



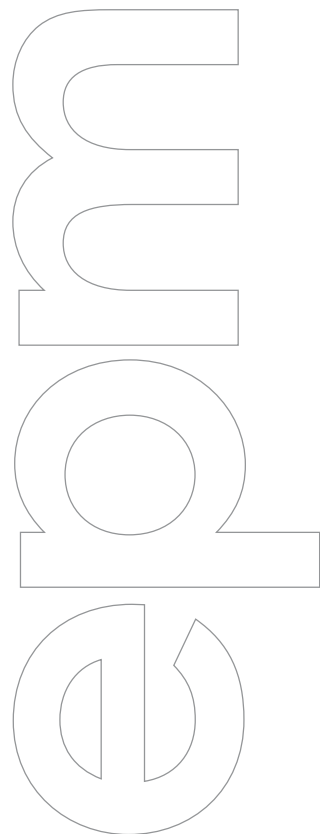
NEWSLETTER

AUTUMN 2016

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IT'S NOT OVER 'TIL IT'S OVER

Revisiting a contractor's entitlement to submit a payment claim and subsequent security of payment adjudication application *after* termination.

Under the *Security of Payment Act 1999* (NSW) (**the Act**) a contractor's entitlement to progress payments is based on the occurrence of a *reference date*. The reference date will be either:

1. A date determined in accordance with the provisions of the contract under which the contractor is employed; or
2. Where the contract is silent, the last day of the month where work is carried out.

It might seem logical that when the construction contract is terminated, the occurrence of reference dates should finish as well. The consequence of this would be that the Contractor is no longer entitled to progress payments (and therefore no longer entitled to the other remedies under the Act).

However, as the Courts in NSW have pointed out, most notably in the NSW Court of Appeal case of *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*, reference dates do not necessarily cease with termination. It depends upon the terms of the contract.

The effect of this is that a contractor's ability to serve a payment claim may continue after termination subject only to the time limit of 12 months following the carrying out of work in section 13(4) of the Act.

The contractor's entitlement however could still be limited by the principles that:

1. Generally a claim cannot be made covering the same items as an earlier claim adjudicated (as in the case of *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*); or
2. A claim cannot be made where no further work is done since an earlier payment claim (*Perform (NSW) Pty Ltd v Mev-Aust Pty Ltd* (this would contravene section

13(5) of the Act which says that only one payment claim can be served for each reference date).

So if the Contractor has done work between the last payment claim and termination, they may remain entitled following termination to claim under the Act for that work.

Additionally section 13(6) of the Act tells us that a claimant is not prevented from bringing a claim that includes amounts that were the subject of a previous claim. As such it *may* be possible for the Contractor to attempt to include work previously claimed (e.g. items from a claim which an adjudicator determined in the contractor's favour but were negated by the adjudicator having determined the balance of the claim in the principal's favour).

This poses a real risk for principals, and so the question arises as to how to prevent reference dates from continuing after termination in construction contracts.

The more recent Court of Appeal case of *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd (Lewence)* would tend to suggest that the unamended wording of the clauses concerning termination in Australian Standards contracts would not be sufficient to prevent the continuation of reference dates.

However, any attempt to expressly exclude the continuation of reference dates would need to be balanced against the prohibition on contracting out of the Act (section 34).

The judicial decisions on these issues, particularly in *Lewence* are in need of further clarification. For now, parties should not assume that payment claims under the Act can't be made following termination.

Helena Golovanoff

Partner



Kennedys

Legal advice in black and white

THE VALUE OF VALUE ENGINEERING

An accepted definition of Value Engineering is:

DEFINITION – “Value engineering (VE) is a systematic method to improve the “value” of a project by using an examination of function. Value, as defined, is the ratio of function to cost. Value can therefore be increased by either improving the function or reducing the cost.”

Another way to identify Value Engineering is to describe it as a structured procedure designed to identify and implement optimum value for both initial and long term investment. A number of sources suggest that VE dates back to World War II and it has been used as a construction industry tool for many years.

