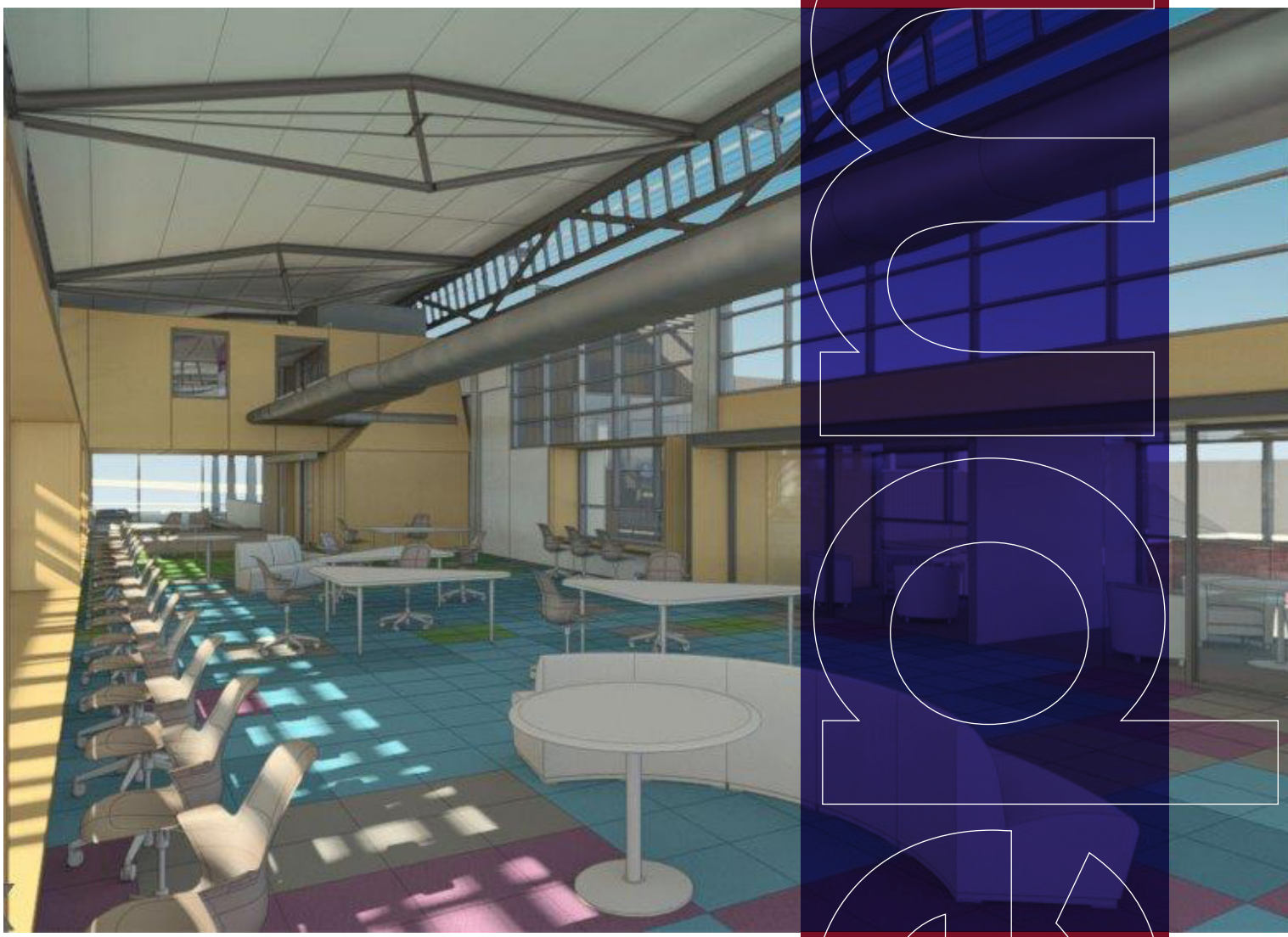
epm projects pty ltd

NEWSLETTER

AUTUMN 2015

Cover image: Northern Beaches Christian School Project Barcelona 3D Perspective 'Chelsea'



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green building council australia
MEMBER 2014-2015

2014 – TOUR OF DUTY

Kennedys

Legal advice in black and white

With 2014 behind us, it's time to take a look at the year that was. In this article, we take a look at some of 2014's significant building and construction decisions.

