epm projects pty ltd

NEWSLETTER

AUTUMN 2013

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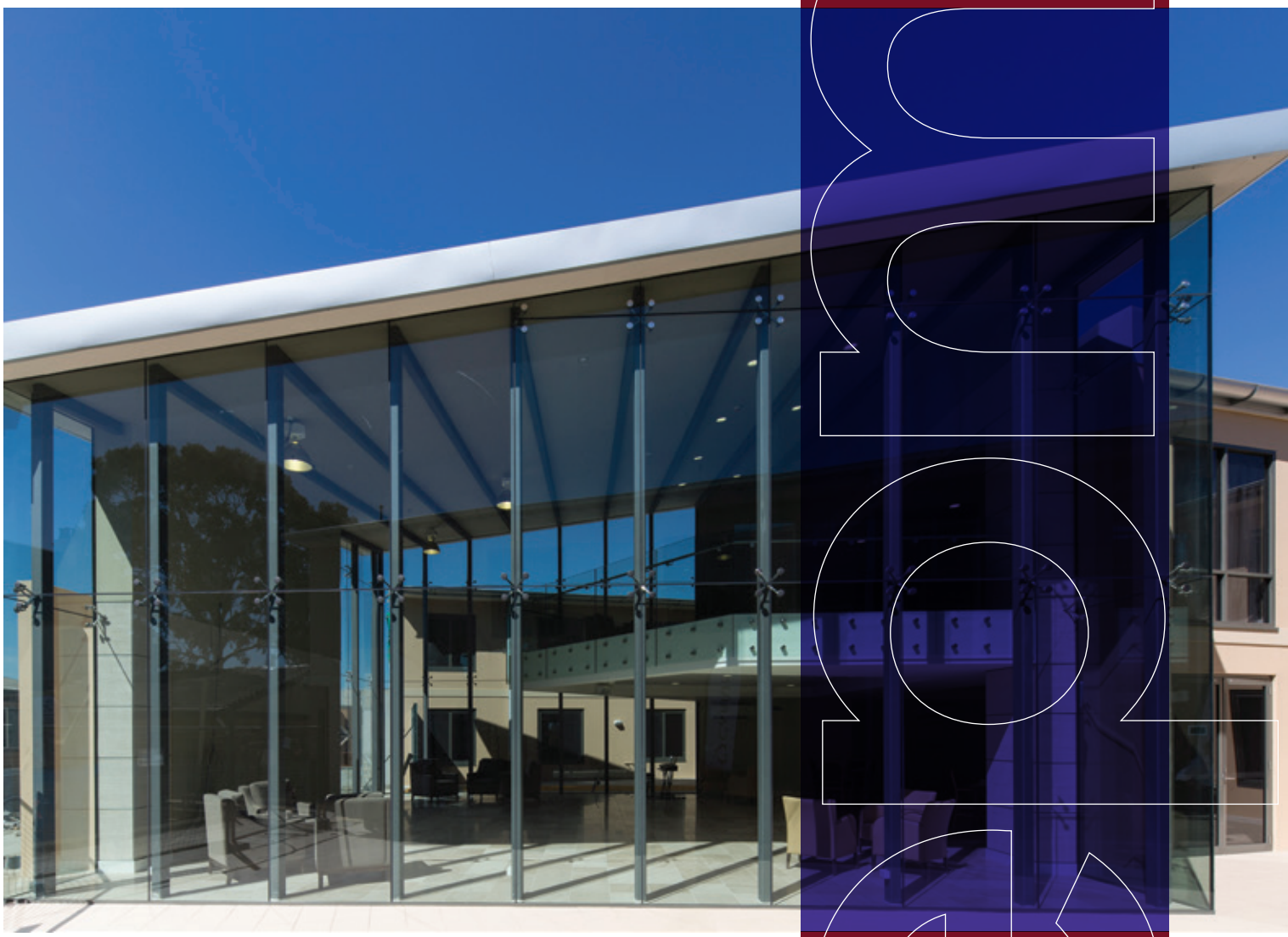

This Edition

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REVERSING THE REVERSE ONUS OF PROOF FOR DIRECTOR'S LIABILITY IN NSW

Lawyers | McCullough Robertson

The way in which directors are held liable for offences committed by the companies they direct has been changed profoundly by the passage of the *Miscellaneous Acts Amendment (Director's Liability) Act 2012* (NSW) (**Director's Liability Act**). Enacted following a November 2008 commitment of the Council of Australian Governments (**COAG**), the stated goal of the Director's Liability Act is to cut down on unnecessary red tape, make the NSW approach to personal liability of directors more consistent with other States and the Commonwealth, *'increase certainty and predictability and assist efforts to promote effective corporate compliance and risk management'* (Attorney-General Greg Smith, Second Reading Speech, 17 October 2012).

