



OCCUPANCY CERTIFICATION GUIDELINES

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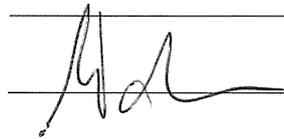
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The Director of Building Control under section 167B of the *Building Act* authorises these guidelines.

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Contents

1. Purpose	5
2. Legislative authority	5
3. Background.....	5
4. Overview of the three-level Occupancy Certification System.....	5
4.1. Occupancy Permit.....	6
4.2. Certificate of Substantial Compliance.....	6
4.3. Certificate of Existence	6
5. Obligations of building certifiers and owners' agents.....	7
5.1. Role and obligations of building certifiers	7
5.2. Advice that must be provided to owners.....	7
6. Granting an Occupancy Permit or a Certificate of Substantial Compliance against an expired Building Permit	8
6.1. All work essential to the class of building has been completed.....	9
6.2. Building work that can be severed from the Building Permit.....	10
Scenario – all work essential to the class of building completed.....	10
7. Suitable for occupation.....	10
7.1. Where building work is not suitable for occupation.....	11
8. Mixed classes of buildings	12
Scenario – mixed classes where there is a dependency	12
9. Certification of work under the Building Act 1983 and Building Act 1993.....	13
10. Work constructed before the Building Act 1983.....	13
11. Assessing an application for a Certificate of Substantial Compliance.....	14
11.1. Work that can be granted a Certificate of Substantial Compliance.....	14
11.2. Complies substantially	14
11.2.1. Complies substantially with the Building Act and or Regulations	15
Scenario – missing wet area inspection	16
11.2.2. Complies substantially with the Building Permit	17
Scenario – An Occupancy Permit may still be granted	17
Scenario – Certificate of Substantial Compliance.....	18
Scenario – work not substantially in accordance with building permit (unauthorised work).....	18
12. Assessing an application for a Certificate of Existence.....	18
12.1. Work that can be granted a Certificate of Existence	18
12.2. Establishing a 'reasonable level' of safety, health and amenity.....	19
12.3. Application process	19

Scenario – Unapproved commercial building (shops and offices)	20
13. Finalising Occupancy Certification in Tier 2 areas.....	21
14. HBCF implications	22
15. Fidelity Fund implications.....	22
16. Engaging a new building certifier	22
17. Minor rectification work	23
18. Assessing unapproved work completed after 1 May 2016.....	24
Appendix A	25

1. Purpose

The purpose of these Guidelines is to provide guidance to building certifiers, other building practitioners, owners and owners' agents about the three different levels of Occupancy Certification in the Northern Territory Building Certification System. The focus of the Guidelines is in relation to the assessment of Certificates of Substantial Compliance and Certificates of Existence, as these categories of Occupancy Certification were introduced on 1 May 2016.

2. Legislative authority

The Director of Building Control (DBC) under section 167B of the *Building Act* makes these Guidelines. Section 167B enables Guidelines to be issued to assist in the administration and compliance with the *Building Act*. A person acting under the *Building Act* must have regard to these Guidelines, which means that strict compliance is not required, except where reference is made to law.

3. Background

In April 2009, a Moratorium on building enforcement was declared. The Moratorium suspended any enforcement of the *Building Act* on existing building works with incomplete certification or no approval, subject to there being no serious health or safety issues. The purpose of the Moratorium was to encourage existing building owners to achieve compliance.

When the moratorium commenced, it became apparent that impasses could arise, which prevent the granting of an Occupancy Permit resulting in the building works being unable to be lawfully occupied. The *Building Amendment (Occupancy Certification) Act 2016* commenced on 1 May 2016, creating the framework for a three-level Occupancy Certification system to allow new pathways for buildings to be lawfully occupied in the Northern Territory.

4. Overview of the three-level Occupancy Certification System

Prior to 1 May 2016, an Occupancy Permit was the only level of certification that could finalise the building certification process. The *Building Amendment (Occupancy Certification) Act 2016* creates two additional levels of Occupancy Certification, which are a Certificate of Substantial Compliance and a Certificate of Existence, in addition to an Occupancy Permit. The three different levels of Occupancy Certification allow for differing levels of compliance with the Act and Regulations. This allows for transparency in the building certification process.

The three levels of Occupancy Certification are:

- An Occupancy Permit (highest level);
- A Certificate of Substantial Compliance; and
- A Certificate of Existence (only available for work completed prior to 1 May 2016).

In relation to each level of Occupancy Certification, building works must comply with all other relevant legislation. For example, for certain building work carried out after 1 May 2010, compliance with the *Disability (Access to Premises – Buildings) Standards 2010* is required.

4.1. Occupancy Permit

An Occupancy Permit is the highest level of Occupancy Certification and may be issued if works fully comply with the requirements of the Building Permit, the Act and Regulations and the relevant technical standards at the time of the Building Permit.

This level of Occupancy Certification may be granted by a building certifier for any class of building.

An Occupancy Permit can be granted by a building certifier against an expired Building Permit, but only for works carried out during the validity of the Building Permit.

4.2. Certificate of Substantial Compliance

A Certificate of Substantial Compliance may be granted by a building certifier where building works occur under a valid Building Permit and meet the technical standards (specifically, the standards and codes that applied at the time the Building Permit was granted), but with minor departures from the legislated construction and certification processes.

This level of certificate may be granted by a building certifier for any class of building.

Minor departures might include works not constructed precisely in accordance with approved plans, missing required inspections or missing documentation e.g. a glazing certificate, plumbing certificate, etc. This category of certification cannot be granted where there is any non-compliance with the relevant technical standards.

