



# NEWSLETTER

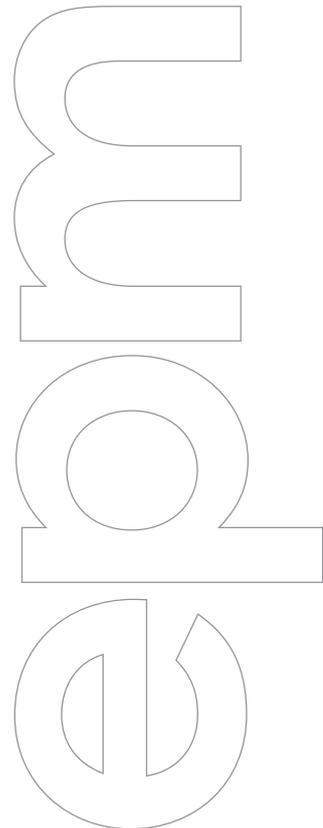
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## SPRING 2018

Pymble Ladies College Centenary Complex © Brett Boardman Photography

### This Edition

- How Safe is the Harbour for SOPA Claimants?
- Development of Educational Establishments on Bush Fire Prone Land
- Pitfalls of Protracted Project Commencement



# HOW SAFE IS THE HARBOUR FOR SOPA CLAIMANTS?

## Will a claimant in a 'Safe Harbour' be able to convince a court that a stay of judgment under SOPA based upon their financial position is not justified?

On 28 September 2018, the NSW Supreme Court in *Greenwood Futures v DSD Builders (No. 2)* [2018] NSWSC extended a stay of a judgment in favour of a contractor based upon a SOPA adjudication on the basis that the contractor was at risk of insolvency. This is consistent with previous decisions of the court in similar circumstances.

On 18 September 2017 and 1 July 2018, new retrospective insolvent trading laws came into force. Designed to protect companies in the process of restructuring (and to ensure higher chance of recovery from insolvency events), the new regime introduced, of significance:

- (a) a 'safe harbour' for company directors from personal liability for companies trading insolvent; and
- (b) a stay on the enforcement of *ipso facto* clauses during a period of restructuring of a company (that is a clause entitling the other party to terminate the financially distressed party on the basis of that financial distress alone).

Given the prevalence of contractor insolvency, the new regime is likely to be utilised by contractors in the building and construction industry. Notwithstanding, there appears to be the potential for the reforms to conflict with the courts' approach towards contractor insolvency under Security of Payment legislation.

## The Safe Harbour regime

Essentially, the new safe harbour scheme protects directors from insolvent trading liability if the director can show that they are developing a course of action which

is 'reasonably likely' to lead to a 'better outcome' for the company than administration or liquidation. The period of safe harbour can continue from the point the director begins to develop the course of action up to the point an administrator or liquidator is appointed to the company.

Accordingly, if the director of a company can show that it is abiding by the conditions to move the company away from insolvency (as specified in the legislation), a company/director may have grounds to assert 'safe harbour' in proceedings against that director for insolvent trading.

A contractor in financial distress, may well use the Security of Payment regime to improve cash flow, as presumably the sort of 'better outcomes' they might be looking for involve being paid for the work they have done.

## SOPA's approach towards contractor pre-insolvency

There have been a number of cases, whereby the Courts have stayed or prevented the enforcement of an adjudication determination (or judgment) where it is established that the beneficiary of that determination (or judgment) is insolvent or at risk of going insolvent. The underlying rationale is that the interim nature of the regime would be negated should the contractor go into liquidation before final resolution of any dispute over the payment. In other words transferring the risk of insolvency onto the party liable to make payment.

For example, in the Supreme Court NSW decision of *Hakea Holdings Pty Limited v Denham Constructions Pty Ltd; BaptistCare NSW & ACT v Denham Constructions Pty Ltd* [2016] NSWSC 1120, the Court granted a stay in enforcement of a determination in favour of the contractor on the basis that the contractor was at risk of becoming insolvent,

# HOW SAFE IS THE HARBOUR FOR SOPA CLAIMANTS?

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and consequently, would not be able to pay any debt challenged by the applicant. See also: *R J Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390 and *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2018] NSWCA 33.

In the more recent decision of *Greenwood Futures v DSD Builders* [2018] NSWSC, the Supreme Court of NSW similarly granted the stay of a judgment on the basis "that there [was] a very real risk" of the contractor becoming insolvent. In that case, the Court considered the financial position of the contractor and re-structuring practices of the contractor's directors. The Court found that the directors were engaged in structuring their affairs in such a way so as to avoid paying their liabilities. By way of example, the directors would plague respondents with a succession of payment claims and adjudication applications and would consign insolvent companies to liquidation, creating new companies to take their place.