It is important to note that, as seems to be widely misconstrued, VE is not just a review of cost or a cost-cutting exercise. VE is a process which identifies and analyses the requirements of the client and a project for the purpose of achieving and / or bettering the desired functions at the lowest total costs over the life of the project.

Whereas there is an argument to suggest that an independent team of ‘Value Engineers’ are the most effective option, it is generally an exercise undertaken by the existing team of project managers and design consultants including the Quantity Surveyor.

VE can be introduced at any stage of a construction project. However, the general consensus is that the best results are realised where VE is applied during the early stages of planning and design. Workshops during initial planning stages can offer confirmation / verification of the proposed programme, adequacy of budgets, and functional analysis of the building / facility as well as identifying the Clients own definition of value. The benefits are obvious as any changes in programme at this stage would not generally impact the overall schedule or incur any additional redesign costs or the like. Also, as design progresses there would be fewer changes required as any issues affecting value would be identified early in the process.

Design is the stage usually recognised as the ‘normal’ time for VE to be addressed. Documentation will have reached at least schematic stage and an informed cost plan has likely been developed and its relationship to the

established project budget has been considered. It is quite normal for ‘Value Engineering’ to be considered at this time especially if the cost plan is suggesting that the budget is in jeopardy. However, VE should be considered regardless of budget constraints to ensure best value (best value = consistent performance of the specified outcomes, or better, at the lowest life cycle cost). After assessment, it may be proposed that best value based on whole of life costing may be achieved by a higher than previously considered initial layout as part of the project cost.

During design any VE workshops and the implementation of outcomes should generally follow a methodology as noted below or similar;

1. **Information Gathering** – Identify and understand the design drivers and decisions to date, identify and analyse key functional requirements forcing understanding of function and cost impacts, define client overriding objective criteria and their own definition of ‘Value’
2. **Brainstorm Ideas** – identify as many different options for different project areas as possible which provide the required function at a lesser initial outlay or life cycle cost which would represent improved value
3. **Analyse Ideas** – analyse each idea raised in the previous section, discard any that may not be practical or are undesirable, develop further those ideas which seem to offer the greatest financial and value improvements for the project, identify a hierarchy of ideas showing precedence of value target.
4. **Develop Ideas** – each idea should be described (if a proposed design change), identify any advantages and disadvantages in proceeding with the change, cost comparisons with original design are generated
5. **Client Presentation** – Report to the client in writing (with a meeting presentation if required) describing process undertaken, the rationale of each of the developed proposals and any recommendations including a summary of cost impacts to the original design.



THE VALUE OF VALUE ENGINEERING

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The process briefly described above gives the client an insight into available options and informs and empowers their further decision making regarding the adoption of any design change based on the targeting of best value.