A Certificate of Substantial Compliance can be granted by a building certifier against an expired Building Permit, but only for works carried out during the validity of the Building Permit. Section 11 of this Guideline addresses the assessment process for a Certificate of Substantial Compliance.

4.3. Certificate of Existence

A Certificate of Existence may be granted by the Director of Building Control, on recommendation by a building certifier for building works that were completed before 1 May 2016, when certain conditions are met and any of the following circumstances apply:

- the works were unapproved i.e. works were never granted a Building Permit or works were completed after the Building Permit had expired;
- a Building Permit was in force for the works but they were completed with less than substantial compliance with the Building Permit or other legislative requirements; or
- a Building Permit was in force but the works did not meet the relevant technical standards.

To be eligible for a Certificate of Existence the building work must meet a reasonable level of safety, health and amenity sufficient for occupancy of the building. Section 12 of this Guideline addresses the assessment process for a Certificate of Existence.

A Certificate of Existence cannot be granted for:

- buildings classified by the National Construction Code as ‘Importance Levels 3 and 4’ e.g. hospitals, schools, emergency shelters, buildings that accommodate a large number of people, and other high risk buildings and essential facilities; or
- building works associated with fire safety systems.

These types of buildings and building works must comply with the requirements for an Occupancy Permit or a Certificate of Substantial Compliance.

Whether there was a Building Permit issued for the work originally or not should not be the only consideration for a Certificate of Existence. A range of other assessments will be required to determine whether the work as constructed meets minimum levels of safety, health and amenity and suitability for occupancy. This is because a Certificate of Existence is intended to cover work that; has departed significantly from the Building Permit, is not in accordance with the relevant technical standards and or where there was no valid Building Permit.

Where a building certifier is unable to determine that a building meets a reasonable level of safety, health and amenity, the building certifier will be obliged to inform the Director of Building Control. The building owner will be provided with the opportunity to upgrade the building to meet a minimum standard, or to remove the works.

5. Obligations of building certifiers and owners’ agents

The three-level Occupancy Certification system provides transparency on the level of certification achieved, which may have an impact on the value of properties.

Insurers and lenders may also determine that different policies or rates apply to work covered by a Certificate of Substantial Compliance and or a Certificate of Existence. It is essential that owners understand the difference between each level of Occupancy Certification and that the owner and building professionals strive to obtain the highest level possible.

5.1. Role and obligations of building certifiers

The role of a building certifier is to grant Building Permits, conduct inspections of buildings and building work and to grant Occupancy Permits and Certificates of Substantial Compliance and to make recommendations to the Director of Building Control regarding Certificates of Existence.

To grant Building Permits, Occupancy Permits and Certificates of Substantial Compliance, a building certifier assesses relevant documentation and carries out inspections. Building certifiers also ensure that any required consents and approvals from reporting authorities are obtained and are consistent with the Building Permit application.

5.2. Advice that must be provided to owners

There are many other specific obligations under the *Building Act* and other legislation that apply to building certifiers, however, the following obligations apply specifically to the granting of Occupancy Certification:

- building certifier must advise owners that if they proceed with an application for a Certificate of Existence that their HBCF policy or Residential Building Cover will not be valid;
- if a building certifier determines that an Occupancy Permit may not cover the work, however, a lower level of Occupancy Certification could apply, the building certifier must declare that they have advised the owner or the owner's agent about why the highest level of Occupancy Certification may not be achieved. This obligation is imposed through the approved Occupancy Certification forms. Failure to comply with this obligation could give rise to disciplinary action;
- it is also an obligation for a building certifier to advise the owner or the owner's agent that there are appeal rights against a building certifier's decision to refuse to grant or to impose a condition on an Occupancy Permit or a Certificate of Substantial Compliance. The building certifier must advise the owner that an appeal must be commenced not later than 28 days after the date on which notice of the decision appealed against is given; and
- owners' agents must advise owners when the building works may only be covered by a Certificate of Substantial Compliance or a Certificate of Existence and why the highest level of Occupancy Certification (an Occupancy Permit) cannot be achieved. If the agent is a registered building practitioner e.g. a building contractor, failure to comply with this obligation could give rise to disciplinary action. Additionally, the approved form that is required to be signed by the owner's agent is in the form of an unattested statutory declaration, which means that if a false declaration is made, enforcement action may be commenced.

6. Granting an Occupancy Permit or a Certificate of Substantial Compliance against an expired Building Permit

In the Northern Territory, Building Permits expire two years from the date they are granted, unless an extension of time is granted by the building certifier prior to the original expiry date. Occupancy Permits and Certificates of Substantial Compliance can be granted by a building certifier after the expiry of a Building Permit where certain criteria are met.

The building certifier must ensure that all work under the Building Permit that is essential to the class of the building was carried out while the Building Permit was still in force. Work that is not essential to a class of building that has not been completed during the validity period of the Building Permit can be severed from the Building Permit.

It is expected that even if a final inspection had been carried out for the work previously, that the building certifier undertake a site inspection to confirm the status of the building work before granting an Occupancy Permit or a Certificate of Substantial Compliance. This is because the building certifier will be declaring that the work is suitable for occupancy on the granting of the Occupancy Certification.

The following sections provide guidance around how to determine whether all work essential to the class of building has been completed during the validity period of the Building Permit, and whether any additional work not essential to the class of building can be severed from the Building Permit.

6.1. All work essential to the class of building has been completed

To determine whether all work essential to the class of building has been completed, the building certifier must refer to the relevant technical standards.