The position before these reforms was that in many NSW Acts there were provisions that presumed directors committed an offence if their companies did. As such, the director or manager would bear the onus of proving they took all reasonable steps to prevent or stop the commission of the offence by the company.

According to the Attorney-General of NSW, Greg Smith, provisions imposing this reverse onus of proof on directors were often applied as boiler-plate provisions in statutory drafting, without genuine consideration of whether imposing such liability was justified. The passage of the Director's Liability Act has reduced the number of these provisions from over 1000 to a small number of core environmental offences.

The effect of the Director's Liability Act is to amend 46 existing Acts, removing almost all provisions imposing a reverse onus of proof on directors of companies which have committed offences. As mentioned above, the only such provisions that remain in any of those 46 Acts and Regulations are specific offences under the *Protection of the Environment Operations Act 1997* for which it was felt that there are strong public policy considerations in favour of maintaining the more strict form of personal liability for directors. For those offences (such as carrying out a scheduled activity without the appropriate licence, pollution of waters and pollution of air) the director or manager must prove that either they were not in a position to influence the conduct of the corporation in relation to committing the offence or that they used all due diligence to prevent the offence.

For all the other offences contained in the 46 Acts and Regulations amended by the Director's Liability Act, the prosecution now bears the onus of proving every element in the offence, including the director or manager's failure to take *'reasonable steps'* to prevent the company committing the offence. Reasonable steps include things such as ensuring that professional assessments of compliance with relevant provisions are undertaken, ensuring that employees are trained appropriately, ensuring that plant and equipment are properly maintained and more generally maintaining a corporate culture that does not tolerate non-compliance.

Of the 46 existing Acts and Regulations amended by the Director's Liability Act, many are concerned with environmental management and regulation, including the *Contaminated Land Management Act 1997; Environmentally Hazardous Chemicals Act 1985; Mining Act 1992; National Parks and Wildlife Act 1974; Native Vegetation Act 2003; Pesticides Act 1999; Protection of the Environment Operations Act 1997; and the Threatened Species Conservation Act 1995.*

Patrick Holland
Partner

AT WHAT COST?

'Time is money'. Many of us feel the pressures of this statement on a day to day basis.

With rapidly developing technology enabling lightening quick design and almost instantaneous distribution of information, added to tight deadlines and the Client's desire to do everything cost effectively the pressure builds and this does not come without cost. But how do we identify this cost? Effectively it comes back to common sense and the fact that we all 'know' what is needed to get the best and most cost effective solution. If we don't spend the time an exercise deserves then you cannot get the best outcome. Is that the simple truth? Probably. Is there a simple solution? Probably not, but we could start by appreciating that some things take time and the appropriate amount of time is required to get it right.

Now, wouldn't it be nice if we could slow down, spend the time to work through every issue and not leave anything till later (or to fate!) How do we manage this? We don't, we just put up with it because that's how things are now and you have to adjust. Let's face it, all Clients, consultants and contractors are aware that time is money.

Rush Rush Rush. The two scenarios below are certainly contributing to the 'unidentifiable' cost of pushing to meet the ever tightening deadline. As Quantity Surveyors, it is no surprise that we identify intimately with both of these situations:

- Rushing Cost Plans and Estimates as the various design stages come to a close to meet a deadline that no other consultant has been able to work to. This leads to rush jobs, human error, short cuts and, if deemed necessary, the inclusion of additional contingencies for the unknown or potentially missed scope. The danger here is to allow too much or too little which gives the Client inaccurate information on which later design decisions may be based. You could argue that the process is designed to graduate towards a final design and cost with each stage becoming more and more accurate as more and more detail is provided. However, we all know which figures the Client remembers. The very first one they hear!
- Rushing out to tender with un-coordinated Tender documents full of "holes" due to time constraints leading to the inclusion of blanket coverage clauses passing risk, sometimes unfairly, onto tendering contractors and creating large variation accounts during construction.

