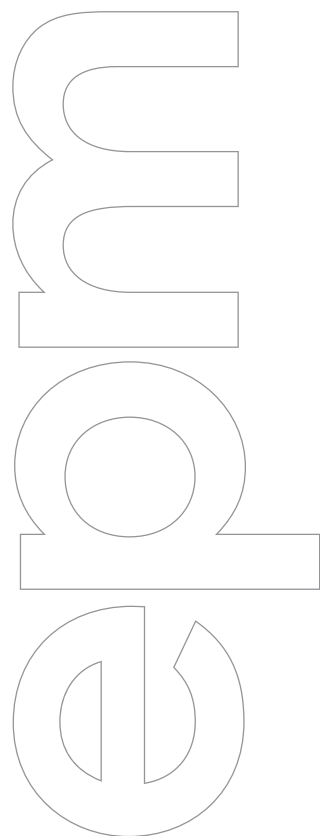


Cover image: Ascham School Science Building  
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### This Edition

- Back-to-School for Educational Establishments and Child Care Centres
- What to Consider When Commencing a Fitout Project
- Specialised Asset Valuation and the QS
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- Draft Education and Child Care SEPP



# BACK-TO-SCHOOL FOR EDUCATIONAL ESTABLISHMENTS AND CHILD CARE CENTRES

In February 2017, the NSW Department of Planning and Environment (**DPE**) released a public consultation draft State Environmental Planning Policy (*Educational Establishments and Child Care Facilities*) 2017 (**the draft SEPP**) with the intention of making it easier for child-care providers, schools, TAFEs and universities to build new facilities and to improve existing facilities. Submissions on the draft SEPP can be made during the exhibition period until 24 March 2017.

The Planning Institute Australia (**PIA**) has indicated that the draft SEPP aims to:

- “streamline the planning system for education and child care facilities including changes to exempt and complying development;
- NSW will be the first State to bring Commonwealth Laws regulating early childhood education and care into a state planning system;
- bring the Department of Education into the planning process early, and gives child care providers and developers information, from the beginning regarding all national and state requirements for new child care services;
- streamline the delivery of new schools and upgrading existing facilities, with a focus on good design; and
- assist TAFEs and universities to expand and adapt their specialist facilities in response to the growing need, and to maintain our reputation for providing world class tertiary education, while allowing for more flexibility in the use of their facilities.”

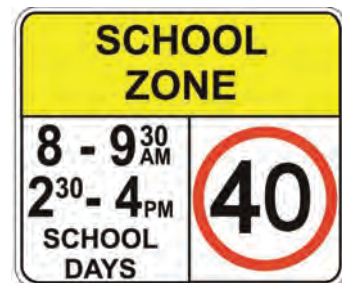
Amongst a raft of new changes, this new policy will be a standalone educational/child care SEPP rather than a small updated component of the current *State Environmental Planning Policy (Infrastructure)* 2007 (**ISEPP**) which also includes other forms of development.

This may provide an impediment to the ongoing goal of ‘simplifying the system’ as the amendments will result in yet another environmental planning instrument for consideration under Section 79C of the *Environmental Planning and Assessment Act 1979 (the Act)*.

Furthermore, rather than the broad application of prescribed zones for an educational establishment, it is proposed to provide individual consideration to schools, universities, TAFE establishments and early childhood education and care facilities for the purposes of determining permissibility and applicable exempt or complying development provisions.

The draft SEPP also introduces scope for student and staff caps to be conditioned. However, a potential conflict may arise between non-government and government schools as it is recognised that public schools are legally required to accommodate all children within their local catchment. For matters such as these, it would appear that the unfair bias that currently exists in favour of public, not private schools will remain.

This is likely to emerge as a critical matter given that the exhibition documentation identifies that non-government schools represent 30% of the sector. The exhibition documentation also identifies that between 2010 and 2015, the NSW school student population grew by 5.4% and the average enrolment per school grew by 5.9%.



# BACK-TO-SCHOOL FOR EDUCATIONAL ESTABLISHMENTS AND CHILD CARE CENTRES

(CONTINUED)

Exceptions have been made in the form of proposed amendments to the *Environmental Planning and Assessment Regulation 2000* (**the Regulation**) to enable registered non-government schools to be recognised as a public authority for the purposes of exempt development – perhaps just to confuse matters!