For example, the National Construction Code, Volume 2, 2016 Edition refers to a number of specific essential facilities for a class 1a house. They are:

- A kitchen
- A bath or shower
- Clothes washing facilities
- Toilet and washbasin

There are other features of work that must be present for the building to be classified as a class 1a and those elements must also be completed to satisfy this requirement, for example, requirements in relation to ventilation and natural lighting.

Those essential features of the building must be completed during the validity period of the Building Permit in addition to the essential facilities in order for the building certifier to grant an Occupancy Permit or a Certificate of Substantial Compliance.

In relation to class 2-9 buildings, the same principles apply. A building certifier may not grant an Occupancy Permit or a Certificate of Substantial Compliance unless all work essential to the class of the building was carried out while the Building Permit was in force. For example, the National Construction Code, Volume 1, 2016 Edition refers to the following facilities for the sole occupancy parts of a class 2 building:

- A kitchen
- A bath or shower
- Toilet and washbasin
- Clothes washing facilities (or shared clothes washing facilities)

There are also fire system requirements, ventilation and lighting and other essential services required as a minimum for class 2-9 buildings. As these are minimum requirements specified in the National Construction Code, these elements must have been completed during the validity period of the Building Permit in order for a building certifier to grant an Occupancy Permit or a Certificate of Substantial Compliance for the building.

If the work that was not completed during the validity period of the Building Permit is not essential for the building class, the building certifier may sever (exclude) that work from the assessment for an Occupancy Permit or a Certificate of Substantial Compliance.

The above references to essential facilities and features of building work for particular classes have been mentioned to provide an explanation of this principle only. There are essential features for each class of building referred to throughout the National Construction Code. The building certifier must assess the minimum requirements for the class of building the application relates to and ensure that they have been met and that the work was carried out during the validity period of the Building Permit.

6.2. Building work that can be severed from the Building Permit

Where certain work is severed from the Building Permit, the Occupancy Permit or Certificate of Substantial Compliance must identify those parts of the building that were completed and which building work was severed from the Building Permit.

The following scenario illustrates how a building certifier can determine an application for an Occupancy Permit or a Certificate of Substantial Compliance where some work under the original Building Permit has not been carried out during the validity period of the Building Permit.

Scenario – all work essential to the class of building completed

A Building Permit was granted in 1999 for a house. The house is a 'pod style' house and the Building Permit specified there would be five pods. Three of the pods were for bedrooms, one for a living area/laundry and one for a carport. The Building Permit expired in 2001. All but one of the bedroom pods were constructed within that period.

This means that the work essential to the class of building has been completed.

Aside from the one bedroom pod that was not constructed, all the works were completed in accordance with the Building Permit during its validity period. All inspections required by the building certifier and legislative requirements were complied with.

The remaining pod that was not constructed can be severed from the Building Permit.

The Occupancy Permit can be granted without an amendment to the Building Permit. The Occupancy Permit must specify the work that it covers and which elements of the work specified in the Building Permit have been severed.

Alternatives

If the remaining pod had been constructed, but constructed outside the validity period of the Building Permit (for example, in 2005), the building certifier should advise the owner that it is considered unlawful building work. Because the work was completed prior to 1 May 2016, the owner could apply for a Certificate of Existence for that portion of work. If, however, work for the remaining pod was constructed after 1 May 2016, the owner would need to apply for a new Building Permit for that portion of work and comply with the standards that are applicable to that new Building Permit.

7. Suitable for occupation

Building certifiers have been required to determine whether building work is suitable for occupation when considering applications for an Occupancy Permit since commencement of the private building control system on 1 September 1993. For all levels of Occupancy Certification (an Occupancy Permit, a Certificate of Substantial Compliance and a Certificate of Existence), the building certifier must be satisfied that the work is 'suitable for occupation'.

To determine suitability for occupation, it is expected that the building certifier consider

(among other matters as may be determined by the building certifier based on their professional judgement) the following:

- The class of building and its use;
- Whether the work relates to an entire building, a portion of a building or a structure that is not a 'building' (such as a fence);
- The location of a building or building work (for example is it within a high wind area);
- The age of the building work; and
- The state of repair (the condition) of the building or building work.

The assessment of suitability for occupation will vary, depending on the above factors. As Occupancy Certification may be granted for building work that may be the subject of an expired Building Permit, (and as such may be very old), the building certifier must consider what relevant reports and or documentation are required in order to be satisfied that the work is suitable for occupation. For example, if building work has recently been completed and or the Building Permit has only recently expired, a building certifier may determine that no reports are required and confirm the building's suitability for occupation.

Another example is an owner may apply for an Occupancy Permit or a Certificate of Substantial Compliance for building work carried out under the *Building Act 1983* and accordingly the work may be very old. It would be expected that the building certifier would, at a minimum, require plumbing and drainage and electrical status reports, in addition to undertaking an on-site inspection of the work, to confirm whether the work is fully or substantially in accordance with the building approval and remains in a state of repair that is suitable for occupation.

To make an assessment regarding whether the building or building work is suitable for occupation, it is expected that the building certifier must carry out at least one on-site inspection and not base their decision solely on a desktop assessment (purely through receipt of reports and or other documentation).

7.1. Where building work is not suitable for occupation

If the building certifier is of the opinion that the building or building work is not suitable for occupation, the building certifier may issue a Building Notice to advise that the *Building Act* has been breached and to seek a response on how the issues will be resolved. The building certifier must then follow the relevant procedures under the *Building Act* in relation to the receipt of representations from the owner, prior to deciding whether or not to issue a Building Order. In the event that a Building Notice has not been complied with the building certifier may issue a Building Order to require the issues to be resolved. If the building certifier decides to issue a Building Order, the procedures in the *Building Act* must be followed, including providing a copy of the Building Order to the Director of Building Control within two calendar days.

