

Part 6 of the Environmental Planning and Assessment Act is Finally Coming into Effect (Hopefully)!

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On 30 August 2019, the NSW government introduced the *Environmental Planning and Assessment Amendment (Building and Subdivision Certification) Regulation 2019* (NSW). With this, Part 6 of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EPA Act**) is likely to finally come into effect on 1 December 2019, bringing significant changes to the building approval and certification regimes in NSW.

Background

Part 6 of the EPA Act was inserted into the EPA Act as part of the major reform package introduced by the *Environmental Planning and Assessment Amendment Act 2017* (NSW). With the exception of the sections relating to the Building Information Certificate, Part 6 did not immediately commence with most of the reform package. Instead, its commencement was delayed several times to enable industry to make the transition.

Introduced by the state government as a part of its response to the report on the building certification regime in NSW by former state treasury secretary Michael Lambert (the Lambert Report), Part 6 of the EPA consolidated all provisions relating to building certification - which was previously found at various parts of the EPA Act - into a one single part within the EPA Act. Further, Part 6 will make the following substantive changes:

1. Introduction of 'Subdivision Certificates' to certify subdivision works (see sections 6.12-6.13);
2. Abolishing 'Interim Occupation Certificates', although occupation certificates in respect of a partially completed new building could still be issued; and
3. Introduction of 'written directions notice' (see section 6.31), which replaces 'notice of intention' that can be issued under the now-repealed section 109L.

Subdivision Works Certificates

Subdivision Works Certificates will replace the need for construction certificates before the commencement of subdivision works. To put it simply, Subdivision Works Certificates under the current legislative requirement will operate in almost identical way to Construction Certificates, except of course they may be issued only in relation subdivision works.

The criteria for issuing a Subdivision Works Certificate will be found in clauses 148F and 148G of the *Environmental Planning and Assessment Regulation 2000* (**EPA Reg**), which will provide:

148F Compliance with development consent

(1) A certifier must not issue a subdivision works certificate for subdivision work unless the

design and construction of the work (as depicted in the plans and specifications and as described in any other information furnished to the certifier under [provision of information clause]) is consistent with the development consent.

(2) A certifier must not issue a subdivision works certificate for subdivision work under a development consent unless each of the following have been complied with—

(a) each condition or agreement requiring the provision of security before work is carried out in accordance with the development consent (as referred to in section 4.17(6) of the Act),

(b) each condition requiring the payment of a monetary contribution or levy before work is carried out in accordance with the development consent (as referred to in section 7.11 or 7.12 of the Act),

(c) each other condition of the development consent that must be complied with before a subdivision works certificate may be issued in relation to the subdivision work.

148G Restriction on issue of certificate without compliance with planning agreement

If a planning agreement specifies requirements of the agreement that are required to be complied with before a subdivision works certificate for subdivision work is issued, a certifier must not issue a subdivision works certificate for the work unless the certifier is satisfied that those requirements have been complied with.

The requirements for issuing a Subdivisions Works Certificate appear to be very similar to those for the issuing of a Construction Certificate, which is specified under Division 2 of Part 8 of the EPA Reg.

Abolition of Interim Occupation Certificates

Under Part 6 of the EPA Act will no longer make the distinction between ‘interim occupation certificates’ and ‘final occupation certificates’. Instead, where an Occupation Certificate is issued to permit the occupation and use of only a part of a building, that Occupation Certificate will be instead given the creative name ‘partial occupation certificate’. Unlike an Interim Occupation Certificate, a Partial Occupation Certificate will be subject to the condition that an Occupation Certificate in respect of the whole of the building must be obtained within 5 years under the proposed clause 156A of the EPA Reg.

Introduction of Written Directions Notice

Again, the Written Directions Notice will function in largely the same way as a ‘Notice of Intention’ a private certifier or council may issue under the existing regime, which identifies any non-compliance with development consent and/or relevant development standards, and outlines the term of a development control order that would be issued in relation to that non-compliance. Like the Notice of Intention it replace, a Written Directions Notice does not, by itself, have any coercive effect on the recipient.



Under the new regime, a private certifier who becomes aware of such non-compliance no longer has any discretion over whether or not to issue the Written Directions Notice. In cases where a council is the certifying authority for a development, council would retain discretion over whether or not Written Directions Notice may be issued. Councils will continue to be able to issue Notice of Intentions under Schedule 5 to the EPA Act.

Summary

In summary, councils must prepare for the following transitions by 1 December 2019:

1. Cease to issue Construction Certificates for new subdivision works and issue Subdivision Works Certificates instead;
2. Cease to issue Interim Occupation Certificates in respect of buildings that are not fully completed and issue Partial Occupation Certificates with a condition that an Occupation Certificate in respect of the whole of the building must be obtained within 5 years; and
3. Where council is the certifying authority in a development – council may issue Written Directions Notice if it becomes aware of any non-compliances with development consent or development standards.

Part 6 of the EPA Act will no doubt have substantive impacts on the operations of local governments' certification works once it comes into effect. However, as our discussion above shows, the changes could best be described as evolutionary and thus should not be too difficult for councils to adopt.