



- 3.1.2 where building work has been carried out without a permit, such as a rear extension, verandah or carport and it isn't possible to tell whether the work is BCA compliant;
  - 3.1.3 where the use of the building has changed (without appropriate regulatory oversight); or
  - 3.1.4 work has been carried out over an easement.
- 3.2 In light of the Shout Rock Appeal:
- 3.2.1 a building surveyor can determine what building work or protection work should be required under a BO and is not limited by work that is required by the regulations; and
  - 3.2.2 a BOMW cannot be used to:
    - (a) direct an owner or occupier to evacuate or vacate a building;
    - (b) prohibit entry, use or occupation of any building or part of a building, land or place;
    - (c) require an owner to cause an inspection of a building, land or place to be conducted; or
    - (d) require destructive or non-destructive testing of materials.
- 3.3 There are other alternatives to a BO or a BOMW which may be more appropriate depending on the circumstances, including:
- A. using the other parts of the section 111 BO power;
  - B. issuing an EO (if there is a danger to life or property);
  - C. using the section 234E injunction power; or
  - D. using the section 16 prosecution power.

#### **4. ALTERNATIVE OPTIONS**

##### ***A. Using the other parts of the section 111 BO power***

- 4.1 Council should consider whether it is possible that any other requirements that can be included in a BO under section 111 would assist, such as:
- 4.1.1 directing the evacuation of the building;
  - 4.1.2 prohibiting the occupation of the building;
  - 4.1.3 requiring an inspection to be carried out; or
  - 4.1.4 requiring testing of specified materials to be carried out.
- 4.2 This could be accompanied by a separate written explanation of the building work that the owner could carry out which would resolve Council's concerns so that Council could withdraw the BO or not issue a further BO once the existing BO expires. That is, Council could separately indicate to the building owners the building work that would satisfy it, without including it in the BO itself. For example, if a building is substantially damaged,

Council could prohibit occupation of the building via a BO and could separately indicate to the building owner the type of repairs that would be necessary before Council could consider withdrawing the BO and allowing occupation again.

**B. Using the EO power**

4.3 Section 104 of the Act permits an EO to direct the carrying out of building work or other work necessary to make the building, land or place safe or to secure it from access. This encompasses any work that the MBS considers necessary for safety or to prevent access.

4.4 An EO can be issued when an MBS is of the opinion that it is necessary because of a danger to life or property arising out of the condition or use or proposed use of:

- (a) a building; or
- (b) the land on which building work is being or is proposed to be carried out; or
- (c) a place of public entertainment (**place**).

4.5 There is a common current practice of issuing an EO only where there is an ‘imminent danger’. However, there are no words in section 104 that limit an EO to being issued only where there is an ‘imminent danger’. The decision of when an EO should be issued is a matter left to the discretion of the MBS. There is no prescribed requirement, process or factors for the MBS to consider. There is no specific degree of danger to life or property which an MBS must be satisfied of, nor is there a requirement that a danger be ‘imminent’.

4.6 Accordingly, Councils should consider three questions:

- 4.6.1 whether there is a danger to life or property;
- 4.6.2 whether it is necessary to issue an EO because of that danger; and
- 4.6.3 whether the measures proposed to be required under the EO are directed to making the building or land safe or preventing access.

4.7 Where the three questions are satisfied then it is open to Councils to issue an EO in order to address the issue.

**C. Section 234E injunction**

4.8 Where Council is aware that the Act has been contravened, section 234E of the Act empowers an MBS to apply to Court for an injunction requiring the carrying out of building work, protection work, plumbing work or other work. This means the MBS can exercise their discretion in the type of work it seeks the Court to order. An application under section 234E does not need to be made in conjunction with a prosecution – it can be sought as a stand-alone application.

4.9 An application under section 234E requires the preparation of a summons and supporting affidavit. Whilst this is more time-consuming than issuing a BO, orders under section 234E can be obtained by consent between the MBS and the building owner. Where Council can demonstrate to a building owner that, if they do not carry out the work that Council considers would resolve its concerns, Council can obtain an injunction under section 234E, this may be enough to persuade a building owner to agree to a consent injunction order or to simply carry out the work without the need for an order.

**D. Section 16 Prosecution**



- 4.10 An alternative to the notice and order process under Part 8 of the Act is to commence proceedings for an offence under the Act, where an offence has been committed, such as an offence under section 16(1) of the Act. During the prosecution process, Council could discuss the work that could be carried out by the owner that would satisfy Council's concerns.
- 4.11 This may be a useful strategy for dealing with buildings built without a permit. In dealing with the building owners prior to instituting proceedings or during the course of a prosecution, Council may be able to reach agreement with the owners regarding the appropriate way to deal with the unlawful structure.
- 4.12 Alternatively, where appropriate, Council could issue a building infringement notice<sup>1</sup> which may include additional steps to expiate the offence (i.e., additional steps for compliance).

**5. EXISTING BUILDING ORDERS AND BUILDING ORDERS FOR MINOR WORK**

- 5.1 MBS might have issued BOs and BOMWs following the Shout Rock decision which required that an owner carry out work required by the regulations only. Councils may wish to consider, where appropriate, if these BOs and BOMWs should be revisited so that a more unrestricted nature of work can be specified instead.

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<sup>1</sup> Available for an offence against regulations 41(1), 41(2), 147C, 147L(2), 147M(2), 147N(2), 147O(2), 147V(1), 147X(3), 147ZC, 147ZJ(4), 166D, 166H, 197(2), 199(2), 216(2), 218(3), 223(1), 223(2), 225, 226(1), 227 and 228.