If a Building Order is issued that requires building work, the work must comply with the *Building Act*. This means that a Building Permit must be obtained. Following successful completion of any building work that may be required, the building certifier may then grant the relevant Occupancy Certification.

If at any time the building certifier forms the opinion that building work is unsafe or poses a

danger to its occupants or the public, the building certifier must notify the Director of Building Control.

8. Mixed classes of buildings

A Building Permit is able to have different classifications for each building, which means there can be multiple classifications under the Building Permit. Each classification will require an assessment for an Occupancy Certificate, which means there can be different levels of certification issued for different classes. However, where a non-compliant element of one class affects the compliance of another class (where there is a dependency between the two classes), it would not be appropriate to issue separate Occupancy Certificates.

The below example illustrates this point.

Scenario – mixed classes where there is a dependency

A five storey residential complex was constructed in 2015 in Darwin CBD. The building contains a carpark for its residents and some storage area. This means that the building has a mix of class 2, 7 and 10 buildings. Certification for the entire building was never finalised as the exits in the carpark were not compliant with the National Construction Code. The body corporate now wants to finalise certification.

In this example, since the carpark exits are non-compliant, the entire building would only be able to be issued with the level of certification that applies to that class (the class 7) due to the dependency of that class on all classes within the building.

As the exits do not meet the relevant technical standards, an Occupancy Permit and a Certificate of Substantial Compliance are not available. As the works were carried out prior to the commencement of the Bill, it is possible that the work could be covered by a Certificate of Existence (although the building work would still need to meet a reasonable level of safety, health and amenity).

This will mean, however, that the entire building and all classes that comprise the building would only be able to be covered by a Certificate of Existence. This is because the exits are dependent on each of the other classes within the building. Alternatively, the body corporate could rectify the non-compliant element and it would therefore be possible for the work to be covered by an Occupancy Permit or Certificate of Substantial Compliance.

9. Certification of work under the Building Act 1983 and Building Act 1993

The *Building Act 1993* established the private certification building control system that exists in the Northern Territory. Prior to the commencement of that Act (which was on 1 September 1993), the *Building Act 1983* operated and building approvals and Occupancy Permits were granted by the Director of Building Control only. There was no private sector participation in the certification of building work under the 1983 *Building Act*.

Section 170 of the *Building Act 1993* (which is the current *Building Act* in operation), preserved the operation of the *Building Act 1983*. This enables owners to be able to continue to finalise certification for work carried out with an approval under that Act.

Prior to 1 May 2016, only the Director of Building Control was able to finalise certification for work carried out under the *Building Act 1983*, on the basis that under that Act, it was the Director of Building Control that was responsible for issuing Occupancy Permits. The *Building Amendment (Occupancy Certification) Act 2016* amended the current *Building Act* to enable building certifiers to undertake the role of finalising certification for work carried out under a building approval granted under the *Building Act 1983*.

The position regarding what work can be granted a particular level of certification is as follows:

- Building certifiers are able to grant Occupancy Permits and Certificates of Substantial Compliance under the 1983 *Building Act* and up to the commencement of the 1993 Act.
- Building certifiers are able to grant Occupancy Permits and Certificates of Substantial Compliance for work completed under the current *Building Act* i.e. after 1 September 1993.
- Certificates of Existence are to be able to be granted by the Director of Building Control on recommendation by a building certifier for building work of any age where building approval was required at the time it was built (provided works were completed before 1 May 2016).

The granting of any Occupancy Certification is dependent on demonstrated compliance with the relevant technical standards and legislative requirements.

10. Work constructed before the Building Act 1983

Building Advisory Services has by way of policy granted Certificates of Occupancy for building works covered by a building approval and carried out prior to the commencement of the *Building Act 1983*, where certain criteria are met. From 1 May 2016, this policy will no longer operate.

The operation of the *Building Act 1983* is preserved by virtue of section 170 of the current *Building Act*. However, for work carried out prior to the commencement of that Act, there is no statutory basis for the granting of Certificates of Occupancy.

From 1 May 2016, if an owner wishes to finalise certification of building work carried out prior to the commencement of the *Building Act 1983* (prior to 1 June 1984), they have the

opportunity to apply for a Certificate of Existence. Owners with incomplete certification for work completed prior to 1 June 1984, however, are not required to finalise certification as certification requirements ceased to exist from that date. All building work, however, is subject to the provisions in the current *Building Act* relating to safety. This means that regardless of a building's age or certification status, the work could be issued with a Building Order.

11. Assessing an application for a Certificate of Substantial Compliance

A Certificate of Substantial Compliance has the following features:

- Similar to an Occupancy Permit as this certificate applies to building works that have been granted a Building Permit.
- The building work must comply with the technical standards applicable to the Building Permit.
- The certificate may be granted by a building certifier.
- The certificate may be granted where the building work does not comply fully, but complies substantially with the requirements of the legislation that applied in force when the Building Permit (or for work subject to the *Building Act 1983* – a Building Approval) was granted. It should be noted that whilst generally the legislative requirements that applied at the time of the approval or permit will apply, some requirements of the legislation in force from time to time will also apply (for example, what documentation is required to accompany the Occupancy Certification application).
- Is able to be granted in relation to all classes of buildings where relevant criteria are met.

11.1. Work that can be granted a Certificate of Substantial Compliance

All classes of buildings may be granted a Certificate of Substantial Compliance. A Certificate of Substantial Compliance may be granted by a building certifier for work that was subject to the *Building Act 1983* (and accordingly has an approval under that legislation) and for building work granted with a Building Permit under the *Building Act 1993* (the current *Building Act*).

