Why local governments must take building non-compliance seriously

Adams vs Price case study

A good 2018 Reference Report This was commissioned in 2017 by the Building Ministers' Forum (BMF) to assess the effectiveness of compliance and enforcement systems for the building and construction industry across Australia. https://apo.org.au/node/314175.

The issue for WA Councils, as Permit Authorities under the Building Act 2011

Councillors may not be involved in individual building enforcement decisions, but they have a legitimate governance interest in whether the City's building regulatory system is functioning effectively, consistently and transparently. The Building Act 2011 (WA) gives local governments important responsibilities as permit authorities and in relation to building compliance and enforcement.

When credible building non-compliances are reported, failing to investigate, respond or explain the City's position can create consequences for residents, neighbouring property owners and the integrity of the regulatory system.

A cautionary WA example — Adams v Price [2021] WADC 130 (summary below)

The importance of this issue is illustrated by the District Court of Western Australia's decision in Adams v Price [2021] WADC 130. Mr Adams was a purchaser who bought a property at 41 Coral Road, Kalamunda, in 2012. The property contained numerous additions and structures. He said he was told that the necessary approvals were in place and relied upon that information when purchasing the property for $605,000. Years later, when Adams attempted to sell the property, investigations identified that a number of structures did not have corresponding approval records. The property was ultimately sold in 2020 for $480,000, and Adams claimed substantial losses.

The important point for Councillors

Mr Adams was not the person who constructed the historical additions. He was the subsequent purchaser who inherited the consequences of uncertainty about the property's building approval history. That is an important reminder for local government:

<u>When building compliance problems are left unresolved, the consequences can ultimately fall on an innocent subsequent owner (the victim) who had no involvement in creating the original non-compliance.</u>

The case does not establish that Kalamunda was legally responsible for Adams' loss. His claims were against the vendors and real-estate agent and were ultimately dismissed. But the case demonstrates the potential human and financial consequences when the status of building work is unclear many years later.

Kalamunda's records provide an even more important lesson

The Court examined the historical records held by the City of Kalamunda. Those records showed approvals for some works but did not contain corresponding applications or approvals for a number of the improvements relied upon by Adams. The evidence also included a 2002 letter from the Shire of Kalamunda concerning building work undertaken without a building licence. The Shire stated that it could acknowledge the work but could not retrospectively approve it and recorded that it had decided not to take action against the owners for commencing the work without first obtaining a building licence.

This illustrates a critical distinction: **<u>There is a significant difference between a local government knowingly identifying non-compliance and making a documented decision about it, and a local government failing to respond adequately to reported non-compliance.</u>**

The innocent-owner (the victim) problem

The Adams v Price case highlights a broader problem councillors should consider. A building may pass through several owners:

Owner A constructs the work →
Owner B purchases the property →
years later Owner B discovers an approval problem →
Owner B bears the practical consequences.

The subsequent owner may have:

- had nothing to do with the original building work;
- reasonably assumed that the property was compliant;
- relied upon council records or representations;
- difficulty obtaining retrospective approval;
- difficulty selling the property;
- additional professional and investigation costs; and
- potentially significant financial exposure.

That is why building compliance is not simply a dispute between a council and the person who allegedly breached the building legislation. **Poorly resolved building non-compliance can become a problem for innocent people years later.**

Why "doing nothing" matters

There is an important difference between:
"**The City investigated the alleged non-compliance, considered the evidence, made a properly authorised decision and explained why enforcement was or was not warranted."**
and:
"The City received a credible complaint about potential non-compliance but did not adequately investigate, respond or explain its decision."

The first is an accountable regulatory decision. The second creates a governance risk. A decision not to enforce should therefore not be confused with doing nothing. Where a local government consciously decides that enforcement is inappropriate, there should be a clear evidentiary and regulatory basis for that decision.

What councillors should ask

Councillors should not direct officers to enforce against a particular property. Instead, they should ask whether the City's overall Building Act 2011 compliance system can demonstrate:

- How building non-compliance complaints are assessed.
- What triggers an investigation.
- What factors are considered before enforcement is commenced or declined.
- How decisions not to enforce are documented.
- How unresolved non-compliance is tracked.
- How affected and adjoining owners are treated.
- Whether building compliance decisions are reviewed for consistency.
- Whether the City can demonstrate that its regulatory processes are operating effectively.

