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The background of the page is a photograph of a dark wooden desk. On the left side, there is a clipboard with a silver clip at the top. The clipboard holds a sheet of blue graph paper. On the graph paper, there is a hand-drawn line graph. The graph has a vertical axis and a horizontal axis. A line starts at the origin and goes up and to the right, labeled 'Cost'. Another line starts at the same origin and goes up and to the left, labeled 'Profitability'. There are also some other handwritten words on the graph paper: 'aint' and 'e'. A black ruler is placed vertically next to the clipboard, showing measurements from 0 to 12. A gold-colored pen lies diagonally across the desk, partially overlapping the ruler and the graph paper.

# EPM SPRING NEWSLETTER

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# **DEVELOPMENT PERMITTED WITHOUT CONSENT - WHAT ELSE DO YOU NEED TO KNOW?**

**Kate Swain, Partner, McCullough  
Robertson**

Navigating through the complex planning approval pathways to determine what is required for a development to be undertaken lawfully can be a challenging task. Whilst not all types of development will require development consent before work may be carried out, even development permitted without consent can require other types of approval to be obtained before the proposed development can proceed.

### **What developments may fall under development without consent?**

Development with relatively low impacts is often classified as 'development permitted without consent'. Specific types of development that are permitted to be carried out without development consent have been identified in a number of environmental planning instruments including the State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (ESEPP) and the State Environmental Planning Policy (Infrastructure) 2007. For example, clause 36 of the ESEPP provides that, in specified circumstances, the construction, operation and maintenance of a library, administration building, classroom, kiosk, cafeteria and car park may be carried out by or on behalf of a public authority without development consent. For the purposes of the ESEPP, a registered non-government school is

prescribed to be a 'public authority'. If a development is identified in an environmental planning instrument such as a Local Environmental Plan or a State Environmental Planning Policy as being permitted without consent, this means that development consent from the relevant consent authority (usually the Local Council) is not required before the development can be carried out. However, the development will still need to be undertaken in accordance with any other legislative requirements imposed by the relevant planning instrument or another applicable Act or Regulation.

