building surveyor for such certification should be advised to initiate the process with the council's permit authority.

It should also be noted that under section 171 and subsequent sections it is the owner's, not the permit authority's responsibility to apply for a certificate to proceed or a certificate of substantial compliance from a building surveyor.

Please circulate to

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Illegal Building Work

Illegal building work is building work that is not in compliance with the Building Act. This could occur because the work does not comply with the Building Permit or it has been carried out without a permit.

Illegal building work may come to light in a number of different ways:

- It is discovered by council officers while carrying out their duties.
- It is discovered by building surveyors while carrying out their duties.
- A prospective owner discovers the fact during a pre-purchase inspection or search.
- An owner admits to illegal building in order to undergo a process to obtain a Certificate of Completion from the Permit Authority.
- An owner or purchaser applies to the general manager for a Building Certificate.

Sometimes the current owner of a building may not be the owner who carried out the illegal building work. However, the fact remains that the building is illegal and does not benefit from a Certificate of Completion. It is understandable that in such circumstances authorised persons may wish to make it as easy as possible for the current owner to resolve the situation. The Act, however, provides no such short cuts. Sections 170 and 171 (and related sections) are quite specific about the required process. Despite this, there appears to be ongoing misinterpretation of the enforcement provisions.

Under section 171, which relates specifically to building without a permit, it is the general manager's duty to initiate the enforcement process. It is important to realise that illegal building does not relate just to the building provisions of the *Building Act 2000*; an illegal building will almost certainly have been constructed without a plumbing permit, a special plumbing permit or a planning permit, so there is likely to be a range of issues for a council's General Manager to consider prior to determining appropriate action.

Conversely, there will be instances where the nature and extent of the illegal building work may be such that the general manager will be prepared to grant a Building Certificate to the effect that no action will be taken.

Enforcement Process where building work has been carried out without a Permit.

The enforcement process for dealing with building work without a permit is covered in Part 11 of the Act. A general manager can make an emergency order if it is considered that the illegal work gives rise to a threat to life. The emergency order may prohibit occupation or require an owner or occupier of a building to stop work or to carry out building or other specified work.

Otherwise, building work without a permit must be dealt with by the issue of a Building Notice by the general manager. Under section 170, if a Building Notice is not revoked, the general manager, (or the building surveyor in cases where the illegal work is work for which a building surveyor has been engaged), is to serve a Building Order on the owner. The order may prohibit occupation or require the owner to stop work or to carry out building or other specified work.

In addition, in the case of work without a permit, section 171 requires a general manager to serve a Building Order on the owner giving the owner a choice between

- a) demolition of the building work, or
- b) the following of a specified process intended to make the building work legal.

As far as is practicable, the process is equivalent to the normal building permit process and starts with the owner obtaining a certificate from a building surveyor. A Certificate to Proceed is used for illegal building work which has commenced but is not finished, a Certificate of Substantial Compliance where an illegal building is finished. These certificates may have conditions attached.

It should be understood that these certificates are requested only under the order served under section 171. The Act does not provide for any circumstances where these certificates can be volunteered.

Consistency

Section 175, Application for Certificate to Proceed, and section 183, Application for Certificate of Substantial Compliance, both refer to sections 63, 64, 65 and 66 as applying to the applications for these certificates as if they were applications for a Certificate of Likely Compliance. So, for example, in considering an application for either of these certificates, a building surveyor should determine whether an order has been issued, and if a planning permit has been issued for the project and if so what conditions it imposes. In the absence of a planning permit, the building

surveyor should be careful to query the situation with the council, as the owner may either not be aware of the need to have applied separately for a planning permit, or in some other way may be jumping the gun.

Documentation for Permit Applications for illegal work

The process provided in s175 and s183 may lead to the application for a Permit to Proceed or a Permit of Substantial Compliance. In both these cases there is a requirement for documentation as specified in the Director's Specified List. An application for a Permit to Proceed should have the same level of documentation as that which is required for a building permit. However, an application for a Permit of Substantial Compliance could have a lesser level of drawing if suitably annotated photographs of the construction are submitted. There should at least be comprehensive as-built plans, sections and elevations describing the layout and appearance of the building. Building surveyors are advised that it is in everybody's interest for them to certify that any drawings or photographs submitted with an application represent a true record of the existing building for which substantial compliance is being certified.

Owner Builders

If the owner of uncompleted building work without a permit was the owner builder of the illegal work, or intends to become an owner builder once granted a permit to proceed, the appropriate report and registration number is to be obtained from the Director of Building Control and entered on the certificate to proceed. A start work notice will also be required. In the case of a Permit of Substantial Compliance, there will be no start work notice, so it is requested* that the building Permit Authority provides a copy of the permit to the building surveyor to trigger the final inspection and occupancy permit procedures. A copy of the permit should also be provided to the Director of Building Control so that the owner built project can be entered in the owner builder database.

**The Act does not currently require that copies of these permits are provided to the building surveyor or Director.*

This will be corrected when the next amendments are drafted; we request that Permit Authorities adopt this practice now in anticipation of the amendments.

Please provide copies of Permits to Proceed to the building surveyor and copies of Permits of Substantial Compliance to the building surveyor and the Director of Building Control.

In Summary:

- **A Building Surveyor who is approached by an owner about illegal buildings should direct the owner to contact the council**
- **The General Manager may decide that a Building Certificate is appropriate or may decide that the building needs to be legalised.**
- **The process of remedying illegal buildings begins with a Building Notice issued by the General Manager.**
- **An Owner may waive the representations period on the Notice and request an Order be issued immediately. Councils will facilitate the process (and often the land sales process) by having the ability to do this.**
- **Once the Order is issued, the Building Surveyor may prepare the Certificate to Proceed or the Certificate of Substantial Compliance.**
- **Plumbing Notices, Fire Upgrading Notices and other enforcement actions may result from the General Manager's actions.**
- **The Permit Authority will consider applications for Permits to Proceed and Permits of Substantial Compliance.**
- **Copies of Permits issued will be sent to the Building Surveyor and the Director of Building Control as appropriate.**

For more information

The *Building Act 2000* and the *Building Regulations 2004* can be downloaded from <http://www.thelaw.tas.gov.au>

Further information can be obtained from Workplace Standards Tasmania Helpline
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