The governance lesson from Adams v Price

The lesson is not that every complaint must result in enforcement. Nor did the Court find that Kalamunda's conduct caused Adams' financial loss, as Kalamunda was not a party to the proceedings. The lesson is more fundamental: **Building regulatory decisions can have consequences long after the original building work occurred — and those consequences may ultimately be borne by people who had nothing to do with the original non-compliance.**

<u>That is why councillors should care about whether their City's building regulatory system is working properly</u>.

Bottom line

<u>Building compliance is a core local-government regulatory function, not merely an operational matter for individual officers.</u>

Councillors should therefore be asking: "Can the City demonstrate that when building non-compliance is brought to its attention, it deals with it appropriately, documents its decision and protects the community from the consequences of unresolved non-compliance?" The issue is not whether Council should order enforcement against a particular resident. The governance issue is whether Council can have confidence that its Building Act 2011 regulatory system is functioning as it should —
<u>… so that today's unresolved building problem does not become tomorrow's innocent owner's (the victim's) problem.</u>

Summary of the Adams v Price case

This is **Adams v Price [2021] WADC 130**, decided by Levy DCJ in the District Court of WA on 22 December 2021. It concerns the sale of a house at **41 Coral Road, Kalamunda**, and the history of building approvals at that property.

1. What the case was about

The central problem was that the property contained numerous additions and structures, including:

- a converted/extended master bedroom and ensuite
- games room
- outdoor bar and patios
- spa and roof
- rear veranda
- shed/carport
- other additions.

The purchaser, David Adams, said he asked the selling agent, Simon Mills, whether the additions had council approval. He said Mills told him he had checked with the **Shire of Kalamunda** and that there were no outstanding approvals and that the approvals were in place. Adams relied on that when purchasing the property for **$605,000**.

Years later, when Adams tried to sell the property, his new agent checked the City's records and found that only some structures appeared in the council records as approved. This resulted in the property being marketed with unapproved structures disclosed.

Adams ultimately sued the former owners and the real estate agent, seeking damages including the claimed $125,000 difference between his purchase price and later sale price.

The District Court dismissed his claim.

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2. The particularly interesting part: Kalamunda's role

This is where the case becomes quite relevant to your broader questions about local-government building regulation.

The Court examined the **actual historical records held by the Shire/City of Kalamunda**.

The records showed approvals for:

Work	**Council record**
Original residence	Approved in 1980
Rear garage	Approved 1994
Above-ground pool	Approved 1995
Front carport	Approved 1998
Other major additions	**No corresponding approval found**

The City's records system contained application numbers, dates, descriptions and approval information.

So there was an important distinction:

The evidence did not establish that all of the structures were approved.

But it also did **not establish precisely when each unapproved structure had been constructed**.

That distinction ultimately became crucial to Adams' lawsuit.

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3. The 2002 incident is particularly significant

There is one piece of evidence that, in my view, deserves special attention.

In **December 2002**, the Shire's Manager of Building Services, G B Allen, wrote to the Prices concerning a **water closet that had been constructed without Shire approval**.

The letter said, in substance:

- the Shire could acknowledge the building works;
- the letter did **not** certify the structural adequacy;
- the legislation did not provide a mechanism for retrospective building approval;
- and, importantly, **the Shire had decided not to take action against the owners for commencing building works without first obtaining a building licence**.

That is a documented instance where the local government **knew of unauthorised building work and consciously decided not to commence enforcement action**.

However, it is important not to overstate what the judgment establishes:

The Court did not find that the Shire knowingly allowed all of the later additions to remain unauthorised.

The 2002 letter specifically concerned the water closet. The Court records that Mr Wilson said the Shire had no other record of applications or approvals relating to the property.

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4. What were Kalamunda's legal responsibilities?

This is perhaps the most important part.

For works undertaken under the old legislation, **s 374 of the Local Government (Miscellaneous Provisions) Act 1960** applied.

The Court explained that the provision prohibited a person from commencing building work or altering/extending an existing building **until plans had been submitted to the local government and the local government had approved them and issued a building licence**.

So the regulatory framework was essentially:

Owner proposes building work → plans submitted → local government approval/licence → building work.

