Update on Private Certification under the Environmental Planning and Assessment Act 1979

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Introduction

2018 saw significant changes to planning law in NSW. The focus of this paper is on two aspects of those changes, both of which relate to private certification of building and development approvals.

The first change is the new Part 6 of the Environmental Planning and Assessment Act 1979, which deals with certification of building and subdivision work including certificates that may be issued by a private certifier and limitations on the powers of private certifiers. The second change discussed in this paper is an amendment to the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 that permits specified forms of dual occupancy and low-rise medium density development to be approved by a private certifier under a complying development certificate.

Private certification of building and development approvals in NSW is on the rise. These changes represent the next chapter in the evolution of private certification in NSW. They also represent a trend towards tighter controls on the powers of private certifiers, in the case of the new Part 6, and a broadening of the types of buildings that can be approved by a private certifier, in the case of the low rise medium density development code.

The New Part 6 of the Environmental Planning & Assessment Act 1979

The Environmental Planning and Assessment Act 1979 was amended extensively on 1 March 2018. The overriding purpose of the amendments was “to improve the planning system through faster, simpler processes, enhanced strategic planning, to improve community confidence and participation, and enable more balanced and transparent decision-making.”¹ The most significant change was to the structure and form of the Act - the provisions of the new Act are now based on a decimal divisional and numbering system. Section numbers start with 1.1 and progress in increments of 0.1. The last section of the Act is section 10.16. Certification of building and development approvals is now governed by the Part 6 of the new Act.

¹ Minister’s Second Reading Speech, Hansard 18 October 2017.
The new Part 6 of the EP&A Act replaces Part 4A of the old EP&A Act. Except for Division 6.7 (building information certificates) Part 6 of the new Act does not commence until 1 September 2019 and until then, the old Part 4A and sections 81A(2)-(6), 86 and 121ZP of the old EP&A Act remain in force.²

Part 4A of the old Act introduced for the first time in NSW the concept of private certification in the planning system. Prior to Part 4A, local councils and state government agencies were there only authorities with the power to issue planning approvals and building permits, and to inspect building works. Part 4A created the roles of an accredited certifier and principal certifying authority who, could be accredited private individuals. Part 4A also created a suite of certificates permitting building work, and in some instances, permitting the use of land and buildings.

The new Part 6 of the EP&A Act is titled “Building and Subdivision Certification” and contains most of the previous provisions in the old Part 4A, with additional provisions. The definition of subdivision previously found in section 4B of the old Act is now located in Part 6, in identical terms. Importantly for property lawyers, the subdivision of land for the purposes of the new EP&A Act continues to not include a lease (of any duration) of a building or part of a building or “a division of land effected by means of a transaction referred to in section 23G of the Conveyancing Act 1919”.³ A transaction referred to in section 23G of the Conveyancing Act 1919 includes “the lease of part of an existing lot for a period that, including the period of any option to renew, does not exceed 5 years.”⁴ The registration of a plan of subdivision for lease purposes where the lease period exceeds 5 years is subdivision for the purposes of the EP&A Act, and in most cases requires development consent prior to registration if permitted under an environmental planning instrument.

The new Part 6 contains the following new provisions:

- new restrictions on the issue of an occupation certificate (s6.10);
- a power for a principal certifier to issue a rectification notice (s6.31); and
- an obligation on a person applying for an occupation certificate to cause the preparation of an “owners building manual” (s6.27).

These changes are explained below.

**New Restrictions on the Issue of an Occupation Certificate ("OC")**

An OC is a certificate that authorises the occupation and use of a new building, or a change of building use for an existing building in accordance with a development consent.⁵ An OC may be issued by a “principal certifier”,⁶ formerly known under the old EP&A Act as a “principal certifying authority”. An OC is not required in specified circumstances such as if the use is exempt development, the occupation is authorised by a compliance certificate or the building has been erected by or on behalf of the Crown.⁷

Previously, an OC could be an interim certificate or a final certificate, and may be issued for the whole or any part of a building.⁸ Under the new Act there is only one type of OC, which is simply described as a certificate that authorises the occupation and use of a new building, or a change of building use.

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² Clause 18 Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017
³ Section 6.2(3)(a) and (d) new EP&A Act
⁴ Section 23(d)(1) old EP&A Act
⁵ Section 6.4(c) old EP&A Act
⁶ Section 6.5(1)(c) old EP&A Act
⁷ Section 6.9(2) new EP&A Act
⁸ Section 109C(2) and 109H(1) old EP&A Act
for an existing building in accordance with a development consent. The Act is silent on whether such a certificate can be for part of a building or must be for the whole of a building.

