

As part of broader reform to the Environmental Planning and Assessment Act 1979 (NSW) (EPAA), the Parliament has overhauled the legislative regime relating to occupation certificates.

For more than 20 years, interim occupation certificates have been an integral component of many commercial developments, allowing developers to obtain early cash flow for partial completion of projects. Many construction contracts also rely on interim occupation certificates to determine practical completion, among other things.

This overhaul is in response to the Lambert report, which reviewed the Building Professionals Act 2005 (NSW). This report recommended that interim occupation certificates and final occupation certificates be replaced with a single occupation certificate as it is:

“... not unusual for an interim OC to be sought but for a final OC not to be sought. There is a need for the certification process to complete what was started and that is to assess and confirm whether the completed building conforms to the planning and building approvals. The current OC does not achieve this requirement.”

Accordingly, the new Part 6 of the EPAA (which replaces the existing Part 4A Division 1) removes the concept of interim and final occupation certificates, and replaces it with a single occupation certificate. It is not clear, however, that this new occupation certificate achieves the purpose outlined in the Lambert report; it may more closely resemble the previous interim occupation certificate than a final occupation certificate. This is discussed further below.

Whilst the reforms have already received assent and been incorporated into the EPAA, Part 6 of the new EPAA does not commence until 1 September 2018. This means applications for interim occupation certificates made under the old EPAA Part 4A Division 1 can still be made until that date.

## The New Occupation Certificate

The occupation certificate under the new Part 6 is not the same as the final occupation certificate under the old Part 4A Division 1. It seems, instead, to more closely resemble the previous interim occupation certificate, with one important caveat – the new occupation certificate does not authorise the occupation of a “partially completed new building”. Instead, it authorises the occupation of “any part of” a completed new building (see section 6.9).

The restrictions on issuing the new occupation certificate are set out in section 6.10. Notably, these mirror (and are materially identical to) the restrictions on the issue of interim occupation certificates under the old section 109H, and not the restrictions on the issue of final interim occupation certificates in that section. The language in section 6.10 is consistent with that in section 6.9, referring to an occupation certificate authorising occupation of “a new building (or part of a new building)”.

## How Does This Affect You?

The full effect of this new language in Part 6, referring to a “part” of a new building, requires deeper analysis beyond the scope of this client alert. It will be interesting to see the courts’ consideration of this new term.

There are, however, some take-home points that can be derived from the abovementioned legislative changes:

- Applications for interim payment certificates can only continue to be made before 1 September 2018. From 1 September onwards, applications may only be made for the new occupation certificates.
- The new occupation certificates will not authorise occupation or use of a partially completed new building. Instead, they will authorise occupation or use of a completed new building or a part of a completed new building.
- Depending on the interpretation of the new Part 6’s reference to “part” of a completed building, this change may affect developers’ cash flows by delaying when occupation certificates will be issued.

- The legislative changes will need to be considered by parties when entering into construction contracts and other commercial arrangements. Developers will need to revise the terminology in their contracts and may wish to revise the effect of clauses that rely on occupation certificates, such as those clauses relating to receipt of payments, practical completion and sunset dates. As a precaution, developers may wish to extend sunset dates in light of the potential delay in issuing the new occupation certificates compared to the old interim occupation certificate.
- Existing arrangements for projects where an application for an interim occupation certificate will not be made by 1 September 2018 will also need to be revised in light of the legislative changes and the parties may wish to seek legal advice as to the best avenue to negotiate the effect of existing clauses in their active contracts in light of the legislative changes.

The full effect of these legislative changes, and strategies to minimise any adverse effects of these changes on current and future projects, will require careful individual fact-based analysis for each client and project. We would be pleased to provide any assistance that you require in this regard.

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