## What to expect?

As the underlying facts of the above cases pre-date the introduction of the new insolvency laws, the application of the 'safe harbour' reforms was not in issue. However it seems that if the directors of such companies were seeking to trade their way out of insolvency then those efforts might have been easily frustrated, by nature of the very regime implemented by the legislature to improve their chances of avoiding insolvency.

Where Courts have historically stayed the enforcement of an adjudication determination where it can be shown that the contractor is on the verge of insolvency, it will be interesting to see how the Courts will grapple with the purpose of the insolvency reforms in considering whether a stay ought to be granted.

**Helena Golovanoff** | Partner  
Holding Redlich

**Divya Chaddha** | Associate  
Holding Redlich

# DEVELOPMENT OF EDUCATIONAL ESTABLISHMENTS ON BUSH FIRE PRONE LAND

When undertaking the development for or relating to an educational establishment in NSW, planning legislation has certain requirements that must be met if the land is considered to be “bush fire prone”.

## Whether land is “bush fire prone”

Under the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA**) land that is recorded on a bush fire prone map is “bush fire prone land” for the purposes of any legislation in NSW (section 10.3(3) EPA). These maps are maintained by the Council in any given local government area, and are required to be made available for public inspection. The Commissioner of the NSW Rural Fire Service is responsible for keeping the bush fire maps up to date and for keeping Council informed of any changes. A planning certificate (section 10.7 certificates) can be obtained for any lot of land which will note whether the land is categorised as bush fire prone.

## Developing a school on “bush fire prone land”

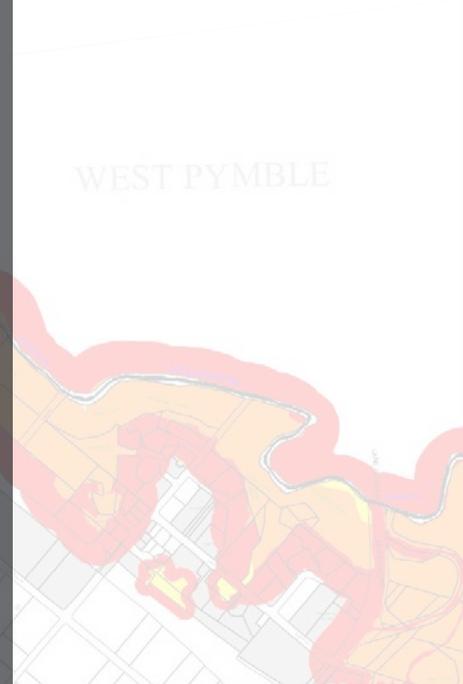
Undertaking development of a “school” is known as a **Special Fire Protection Purpose** under the *Rural Fires Act 1997* (NSW) (**RFA**) if it is on bush fire prone land. Development of this nature requires a bush fire safety authority (**authority**) from the NSW Rural Fire Service under section 100B(3) of the RFA. This authority permits the relevant activities and ensures that the development complies with standards regarding setbacks, provision of water supply and other matters that the Authority considers necessary to protect people, property or the environment from bush fire danger (section 100B(2) RFA).

## Development under the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* (ESEPP)

Under the RFA, an authority is not required for development that is for internal alterations only. Additionally, development on bushfire prone land cannot be categorised as *complying development* (section 5(b) 100B(1) RFA). The ESEPP identifies that development proposed on bush fire prone land requires consultation with the NSW Rural Fire Service (clause 13(2)(e)). If the development is *permitted without consent* under clause 36 of the ESEPP, but is on bush fire prone land, a bush fire safety authority is still required.

The general rule, therefore, is that if the land upon which the educational establishment is being developed is identified **by a map** prepared by Council to be bush fire prone then a bushfire safety authority is required from the NSW Rural Fire Service before commencing development. We encourage you to seek advice if there are any queries in respect of school development on bush fire prone land.

**Patrick Holland** | Partner  
McCullough Robertson



# PITFALLS OF PROTRACTED PROJECT COMMENCEMENT

What can go wrong by putting a project on hold after tendering? There are a number of forces and drivers that may motivate a principal to delay the commencement of a project. What can be left unsaid are the risks to a project if it is placed on hold for an extended period after tendering. This article covers a few things to consider if you choose to pursue a project after placing it on hold for an extended period:

## Market Forces

The factors of supply and demand over the passage of time can impact both the availability of resources as well as market prices within the building industry. This will require a close interrogation and may necessitate re-tendering of the project in order to provide certainty around the elements of time and cost.

