Occupation certificates and PCA closure of files

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Introduction

1. The purpose of this paper is to discuss the issues faced by an accredited certifier appointed as principal certifying authority (PCA) for building work when a building is occupied without a final occupation certificate (OC).

2. The paper examines the role of the PCA during that period of the construction phase leading up to occupation of a new building or change of use of an existing building. In particular it examines:

   2.1. closure of files

   2.2. how certifiers should be dealing with outstanding projects

   2.3. the liability period and run off

   2.4. possible breaches of legislation, and

   2.5. a certifier's obligations prior to issue of a final OC.

3. In order to examine these issues, the paper looks at a PCA's discretion in issuing an OC, the history of sections 109M(1) and 109E(3)(e) of the Environmental Planning and Assessment Act 1979 (EP&A Act), civil liability on the part of a PCA, and the implications of legislative amendments yet to commence.

Key provisions of the EP&A Act relating to OCs

4. An OC is defined in section 109C(1)(c) of the EP&A Act as a certificate that authorises: (a) the occupation and use of a new building, or (b) a change of building used for an existing building. An OC may be interim or final and may be issued for the whole or part of a building (section 109(2), EP&A Act). A "new building" includes and altered portion of, or an extension to, an existing building (section 109(4), EP&A Act).
5. In 2007/2008 45,085 OCs were issued in NSW.\(^1\) This was compared to 65,815 construction certificates issued in the same period.

6. An OC may be issued by a consent authority, the Council or an accredited certifier (section 109D(1)(d), EP&A Act). “Council” means the Council for the Local Government Area within which the building work is located and an “accredited certifier” is the holder of a certificate of accreditation as an accredited certifier under the Building Professionals Act 2005.

7. A “consent authority” is defined in section 4 of the EP&A Act, but only in relation to a development application or an application for a complying development certificate. Presumably a consent authority is someone other than a Council or accredited certifier. Precisely who a “consent authority” is in relation to an OC is not apparent on the face of the Act.

8. An OC may only be issued by the PCA appointed for the erection of the building (section 109D(2), EP&A Act). The Act is silent on the scope of a PCA’s discretion to refuse an OC. The Act specifies the matters that, if present, precluded a PCA from issuing an OC (section 109H(5), EP&A Act). If any of those matters exist, a PCA has no choice but to refuse to issue an OC. However, the EP&A Act does not specify:

8.1. the circumstances in which a PCA must issue an OC;

8.2. whether or not, if none of the matters exist which precluded issue of an OC, a PCA may nonetheless refuse to issue an OC; or

8.3. an exhaustive list of matters for consideration against which a PCA may choose, in the exercise of the PCA’s discretion, to refuse to issue an OC.

9. The trigger for obtaining an OC is an application made in accordance with clause 149 of the Environmental Planning and Assessment Regulation 2000 (Regulation).

10. The EP&A Act imposes an obligation on the owner or person wishing to occupy a new building to obtain an OC before occupying that building. An application may only be made by a person who is eligible to appoint a PCA for the relevant development (clause 149(2B) of the Regulation). A person is eligible to appoint a PCA if the person has “the benefit of a development consent” (section 81A(2)(b), EP&A Act).

11. The obligation to obtain an OC is expressed in terms of a prohibition on occupation rather than a positive duty. Section 109M(1) of the EP&A Act provides that, subject to specified exceptions in section 109M(2):

“A person must not commence occupation or use of the whole or any part of a new building (within the meaning of section 109H) unless an occupation certificate has been issued in relation to the building or part.”

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1 Local Development Performance Monitor 2007-08 NSW Government Department Planning
12. The maximum penalty for a contravention of section 109M(1) is $550 in the case of a class 1a or 10 building, or $110,000 in the case of any other class of building. An offence against section 109M(1) of the EP&A Act is also a penalty notice offence under the Regulation, for which a penalty infringement notice may be issued. The current penalty under a penalty notice is $330. These amounts must be among the lowest, if not the lowest penalty for an offence against the EP&A Act.

13. A quick survey of the AustLII database reveals no prosecutions in the Land and Environment Court for offences against section 109H of the EP&A Act, which is hardly surprising given that most of the likely offences would involve class 1a or 10 buildings.

14. My brief enquiries of Council officers suggests that prosecutions and penalty notices under section 109M(1) of the EP&A Act are rarely issued. Anecdotal evidence from my enquiries of certifies suggests that between 50% and 80% of class 1a and 10 buildings are occupied prior to an OC being issued.