In the end you have to admit that in today's environment, yes indeed time is most certainly money, especially when applied to our industry and the reliance upon programming and time management. The question we pose is, should every project have a 'stop and think' moment early on to assess the flexibility of the end date and where we ask ourselves *'in pushing for this deadline, does taking less time amount to more cost in the end, just to save a couple of hours / days / weeks / months right now?'*

David Noble
Director

STRATEGIC OR STATUTORY – PERHAPS BOTH?

DFP outlines the reasons why it is important to establish the key facts from the outset of a project particularly when investigating the relevant zoning and constraints of a site:

Have you ever embarked upon a project only to feel that you are being forced down a path of designing to outdated planning controls instead of reaping the benefits that a site may have to offer? If so, you would no doubt be aware that this approach does not do the proponent, Council or the community any justice.

Why wait for an obscure zoning to question why the land was zoned a certain way in the first place, or rather, if the existing zone is indeed, still appropriate? The same type of investigation can also apply to encumbrances on title, which over time may lose their relevance or no longer be applicable, yet if left without proper attention, could result in significant constraints that could unnecessarily burden the development potential of a site.

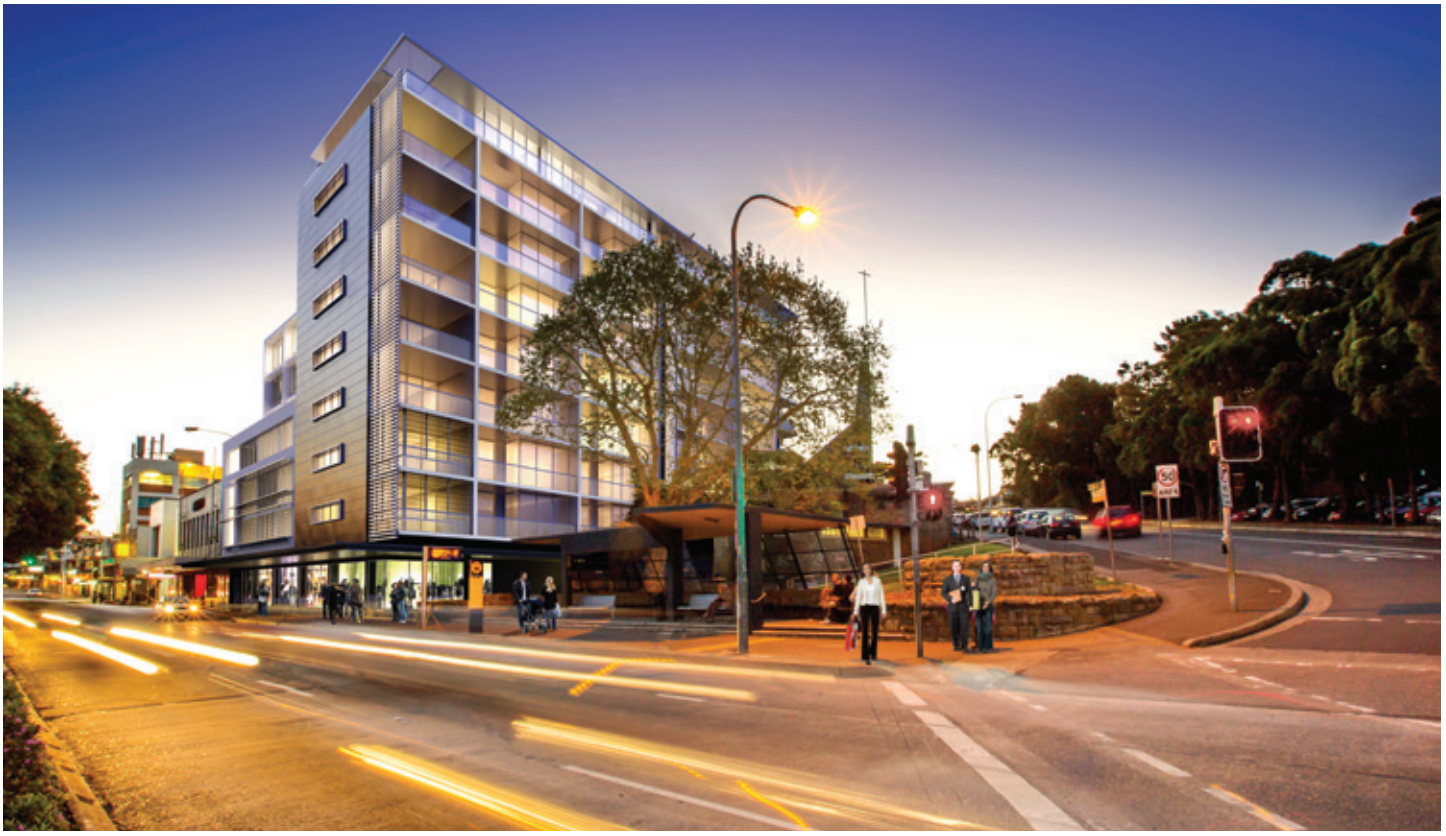
All plans are meant to reflect community aspirations and goals, hence the extensive public exhibition periods and community consultation that occurs when a plan is made (strategic planning) either as part of a gateway planning proposal determination or LEP review/rezoning, or when a plan is implemented (statutory planning) through submission of a development application.