11.2. Complies substantially

Events may arise during construction that prevent an Occupancy Permit being issued as full compliance with the *Building Act* and or Regulations (legislative requirements) was not achieved. Where this occurs, a building certifier may grant a Certificate of Substantial Compliance by applying professional skill and judgment to assess the nature of the departure from full compliance and its importance in determining whether the work could be said to 'comply substantially' with the legislative requirements and or the Building Permit.

Substantial is a term that is frequently used in legislation where something other than 'precise' is meant. The *Building Act* does not define 'complies substantially' so that professional skill and judgement can be applied due to the complex nature and variety of

building issues that arise.

The intention is that when assessing whether work ‘complies substantially’ with the Act, Regulations and or Building Permit, the building certifier will consider whether the element that is not fully compliant (for example, a missing inspection) has a substantial impact on the assessment of whether the building work meets the technical standards. To do this, the building certifier must take into account whether compliance can be reasonably demonstrated through other means, for example, a statutory declaration or a post construction assessment. The term ‘substantial’ should not be construed as meaning that the departure from precise compliance is greater or less than 50%. The building certifier should consider the likely effect of the departure from precise compliance instead.

These guidelines illustrate various scenarios where a Certificate of Substantial Compliance may be granted where the legislative and or Building Permit requirements have been substantially, but not precisely, complied with. Building work granted with a Certificate of Substantial Compliance, however, must meet the relevant technical standards that applied to the Building Permit.

11.2.1. Complies substantially with the Building Act and or Regulations

There are various legislative requirements for the carrying out of building work. For example, for certain work, a Building Permit may not be granted unless evidence of a building contract is in place and Residential Building Cover has been taken out. Another example is the documentation that is required before a building certifier may grant an Occupancy Permit. A building certifier must not grant an Occupancy Permit unless the following are included in the application:

- A builder’s declaration
- the certificates or other documents that relate to the manufacture and assembly off-site, or installation on-site, of any components of the building work by a person other than the person required to make the builder's declaration for the work that a building certifier would reasonably require in order to grant an occupancy permit
- section 40 certificates relied on by the building certifier
- inspection certificates
- if work to which section 69 of the *Electricity Reform Act* applies was carried out in conjunction with the building work – a copy of the certificate of compliance
- a copy of each relevant planning or other prescribed consent, report or approval, if any

Additionally, relevant procedures required by the legislation may not have been precisely met. For example, for residential building work (which is houses, units and associated non-habitable buildings), the person carrying out or in charge of carrying out the building work must notify the building certifier at various stages for inspections. If this legislative requirement is not met, an impasse will arise because the application for an Occupancy Permit must include inspection certificates for each stage that is prescribed by regulation. Where this situation arises, a Certificate of Substantial Compliance could be granted instead of an Occupancy Permit, to demonstrate that whilst the technical standards have been met, there has not been precise compliance with the legislative requirements specified in the

Building Act and Regulations.

The below scenario illustrates where either a Certificate of Substantial Compliance or an Occupancy Permit could be granted following testing of the work.

Scenario – missing wet area inspection

The owners of a unit (class 2 building) obtained a Building Permit for the renovation of their bathroom. The wet area inspection stage was missed and tiles were laid which are covering the waterproof membrane.

The owners are in breach of their legislative obligations as they should not have allowed the waterproofing to be covered with tiles prior to the building certifier's inspection, however, the owners want to finalise certification so that tenants can lawfully occupy the premises.

The *Building Act* contains provisions concerning the issuance of inspection certificates. The provisions permit the building certifier to do anything that is reasonably necessary to be done, including testing building work, in order to be satisfied that the work meets the technical standards. Once satisfied the building work meets the technical standards, the building certifier may issue an inspection certificate.

The building certifier therefore has several options in this instance.

Option 1

If testing or some other means of evidence (e.g. photos or declarations) demonstrate to the building certifier's satisfaction that the technical standards had been met, the building certifier could issue the inspection certificate and accordingly an Occupancy Permit could still be obtained.

Option 2

If the building certifier is not willing to grant an inspection certificate on the basis that they are unable to inspect all of the waterproof membrane but they are still satisfied that the technical standards have been met, the building certifier may issue a Certificate of Substantial Compliance. The building certifier must advise the owners about why they are unable to be granted an Occupancy Permit.

Option 3

If the building certifier determined that they could not be satisfied the technical standards had been met and the work was carried out after 1 May 2016, the owner would be required to rectify the work (remove tiles and re-do the waterproofing before an Occupancy Permit or a Certificate of Substantial Compliance could be granted). The building certifier could require the owner to do this through their ability to issue building notices and orders.

Option 4

If the work approved by the Building Permit was carried out before 1 May 2016, it is possible that the building certifier could make a recommendation to the Director of Building Control for a Certificate of Existence.

An important note is that the building certifier must not grant a Certificate of Substantial Compliance where there are any potential health or safety risks. For example if there is a missing electrical certificate the building certifier is expected to inform the owner or owner's agent of the need to obtain that document and that a Certificate of Substantial Compliance cannot be granted until the relevant document or documents have been obtained.

11.2.2. Complies substantially with the Building Permit

Events may arise during construction that prevents an Occupancy Permit being granted as precise compliance with the Building Permit was not achieved. For example, the owner may arrange a minor change to the plans, such as the placement of a window, without first applying for an amendment to the Building Permit. A building certifier may grant a Certificate of Substantial Compliance by applying professional skill and judgment to assess the nature of the departure from precise compliance with the Building Permit and its importance to the compliance with technical standards and health and safety risks.