**Recent history of section 109M(1) of the EP&A Act**

15. Prior to March 2004 section 109M(1) of the EP&A Act did not apply to class 1a and 10 buildings. That exemption was removed as part of wide ranging amendments to building certification in New South Wales recommended as a result of an enquiry conducted by a Joint Select Committee of the New South Wales Parliament. The Joint Select Committee produced a report in July 2002 which was entitled "Report upon the Quality of Buildings", which became known as the Campbell report.

16. The Campbell report made numerous recommendations designed to improve the integrity of the building certification system in NSW. Some of those recommendations involved amendments to the EP&A Act, which were ultimately promulgated in the form of the *Environmental Planning and Assessment Amendment (Quality of Construction) Act 2003* (QOC Act). The QOC Act commenced in stages in late 2003 and early 2004.

17. The amendments to the EP&A Act introduced by the QOC Act included clarification of the duties of a PCA, obligations to undertake mandatorily critical stage inspections, new offences and greater penalties for improper conduct, new powers to audit Council's role as certifying authority, requirements for on-site signs, and requirements that preconditions be met prior to issue of an OC.

18. The Campbell report described the exemption of class 1a and 10 buildings from the prohibition on occupation in section 109M(1) of the EP&A Act as an "anomaly". A submission to the enquiry by PlanningNSW (as it then was) explained the rationale for the exemption as follows:

"..... work on individual homes may not be fully completed protective owner builders, and that excluding people from living in their homes before it is in a state to have an occupation certificate is too onerous".
19. The Joint Select Committee took a different view of the exemption. It concluded that the impact on owner builders did not justify a broad-brush approach to all class 1a and 10 buildings and that the exemption should go. The following extract from the Campbell report indicates the committee’s view on the issue:

"The committee's view is that benefits of an OC for freestanding homes clearly outweigh the additional costs and possible inconvenience to occupants. In the long term, although it may mean a small cost and delay to occupation, consumers will have confidence that they are moving into a safe and complete home, built to standard and complying with the development consent.”

20. The reference in the above quoted extract from the Campbell report to consumers having “confidence” might suggest that the Joint Select Committee assumed that consumers would ordinarily want to obtain an OC, which is contrary to the anecdotal evidence I referred to above.

21. Although the Committee's views prevailed over that of the planningNSW, it appears that the concern for owner builders influenced the establishment of the meagre penalty for an offence against section 109M(1) for class 1a and 10 buildings. The meagre penalty, together with an absence of any real statutory compulsion to obtain a final OC has probably contributed to the high breach rate of section 109M(1). It might be said that section 109M(1) is honoured in breach, rather than observance.

22. The fact that there were one third less OC’s issued than CC’s in the years 2006/07 and 2007/08 (according to the Department of Planning) is a strong indication that not only are building owners occupying prior to obtaining an OC contrary to section 109M, but a significant portion of homeowners never obtain an OC.

The role of a PCA in respect to occupation certificates

23. The extent of a PCA's liability prior to issue of an OC depends on the statutory and common law duty imposed on a PCA. The EP&A Act is far from clear as to the duties of a PCA prior to issue of an OC. What is clear is that those duties (as defined by the EP&A Act and the common law) commence when a PCA is appointed by the person having the benefit of a development consent (section 109E(1)(a), EP&A Act) and ends when a final OC is issued. What happens in between has been the subject of much consultation and legislative intervention, however, as discussed below, the precise extent of the duty remains surprisingly unclear in my view.

24. The functions of a PCA during the construction process were investigated by the Joint Select Committee referred to above and addressed in the Campbell report. The Campbell report contained the following equivocal statements about a PCA’s role under the legislation as it existed prior to the QOC Act amendments [at page 107]:

"When acting as the PCA, the intention of the legislation is that the accredited certifier effectively acts as the equivalent Council official in enforcing compliance with regulatory
requirements set out in the development consent, construction certificate and the occupation certificate. The Ombudsman and the Independent Commission Against Corruption indicate that private certifiers fall within the definitions of "public authorities" for the purposes of these organisations. Complaints can be made to either organisation."

25. The Committee later appeared to resile from its earlier statement of opinion when it said [at page 118]:

"The Council, as the consent authority, has a public obligation to enforce consent conditions. Councils have exclusive rights to process development applications and consents and charge fees that these services. Council's also receive lodgement fees for CDCs, CCs and OCs, which are not available to the private PCA. In effect, the committee sees that the charge for DA and consent embodies a fee for enforcement services".