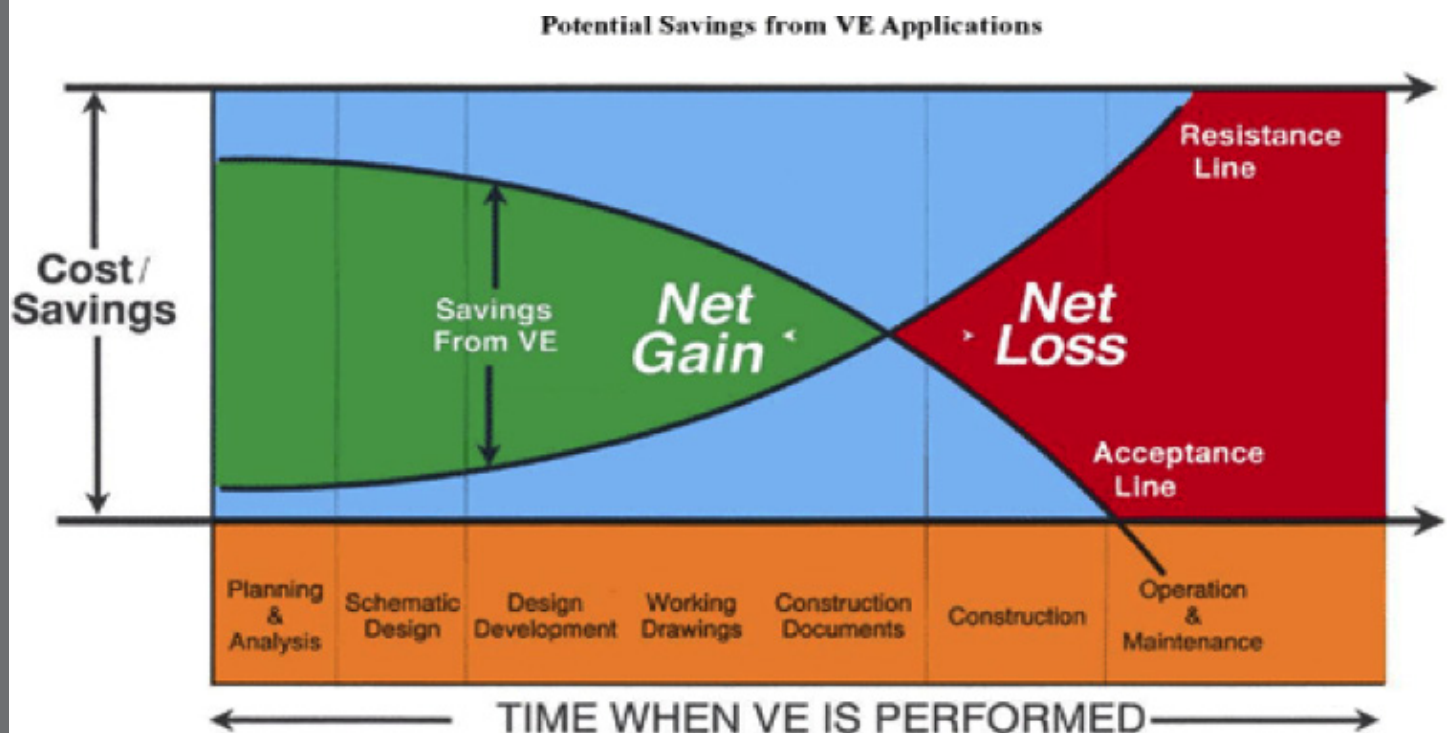
Value Engineering undertaken during the construction stage of a project, where still of value, would need very careful consideration by the client. Contractors are regularly provided with monetary incentives to propose any value engineered enhancements via a share of savings clause in their contract.

Value Engineering is an essential process that should be considered on every project regardless of budget standing during early design and cost planning. Outcomes of improved functionality and resulting best value

over the life of the building are desirable and therefore should be targeted via tried and tested VE processes.

Damon Bissell

Director



THE GREATER SYDNEY COMMISSION

On 27 January 2016 the much anticipated Greater Sydney Commission Act 2015 (**GSCA**) commenced. The GSCA creates the 'Greater Sydney Commission' (**Commission**) which is a body corporate and NSW Government agency. The GSCA also introduces new regional and district plans to the NSW planning scheme – through the new *Environmental Planning and Assessment Act 1979* Part 3B. Further, the GSCA allows the Minister to create 'Sydney Planning Panels' which will take on the functions of the current Sydney Joint Regional Planning Panels, including rezoning reviews.

The Commission's primary purpose is to lead metropolitan planning for the Greater Sydney Region (**Region**). The Commission will be assisted by several internal Committees and subcommittees.

The Region encompasses Hawkesbury, Hornsby and Pittwater to the north, the Blue Mountains to the west, and, to the south, Wollondilly, Campbelltown and Sutherland. It is currently separated into six districts.

The Commission will be led by Lucy Turnbull (the previous Lord Mayor of Sydney and the President of the Commission for Sydney) and will comprise an additional three expert 'Greater Sydney Commissioners' (covering the areas of social, environmental and economic), six 'District Commissioners' and three 'Ex-Officio Members' being the Secretaries of Planning and Environment, Transport, and Treasury. Whilst the Minister will appoint 10 of 13 Commission members, the Commission is otherwise independent.