Scenario – An Occupancy Permit may still be granted

A Building Permit has been granted for the construction of a house. In the living area, the plans that form part of the permit show there are to be two internal doors to the north of the room. The owner requests the builder to only include one internal door and the builder constructs the living area in accordance with those instructions. The building certifier is not notified and the Building Permit is not amended. Some very minor departures from the Building Permit are permitted without requiring an amendment to the Building Permit, so long as 'as constructed' drawings or a note is included in the building file. The building certifier wants to know whether they can grant an Occupancy Permit with 'as constructed drawings' or a note showing the minor departure, or whether they can only grant a Certificate of Substantial Compliance.

If the departure from the plans is such that the building certifier would have granted an amended Building Permit (for example, the building certifier would have required an engineer or other professional to confirm the impact of the change), then the Building Permit has not been complied with substantially. This means that the owner would be required to undertake rectification work, or, for work completed prior to 1 May 2016, apply for a Certificate of Existence.

If the departure was so minor that the building certifier could have only noted the change on the plans and not amended the Building Permit, then an Occupancy Permit could still be granted.

To determine whether or not a Building Permit has been complied with substantially, the building certifier must consider the likely impact of the departure from precise compliance. If the departure from precise compliance will have an impact on compliance with the technical standards, then the building certifier should not grant a Certificate of Substantial Compliance. Where the departure from precise compliance is likely to have an impact on compliance with the technical standards, the building certifier should advise the owner that they would be required to undertake rectification work, or, for work completed prior to 1 May 2016, the owner could apply for a Certificate of Existence.

Scenario – Certificate of Substantial Compliance

A Building Permit is granted for a house. The drawings that form part of the Building Permit show a kitchen with a different layout to that which is built, including the position of the plumbing installation. The building certifier wants to know whether or not a Certificate of Substantial Compliance should be granted.

If the building certifier determines that the technical standards have been met and that the layout of the kitchen does not have an impact on compliance with those standards, this would be an example of where it would be appropriate for a Certificate of Substantial Compliance to be granted.

Scenario – work not substantially in accordance with building permit (unauthorised work)

A Building Permit is granted for a two storey house showing one kitchen which is to be constructed on the upper level. The house is constructed and without amending the Building Permit, a second kitchen is installed on the ground level. The building certifier wants to know whether the house can be granted a Certificate of Substantial Compliance, if ‘as constructed’ drawings are included on the building file.

This is an example of work that is not substantially in accordance with the Building Permit, as the addition of a second kitchen would have required a Building Permit for the plumbing. It is unauthorised work. This means that a Certificate of Substantial Compliance may not be granted. If the work was completed before 1 May 2016, the owner could apply for a Certificate of Existence, however, the building certifier would need to be satisfied that the work meets a reasonable level of safety, health and amenity. If the work was completed after 1 May 2016, the owner would be required to apply to a building certifier for a Building Permit and demonstrate compliance those Building Permit requirements, including the technical standards.

12. Assessing an application for a Certificate of Existence

A Certificate of Existence is designed to provide an owner with a basic level of Occupancy Certification for building work completed prior to 1 May 2016. An owner that is able to obtain this level of Occupancy Certification demonstrates that the building work meets ‘a reasonable level of safety, health and amenity’, which makes it ‘suitable for occupation’, and the building work complies with other relevant legislative requirements (e.g. compliance with the *Disability (Access to Premises – Buildings) Standards 2010*).

12.1. Work that can be granted a Certificate of Existence

All classes of building work, except importance levels 3 and 4 buildings (as contained in the National Construction Code), may be granted a Certificate of Existence, if the work was completed before 1 May 2016. Certificates of Existence are to be able to be granted by the Director of Building Control on recommendation by a building certifier *for building work of any age* where building approval was *required* and the works are demonstrated to meet the

relevant assessment criteria.

12.2. Establishing a 'reasonable level' of safety, health and amenity

The Macquarie dictionary defines 'reasonable' as:

Reasonable – 1. endowed with reason. 2 agreeable with reason or sound judgement: a reasonable choice....

To determine whether work could be said to meet a 'reasonable level' of safety, health and amenity, a building certifier will be exercising professional judgement based on the collection and consideration of documentation and through on-site inspection and or testing of the works. A building certifier should carry out a risk assessment to determine the technical standards that are appropriate for the building's classification or elements of the works to be covered by the Certificate of Existence.

As a minimum, however, all building works granted with a Certificate of Existence must meet current standards under the National Construction Code in relation to wind loading and fire safety.

When considering what is a reasonable level of safety, health and amenity, the building certifier should as a minimum consider the following (which are the same matters that a building certifier would be considering as a minimum to determine whether the work is suitable for occupation):

- The class of building and its use;
- Whether the work relates to an entire building, a portion of a building or a structure that is not a 'building' (such as a fence);
- The location of building or building work (for example is it within a high wind area);
- The age of the building or building work;
- The state of repair (the condition) of the building or building work; and
- If at any stage the building certifier considers the building work is 'unsafe' for occupation the building certifier must notify the Director of Building Control.

12.3. Application process

A Certificate of Existence application should be assessed in the following way:

Step 1 - Compliance with other relevant legislation

The owner must meet all other relevant legislative requirements, which would include relevant consents and approvals (eg. planning and disability access). If consents and approvals are not able to be obtained, the owner must be advised that the application cannot be progressed and that the Director of Building Control will be notified.