27. Section 109E(3)(e) requires the PCA appointed in respect of building work to be satisfied:

"that any preconditions required by a development consent or complying development certificate to be met for the work before the issue of an occupation certificate or subdivision certificate have been met, before the principal certifying authority issues the occupation certificate or subdivision certificate."

28. Section 109E(3)(e) raises a number of questions. What is the duty imposed by section 109E(3)(e)? When does the duty start and finish? How long before an OC is issued must a PCA ensure preconditions are satisfied? Does a PCA only breach its duty under section 109E(3)(e) if an OC is issued and the PCA is not satisfied about the requisite items, or does a PCA breach its duty if it fails to ensure a precondition has not been met and an OC is yet to issue?

29. There are a number of things that section 109E(3)(e), in terms, does not require a PCA to ensure. A PCA is not required to ensure that:

29.1. a building is not occupied until an OC is issued (the duty operates on the issue of an OC not the occupation of the building);

29.2. any preconditions to the occupation of a building required by the Act itself (such section 109M(1)) are satisfied prior to an OC being issued;

29.3. a building is constructed in accordance with the relevant development consent (unless there is a condition to that effect in the consent expressed as a precondition to the issue of an OC).

30. There is no case law as far as I am aware on the meaning of section 109E(3)(e) of the EP&A Act. If the Court was to determine the meaning of that section, in my view it would be persuaded that the duty imposed on a PCA by section 109E(3)(e) starts and finishes when
the PCA issues an OC. The Court would determine the meaning of that section according to accepted principles of statutory interpretation, principal among which is that the meaning of words in a statute is determined firstly by their ordinary meaning, read in the context of the statute. Secondly, if there is any ambiguity or uncertainty in a statute, regard may be had to the purpose of the provision and any extrinsic material (sections 33 & 34, Interpretation Act 1987).

31. Both the ordinary meaning of the words used in section 109E(3)(e) of the EP&A Act and their context within the remainder of the Act indicate that a PCA’s duty in respect of satisfaction regarding preconditions in a development consent arises at the time of determination of an application for an OC. The ordinary meaning of the phrase “before the [PCA] issues an [OC]” is that the relevant degree satisfaction must exist as a precondition to the issuing of an OC. As a matter of common sense that precondition must exist immediately before a decision is made to issue an OC. Accordingly, if there is no application for an OC, then there cannot be any breach of section 109E(3)(e).

32. Even if there is an application for an OC, the duty to be satisfied that all preconditions to issue of a final OC is not breached until a decision is actually made to issue an OC. If the duty to be satisfied in respect of preconditions existed at any time prior to issue of an OC, it would be impossible to determine whether or not the duty had been breached. For example, situations might arise in which a PCA might not be satisfied at an early stage in the construction phase that a precondition has not been met but subsequently the builder or person acting otherwise in breach of the consent rectifies the situation.

33. The PCA could not be in breach of the duty under section 109E(3)(e) for that period in time during which the precondition remained outstanding because the precondition is not required to be met until an OC has been issued.

34. An important part of the context of section 109E(3)(e) is the paragraph that immediately precedes it, that is section 109E(3)(d). That section requires a PCA to be satisfied that the building work has been inspected, on such occasions as are prescribed, before the PCA issues an OC. Clause 162A of the Regulation prescribes the occasions on which building work must be inspected. If the Act intended that a PCA was required to do more than merely inspect a building site (such as monitor and identify non-compliance with any conditions that might preclude issue of an OC) such requirement could easily have been stated in section 109E(3)(d) and clause 162A.

35. Section 109H of the EP&A Act sets out restrictions on the issue of an OC. Subsection (2) of section 109H repeats the requirement in section 109E(3)(e) that all preconditions in a development consent must be met before an OC is issued. The remaining provisions of section 109H specify preconditions to the issuing of interim and final OCs. Nothing in section 109E(3), section 109H or clause 162A requires a PCA to do anything more during the construction phase of a building than to carry out (or require the carrying out of) prescribed inspections.
36. Another important part of the scheme of the EP&A Act is a council’s specific powers to investigate breaches of, and enforce compliance with conditions of development consent (notably sections 121B, 123 and 127). The Courts have held that a council is not under a positive obligation to prosecute or otherwise take action against a breach of the EP&A Act, which includes a development consent (Ryde City Council v Echt [2000] NSWCA 108). The extent of the obligation is to consider whether or not to exercise the discretion to take enforcement action. Provided that question is considered, the fact that enforcement action may not be taken in every instance is not a breach of the legislation according to the Court of Appeal in Echt.