The Commission is empowered to create Local Environmental Plans within the Region. It may, or must if directed by the Minister, create a draft regional plan for the Region (currently the 'Plan for Growing Sydney'). The Commission must also prepare and publicly exhibit a draft district plan for each declared district by 18 January 2017. Note the Minister is not obliged to make any of these draft plans. The Commission will also conduct all decision-making and plan-making on rezoning proposals currently undertaken by the Minister (or delegate), known as the 'Gateway' process.

To assist the Commission's functions, it has power to access and copy documents held by a council, and be provided with staff and facilities by council. The Commission is also authorised to delegate its functions, including to the DoPE, PAC, a Sydney Planning Panel, JRPP or local council.

These changes, particularly the new district plans, are likely to impact future development plans. We are happy to discuss these changes and their consequences further with you.

Patrick Holland
Partner

BACK-TO-BASICS APPROACH TO PLANNING

The recent introduction of the Greater Sydney Commission (Commission) will change the way planning operates in NSW and together with local government amalgamations, may ultimately prompt the need for a back-to-basics approach to planning.

The **objectives** of the Commission are:

- (a) *to lead metropolitan planning for the Greater Sydney Region,*
- (b) *to promote orderly development in the Greater Sydney Region, integrating social, economic and environmental considerations with regard to the principles of ecologically sustainable development contained in section 6 (2) of the Protection of the Environment Administration Act 1991,*
- (c) *to promote the alignment of Government infrastructure decision-making with land use planning,*
- (d) *to promote the supply of housing, including affordable housing,*
- (e) *to encourage development that is resilient and takes into account natural hazards,*
- (f) *to support ongoing improvement in productivity, liveability and environmental quality,*
- (g) *to provide increased opportunity for public involvement and participation in environmental planning and assessment in the Greater Sydney Regions.*

The **functions** of the Commission are:

- (1) *The Commission has the following functions:*
 - (a) *to provide advice and make recommendations to the Minister on matters relating to planning and development in the Greater Sydney Region,*
 - (b) *to prepare and provide reports to the Minister on the implementation (including any impediments to the implementation) of any plan or*

proposal relating to development in the Greater Sydney Region,

- (c) *to provide advice and make recommendations to the Minister on any impediments to the implementation of any plan or proposal relating to development in the Greater Sydney Region,*
 - (d) *to provide advice to the Minister on the application of any development fund created under section 129 of the Planning Act in respect of land in the Greater Sydney Region,*
 - (e) *to assist local councils in the Greater Sydney Region and other government agencies (including an agency of the Commonwealth) on the implementation of any plan or proposal relating to development in the Greater Sydney Region,*
 - (f) *to provide the Minister with such information, advice or reports as the Minister may request,*
 - (g) *if requested to do so by a Minister other than the Minister administering this Act (the other Minister), to provide the other Minister with such information, advice or reports as may be requested by the other Minister.*
- (2) *Any such other Minister must obtain the approval of the Minister administering this Act before making a request under subsection (1) (g).*
 - (3) *The Commission has such other functions as are conferred or imposed on it by or under this or any other Act.*
 - (4) *Without limiting subsection (3), the Commission may exercise functions delegated to it under any other Act.*

Supporters of this change view the Minister's delegation to the Commission as a means in which to be more progressive in getting things done, but those critical of this change highlight the additional bureaucratic layer of complexity and the risk that distancing politics