The Department of Planning and Environment website states that the change will not affect the ability to stage occupation of buildings. However, the Department’s suggestion could be problematic, as the new EP&A Act does not expressly provide the power to issue more than occupation certificate on a single site or single building. If the power does exist, it exists because the Act does not prevent the issue of more than one certificate and therefore by inference permits the issue of more than one certificate. The title of a certificate for part of a building will not readily identify whether it is a staged certificate or a certificate for the whole of a building. Practitioners involved in property transactions should ask to see the OC before advising clients whether the certificate authorises occupation of the whole of a new building.

**Rectification Notices**

Under the old EP&A Act, a principal certifying authority had limited power to require a person to rectify unauthorised building work, and the power was discretionary. Under the new Act a principal certifier must issue a notice in writing requiring a person responsible for carrying out development to “take specified action within a specified time” if the certifier becomes aware of any “non-compliance to which [section 6.31] applies”. The obligation to issue a notice if the circumstances arise is mandatory.

If the specified action is not taken by the recipient of the notice, the certifier must send a copy of the notice to the consent authority and to notify the consent authority that the notice has not been complied with. The non-compliances to which section 6.31 applies are to be prescribed in the Regulations, which are yet to be published.

The new section 6.31 is designed to address the current uncertainty about the role of a principal certifier. Under the old Act, the role of a principal certifying authority was to carry out inspections of building work and issue an occupation certificate if satisfied that the building work was “not inconsistent with a development consent”. There was no express obligation to monitor or enforce breaches of development consent at all times during the construction, other than breaches relating to the building works for which inspections were required. The new section 6.31 imposes a mandatory obligation on a principal certifier to monitor and enforce a potentially wide range of breaches during the construction phase.

**Owner’s Building Manual**

The new Act prevents the issue of an OC for a building that is of a class prescribed by the regulations unless a building owners manual is prepared and provided to the owner of the building. The form, content and related procedural matters associated with the preparation of an owners building manual are to be specified in the Regulations, which are yet to be prepared.

The concept of a building owners manual comes from the 2015 Lambert Report into the Building Professionals Act 2005. The purpose of the manual was to address the problem of a lack of accessible information on buildings and building systems. The Lambert Report identified a deficiency in the old Act where insufficient information about BCA compliance was available about the existing buildings and their safety measures to allow later consent and certifying authorities to undertake a proper assessment of applications for building alterations and changes of use.

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9 Section 109L old EP&A Act  
10 Clause 154 EP&A Regulations 2000
The Lambert Report recommended that a manual be prepared only for all commercial buildings. Whether that is a requirement of the new Act will be known when the Regulations are prepared.

**Private Certification of Dual Occupancy and Low-Rise Medium Density Development**

On 6 July 2018 an amendment was made to *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* ("the Codes SEPP") which enables private certification of planning approvals for dual occupancy and low-rise medium density development. Prior to the amendment approvals for these forms of development could only be issued by a local council. The Code commenced on 6 July 2018. Commencement of the Code has been deferred in 50 Local Government Areas in NSW until 1 July 201911 and in the City of Ryde until 1 July 2020, “due to the special circumstances in Ryde and advice from the Greater Sydney Commission”.

Under the Code, an approval for development of a land for dual occupancy and low rise medium density development can be obtained in the form of a complying development certificate (“CDC”). A CDC is a development consent issued by an accredited certifier. An application for a CDC cannot be refused if the proposed development complies with the development standards applicable to it, and complies with other requirements prescribed by the regulations relating to the issue of a CDC.12 An application for a CDC must be determined within either 10 days or 20 days.13 Currently a third of all planning approvals issued in NSW are complying development certificates.14

Only those types of development specified in an environmental planning instrument may be the subject of a CDC. There are several instruments that identify different forms of complying development. Development for the purpose of dual occupancy and low rise medium density development is specified in Part 3B of the Codes SEPP.

Under the Codes SEPP development described as 1 or 2 storey dual occupancy, manor house or multi dwelling housing (terraces) may be the subject of a CDC, provided the requirements of the SEPP are satisfied. These types of development are defined in the Standard Instrument and the Codes SEPP as follows:

- **dual occupancy** means a dual occupancy (attached) or a dual occupancy (detached). Where *dual occupancy (attached)* means 2 dwellings on one lot of land that are attached to each other, but does not include a secondary dwelling and *dual occupancy (detached)* means 2 detached dwellings on one lot of land, but does not include a secondary dwelling.