37. A PCA has almost the same powers to investigate breaches of, and enforce compliance with consents, but only in as far as issuing a notice of intention to issue an order under section 121B of the EP&A Act. If a Council is not under a positive duty to enforce compliance with conditions of development consent, then neither is a PCA.

38. At a practical level, a PCA is compelled by section 109E(3)(e) to at least identify breaches of development consent conditions when they arise so as to avoid difficulties at the OC stage. A PCA might be inclined to raise issues at an early stage as much as a matter of courtesy to the building owner as a feeling of obligation under the Act. However, failure to do so does not amount to a breach of a PCA’s duty under section 109E(3)(e) or any other section of the EP&A Act.

39. The interpretation of section 109E(3)(e) expressed above is not consistent with that of the Department of Infrastructure, Planning and Natural Resources (as it was known when section 109E(3)(e) commenced) or the Minister responsible for the introduction of the QOC Act. In a circular to accredited certifiers in December 2003 the Department stated that the amendments were part of a ”package of improvements to the NSW certification system aimed at an improved regulatory regime, which operates with greater clarity and accountability”.

40. Further, in a circular dated April 2005 (PS05-001) the Department makes the following statement:

"Up until issuing the final occupation certificate, the PCA is responsible for monitoring compliance with consent conditions relating to the building and site.

While private certifies do not have a consent authority’s power to issue an order, they can initiate this action by issuing the owner with a notice, in which case they must send the Council a copy within two working days."

41. The Minister for Infrastructure and Planning clearly intended that a PCA would be responsible for enforcing compliance with section 109M(1). In the Minister’s second reading speech to Parliament on the QOC Act the Minister said that:

"The principal certifying authority will also need to be satisfied that the building is inspected at critical stages, that of the finished building is the same as the approved plans, that an


**occupation certificate is issued for the building after the relevant conditions of consent have been complied with, and that the building is suitable for occupation in accordance with its class under the Building Code of Australia.” (my emphasis)**

42. As far as I am aware the questions that I have raised above about the meaning of section 109E(3)(e) have not been the subject of any case law. The fact that a misunderstanding exists about this and other provisions of the EP&A Act setting out the functions and duties of a PCA is surprising given the degree of scrutiny, enquiry and legislative attention focused on the issue.

43. Having regard to the analysis set out above, it would seem that although an accredited certifier remains as a PCA on a building project until a final OC is issued, the PCA does not breach his or her statutory obligations under the EP&A Act (as it currently stands) by not ensuring that all preconditions in a development consent are being complied with during that period.

44. Nor does the PCA breach any obligation under the EP&A Act by not enforcing compliance with section 109M(1) of that Act. However, as set out below, the EP&A Act is about to be amended in a way which will fundamentally change those obligations.

**Some upcoming legislative amendments to certification**

45. The “planning reform” package of amendments to the EP&A Act passed by the NSW Parliament in June 2008 includes a number of amendments relating to certification. Most of the other amendments have already commenced. One amendment that is yet to commence, and which will be of particular interest to certifying authorities, is the repeal of section 109L of the EP&A Act and commencement of a new section 109EB.

46. Section 109EB of the EP&A Act deals with the powers and obligations of a PCA in respect of breaches of development consent conditions. Under the current Act (section 109L) a certifying authority “may” issue a person with a notice of intention to issue an order under section 121B of the EP&A Act if the certifier becomes aware of a breach of a development consent. The decision to issue, or not issue, such a notice is entirely at the discretion of the certifying authority (consistent with the Court of Appeal's decision in *Echt* referred to above).

47. Section 109EB creates a new type of notice and removes the discretion that previously existed under section 109L. The new notice is a written direction that identifies “[a] matter that has resulted or would result in [a] non-compliance” and that directs a person to take specified action, within a specified period, to remedy the matter. The certifier must issue the notice if he or she becomes aware of a “non-compliance”.

48. The notice is to be issued to “the person responsible for that aspect of the development.” If the notice is not complied with by the certifier is to notify the consent authority of the non-compliance.

