

Circular

Division: Land and Property Information
No: 2004/02
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New Conveyancing Procedures Affecting the Sale of Strata Lots and 'House and Land' Packages

Note: This Circular replaces and updates Circular 2003/04 issued in February 2003 (edition 1) and June 2003 (edition 2)

The Conveyancing (Sale of Land) Amendment (Occupation Certificate) Regulation 2003 amends the Conveyancing (Sale of Land) Regulation 2000 by introducing clauses 6A and 6B as clauses of the Regulation and inserting clauses 2 and 3 in Schedule 2 of the Regulation. The new clauses provide for an occupation certificate (either interim or final) under the Environmental Planning and Assessment Act 1979 to be served by the vendor on the purchaser before completion of certain contracts.

What is an occupation certificate?

There are two kinds of occupation certificates:

- (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.

It is not necessary for an interim occupation certificate to be issued before a final occupation certificate is issued with respect to the same building (section 109H(1A) Environmental Planning & Assessment Act 1979).

Sections 109M and 109N of that Act prohibit the occupation or use of a new building, and the change of building use for an existing building, unless an occupation certificate has been issued for the building. An occupation certificate may be issued by a consent authority or council or an accredited certifier (section 109D(1)(c)). However an occupation certificate must not be issued to authorise occupation or use of a new building except by the principal certifying authority appointed for the erection of the building (section 109D (2)).

What are the new conveyancing procedures?

A non-excludable term is implied into relevant contracts stating that completion is not due until at least 14 days after the vendor provides the purchaser with an occupation certificate (or a copy thereof) for the building (or part of the building) to which the lot relates.

Why are the new procedures being introduced?

To protect purchasers from having to complete contracts in respect of properties that they are not legally entitled to occupy.

When do the new procedures commence?

1 July 2003 (ie they only apply to contracts entered into after that date).

Which contracts for the sale of strata lots are affected by the new procedures?

1. A contract for the sale of a lot in a proposed strata plan entered into before the date of registration of the plan (ie a sale "off the plan"), and where an occupation certificate under section 109M of the Environmental Planning and Assessment Act is required before the building (or part) to which the lot relates may lawfully be occupied or used.
2. A contract for the sale of a lot in a strata plan entered into within 12 months of the date of registration of the strata plan, and where an occupation certificate under section 109M of the Environmental Planning and Assessment Act is required before the building (or part) to which the lot relates may lawfully be occupied or used.

NB: The above applies to strata plans within the meaning of the Strata Schemes (Freehold Development) Act 1973 or the Strata Schemes (Leasehold Development) Act 1986.

3. However a contract which satisfies the above criteria will not be subject to the new procedures if there is a clause expressly providing that the parties agree that:
 - a) an occupation certificate will not be issued before completion and
 - b) occupation or use of the lot will not commence until an occupation certificate is issued.

(This is intended to cover the sale of "shell" lots which will only be fitted out after completion).

Which contracts for the sale of lots in deposited plans are affected by the new procedures?

1. A contract for the sale of a lot in a deposited plan, or in a proposed deposited plan, that also provides for the erection by the vendor of a dwelling-house on the lot, and where an occupation certificate under section 109M is required before the dwelling-house may lawfully be occupied or used.
2. A contract for the sale of lot in deposited plan, or in a proposed plan, that also provides for the sale of a dwelling-house already erected on the lot, and where an occupation certificate is required before the dwelling-house may lawfully be occupied or used.

NB: Clause 156 of the Environmental Planning and Assessment Regulation 2000 has been amended (commencing 1 March 2004) to require new dwelling-houses to have an occupation certificate. However, this requirement does not apply to those new dwelling houses that had a construction certificate or complying development certificate issued before 1 March 2004.

What will be the text of the new clauses in the Regulation?

A copy of the relevant amendments to the Conveyancing (Sale of Land) Regulation is attached.

Where can I address further queries?

Contact Peter Blair, Senior Legal Officer, Department of Lands, Legal Services, Level 3, 1 Prince Albert Road, Queens Square, Sydney 2000 T:02 9228 6964 or email peter.blair@lands.nsw.gov.au.