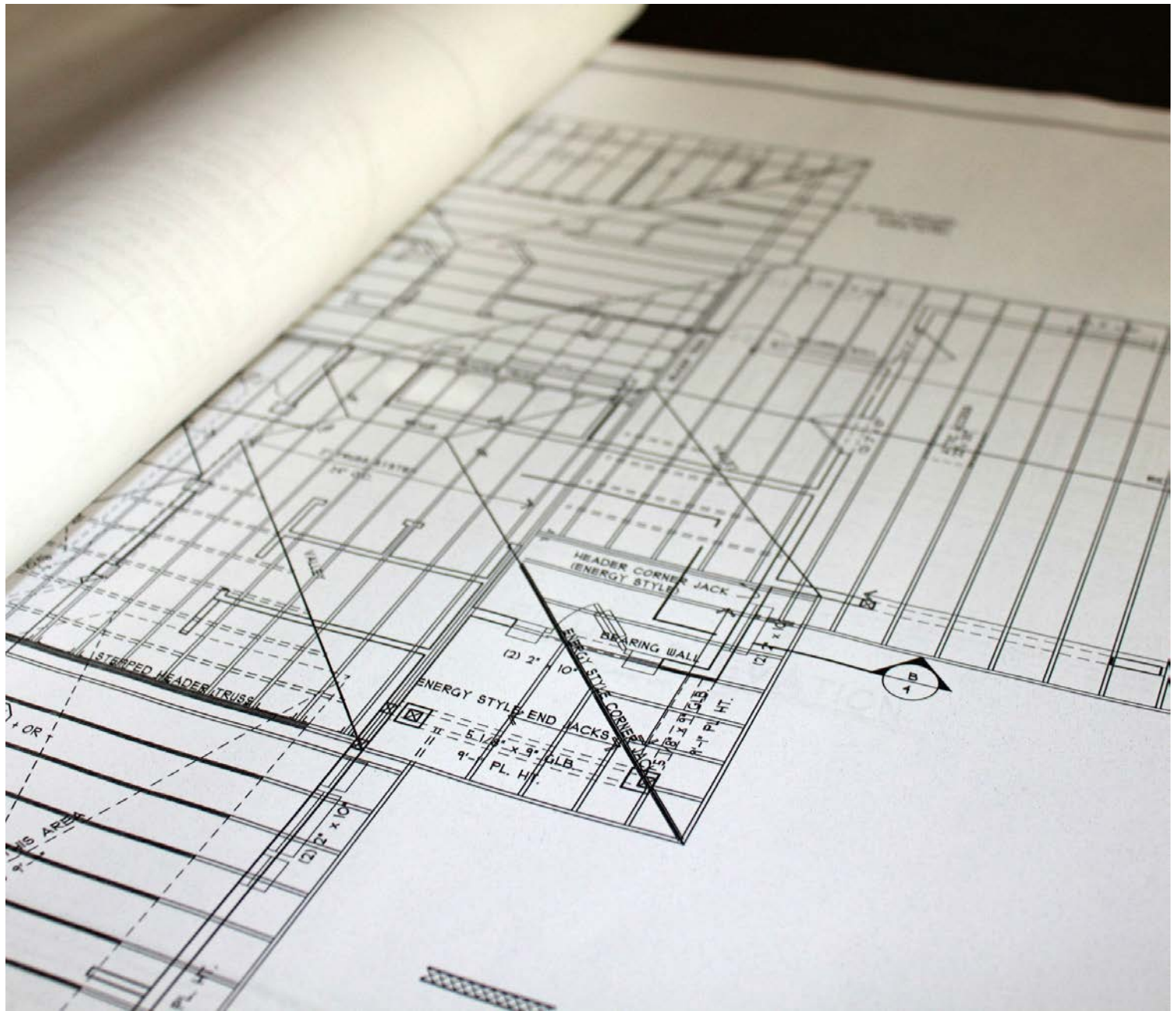
### **Other required approvals**

Therefore, even if a particular type of development is permitted without consent, it may still need a licence, permit or another approval from a public authority before the development can commence. In order for any additional approval to be granted by the determining authority, the proposal may need to undergo an environmental assessment under Part 5 of the Environment Planning and Assessment Act (EP&A Act) before the additional approval can be given. For example, water approvals may be required under the Water Management Act 2000 (NSW) for any development in close proximity to a watercourse and consent from the council may be required under section 138 of the Roads Act 1993 (NSW) for works to the public road or road reserve. These activities require an environmental assessment under Part 5 of

the EP&A Act to be prepared to ensure environmental issues are fully considered before any activities permitted without consent are authorised to proceed.

### **Compliance with existing conditions of consent**

It is important to remember that whilst certain development may proceed without additional development consent, it must still comply with any existing conditions of a development consent (other than a complying development certificate) that applies to the school. These existing consent conditions may relate to hours of operation, noise, car parking, vehicular movement, traffic generation, loading, waste management, landscaping or student or staff numbers.



# **DEVELOPMENT UNDER ESEPP AND CONSIDERATION OF EXISTING CONDITIONS OF CONSENT**

# Andrew Graham, CEO, EPM Projects

While Complying Development and Development Permitted Without Consent can open a lot of doorways for schools looking to develop, it is important to be wary of the limitations triggered by the conditions of the most recent development consent. Subclause (4) of ESEPP Clause 39 Existing Schools – Complying Development of the State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 ‘ESEPP’ states: *‘Nothing in this clause authorises the carrying out of development in contravention of any existing condition of the most recent development consent (other than a complying development certificate) that applies to any part of the school, relating to hours of operation, noise, car parking, vehicular movement, traffic generation, loading, waste management, landscaping or student or staff numbers.’* The same wording is used in ESEPP clause 36(3) in relation to Development Permitted without Consent.

## What are the conditions that must not be contravened?

The conditions are those of the ‘most recent development consent’, for example the most recent approved Development Application (‘DA’). If any of the items listed in cl. 39(4) above are referenced in these conditions, then any development proposed to be undertaken as Complying Development or Development Permitted Without Consent must not seek to contravene what is stated and approved. However, while the



consent conditions may not make explicit reference to, for example, a student cap, they may make reference to a particular document that does define limitations on student numbers. In this example, proposed maximum student numbers could be buried within a Traffic & Parking Report, an Environmental Impact Statement or Statement of Environmental Effects that forms part of the approved documents. Therefore, it is critical that close attention is paid to a) what drawings and reports form part of the most recent development consent, and b) what these documents reference in relation to hours of operation, noise, car parking, vehicular movement, traffic generation, loading, waste management, landscaping or student or staff numbers.

## **What drawings and reports form part of the most recent development consent?**

A lot can change from an original development consent submission package to when a consent is obtained. This is usually as a result of the back and forth during review, assessment and determination whereby numerous changes may be required to various drawings and reports. It is important that an accurate and detailed record of all correspondence and document changes is kept for future reference. To demonstrate the importance of tracking these changes, an example of a recent Sydney school SSDA is given. The SSDA consent conditions stated that the '*...development may only be carried out ... (b) in accordance with all written directions of the Planning Secretary; (c) generally in accordance with the EIS and Response to Submissions; (d) in accordance with the approved plans.*' In



reference to order of precedence and discrepancies, the conditions stated: *‘The conditions of this consent and directions of the Planning Secretary prevail to the extent of any inconsistency, ambiguity or conflict between them and a document listed in [the] condition[s] ... In the event of an inconsistency, ambiguity or conflict between any of the documents listed in [the] condition[s]... the most recent document prevails to the extent of the inconsistency, ambiguity or conflict.’*

In summary, it is critical for any school wishing to undertake development under the provisions of ESEPP as Complying Development or Development Permitted without Consent to understand what the ‘most recent development consent’ is, and what the consent conditions or documents referred to in the consent conditions say about hours of operation, noise, car parking, vehicular movement, traffic generation, loading, waste management, landscaping or student or staff numbers. In order to ascertain what documents are relevant to the consent conditions, an accurate and detailed record of correspondence and document changes from original submission to obtaining consent should be retained.