At present, new ideas on how the NSW planning system should be formed have made their way from a Green Paper to a White Paper which will influence both strategic and statutory planning, yet it is often argued that until such time as metropolitan and regional strategies become long term plans (with a higher degree of integrity) for New South Wales, the NSW planning system will continue to be more reactive than proactive. This highlights the importance of considering both strategic and statutory planning options when reviewing the development potential of your site.

For your next project, contact DFP in order to ensure that you have properly considered the potential to maximise opportunities within the environmental capacity of your site.

John McFadden
Partner

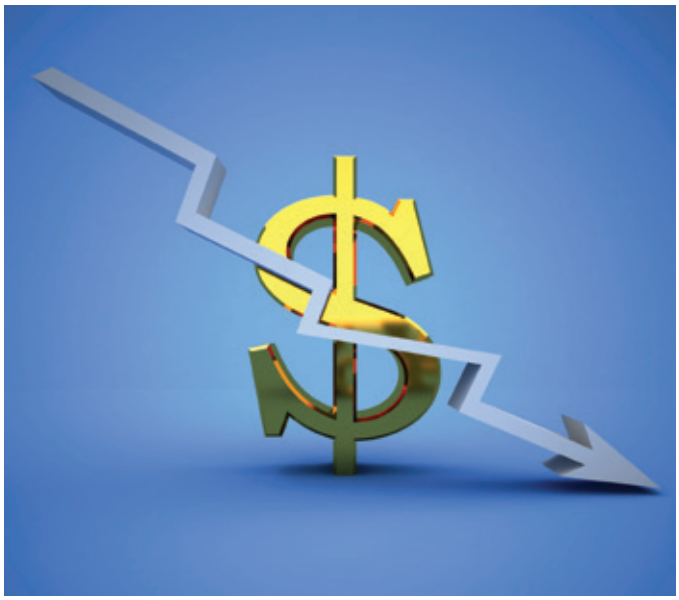
dfp
planning consultants



INSOLVENCY QUICK TIPS PART 2

Unfortunately when advising our clients when insolvency affects a project, all too often it turns out the signs were apparent for some period before formal action is taken.

Kennedys
Legal advice in black and white



Apart from the rumours that abound in such situations, there are a number of tell-tale signs that an entity is in trouble for example:

- requests for early payment or changes to payment terms;
- requests for release of security or swapping of security;
- post-dated cheques;
- problems obtaining supplies and/or labour; and
- Principals may begin to receive telephone calls from sub-contractors demanding payment.

Any request to change payment or security arrangements should be carefully considered, as it can affect your position in any eventual liquidation.

What can I do to protect myself?

Prevention is better than cure. As set out in part 1, investigate who you are proposing to contract with. Additional protection can be obtained through the contract terms. For Principals, there are two main avenues:

- A right to terminate or take the works out of the hands of the insolvent entity – this can be achieved through appropriate termination, set-off and "take-out" clauses that respond to insolvencies.
- Security – depending on the stage of the project, this can be your only means to have works completed or defects rectified. It is important to review the fine print of any security offered at the time it is accepted, as certain forms of security can be harder to call upon in an insolvency situation.

For suppliers and service providers some protection can be obtained through using certain trading terms which avoid becoming a creditor. Although this can be of notional benefit, if the services have been undertaken (even if the final product is withheld) or the goods cannot be sold elsewhere.

In the next issue we will look at the practical problems for project participants when a major participant becomes insolvent.

Helena Golovanoff
Partner

MAINTENANCE OF FIRE SERVICES – STATUTORY OBLIGATIONS

Some fire service contractors fail to undertake the statutory annual fire services maintenance certification in accordance with the Act, resulting in monetary implications and liability exposure to property owners.