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Information contained
in this document was correct at
time of publication, but may have
been superseded

Schedule 1 Amendments

(Clause 3)

[1] **Clause 6**

Omit the clause. Insert instead:

6 Implied term—all contracts

For the purposes of section 52A (2) (b) of the Act, the term set out in clause 1 of Schedule 2 is prescribed for a contract for the sale of land.

6A Implied term—strata units bought “off the plan”

(1) For the purposes of section 52A (2) (b) of the Act, the term set out in clause 2 of Schedule 2 is prescribed for a contract for the sale of land if:

- (a) the contract is a contract for the sale of a lot in a strata plan or a proposed strata plan within the meaning of the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*, and
- (b) the contract is entered into before the date of registration of the strata plan, or within 12 months after that date, and
- (c) an occupation certificate within the meaning of the *Environmental Planning and Assessment Act 1979* is required under section 109M of that Act before occupation or use of the building, or part of the building, of which the lot and access to the lot form part, may commence, and
- (d) the contract does not expressly provide that the vendor and the purchaser agree that:
 - (i) an occupation certificate in relation to the building, or part of the building, of which the lot and access to the lot form part, will not be issued before completion, and
 - (ii) occupation or use of the lot will not commence before the occupation certificate is issued.

Note. Under section 109M of the *Environmental Planning and Assessment Act 1979*, an occupation certificate is not required for any lot that forms part of development carried out by or on behalf of the Crown.

- (2) For the purposes of this clause, the part of a building comprising access to a lot is any part of the building reasonably necessary for access to the lot.

6B Implied term—“land and house” packages

For the purposes of section 52A (2) (b) of the Act, the term set out in clause 3 of Schedule 2 is prescribed for a contract for the sale of land if:

- (a) the contract is a contract for the sale of a lot in a deposited plan, or in a proposed deposited plan, and
- (b) the contract provides for:
- (i) the erection by the vendor of a dwelling-house on the lot, or
 - (ii) for the sale of a dwelling-house already erected on the lot, and
- (c) an occupation certificate within the meaning of the *Environmental Planning and Assessment Act 1979* is required under section 109M of that Act before occupation or use of the dwelling-house may commence.

Note. Under section 109M of the *Environmental Planning and Assessment Act 1979*, an occupation certificate is not required for any lot that forms part of development carried out by or on behalf of the Crown.

[2] Schedule 2

Omit Schedule 2. Insert instead:

Schedule 2 Prescribed terms

(Clauses 6, 6A and 6B)

1 Objections and requisitions

Nothing in this contract or any other agreement prevents the purchaser, expressly or by implication, from making any objection, requisition or claim that the purchaser would otherwise be entitled to make in respect of:

- (a) any encroachment onto any adjoining land by any building or structure on the land, other than a dividing fence as defined in the *Dividing Fences Act 1991*, or
- (b) any encroachment onto the land by any building or structure on any adjoining land, other than a dividing fence as defined in the *Dividing Fences Act 1991*,

unless the encroachment is disclosed and clearly described in this contract and the contract contains an express term precluding the purchaser from making such an objection, requisition or claim.

2 Strata units bought “off the plan”

- (1) The vendor must serve at least 14 days before completion the original or a copy of an occupation certificate within the meaning of the *Environmental Planning and Assessment Act 1979* (being an interim occupation certificate or a final occupation certificate) in relation to the building, or part of the building, of which the lot and access to the lot form part.
- (2) For the purposes of this clause, the part of a building comprising access to a lot is any part of the building reasonably necessary for access to the lot.
- (3) The purchaser does not have to complete earlier than 14 days after service of the original or copy certificate.

3 “Land and house” packages

- (1) The vendor must serve at least 14 days before completion the original or a copy of an occupation certificate within the meaning of the *Environmental Planning and Assessment Act 1979* (being an interim occupation certificate or a final occupation certificate) in relation to the dwelling-house.
- (2) The purchaser does not have to complete earlier than 14 days after service of the original or copy certificate.

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