No Duty of Care - Brookfield Multiplex Limited v Owners Corporation Strata Plan 61288 & Anor [2014] HCA 36

The High Court has held that a builder does not owe a duty of care to an Owners Corporation to exercise reasonable care in the construction of a building to avoid causing the Owners Corporation pure economic loss flowing from latent defects.

The case evolved from a very complicated set of facts. The property was part of a larger development. The top floors of the development were used for residential purposes while the bottom floors were used as serviced apartments. The case against the builder concerned only the floors housing the serviced apartments.

The land upon which the property was built was owned by Chelsea Apartments Pty Ltd. In 1997 Chelsea entered into a master agreement with Stockland whereby Chelsea agreed to design and construct the serviced apartments and Stockland agreed to lease them.

Once the terms of the master agreement had been settled, Chelsea entered into a design and construct contract with Multiplex. The Multiplex agreement was described by the Judge at first instance as containing a number of "back to back" quality warranties taken from the master agreement.

The Owners Corporation became the successor in title to the common property for the serviced apartments when the strata plan was registered by Chelsea. In 2008, the Owners Corporation commenced proceedings against Multiplex for the cost of rectifying a series of defects it had allegedly discovered in the common property. The problem for the Owners Corporation was this: in order to succeed in its claim against Multiplex, it had to convince a court that the builder owed it a "duty of care".

Duty of Care

In a claim for negligence, proving a duty of care is a necessary prerequisite for a successful claim. The "duty" is an obligation owed by a person to anyone who it is reasonably foreseeable would be injured by the lack of care of that person: Donoghue v Stevenson [1932] AC 562.

Not everyone is subject to a duty of care in every circumstance. There are general categories of duty that are well established and it is open to a Court to find a new duty where the circumstances permit.

A Court will look at various factors when it considers whether or not to recognise a duty. In cases where the claim is one for pure economic loss (as this one was) the Court must identify a "vulnerability" in the plaintiff. Pure economic loss is financial loss that is not dependant on physical injury or property damage. Cases involving pure economic loss are treated differently in this area of law and the Court must find some reason why the plaintiff cannot protect itself from the economic loss it has suffered. In this case the Judges couldn't identify that vulnerability.

In their judgment, the Judges pointed to the agreements that made up the development. The master agreement between Chelsea and Stockland contained warranties going to the quality of the finished building. Those warranties as to quality were reflected again in both the construction contract with Multiplex and in the sale of land contracts entered into with subsequent purchasers of the lots in the scheme. There was a defects liability period in the construction contract and another in the sale of land agreements. Their Honours Justices Hayne and Kiefel held that "it was not suggested that the parties could not protect their own interests.": Brookfield Multiplex Limited v Owners Corporation Strata Plan 61288 & Anor [2014] HCA 36 at [58].

It seems now that in cases concerning a claim for pure economic loss, a builder will not owe a duty of care to subsequent owners of commercial property. But this may not be the case for claims concerning actual physical damage caused by defective building work, and it does not displace the duty owed to a builder of residential property to subsequent owners.

Contributory negligence – Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139

Site safety is a big issue for builders. Accidents on site are not uncommon and a recent decision reveals the complexity involved in determining liability.

Mr Orestis was hit by a forklift on land owned and occupied by Boral Bricks while he was delivering fuel to site. On the afternoon of the accident, he had:

1. seen the forklift that hit him travelling at high speeds around the site;

2. known that the forklift was being used to transport bricks back and forth;

3. received a visitors pass on entry to the site that read "Forklifts Have Right of Way" that he had not read; and

4. probably seen the "Forklifts in Use" sign.

The Boral employee driving the forklift didn't see Mr Orestis before he hit him. Damages for Mr Orestis' injuries were assessed at just over $1,000,000 and the Trial Judge rejected Boral's submission that Mr Orestis had, by his own negligence, contributed to his injuries.

The Court of Appeal found that both Boral and Mr Orestis had been negligent; a finding that gave rise to a dispute over contribution. In submissions Mr Orestis argued that the use of forklifts in areas in which pedestrians had to walk created a risk of serious injury. He argued that the traffic cones and safety tape that Boral had placed along a makeshift walkway did not provide sufficient protection for pedestrians and that safety measures implemented by Boral after the accident should have been in place when he was hit.