Step 2 - Obtain Required Documentation

The building certifier should advise the owner to obtain any required documentation. This would include obtaining drawings, an engineering certificate, plumbing status report, electrical compliance certificate, post construction section 40 certificate, photographs, test reports and any other required documents.

An important note is that the building certifier must not recommend a Certificate of Existence where there are any potential health or safety risks. For example if there is a missing electrical certificate the building certifier is expected to inform the owner or owner's agent of the need to obtain that document and that a Certificate of Existence cannot be granted until the relevant document or documents have been obtained.

Step 3 – Assess 'a reasonable level of safety, health and amenity' and suitability to occupy

Once relevant documentation has been obtained, the building certifier is able to assess whether they believe on reasonable grounds that the work meets a 'reasonable level of safety, health and amenity' and if it suitable to occupy

To determine whether the work meets a 'reasonable level of safety, health and amenity' compliance with current fire safety and wind loading requirements must be demonstrated as a minimum.

Step 4 – Make a recommendation

If satisfied that the building work meets 'a reasonable level of safety, health and amenity' and is suitable to be occupied the building certifier must make a recommendation to the Director of Building Control for the granting of a Certificate of Existence. Conversely, if it does not, a recommendation must be made to the Director of Building Control to refuse the granting of a Certificate of Existence.

Step 5 – DBC will assess the Recommendation

The Director of Building Control will then decide whether to grant or refuse an application for a Certificate of Existence.

A checklist that can be used to assist building certifiers in making a recommendation for a Certificate of Existence is at Appendix A.

Scenario – Unapproved commercial building (shops and offices)

A two storey building that is used as offices and shops was constructed in 1995 with planning approval but without a Building Permit. The owner wants to obtain a Certificate of Existence to ensure that they are able to comply with their insurer's policy. The building certifier has undertaken a preliminary inspection and it appears that the building is structurally sound and glazing appears to meet the standards that would have applied in 1995. How can the building certifier determine what a reasonable level of health, safety and amenity will be for this building?

The building certifier must confirm that the building meets current requirements under the National Construction Code in relation to wind loading and fire safety. The building certifier may in this instance require glazing on the ground floor shop to be upgraded to current standards as this is an accessible element in a high use area. The building certifier may consider that the risk is lower for existing internal glazing on the second floor and allow it to be retained (compliant with the requirements in 1995). The building certifier must, however, ensure that the condition and installation of the existing glazing work makes the building still suitable for occupation.

13. Finalising Occupancy Certification in Tier 2 areas

From 3 July 2006, building control in the Northern Territory was divided into Tier 1 and Tier 2 areas. Tier 1 areas require buildings to have full Occupancy Certification and apply to major centres, such as Darwin and Alice Springs. Regional areas such as Katherine and Tennant Creek were placed in Tier 2 areas whereby since that date, houses (and associated class 10a structures) were no longer required to be granted an Occupancy Permit to finalise certification. Certification in Tier 2 areas for houses and associated class 10a structures is considered finalised on the making of a Builder’s Declaration.

All other classes of buildings in Tier 2 areas have always required and continue to require Occupancy Certification.

From 1 May 2016, the following applies to houses and associated class 10 structures in Tier 2 areas:

Scenario	Documentation	Occupancy Certification or Builder’s Declaration?
Houses (and associated class 10 structures) constructed after 2006 with a Building Permit	Builder’s Declaration <i>not</i> available	The owner would be required to engage a building certifier for post construction assessments for either a Certificate of Substantial Compliance or a Certificate of Existence.
	Builder’s Declaration <i>is</i> available	The Builder’s Declaration finalises the certification process. No further action required.
Houses (and associated class 10 structures) constructed before or after 2006 but before 1 May 2016, without a Building Permit (unapproved work)	N/A the work is unapproved	The owner would be required to engage a building certifier for post construction assessments for a Certificate of Existence.
Houses (and associated class 10 structures) completed after 1 May 2016), without a Building Permit (unapproved work)	N/A the work is unapproved	The owner would be required to engage a building certifier and obtain a Building Permit for the existing work. The work would need to comply with the standards under the new Building Permit (which may require the work to be upgraded). The work under the Building Permit can be finalised with a Builder’s Declaration.

14. HBCF implications

The Home Building Certification Fund (HBCF) is an indemnity fund that covers the rectification of building works that are non-compliant with the National Construction Code . The period of cover under a HBCF policy is 10 years from the date of the issue of an Occupancy Permit. HBCF policies were first issued with the commencement of private sector certification in 1993 and ceased to be issued on 1 January 2013, with the commencement of Residential Building Cover and the Fidelity Fund.

Many policies issued over this time have not been activated as an Occupancy Permit has not been issued (even though works may have been completed within the validity period of the Building Permit). The *Building Amendment (Occupancy Certification) Act 2016* makes it clear that the 10 year period of cover commences from the date the building certifier determines building works to have been completed, or no later than two years from the date the Building Permit was granted.

The amending Act also makes it clear that HBCF policies can be activated on the granting of a Certificate of Substantial Compliance, in addition to an Occupancy Permit. Building work that is granted a Certificate of Existence will not be able to access HBCF cover.

This means that owners of buildings with HBCF policies that achieve an Occupancy Permit or a Certificate of Substantial Compliance after 1 May 2016 will only be able to access cover under the policy for a period of ten years after the building certifier assesses the work to have been completed. Owners should be made aware by the building certifier that if they proceed with an application for a Certificate of Existence that their HBCF policy cover will not be valid.

15. Fidelity Fund implications

On 1 May 2016 amendments were also made to the Building (Resolution of Residential Building Work Disputes) Regulations. Those regulations relate to work that is covered by the Residential Building Cover package, which includes the issue of Fidelity Fund certificates.

