

# Building Information Certificates

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## Information on building information certificates relating to unauthorised building works

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The following information is designed to help landowners, purchasers and councils understand and apply the requirements of the *Environmental Planning and Assessment Act 1979* and the *Environmental Planning and Assessment Regulation 2021* relating to building information certificates (BIC).

### What is a Building Information Certificate (BIC)?

An application for a BIC is typically made when unauthorised building works have been carried out. As it is not possible to obtain development consent or a construction certificate for a building that has already been erected, a BIC is generally the only option available to “regularise” building work that has been carried out unlawfully.

A BIC is issued by a local council following an application under Division 6.7 of the *Environmental Planning and Assessment Act 1979* (EP&A Act). The application for a BIC is made to the council for the local government area in which the unauthorised building works have been carried out and the council is obliged to determine whether to issue or refuse to issue the certificate.

A BIC is a certificate that prevents the council from taking the following actions from the date of issue of the certificate:

- make an order (or take proceedings for the making of an order or injunction) under the EP&A Act or *Local Government Act 1993* (LG Act), requiring the building to be repaired, demolished, altered, added to or rebuilt; and
- take civil proceedings in relation to any encroachment by the building onto land vested in or under the control of the council.

The BIC applies indefinitely to unauthorised building works carried out before the issue of the certificate<sup>1</sup>, though for only 7 years in relation to matters arising only from the deterioration of the building as a result of fair wear and tear<sup>2</sup>.

A BIC can apply to the whole or part of a building.

### What is the purpose of a (BIC)?

A BIC does not approve or legitimise unauthorised building works, instead a BIC provides assurance that a council will not take certain compliance actions relating to those unauthorised works.

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<sup>1</sup> Section 6.25(3) EP&A Act 1979

<sup>2</sup> Section 6.25(4) EP&A Act 1979

It is usually requested by buyers or sellers of property before settlement to make sure that the building being bought or sold is not going to be the subject of compliance action by council. A BIC is commonly sought if it is suspected that building work has been undertaken without the appropriate approvals being issued by council or a registered certifier.

## Can a development application or modification application be used to legitimise unauthorised building works?

Unauthorised building works cannot be approved through a development application or modification of an existing development consent as development can never be retrospectively approved. A development consent can only prospectively approve the carrying out of development.

However, development consent or modification of an existing development consent could be granted to authorise the future use of an already erected building. The modified consent only authorises the use of that building in the future, rather than retrospectively authorising their construction. In *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177 at [41], the judgement stated:

*‘Just as another development consent could not be granted to authorise the erection of the already erected building, so too the existing development consent cannot be modified to authorise retrospectively the erection of the already erected building. However, another development consent could be granted, or the existing development consent could be modified to authorise the use of the already erected building in the future.*

*The grant of another development consent or the modification of the existing development consent would not cure the breach of s 4.2(1) of the EPA Act of carrying out the development of the erection of the building not in accordance with the development consent, but either approval would authorise the development of the use of that building in the future.’*

Separate to a BIC application for unapproved works, an applicant may also lodge a development application or a modification application for prospective alterations and additions to a building or to authorise its future ongoing use.

## Who can apply for a BIC?

The following people can apply for a BIC:

- the owner of the land on which the unauthorised building works have been carried out (BIC Land), or any other person with the consent of that landowner,
- a purchaser under a contract for sale of the BIC Land or the purchaser’s legal practitioner or agent,
- a public authority, provided notice is given to the landowner.

## How do I apply for a BIC?

An application for a BIC must be made through the [NSW Planning Portal](#). The NSW Planning Portal contains guides on how to register for the NSW Planning Portal and [how to submit a BIC application](#).

## What information will be required for a BIC application?

A council may request an application for a BIC to include the relevant information required for it to determine an application. The applicant may be required to supply information, such as building plans, specifications, survey reports and certificates.

## Can a BIC application be amended?

A BIC application cannot be amended.<sup>3</sup> Any amendment of a BIC application would need to be by way of a new application to the Council.

## What are the fees for a BIC?

Councils can charge an approved fee for services they provide under s608 of the *LG Act*, this includes a service in connection with the exercise of the council's regulatory functions – such as issuing a certificate. In setting these fees, councils must comply with the requirements of Part 10 of the *LG Act* and the fees must be published in a fee schedule.

It is noted that a fee for a BIC was previously contained in the EP&A Regulation 2000. The Department intends to re-insert a fee for a BIC in the EP&A Regulation 2021 in future amendments.

## What matters does Council need to consider when determining whether a BIC should be issued?

A council can issue a BIC provided there is no matter discernible by the exercise of reasonable care and skill that would entitle the council, under the EP&A Act or the *LG Act* to

- order the building to be repaired, demolished, altered, added to or rebuilt,
- take proceedings for an order or injunction requiring the building to be demolished, altered, added to or rebuilt, or
- take proceedings in relation to any encroachment by the building onto land vested in or under the control of the council, or
- there is such a matter but, in the circumstances, the council does not propose to make any such order or take any such proceedings.