## Feedback Change Over Time

The success of a design is only as good as the information you feedback to your design team (and builder) in order to bring a concept to life. Even more so, when information is influenced by external factors with a primary example being technology of the time and the individuals that were essential in providing it. Once a project is shelved for an extended period, it often doesn't get revisited with the due attention it deserves by all involved with the by-product being an outdated design that in all probability lacks the functionality requirements to meet new or past expectations.

## Supply Authorities

It is important to understand that supply authorities such as Ausgrid, Sydney Water, Endeavour and Jemena set expirations for approvals once granted. The expiry timeframes range between supply authorities, particularly those are that are difficult to obtain as they require extensive infrastructure augmentation. In all cases, re-

visiting these approvals can have significant impacts on projects in one way or another. Unfortunately, very little can be done to fight these authorities off and in most cases (if not all) the required upgrade of design has to be accepted by a client or designer.

## Availability of Materials

As part of any design process, materials and finishes are crucial to the 'look and feel' of any project. Unfortunately, what is often overlooked after placing a project on hold is the continuing availability of particular materials or finishes. Whilst change can be considered a good thing (depending on your outlook on life), the substitution of a new material can have flow on effects that are not often felt until it's too late.

## Shifting Legislative Landscapes

Through the passage of time and in some ways as a consequence of "lessons' learnt", governing legislation or regulations can be amended. Unfortunately, not all change is good, and with the introduction of any legislative change can come unfavourable provisions.

## Passion and Enthusiasm

The expression, "strike whilst the iron is hot" could not be more important in a project's momentum and ultimate success after tendering and builder appointment. Once a project is placed on hold for an extended period, the passion and creativity behind it slowly evaporates and can be overshadowed by competing priorities for both the consultant team and builder. Notwithstanding that it may be designed within an inch of its life, the 'value' feedback cycle between a designer, client and builder begins to suffer over time and once that enthusiasm is weathered, it is very difficult to re-ignite.

# PITFALLS OF PROTRACTED PROJECT COMMENCEMENT

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Put simply, if you're considering taking a project off hold – it requires careful thought and planning. A review of the commercial marketplace prior to committing with a builder may well be the 1st port of call. This might be followed by bringing the project to the front of your mind by revisiting design from a functional perspective as well as working through supply authorities, availability of materials, and legislative changes.

**Peter Ibrahim** | Senior Project Manager  
epm Projects Pty Ltd





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## Contact Us

[www.epmprojects.com.au](http://www.epmprojects.com.au)

PO Box 1034  
North Sydney NSW 2059  
Level 2, 146 Arthur Street North Sydney  
NSW 2060  
**Ph:** (612) 9452 8300  
**Fax:** (612) 9452 8388

## Key Contacts

### Andrew Graham

CEO  
Mobile: 0419 732 021  
Email: [agraham@epmprojects.com.au](mailto:agraham@epmprojects.com.au)

### Johan O'Brien

COO  
Mobile: 0414 917 904  
Email: [jobrien@epmprojects.com.au](mailto:jobrien@epmprojects.com.au)

### Stephen Welsh

Group Executive  
Mobile: 0417 307 860  
Email: [swelsh@epmprojects.com.au](mailto:swelsh@epmprojects.com.au)

### Mark Blizard

Group Executive  
Mobile: 0438 126 778  
Email: [mblizard@epmprojects.com.au](mailto:mblizard@epmprojects.com.au)

### Ryan Mooney

Group Executive  
Mobile: 0423 835 253  
Email: [rmooney@epmprojects.com.au](mailto:rmooney@epmprojects.com.au)

## Acknowledgements

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Lawyers  
**McCullough  
Robertson**

**Patrick Holland** - Partner  
*Environmental Planning Law*  
McCullough Robertson  
Level 16, 55 Hunter Street Sydney NSW 2000  
**Ph:** (02) 9270 8610 **Fax:** (02) 9270 8699  
**E** [PHolland@mccullough.com.au](mailto:PHolland@mccullough.com.au)  
[www.mccullough.com.au](http://www.mccullough.com.au)

 **HOLDING REDLICH**

**Helena Golovanoff** - Partner  
*Lawyers*  
Holding Redlich  
Level 65, MLC Centre, 19 Martin Place  
Sydney NSW 2000  
**Ph:** (02) 8083 0410 **Fax:** (02) 8083 0399  
**E** [helena.golovanoff@holdingredlich.com](mailto:helena.golovanoff@holdingredlich.com)  
[www.holdingredlich.com](http://www.holdingredlich.com)

**epm**  
projects pty ltd