The amendments make it clear that buildings granted with a Certificate of Substantial Compliance will be eligible for cover under the Fidelity Fund in the same way works covered by an Occupancy Permit receive cover. Building work that is granted a Certificate of Existence will not be able to access Fidelity Fund cover.

16. Engaging a new building certifier

One of the key features of a private building certification system is the restriction placed on owners from terminating the engagement of a building certifier. An owner may face enforcement action if a building certifier's engagement is terminated otherwise than in accordance with the *Building Act*.

The existence of rules regarding disengagement of a building certifier is to ensure the consistent application of building control legislation and technical standards. Without these rules there would be an incentive for building certifiers to grant Building Permits and Occupancy Certification based on what the owner wanted, rather than what is required under the legislation and relevant technical standards, as they could attract a greater volume

of clients. This would potentially dilute the effectiveness of the private building certification system.

In summary the rules regarding the disengagement of a building certifier are:

- a person who has engaged a building certifier must not engage another building certifier to perform the same function in relation to the building or building work without the consent of the building certifier already engaged;
- a person who has engaged a building certifier must not disengage that building certifier, unless the Director of Building Control consents to the disengagement (even where the building certifier has died or become incapable of performing the functions of a building certifier); and
- a building certifier may refer an engagement to another building certifier at any time with the agreement of the other building certifier.

The above rules are not displaced with the introduction of the three levels of Occupancy Certification. Even where a Building Permit has expired, the building certifier that granted the Building Permit must finalise that certification (even if the application is for a Certificate of Existence).

A building certifier may agree with another building certifier to refer an engagement. If the building certifier is unable to do so, or does not agree to the referral of the engagement, the owner must be informed that they may apply to the Director of Building Control to disengage the certifier and request consent to transfer the engagement to another building certifier.

17. Minor rectification work

All building work requires a Building Permit, unless it is exempt through the Building Regulations. There are, however, certain activities that are in connection with the construction of building or plumbing or drainage services, that have been interpreted to be outside the scope of what is considered 'building work'. For example, painting is not an activity that is considered to be building work. Similarly, where there may be some minor rectification work, such as the replacement of two damaged roof sheets, a Building Permit is not required.

Prior to commencement of the three-level Occupancy Certification system on 1 May 2016, building certifiers were exercising professional judgement to determine whether rectification work required a Building Permit. Building certifiers should continue to exercise professional judgement in relation to this area. On some occasions it will be appropriate that a Building Permit be granted for rectification work (such as the replacement of entire roof), however, there are also instances where a Building Permit would not be required (such as the replacement of two roof sheets).

18. Assessing unapproved work completed after 1 May 2016

Building work that is commenced without building approval (a Building Permit) is considered unlawful and may not be occupied. A Certificate of Existence provides an avenue for owners of buildings and building work that has been carried out without approval before 1 May 2016 to achieve Occupancy Certification.

For work that is unapproved and carried out after 1 May 2016, the process is to require the owner to obtain a Building Permit and comply with the standards applicable to that Building Permit (and not the standards that applied at the time of construction). This process is similar to a change of use application where the building certifier is required to consider the Building Permit application for existing building works.

To regularise unapproved work completed after 1 May 2016, the owner must apply for a Building Permit and provide the documentation required by the building certifier to consider the application. The level of documentation required will be determined by the building certifier based on their professional judgement and the type of building work to which the application relates, however, it is expected that as a minimum it would include:

- Evidence of consent and/or reports from reporting authorities;
- As constructed drawings of the building and the site;
- Engineer's certificate (under section 40 of the *Building Act*);
- All other relevant documentation that is required under the *Building Act* and Regulations for the type of building work the application relates to, subject to its availability (for example, if it is work for a house – a Fidelity Fund Certificate would have been required, however, if work has already been carried out, would be unavailable).

If the unapproved building work was work that required Residential Building Cover, the building certifier must advise the owner that the highest level of certification they may be able to receive is a Certificate of Substantial Compliance. This will be the case even where the period of cover would have expired (starting from the date the works have been completed or the Building Permit had expired) if the cover was taken out prior to the building work commencing.

The Fidelity Fund will not issue certificates of cover for work that has already been constructed. This is because there would have been no ability for the Fund to assess the risk prior to work commencing. The purpose of introducing the additional levels of Occupancy Certification was (among other things) to enhance transparency and encourage full compliance and accordingly it is not appropriate that building work that required Residential Building Cover be granted an Occupancy Permit, if that cover is not available. This would have the potential to mislead prospective owners.

Appendix A

Checklist - Recommendation for a Certificate of Existence

Requirement	✓ / ✗	Action to be taken
Did the building work require building approval?		
Are all reporting and consent authority requirements able to be met?		
Is the work able to comply with all other relevant legislation, for example, the <i>Disability (Access to Premises – Buildings) Standards 2010</i> ?		
Has the use of the building been ascertained to determine which classification under the National Construction Code will apply?		
Has the owner obtained drawings that show the existing building work in sufficient detail and relevant reports and certificates?		
From an on-site assessment, are there reasonable grounds to believe that the building work is consistent with the documents that accompanied the application?		
Does the building work meet current fire safety requirements under the National Construction Code?		
Does the building work meet current wind loading requirements under the National Construction Code?		
Are there reasonable grounds to believe that the building work meets a reasonable level of safety, health and amenity?		
Are there reasonable grounds to believe that the building work is suitable for occupation?		

If all requirements have been ticked, the building certifier is able to make a recommendation to the Director of Building Control that a Certificate of Existence should be granted.