BACK-TO-BASICS APPROACH TO PLANNING

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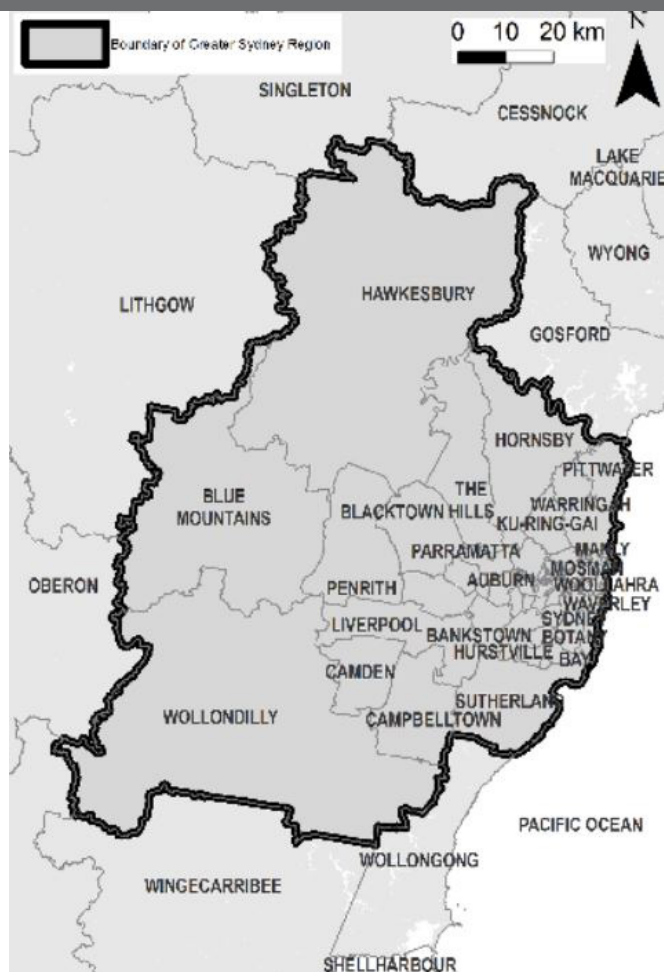
from planning makes it more difficult for plans and subsequent development to reflect community values and objectives.

Over the next 2 years in particular, the focus will be on demarcation between councils, the Department of Planning and Environment and NSW government agencies such as the Commission. However, a back-to-basics approach to planning including recognition of the overarching metropolitan strategy "A Plan for Growing Sydney" as a 'matter for consideration' within Section 79C of the Environmental Planning and Assessment Act 1979 may assist the objectives and functions of the commission.

Please contact State Planning Services regarding the impacts that the Commission may have on your next development.

John McFadden

Managing Director



THE IMPORTANCE OF THE RETURN BRIEF

It is often the case that a Client Brief, prepared by the Client, has not been generated to inform and commence the design development phase of a project. For this reason, the industry has adopted the concept of a Return Brief. For all intents and purposes, the Return Brief contains all (and possibly more) of the information that would be included in a Client Brief. The fundamental difference is that the Return Brief is prepared by the Consultant Design Team, usually documented by the Architect and Lead Design Consultant, and progressively reviewed and approved by the Client.

Good design relies on a good Return Brief. The more effort that goes into the preparation of a Return Brief, then the more likelihood there will be of a design that reflects the Client's requirements. It is often tempting to progress into the preparation of drawings ahead of establishing the actual Client requirements. This can easily lead to an outcome in which the requirement for a particular space is provided, however the space is not functional as it has not considered the specific use of the space.

It is typical for a Return Brief to be progressively prepared, through meetings with the Client, followed by meetings of the design team, and followed again by a Client review. This process is fundamental to a quality outcome and allows for the generation of drawings to progressively communicate, in a visual sense, the elements contained within the Return Brief.

The Return Brief also allows for a clear articulation of change management through the process of developing the design that progressively responds to the Return Brief. This can prove invaluable at later stages of the documentation phase and even into the construction phase as it provides a record of changes in the development of the design and the decisions for such change. Tracking such change through drawing revisions alone will not provide the detail that is possible within a Return Brief.

Time spent in the detailed preparation of the Return Brief will be well rewarded by producing a design that is informed by Client needs and ultimately a built form that will provide all the necessary functionality contained within the Return Brief. For these reasons a Return Brief should have the appropriate buy-in from all Project Stakeholders, particularly the Client

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