- **multi dwelling housing (terraces)** means multi dwelling housing where all dwellings are attached and face, and are generally aligned along, 1 or more public roads. Where *multi dwelling housing* means 3 or more dwellings (whether attached or detached) on one lot of land, each with access at ground level, but does not include a residential flat building.

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11 Armidale Regional, Ballina, Bathurst Regional, Bayside, Bellingen, Blue Mountains, Burwood, Byron, Camden, City of Campbelltown, City of Canada Bay, Canterbury-Bankstown, Central Coast, City of Coffs Harbour, Cumberland, Georges River, City of Hawkesbury, Hilltops, Hornsby, Hunter’s Hill, Inner West, Kiama, Lane Cove, Liverpool, Mid–Coast, Mid–Western, Regional, Moree Plains, Mosman, Narrumine, Northern Beaches, City of Parramatta, Penrith City, City of Randwick, City of Ryde, City of Shellharbour, City of Shoalhaven, Snowy Monaro, Strathfield, Sutherland Shire, City of Sydney, Tamworth Regional, The Hills Shire, Tweed, Upper Lachlan Shire, City of Willoughby, Wingecarribee Shire, Wollondilly, City of Wollongong, Woollahra and Yass Valley.

12 Section 4.28(7) EP&A Act

13 Clause 130AA *Environmental Planning and Assessment Regulation 2000*

**manor house** means a residential flat building containing 3 or 4 dwellings, where:

a) each dwelling is attached to another dwelling by a common wall or floor, and

b) at least 1 dwelling is partially or wholly located above another dwelling, and

c) the building contains no more than 2 storeys (excluding any basement).

Dual occupancy, multi dwelling housing and manor houses in specified circumstances cannot be the subject of a CDC, for example where the development site is a battle axe lot or if the building is to be erected over a registered easement.\(^\text{15}\) The general exclusions applying to all complying development also apply to these forms of complying development.\(^\text{16}\)

Some of the more common development standards applying to dual occupancy, terrace houses and manor houses under the Codes SEPP are:

- the development must not be prohibited under the local environmental plan applying to the land;
- the development site must be zoned RU5, R1, R2 or R3;
- for dual occupancy the development site must be minimum of 400m² and for manor house 600m²;
- the maximum building height is 8.5 m from existing ground level.

The following information about dual occupancy, terrace houses and manor house under the Codes SEPP and complying development generally may be useful:

- Strata and Torrens title subdivision of a dual occupancy, terrace houses and manor house is capable of approval under a CDC;\(^\text{17}\)
- limited neighbour notification is required, and there is no opportunity to lodge objections prior to issue of the CDC;\(^\text{18}\)
- some private covenants have no legal effect if development is carried out in accordance with a CDC;\(^\text{19}\)
- there is no right of appeal by an applicant to the Land and Environment Court against a certifier’s decision to refuse to issue a CDC;\(^\text{20}\)
- there is a third party right of judicial review against the issue of a CDC.\(^\text{21}\)

**Conclusion**

The introduction of Part 3B of the Codes SEPP is further evidence that private certification, and in particular complying development as an approval option is becoming more and more favoured by Government. The complying development assessment pathway provides greater certainty for applicants, provides a quicker and potentially cheaper route to construction and allows consent authorities to focus their limited resources on more contentious forms of development.

Part 3B of the Codes SEPP is particularly significant because it deals with a potentially controversial form of development, dual occupancy, terrace houses and residential flat buildings, that in the past has been assessed entirely by Government. On one view Part 3B is an endorsement of the private certification industry.

\(^{15}\) Clause 3B.2 Codes SEPP

\(^{16}\) Clauses 1.17A, 1.18 and 1.19 Codes SEPP

\(^{17}\) Part 6 Codes SEPP

\(^{18}\) Clause 130AB EP&A Regulations 2000

\(^{19}\) Clause 1.20 Codes SEPP

\(^{20}\) Section 8.6(3)(b) new EP&A Act

\(^{21}\) Section 4.31 new EP&A Act
Whether or not the moratorium on commencement of Part 3B is extended, or the Code is abandoned altogether after the NSW State Government elections in 2019 remains to be seen.

The introduction of the new Part 6 of the EP&A Act is less controversial. Provided the Government has finalised the Regulations necessary to support the new Part 6, the new Part 6 will commence on 1 September 2019. The new Part 6 is more onerous on private certifiers, but will provide greater certainty to the general public about the principal certifier’s role in the supervision of building works. The repeal of provisions relating to interim occupation certificates will potentially create uncertainty for purchasers and risks for property lawyers and conveyancers.

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