# WHEN IS THE BEST TIME TO ENGAGE A QUANTITY SURVEYOR?

**David Shlom, Associate, MBM**

A question that I am regularly asked is 'when is the best time for a QS to be engaged on a project'? A) At the time of a feasibility analysis / bench-marking

exercises? B) At the time of submitting a DA to Council? C) During tender documentation? D) At the time a contractor has been appointed, for cost reporting, progress claim certification and variation assessment?

There are a small proportion of projects where we find the QS is engaged throughout the entire process; from design development all the way through construction and post-construction i.e. Tax Depreciation and Life Cycle / Maintenance scheduling.

Most commonly we see full QS services being required on larger scale projects where the programme runs for a longer period of time and the building is more complex. But why can't this happen on smaller projects that are often as complex with tighter time and budget constraints? Do clients not see the value in having a QS involved throughout the entire process?

To obtain the greatest value from a QS, it is important to involve the QS early in the project process. This way the project team can understand the costs implications of their decisions before finalising design. This will also assist to better manage cost risk prior to engaging a builder.

It is common for a QS to be engaged up to the appointment of a builder and then their services limited to only assisting when issues arise, usually when the builder hasn't met its contractual obligations, or disagreements have arisen about variations or over-claiming on construction costs. At that point, any savings that have been made by not involving the QS to provide a more comprehensive service are significantly outweighed.

Cost risk is most effectively managed by involving a QS throughout the entire project process to provide a comprehensive service. Engaging a QS from project start to finish should be an imperative for all projects no matter how large or small they are.





**IS NEC4 THE WAY FORWARD  
FOR STANDARD CONSTRUCTION  
CONTRACTS IN AUSTRALIA?**

# **Scott Alden, Partner and Victoria Gordon, Associate, Holding Redlich**

Major project delivery around Australia has historically relied on the Australian Standard form of contracts for construction, in particular the AS4000 suite of contracts. Introduced in the late 1990s, this suite of contracts is now almost two decades old.

Having regard to their vintage, there is a broad recognition and acceptance that these standard form contracts need to be updated, or alternatives need to be considered. This includes by the organisation that created them and licenses them being SAI Global.

Over the last 4 years there has in fact been a project, as a joint initiative between SAI Global and the Society of Construction Law to replace the outdated forms of contract AS2124 (1986 and 1992) and AS4000 (1997) with a new form of Contract AS110000: 2017. The development of this new form of contract ceased (although not permanently) in 2018 despite it being almost complete and ready for publication.

The lack of a new and updated standard coupled with a significant shift away from traditional adversarial forms of contract (such as the AS4000 suite) and towards a more collaborative form of contract based firmly on relationship principles and philosophies, has prompted government, industry and advisors to look elsewhere for a contract that meets best practice, current global trends on project delivery.

The NEC4 suite from the UK Institution of Civil Engineers (ICE) is one potential alternative. The NEC suite was first published in 1993 and endorsed by the Governments of UK, South Africa and Hong Kong.

## Features of the NEC4 Suite

The NEC4 suite includes a range of options that parties may choose from, allowing it to be easily adapted to a variety of projects without the need for significant amendments. Key features and options of the NEC4 suite include:

- Six alternative remuneration models (Priced Contract with Activity Schedule, Priced Contract with Bill of Quantities, Target Contract with Activity Schedule, Target Contract with Bill of Quantities, Cost Reimbursable Contract, Management Contract);
- Optionality around the degree of design responsibility;
- Express provisions requiring the parties to perform the contract collaboratively and cooperatively and an option for further multiparty collaboration with subcontractors and suppliers;
- Provisions that mandate and incentivise the preparation and acceptance of regular updates of the programme (including an obligation on the parties to keep an ‘early warning’ register);
- An option to support the use of Building Information Modelling (BIM);
- An option for incentive payments to assist the parties to achieve Key Performance Indicators (KPIs);

- An option for Early Contractor Involvement (ECI);
- A mechanism in the subcontracts which allows a dispute to be joined to a related dispute under the main contract

One argument that is raised against the use of the NEC4 suite is that they are not 'Australianised'. However, many amendments that would be need to be made to the NEC4 suite to reflect Australian legislation are often required to Australian Standard contracts in any case, to reflect new law since those contracts were first published (for example, SOPA and WHS legislation).

The optionality of the NEC4 suite combined with the focus on collaborative and relationship contracting principles that are embedded within the suite, may see the NEC4 suite being increasingly used as a preferred alternative to the standard construction contracts that are currently being used in Australia.

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