Boral argued that Mr Orestis' conduct "indicated a significant departure by him from the standard of care to be expected of a reasonable person in the circumstances"; Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 at [20]. Boral argued that Mr Orestis had been a regular visitor to the site, had seen all of the warnings, did not keep a proper lookout and had his earplugs in.

The Court looked at Mr Orestis' conduct objectively, examining whether he had taken the degree of care for his safety that an ordinary reasonable person would take. It also looked at Boral's conduct and the duty that Boral owed Mr Orestis to take reasonable care to prevent injury to him on the assumption that he was using reasonable care for his own safety.

The Court held that Mr Orestis was 30% responsible for the injuries he sustained, representing a significant reduction in the damages payable by Boral. The case serves as a warning to invitees to take care when on site and provides some useful guidance on appropriate precautions for high traffic areas.

Duty to Inspect Subcontractor Works: WB Jones Staircase & Handrail Pty Ltd v Richardson & Ors [2014] NSWCA127

In another argument over contributory negligence, the Court of Appeal has made some interesting statements concerning duty of care and responsibility for subcontractor work.

Mirvac built a project home for Mr Richardson. Mirvac subcontracted the supply and installation of a staircase (including balustrade) to WB Jones. WB Jones manufactured the balustrade and subcontracted the installation work to JMKG.

Mirvac had been subcontracting to WB Jones for a long time, but Mirvac was not aware that WB Jones was subcontracting installation to JMKG. Other than to measure up, WB Jones never attended site. It just supplied the balustrade to JMKG, let JMKG select its own fasteners and attend to the installation. WB Jones never inspected JMKG's work.

The balustrade failed and Mr Richardson was injured. In evidence it emerged that the nails used by JMKG were too short, the wrong gauge, installed using a nail gun and in some cases, driven into gaps. The balustrade itself was fine. The installation was not.

There was no contest that Mirvac and WB Jones had an obligation to select competent independent contractors, but there was a question over whether or not Mirvac and WB Jones had an obligation to inspect JMKG's work to check that it was competently executed.

Mirvac argued that it should not have been required to inspect and check the adequacy of work performed by WB Jones. Mirvac argued that WB Jones had installed stairs and balustrades for many years without incident and as a general builder, Mirvac did not have the specific knowledge of those matters which would make it responsible for carrying out staircase and balustrade inspections.

WB Jones argued that its only duty was to take reasonable care for that part of the work it undertook (i.e. the manufacture of the balustrade). It argued that it had discharged any duty of care by retaining JMKG to attend to the installation. WB Jones further submitted that it had assumed that Mirvac was checking the work.

It was common ground that using a nail gun to fix fasteners to structural wooden joints was a dangerous practice and it emerged in evidence that WB Jones knew that JMKG was doing it. The Judges apportioned liability between the parties 50% to JMKG, 25% to Mirvac and 25% to WB Jones. The Court held that Mirvac had, as part of its duty of care, an obligation to exercise reasonable care in inspecting work carried out by contractors. Likewise, the Court held that WB Jones had failed in its duty of care to avoid foreseeable risks of harm arising from the manufacture and installation of the balustrade.

If you would like any further information on any of these judgments, contact Helena Golovanoff or Tamara Helm of Kennedys.

Tamara Helm

Senior Associate

THE 10/50 RULE AND HOW IT COULD AFFECT YOUR DEVELOPMENT PLANS

Lawyers | McCullough Robertson

The 10/50 vegetation clearing rule (**the 10/50 rule**) commenced in NSW on 1 August 2014 in response to the 2013 bush fires which destroyed more than 200 properties.

The 10/50 rule allows a landowner to carry out the following vegetation clearing work on their own land:

- the removal, destruction (by means other than fire) or pruning of any vegetation (including trees) within 10 metres; and
- the removal, destruction (by means other than fire) or pruning of any vegetation, (except for trees) within 50 metres

of an external wall of a building containing habitable rooms that comprises or is part of residential accommodation or a high-risk facility without obtaining any form of approval. It does not matter whether the residential accommodation or high-risk facility is located on the owner's land or adjoining land. The 10/50 rule applies to dwellings, other residential accommodation such as tourist and visitor accommodation as well as buildings that are considered to be a 'high-risk facility' such as child care centres, schools and hospitals.