The council should consider and assess the application on its merit taking into account the relevant considerations of the EP&A Act and EP&A Regulation. In deciding whether to issue a BIC, council should consider:

- as best practice, whether the building meets relevant buildings standards and the structural adequacy of the building,
- where no prior consent or approval has been obtained, whether development consent would have been granted had consent been sought for the building (the notional DA)<sup>4</sup>

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<sup>3</sup> *Scarf v Shoalhaven City Council* {2021} NSWLEC 127

<sup>4</sup> *Taipan Holdings Pty Ltd v Sutherland Shire Council* [1999] NSWLEC 276<sup>5</sup> *Ireland v Cessnock City Council* [1999] NSWLEC 250. Note where there is an actual development application, there is no need for consideration of the notional DA as outlined in *Mineral Wealth Pty Limited v Gosford City Council* [2003] NSWLEC 153)

having regard to those matters in section 4.15 of the EP&A Act of relevance to the notional DA, including the relevant planning controls.<sup>5</sup>

Where a reasonable consent authority would never have granted development consent to the notional DA, then the BIC is unlikely to be granted<sup>6</sup>. In such circumstances, the council may consider it would be preferable to address the unauthorised building works by issuing development control orders or taking other compliance action.

The courts have provided guidance that past unlawful use is not a relevant factor in determining whether development consent should be granted to a notional DA (and hence, in considering whether to issue a BIC). The proper approach to be taken is to leave to the criminal law the punishment of the unlawful conduct and to determine the BIC application on its merits.<sup>7</sup>

## Can other orders or actions be issued/taken when a BIC has been issued?

A BIC does not prevent a council from making development control orders that relate to a fire safety order or a building product order rectification order under the *Building Products (Safety) Act 2017*.

A BIC does not prevent a council from taking proceedings under section 9.50 of the EP&A Act for failure to obtain a development consent or to comply with the conditions of a development consent.

## What information must be included on a BIC?

A BIC must include the following information (section 289 of the EP&A Regulation 2021):

- the address of the building,
- a description of the building, or the part of the building that the BIC applies to,
- the day on which the building or the part of the building was inspected,
- a statement that the council is satisfied about the matters specified in section 6.25(1) of the EP&A Act,
- a statement that describes the effect of the certificate in the same terms as, or in substantially similar terms to section 6.25 of the EP&A Act,
- the date of issue.

A council must keep a record of all BICs that have been issued and these must be made available for inspection by the public.

## What if a BIC is refused and what are an applicant's appeal rights?

If a council refuses to issue a BIC, it must inform the applicant of its decision and the reasons for it. The reasons must be sufficiently detailed to inform the applicant of the work that needs to be done to enable the issue of a BIC.

Section 8.25 of the EP&A Act contains appeal rights relating to a BIC. An applicant may appeal to the court where a council has refused to issue a BIC, where a council has failed to issue a BIC within

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<sup>5</sup> *Ireland v Cessnock City Council* [1999] NSWLEC 250. Note where there is an actual development application, there is no need for consideration of the notional DA as outlined in *Mineral Wealth Pty Limited v Gosford City Council* [2003] NSWLEC 153)

<sup>6</sup> *Malass v Strathfield Municipal Council* [2022] NSWLEC 1160

<sup>7</sup> *Kouflidis v City of Salisbury* (1982) 49 LGERA 17, *Jonah Pty Limited v Pittwater Council* [2006] NSW LEC 99

the period prescribed by the EP&A Regulation 2021 or where they are dissatisfied with a notice from council to supply information relating to the BIC.

An appeal must be made within 6 months of the date on which the applicant is given notice of council's decision in relation to the BIC or at the end of the deemed refusal period, which is 40 days after:

- the date on which the application for the BIC was made (section 248(2)(a) of the EP&A Regulation 2021); or
- the date on which the applicant supplies information to the council in response to a notice issued under s6.26(2) of the EP&A Act (section 248(2)(b) of the EP&A Regulation 2021).

The court may direct the council to issue a BIC, revoke, alter or confirm a notice to supply information or make any other order that it considers appropriate.

## What actions may consent authorities take for unauthorised building works?

Consent authorities may undertake a range of enforcement actions for unauthorised building works, which may result in substantial fees and fines being incurred and significant delays. These include:

- issuing penalty infringement notices
- issuing development control orders in accordance with Division 9.3 and Schedule 5, Part 1 of the EP&A Act. These may include stop work orders, demolish work orders, restore works orders and compliance orders
- criminal prosecutions through either the Local Court or the Land and Environment Court

## Can a council insist on a BIC application being made?

A council cannot insist on a BIC being applied for as part of dealing with unauthorised building works or enforce a development consent condition requiring a BIC application to be made. It is at the discretion of the land owner to choose to obtain one. However, a council may take action for unauthorised building works if a BIC has not been obtained.

## What is an Occupation Certificate (OC) and is it a requirement of a BIC?

An OC authorises the occupation and use of a new building or part of a building. An OC is issued by a Principal Certifier when they are satisfied the development meets various regulatory standards. These standards include the design and construction of the building being consistent with the development consent, all pre-conditions having been satisfied, a construction certificate having been issued and the building being suitable for occupation. An OC cannot be issued if these matters have not been addressed.

A BIC can be issued for buildings that do not have an OC. If there are unauthorised building works at a site which are preventing an OC from being issued, then the council should decide, through the BIC process whether to take action or not in relation to those works.