Buildings up to four storeys in height/22m are proposed to be considered as part of a complying development certificate (**CDC**) application (subject to the achievement of design quality principles). There is also scope for traffic assessment to be considered as part of a CDC application. Other Part 5 assessment criteria will apply to development that can occur without obtaining council consent.

The draft SEPP includes a number of other amendments that warrant consideration by educational establishment/child care providers. Where appropriate, submissions should be made in response to the proposed changes in order to ensure that 'good on-ground outcomes' are not sacrificed by the draft SEPP. For further information on how the draft SEPP will affect your existing or proposed development projects, please contact SPS.

**John McFadden**

Managing Director  
State Planning Services



# WHAT TO CONSIDER WHEN COMMENCING A FITOUT PROJECT

Commercial fitout and refurbishment projects are usually subject to considerable time pressure due to limited windows within which the work can be undertaken to minimise the impact on other tenants, the expiry of the lease of the incoming tenant's demised premises, and work to address the limitations of existing structures and building services that wasn't anticipated at the time of securing the lease.

As with all time-critical construction projects, upfront investigation will assist to inform the risk in the project and plan and manage the delivery of the project within agreed timeframes.

## **Understanding the existing conditions and nature of the building**

It is worthwhile undertaking a full Due Diligence Study as part of the property selection process. This has the benefit of assisting the selection of the right premises, and it also assists in achieving efficiencies during the design stage through early identification of major constraints.

Of particular interest are:

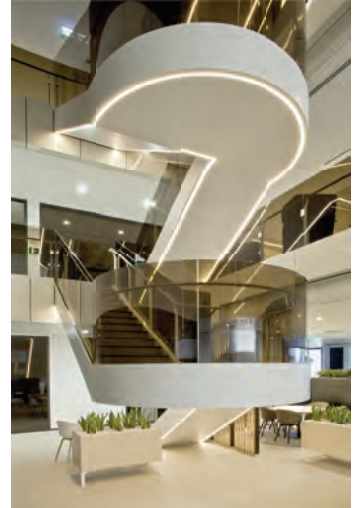
- The availability of information about the existing building
- The general condition of the existing building, including understanding of existing non-conformances in relation to the Building Code of Australia.
- The existing constraints of the structure of the building, including restrictions on load and ability to penetrate slabs and remove walls
- The capacity and condition of the existing services, and any upgrades which might be required

It may be difficult to gather information about the existing building whilst another tenant is in occupation. It is important to understand the scope of any 'make-good' by the outgoing tenant or building owner and the scope and timing of base-building refurbishment t, as this could affect the scope and timing of the fitout.

## **What type of approval is needed?**

The NSW planning system provides several pathways for development consent for office fitout and refurbishment. Often fitout projects can be Complying Development (as specified in State Environmental Planning Policy (Exempt & Complying Development Codes) 2008, commonly referred to as the 'Codes SEPP'. Under this pathway, a consultant Certifying Authority (often referred to as "private certifiers") issues a Complying Development Certificate (CDC) prior to the fitout work commencing. This is advantageous for a client as it can reduce the administration and time associated with obtaining a Development Application from Council.

It is worth investigating the approvals pathway at the outset of the project, as elements which do not meet the codified requirements of either Exempt or Complying Development must be submitted to the relevant local council for approval. Major modifications, or the introduction of external plant or signage could trigger the need for a Development Application to Council.



# WHAT TO CONSIDER WHEN COMMENCING A FITOUT PROJECT (CONTINUED)

## Understanding the design constraints

Besides understanding the client's functional brief, the design program will benefit from gaining an early understanding of the selected approvals pathway, the existing structural and services limitations, capacity and condition, as well as any proposed performance-based solutions as a means of avoiding strict compliance with the deemed-to-satisfy provisions of the BCA. Whilst it may seem trivial, it is also advisable to carefully investigate any limitations on access to the site. For instance, a single goods lift shared between all tenancies in the building can cause a significant 'bottle-neck' during fitout, both for delivery of material and removal of waste. The size of materials, fixtures and equipment which can fit within the lift must be considered within the design stage.

## External Stakeholders

Consider any other tenancies within the building, and how they might be affected by the project delivery, particularly if a large amount of noisy, disruptive work is required. It is recommended to establish a relationship with the other tenants and the building manager prior to construction commencing and to maintain the relationship through an ongoing consultation and complaints handling process.