Following the implementation of the 10/50 rule a number of councils have become concerned about the level of uncontrolled clearing occurring within their local government area because the 10/50 rule overrides the authority of local councils and/or the State Government to protect trees and vegetation.

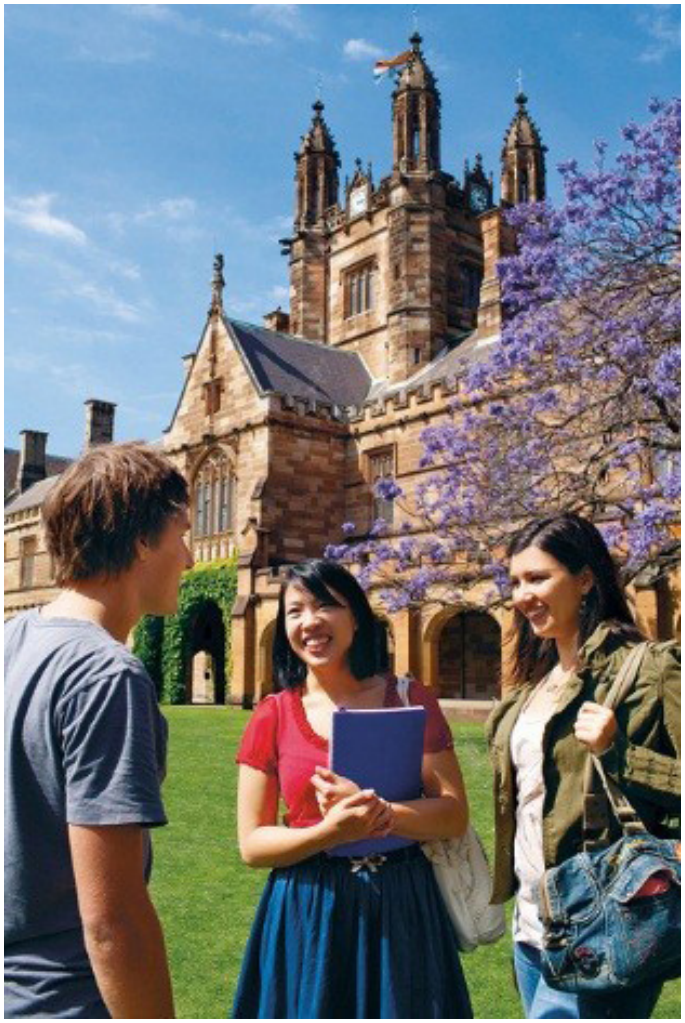
In particular the laws may limit development that might otherwise be approved due to the potential for the code to be implemented at any time. This was the subject of the judgment in Johnson v Hornsby Shire Council (2014) NSWLEC 1215 where Commissioner O'Neill of the Land and Environment Court dismissed an appeal against the refusal by Council of a development application for a new dwelling at Beecroft. If approved, the construction of the new dwelling would have placed an area containing Blue Gum High Forest at risk of destruction because the Blue Gum High Forest would have been within 10 metres of the newly constructed dwelling. Commissioner O'Neill in refusing the development application concluded that granting of consent to the development would allow more than half of the remnant Blue Gum High Forest to be lawfully removed under the 10/50 rule due to the dwelling's placement by the forest and said that '*a more economical layout…would provide a greater rear setback than is presently proposed and ensure the conservation of a greater proportion of the trees within the Restricted Development Area.*'

It is now clear that a council may take into consideration the 10/50 rule and the potential of clearing vegetation without approval when assessing a development application for residential accommodation, childcare centres, schools, hospitals and dwellings whether the development application proposes new buildings for these uses or alterations and additions to the current buildings on land within a '10/50 Vegetation Clearing Entitlement Area'. New proposed developments on land containing trees will need to ensure they are designed in a manner sensitive to the vegetation occurring on the land or the development application may risk refusal for that reason alone, even in circumstances where there is no intention to destroy trees under the code.