BLACKETT MAGUIRE+ GOLDSMITH

In NSW, the EP & A Act 1979 & Regulation 2000 requires the building owner to issue an annual Fire Safety Statement for any Class 2-9 building.

The Fire Safety Statement is required to be issued each 12 months and must certify that each essential fire safety measure specified in the statement has been assessed by a properly qualified person and was found, when it was assessed, to be capable of performing to a Standard *no less than to that which the measure was originally designed and implemented or installed*.

The Regulation requires Statement to reference each fire safety measure that is installed in the building and as listed in the fire safety schedule (associated with an initial CDC/CC/OC).

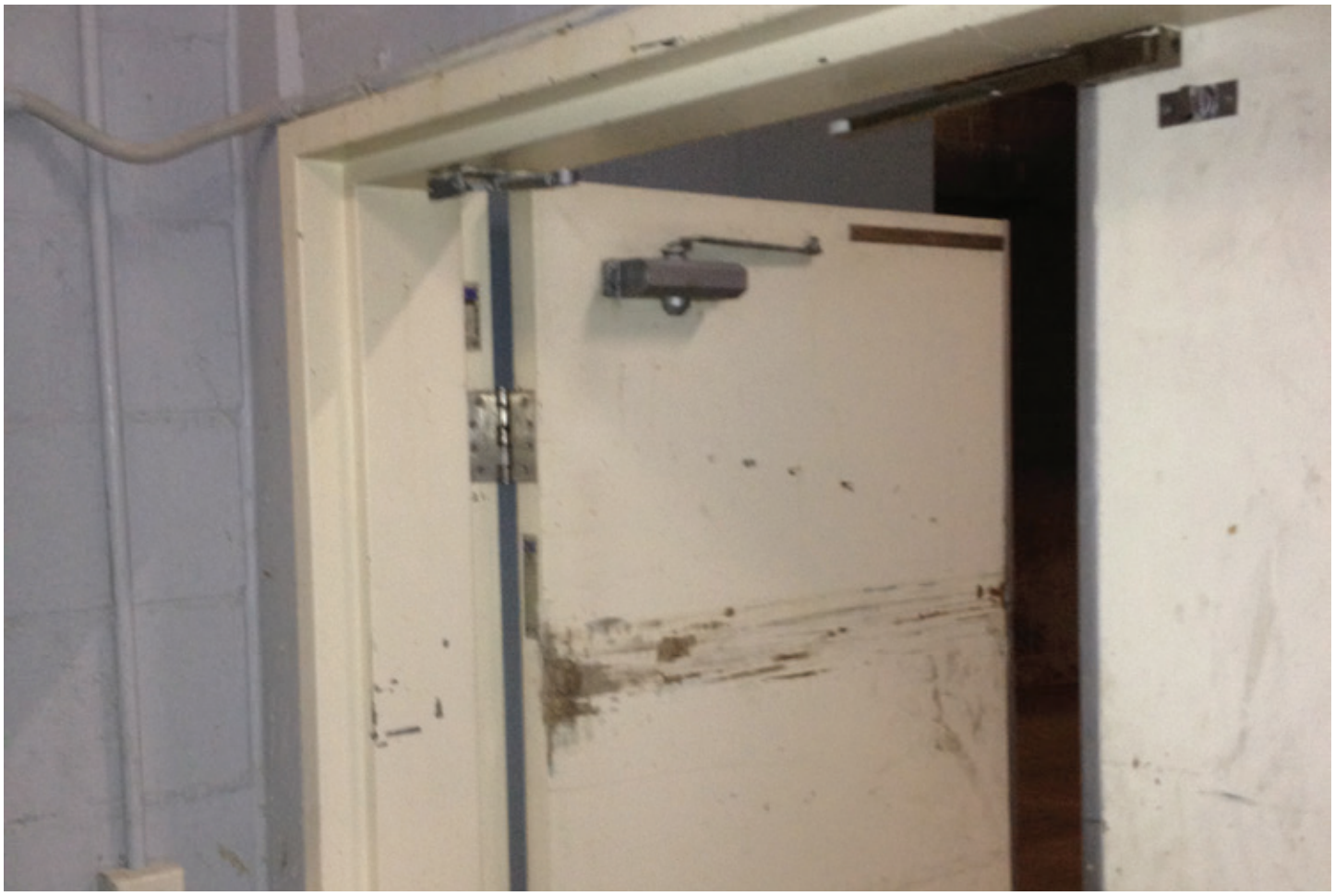
In practice, various fire services contractors whom have been commissioned by the building owner fail to perform this certification process in accordance with the Regulation. In this regard, it is noted that various contactors regularly:-