The Shire therefore wasn't merely a record-keeping organisation. It was the statutory building approval authority.

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5. But here's the critical limitation in the case

The Court **did not decide that Kalamunda was liable to Adams**.

That wasn't the case being litigated.

The case was essentially:

Did the sellers/real estate agent make actionable representations about the approval status of the property?

The Shire was principally involved as the **building approval authority whose historical records were used as evidence**.

The Court called the City's principal building surveyor, Duncan Wilson, as a witness. He produced the historical records and explained the City's records concerning the property.

The Court ultimately found that, as at **24 February 2012**, there were no outstanding applications or approvals relating to the property.

That statement was technically true—even though some improvements may not have originally been constructed with the necessary approval.

That's a very important distinction:

"There are no outstanding applications" ≠ "everything on the property was lawfully approved."

The Court expressly recognised that distinction.

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6. Why Adams lost

There were several reasons.

First — he couldn't prove exactly when the structures were built

This was crucial.

For the contractual representation that "where required all structures have building approval", Adams needed to establish that the relevant structures required approval **and were constructed without it**.

The Court concluded that Adams had not established when the various improvements came into existence. Consequently, he couldn't establish the necessary proposition on the balance of probabilities.

Second — the agent's statement was ambiguous

The Court accepted that Mills had said he had spoken to someone at Kalamunda and had been told there were no outstanding applications/approvals.

But the Court found that this was not necessarily a representation that **every structure had historically been approved**.

Indeed, the Court found that the statement was, strictly speaking, true because there were no outstanding applications at the time.

Third — the Court wasn't satisfied that Mills had acted fraudulently or recklessly

There wasn't sufficient evidence that Mills knew the statement was false or was recklessly indifferent to whether it was true.

Fourth — the negligence claim also failed

Interestingly, the Court did find that Mills, as the real estate agent, owed Adams a duty to exercise reasonable care when making statements about outstanding approvals, and that Adams relied on what he was told.

But Adams still couldn't establish the necessary elements of negligent misrepresentation.

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7. So what does the judgment actually say about Kalamunda?

I'd divide it into **three levels**.

Level 1 — clearly established

The Shire had statutory building approval responsibilities.

It had approved particular works at 41 Coral Road.

It had records showing those approvals.

It had no records of approvals for many of the other structures.

It was aware in 2002 of at least one piece of unauthorised work.

And in that particular instance, it decided **not to take enforcement action**.

Level 2 — strongly suggested by the records

There appear to have been substantial structures at the property for which the City's records contained no approval.

The later real estate agent's investigation produced exactly that finding: the records showed approval for only certain structures, while the other structures had no approval recorded.

Level 3 — not established by the judgment

The judgment does **not** establish:

- precisely when every unapproved structure was built;
- who built them;
- that Kalamunda knew about every one of them;
- that Kalamunda inspected every one;
- that Kalamunda deliberately failed to enforce against every one;
- that the Shire represented to the purchaser that they were approved;
- or that Kalamunda caused Adams' financial loss.

Those propositions would require additional evidence.

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8. The really interesting governance issue

There is nevertheless a potentially important local-government issue buried in this case.

The evidence demonstrates a situation where:

unauthorised work was identified → the local government recorded it → the local government expressly decided not to take enforcement action.

That's materially different from a situation where the council simply **didn't know** about unauthorised work.

The 2002 letter therefore provides documentary evidence of an actual **enforcement discretion decision** by the Shire.

And that may be particularly relevant to your current interest in **City of Melville's approach to unauthorised building work**, because it gives you a useful historical WA example of the distinction between:

1. identifying unauthorised work;
2. recording it;
3. deciding whether it can be retrospectively approved;
4. deciding whether enforcement action should be taken; and
5. communicating the status of the work to the property owner.

One important takeaway

The judgment **doesn't condemn Kalamunda's conduct**. But it provides unusually useful primary evidence about how a WA local government dealt with known unauthorised building work.

Caution these summaries have been produced in good faith in the public interest. The above is an AI summary of the Adam v Price Court decision: https://ecourts.justice.wa.gov.au/eCourtsPortal/Decisions/DownloadDecision?id=129bb4fc-6ac4-4a3e-80dc-ee68cb36ee18 Check yourself if any questions.