



Building Newsflash

POOL FENCING LAWS — WHO CAN TAKE ENFORCEMENT ACTION?

Purpose:

To clarify who has authority to take enforcement action in relation to a breach of Queensland's pool fencing laws.

Background:

A number of councils have expressed confusion about who can enforce pool fencing laws, in particular:

- (i) Can local governments take enforcement action in relation to pool fencing laws, particularly while a *development assessment* process, commenced by a private building certifier, remains outstanding? and
- (ii) Can local governments use *authorised persons* other than *building certifiers* for the enforcement of pool fencing laws?

The Department of Local Government, Planning, Sport and Recreation is keen to support Council inspection programs and has obtained crown law advice to clarify that council officers do not need to be building certifiers to take enforcement action in relation to pool fencing laws.

Legislation

Building Act 1975
Integrated Planning Act 1997
State Penalties Enforcement Act 1999
Local Government Act 1993

Interpretation

The *Building Act 1975*¹ provides that the owner of a pool, on residential land, is required to ensure the pool is fenced and maintained to a standard.

¹ BA-section 22(4)

The *Building Act 1975*² and the *Integrated Planning Act 1997*³ both make provision for enforcement action when a pool fence is non-compliant.

Integrated Planning Legislation

The *Integrated Planning Act 1997* (IPA) requires that for an enforcement notice to be served, non compliance must arise in relation to the absence of a *development permit* or failure to comply with a condition of a *development permit*.

Any *development permit* issued by a local government or a *private building certifier* acting as *assessment manager*, should contain a condition that mandatory inspections are required of the -

- pool fence, before water is placed in the pool⁴ -(Fence); and
- development at the completion of construction⁵ -(Final).

The absence of a *development permit*⁶ or non-compliance with a condition of approval⁷ constitutes a circumstance for an *enforcement notice*.

Who Can Issue an Enforcement Notice Under IPA?

IPA provides⁸ that an *assessing authority* may issue an enforcement notice. An *assessing authority* under IPA for *assessable development-building work* is a *private certifier* or a *local government*⁹.

Accordingly in instances where a *private building certifier* has issued a *development permit* for a pool and fence and there has been a failure to comply with the approval, then either the *private building certifier* OR the *local government* can give an *enforcement notice* to the owner of the pool.

This action may be taken by a *local government* at any time, notwithstanding that a final inspection has NOT been carried out by a *private building certifier*, provided that consultation occurs between the parties about the giving of the notice.

However consultation is not required where it is determined that a dangerous situation exists. A *local government* may reasonably consider that an unfenced pool, filled with water, is a dangerous situation.

Building legislation

The *Building Act 1975* (BA) requires that, for an enforcement notice to be served, there is non-compliance with a particular matter in the BA. A *local government* may give an enforcement notice for any matter of non compliance with the BA¹⁰.

A *private building certifier* may give an enforcement notice ONLY for the matters relevant to the work for which the *private building certifier* has been engaged¹¹.

² BA-section 22(5)

³ IPA-section 4.3.11

⁴ SBR-section 16.B(2)

⁵ SBR-section 87.I(b)

⁶ IPA-section 4.3.1

⁷ IPA-section 4.3.3

⁸ IPA-section 4.3.11(1)

⁹ IPA-Schedule 10

¹⁰ BA-section 22(1)&(2)

A *show cause* notice is required before an *enforcement notice* can be issued¹², except where it is determined that a dangerous situation exists¹³. A *local government* or a *private building certifier* may reasonably consider that an unfenced pool, filled with water, is a dangerous situation.

There is no statutory restriction to a *local government* issuing an enforcement notice at any time, even prior to a final inspection being carried out by a *private building certifier*.

Who can undertake enforcement action under the *Building Act 1975*?

Failure to comply with certain provisions of the BA is an offence. The offence may be prosecuted under the *Justices Act 1886* or the *State Penalties Enforcement Act 1999* (SPEA)

The SPEA provides¹⁴ that an *authorised person*¹⁵ may serve an *infringement notice* if that *authorised person* believes that a person has committed an *infringement notice offence* prescribed under a regulation¹⁶.

Schedule 5 of SPER provides that an *authorised person* under section 1084 of the *Local Government Act 1993* may serve an *infringement notice* for a breach of an identified section¹⁷ of the BA.

The *Local Government Act 1993* provides¹⁸ that a local government may appoint a person as an *authorised person*, only if the local government considers the person has the necessary expertise or experience, or the person has satisfactorily finished training approved by the local government for the appointment.

For the purposes of enforcement of BA provisions relating to pool fencing, an *authorised person* does not need to be a *building certifier*. The *authorised person* can be any person who has been trained for the purposes of carrying out pool fencing assessments and inspections.

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¹¹ BA-section 22(3)

¹² BA-section 22(4)

¹³ BA-section 22(5)

¹⁴ SPEA-section 13

¹⁵ SPEA-Schedule 2

¹⁶ SPEA-section 15(2)(d)(i)

¹⁷ BA-sections 14(1),16,16(8)(2),16B(2),16D(5),16E(5)

¹⁸ LGA-section 1084(3)