

# Changes to EP&A Act – Interim Occupation Certificates

From **1 September 2019**, developers will no longer be able to obtain interim occupation certificates for buildings in NSW. This will likely complicate staged developments, as interim occupation certificates allow use of partially completed buildings.

Developers and builders should be aware of the impending changes and the legal ramifications.

## Background

A new building cannot be legally occupied without some certification that the building complies with the legal requirements and the building is suitable for occupation.

The Environmental Planning and Assessment Act 1979 (**EP&A Act**) provided for a process where occupation certificates can be issued by the Principal Certifying Authority

Under the old section 109H(1) of the Act, reference was made to the two kinds of occupation certificates that could be issued by an authority:

- (a) an **interim occupation certificate** that authorises a person to commence occupation or use of a partially completed new building, or to commence a new use of part of a building resulting from a change of building use for an existing building,
- (b) a **final occupation certificate** that authorises a person to commence occupation or use of a new building, or to commence a new use of a building resulting from a change of building use for an existing building.

The use of interim occupation certificates has been a controversial topic in the past. There was a lot of confusion about how interim occupation certificates could be used and what it means for a part of a building to be “partially complete”.

For instance, under the old regime, developers could “partially complete” one stage of a mixed use project and be issued an interim occupation certificate for occupation of the partially completed stage of the project. The developer could then move on and start work on another stage of the build without needing to comply with all the conditions of consent attached to the first stage.

This has led to scenarios where a staged building may have different statutory warranty periods, to reflect the different dates for the issue of interim and final occupation certificates.

## The Reforms

The EP&A Act was amended earlier this year as a part of broad reforms to the state planning laws. The reforms removed all references to interim occupation certificates.

Section 6.10(1) of the EP&A Act (formerly section 109H(2)) provides that an occupation certificate must not be issued unless any preconditions to the issue of the certificate that are specified in a development consent have been complied with.

Previously, it was thought the regime would come into effect on 1 September this year.

The Government has recently made the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (Savings Regulation) to push back the proposed changes under the EP&A Act and developers have one more year to obtain interim occupation certificates.

## Ramifications for Builders and Developers

The removal of the interim occupation certificates will have consequences for builders and developers alike:

- For developers, the removal of interim occupation certificates means that work on buildings or a part of a building must be wholly complete, and a final occupation certificate must be obtained before occupation can occur.
- This will likely increase the time for returns and yields, as section 6.10 requires all preconditions to the issue of a final certificate are complied with. Developers can no longer rely on the building works being “partially complete”, and the more relaxed conditions attached to an interim occupation certificate.
- Many building contracts also have a date of practical completion that is linked to the date of issue of an occupation certificate. The removal of interim occupation certificates, and the need to obtain final occupation certificates could affect milestone dates under the Contract, and trigger clauses relating to progress payments and liquidated damages.
- The changes to the occupation certificate regime also have ramifications for when residential building works are deemed to be “completed” for the purposes of statutory warranties under the Home Building Act 1989 (NSW).
- Although the Home Building Act recognises a number of possible scenarios for the completion of residential building works, the date of issue of an occupation certificate is one of the factors that can be used to determine a date of completion for a building.
- In certain circumstances, this could inadvertently extend the warranty periods owed by builders and developers under the Home Building Act 1989.

Developers are still able to obtain interim occupation certificates under the saving provisions until **1 September 2019**. However, given the notorious delays that can occur in the construction industry,



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builders and contractors should not assume that current projects will not be caught by the changes in legislation.

It is important that builders and developers are aware of the consequences of the changes in occupation certificates and anyone starting a new job should obtain advice about how the changes in occupation certificates could be factored into the project planning and contractual milestones.

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