Samantha Daly
Partner
Danielle Le Breton
Senior Associate

THE QUANTITY SURVEYORS OF TOMORROW

The benefits of promoting cadetships within the building industry cannot be understated for it is as a result of giving an opportunity to the next generation that the industry continues to grow and improve.



A cadet brings with them the enthusiasm and willingness to learn that many of us may have forgotten about. Having a cadet in the business allows those in more senior positions to re-visit the practices and methodologies which have been acquired over the years and to pass this knowledge on through mentoring programs.

Hands on experience is a great teacher, especially in the construction industry, and can also enable the student to streamline their interest. Once they actually start work in the industry, however, and can see how what they learn at university is put into practice, this may alter the direction they see themselves taking once their studies are complete.

By obtaining experience in a working environment, the student is then also able to put this knowledge to good use in the classroom and often will find both their work and university results improve.

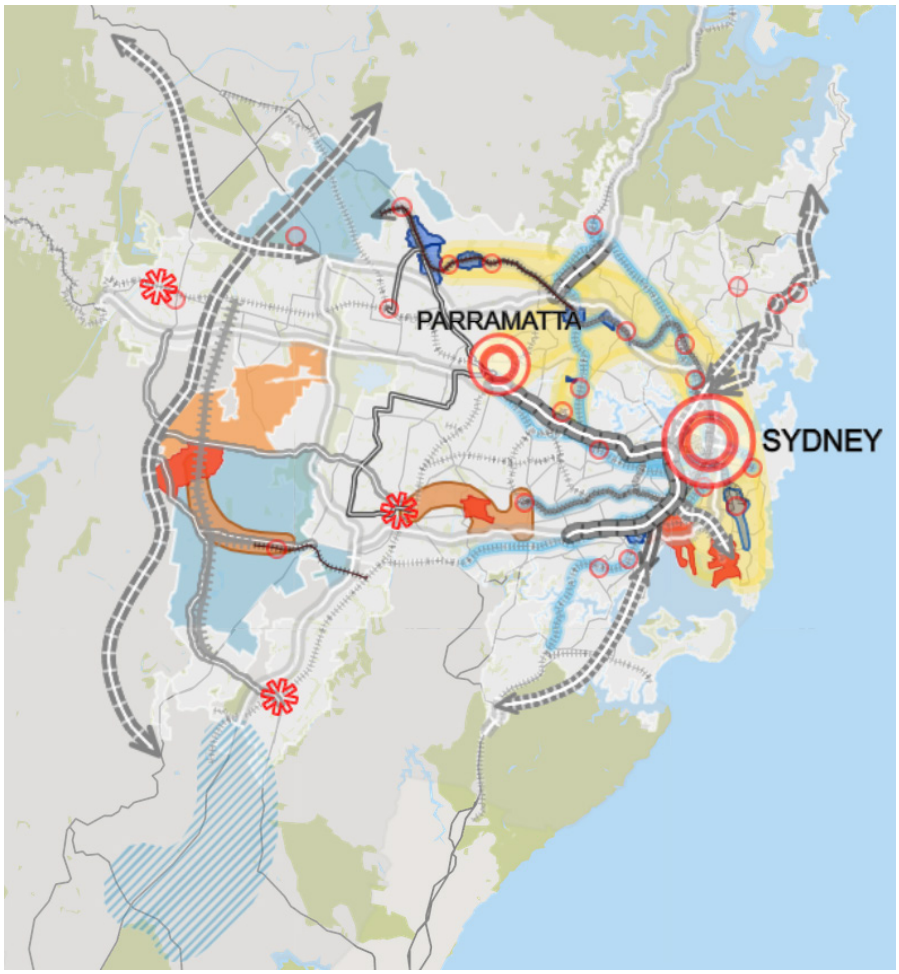
For the employer, assisting a cadet at the beginning of their career is not only socially responsible but can prove quite beneficial when the student graduates as the student can then be placed in a junior full time position in the organisation, thus allowing for a tiered structure of responsibility in the business.

At some time during our working life, someone has offered the opportunity for us to learn and grow and it continues to be the responsibility of those in a position to do so, to offer the same opportunities to our students – the Quantity Surveyors of tomorrow.