49. “Non-compliance” is defined for the purpose of section 109EB of the EP&A Act as:

   *(a) a failure to comply with a condition of a development consent relating to the manner in which construction of that aspect of development is carried out on the relevant site*
(including, for example, a condition relating to the hours during which construction may be carried out or the measures to be taken to reduce impacts on adjoining land), and

(b) any matter arising during the course of carrying out that aspect of development that would prevent the issuing of a final occupation certificate or a subdivision certificate in respect of that aspect of development.

50. The qualifying phrase “manner in which”, and the examples given in paragraph (a), suggesting that the focus of section 109EB is the conduct of the person carrying out the development, rather than the design or construction of a development.

51. Non-compliances under paragraph (b) of the definition are much broader. They include a failure to comply with any conditions specified in the applicable development consent that are required, by the terms of the consent, to be met prior to issue of a final occupation certificate. The obligation imposed on a PCA will depend on the terms of the applicable development consent. This may include design aspects of the development. The “matter” must relate to issue of a final OC, and not occupation of the building. This would not require a PCA to ensure a building is not occupied before an OC is issued. In order for such an obligation to exist, there would need to be a condition contained in the relevant development consent stating that a final OC must not be issued if the building is occupied.

52. Section 109EB appears to achieve that which section 109E(3)(e) was intended to achieve.

53. Once section 109EB commences a PCA will have a positive obligation to monitor and enforce compliance with all conditions of a development consent expressed to be a precondition to the issue of an OC. That obligation will remain until a final OC is issued. Obviously issues will arise about a PCA’s knowledge of a non-compliance. The obligation cannot exist where a PCA does not know or ought to know about a breach of a condition of development consent.

54. A certifier would be persuaded to do all that is reasonably possible to encourage a homeowner to obtain a final OC. If it is obvious that an owner has no intention of obtaining an OC, a PCA might consider applying to be Building Professionals Board under section 109EA(1)(a) of the EP&A Act to be replaced by the Council as PCA for the building site.

**Liability: statute and common-law**

55. The EP&A Act (section 109ZK) imposes a statutory limit on the period within which a “building action” may be commenced in respect of “building work”. “Building work” is defined in section 109ZI as the design, inspection and issuing of a Part 4A certificate or complying development certificate in respect of building work. “Building action” is defined in section 109ZI as an action (including a counter claim) for loss or damage arising out of, or concerning defective building work.

56. Under section 109ZK(1)(b) a building action may not be commenced more than 10 years after:

56.1. the date on which a final OC was issued; or

56.2. if no final OC is issued, the last date on which the building work was inspected by a certifying authority; or
56.3. if no such inspection took place, the date on which that part of the building in relation to which the building work was carried out is first occupied or used.

57. This obviously creates issues for a PCA if a building owner requests a final inspection and an OC is issued many years after occupation of the building. The issue of a final OC many years after occupation will have the effect of extending the liability period.

58. If a PCA receives an application to issue a final OC many years after the final inspection, the PCA may not have discretion to refuse the application. It is unlikely that the scope of the discretion would include consideration of liability.

59. A PCA is under a common law duty to take reasonable care to avoid actions that might cause injury that was reasonably foreseeable to another person. This common law liability is limited by the Civil Liability Act 2002 (CL Act). A PCA is a “public or other authority” as defined in section 41 of the CL Act, being “a person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person’s public official functions”.

60. The CL Act specifies a number of principles that apply to limit liability of a public or other authority in civil proceedings for negligence. Those principles are specified in section 42 of the CL Act as follows:

60.1. financial and other resources can limit the exercise of functions and the allocation of those resources is not open to challenge

60.2. the exercise of a particular function is to be determined in the context of all of the functions that an authority is required to exercise

60.3. whether or not a function was exercised properly can be determined by any general procedures and applicable standards to the exercise of that function.

61. If a public official has a duty under another statute to exercise a function (which a PCA does Under the EP & A Act) then “an act or omission of the authority does not constitute a breach of that duty” unless the act or omission is unreasonable in the legal sense (section 43). A similar protection from liability applies to a any act or omission involving the exercise of, or failure to exercise, a "special statutory power" (section 43A)

62. Sections 43 and 43A the CL Act have been held to be available to claims involving approval and inspection of building works (T and H Fatouros Pty Ltd v Randwick City Council (2006) NSWSC 483). A PCA might avoid common law liability under the CL Act involving a decision to issue, or not to issue an OC, if the decision is not unreasonable in the legal sense.

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