- Require the owner to carry out additional retrospective fire safety upgrade works including installation of additional fire safety measures, as recommended by the contractor, to achieve compliance with *current* SAA Codes and Standards;
- Reference incorrect Standards of performance for respective fire safety measures;
- Omit or fail to certify some fire safety measures as outlined in the initial fire safety schedule, including systems specifically required or referenced in fire engineered alternative solutions associated with the building;
- Fail to advise the owner of the statutory obligations for each Statement to be prominently displayed in the building and a copy to be furnished to the Fire Commissioner.

There is no statutory requirement for fire services contractors to be accredited, licensed or experienced.

As a consequence of the above, the statutory process of the annual certification is resulting is building owners incurring considerable expense for (often) unnecessary upgrade works and liability exposure from issue of deficient or incorrect Statements.

David Blackett
Company Director



POST CONSTRUCTION DOCUMENTATION

The process of post project documentation has proven one of regular frustration over the passage of time and many construction projects. The importance of a well coordinated and documented design for the purpose of construction is rivalled only by the importance of well coordinated and documented "as built" documentation.

Construction projects are characterised by an element of perpetual motion, meaning that once completed, the projects require a significant amount of ongoing preventative maintenance, general maintenance, expansion, modification, or repair. For these reasons, the provision of "as built" documentation at the conclusion of a project provides significant benefit to the property owner or manager.

Post construction documentation typically takes the form of:

- Drawings that detail the position, size, and type of building elements
- Operating and maintenance manuals for service installations incorporating testing and commissioning information
- Warranties and Guarantees for materials and workmanship
- Product information for ongoing maintenance and repair
- Contact details of subcontractors responsible for components of the construction

Despite any good intent of the Principal Contractor to diligently provide the information listed above, there is invariably a level of frustration associated with gathering of the information at and around the time of project completion. Managing the procurement, compilation and transmission of the post construction documentation requires a particular diligence and is best managed by a combination of any or all of the mechanisms listed below:

- Contractual obligation for the provision of the required documentation as a condition precedent to the granting of Practical Completion
- Clearly defined requirements contained within the architectural, structural, and services specifications describing level of detail required
- A purpose prepared schedule of all required documentation
- Provision of a trade item within the contract sum specific to the provision of the required documentation across architectural and service trades
- Inclusion of document procurement on the construction programme

A disciplined approach to the provision of post construction documentation at the start, during, **and not only at the end of a project**, when adopted by all stakeholders will provide the most seamless handover process and offer the project owner the best assurance for the most efficient ongoing operation of the asset.

Mark Blizard
Director

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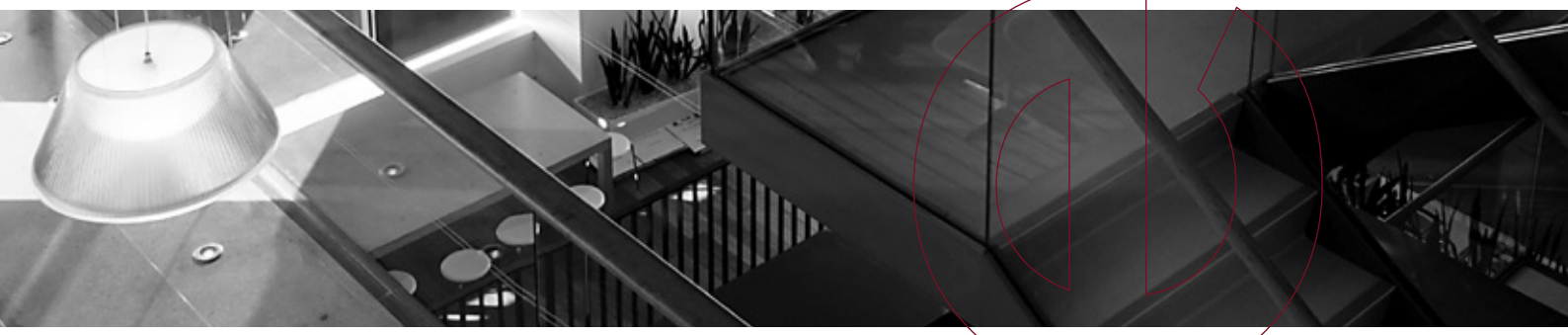

Acknowledgements

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