David Noble
Director

A PLAN FOR GROWING SYDNEY

The NSW Department of Planning and Environment has released a new metropolitan strategy - "*A Plan for Growing Sydney*" (the Plan).



planning consultants

The Plan is the NSW government's key strategic planning document that sets out future directions for the growth of Sydney over the next 20 years. When compared to the previous draft version that was released 18 months ago, the Plan provides a more direct approach and is broken down into a series of objectives and actions under the following goals:

- Goal 1: A competitive economy with world-class services and transport;
- Goal 2: A city of housing choice with homes that meet our needs and lifestyles;
- Goal 3: A great place to live with communities that are strong, healthy and well connected; and
- Goal 4: A sustainable and resilient city that protects the natural environment and has a balanced approach to the use of land and resources.

The Plan re-adjusts its housing and employment figures to correspond with an increase in population projections. Over 1.6 million people are projected to live in Sydney by 2031 and the Plan anticipates the creation of 689,000 new jobs and the construction of 664,000 new homes by 2031.

The Plan largely retains the objectives of previous strategies with Parramatta positioned as the second CBD, growth planned for Sydney's western suburbs and a focus on the Global Economic Corridor.

However, there are also new additions to the Plan, the most notable being the identification of Macarthur South as a potential growth centre, the mapping of Badgerys Creek Airport and its surrounding precinct, a focus on transport infrastructure including the WestConnex and the Parramatta to Sydney Olympic Park growth area. A Green-grid project has also been established, which aims to connect the existing open space network.

In order to assist with implementation, the Greater Sydney Commission has been established to monitor and deliver the plan. In addition, an increase in housing supply will be achieved through designated infill areas called Priority Precincts (essentially a formalisation of the Urban Activation Precincts) that will promote housing through the uplift of planning controls.

While the Plan provides high level direction and solid foundations to manage the future growth of Sydney, time will tell whether it is able to deliver its goals as historically this has been the shortfall of many previous metropolitan strategies.

Please contact DFP if you require town planning advice regarding the implications of the metropolitan strategy for your next project.

John McFadden
Partner

CHARITABLE SPONSORSHIP AT EPM

"Building a Better World"

2014 was a year of many exciting changes for the EPM team, not least of which was the formalisation of a charitable donations policy to provide assistance to those less fortunate. EPM's new donation policy, entitled "Building a Better World" provides a framework for the company to donate one percent of its revenue to those who need it most, with a particular focus on construction-related causes.

In late 2014, EPM took on Habitat For Humanity (HFH) as the core benefactor of our donations plan for 2014-2015. EPM has chosen to allocate our funding to three HFH programs for this financial year:

- **Resettlement of Internally Displaced Persons – Bitung Province, Indonesia – Project 3**

Between 1999 and 2002, North Maluku suffered ethno-religious conflicts which spread across the entire region, and displaced over 150,000 people. Despite the ongoing efforts of HFH in re-settling over 230 families, a survey of the Bitung area in 2010 found approximately 2,000 people still displaced and living in settlements in the region. This project is the third such project aimed at providing a further 120 families with decent housing, water and sanitation access.

- **Brush With Kindness Program – NSW, Australia**

The Brush With Kindness program provides assistance to disadvantaged and isolated members of the community who do not have the means and ability to maintain safe living conditions. EPM is also planning a volunteering day in mid-2015 to provide a physical contribution to the project.

- **Australian Home Building Program**

The home building program provides low-income families with the means to achieve the dream of building and owning their own home. Partner families are provided with constructional and fiscal assistance which is repaid by the family through contribution to the project, known as 'sweat hours'.

Throughout 2014-2015, EPM also maintained ongoing monthly donations to causes in Cambodia and Africa, and was able to donate to the emergency crisis that resulted from the Ebola outbreak in West Africa in late 2014.

During 2014, EPM was proud to sponsor many of our business partners in a wide range of charity events including: Cundall in its 'Collaborative Cambodia' initiative; Taylor Construction in the Tour De PIF ride; Buildcorp in the MS Gong Ride; Alpacrucius College in the Blackmore's running festival; Cockram Constructions in the Jump For a Cure Challenge, NBRS in the London Marathon and Pymble Ladies College in the OzHarvest CEO cookoff.

EPM is always excited to help our business partners in their charitable pursuits where possible. Should you have a charitable cause that you believe we may be interested in, please feel free to contact us.

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