Consider the likely timing of lease negotiations, including executing the lease documents, and how this could impact on the project program. Establish whether there are any intentions for change in ownership of the building during the project delivery, as this could also have significant implications on program.

## Procurement methodology

A range of procurement methodologies exist. It is important to have an early discussion with the Project Manager to:

- Determine the priorities in terms of time, cost and quality
- Understand the available procurement options and the associated risk allocations
- Select the most appropriate procurement methodology.

Often clients choose to complete certain components of the fitout work using their own contractors. Examples are Information Technology or fitting of specialist equipment and artwork. This approach can increase the amount of risk born by the client, and should be carefully considered.

## Danaë Bain

Senior Project Manager  
EPM Projects

# SPECIALISED ASSET VALUATION AND THE QS

One role that we, as Quantity Surveyors and Cost Consultants, undertake but is relatively unrecognised in the construction industry is that of Specialist Asset Valuation.

For organisations and public sector entities that have numerous assets on their books categorised as building, construction and infrastructure assets, the NSW Treasury requires an independent assessment undertaken to calculate a 'valuation of physical non-current assets at fair value'.

Now there is a lot of "accounting" terminology around this requirement, the reasons for the requirement and the methodology to be used whilst completing the valuation. For those that may be interested there is a policy paper issued by The Treasury (TPP 14-01: Accounting Policy: Valuation of Physical Non-Current Assets at Fair Value). However, for this short paper we are merely identifying that there are two main approaches to calculating the fair value of an asset.

The first method is the 'Market Approach'. This method would be used to value 'generalised tangible assets' and would utilise the availability of market transactions and observable prices for identical or similar assets (valuing a house in a certain location is a good example of this).

The Market approach would typically be undertaken by a specialist valuer and not a Quantity Surveyor whose expertise is in the cost of construction. This is where the second approach comes to the fore, the 'Cost Approach'. Where an asset is categorised as specialised (typically in the public sector with an example such as wharves and other marine structures) there is unlikely to be any entirely reliable market comparisons to be utilised as these assets are rarely traded. Therefore, to ascertain the asset value, a calculation of the "current replacement cost of a modern equivalent" is required. Now this is where the Construction Quantity Surveyor comes in with their cost expertise and knowledge of the construction industry and the way things work.

So the value of a specialised public sector infrastructure asset can be based upon the current replacement cost of a modern equivalent construction. It is up to the QS to source all available information for each asset, some of which could be quite old with very little historical information available, and then make an assessment of the current replacement cost while taking account of modern construction techniques and materials along the way. To these direct costs are added applicable indirect cost including Consultant fees, Client fees and contingencies and there you have the current value of the asset for accounting purposes.

Contrary to common belief that's as close as we QS's like to get to accounting!!

**Damon Bissell**

Director  
MDA Australia



# THE REQUIREMENT FOR A REFERENCE DATE UNDER A CONTRACT FOR THE MAKING OF A VALID PAYMENT CLAIM: SOUTHERN HAN BREAKFAST POINT PTY LTD (IN LIQUIDATION) V LEWENCE CONSTRUCTION PTY LTD

In December 2016 the High Court delivered its judgment in case the of *Southern Han Breakfast Point Pty Ltd (in liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52.

The case is significant as it was the first time that the Court has considered the application of security of payment legislation (in this instance *Building and Construction Industry Security of Payment Act 1999* (NSW) (**The Act**) since the adoption of such legislation across all jurisdictions (starting with NSW in 1999).

## Background

In early 2013 Southern Han engaged Lewence under a contract 'substantially in the form of AS 4000-1997' (**Contract**) for the construction of a 5 Storey 60 unit apartment block at Breakfast Point (a suburb on the Parramatta River in the Inner West of Sydney).

On 10 October 2014 Southern Han issued a show-cause notice under the Contract. Following Lewence's response to the notice to show cause, Southern Han purported to take whole of the work remaining to be completed under the Contract out of Lewence's hands. In response, on 28 October 2014, Lewence purported to terminate the Contract, claiming that Southern Han had repudiated the Contract.

On 4 December 2014 Lewence served a payment claim for work carried out up to 27 October 2014 in the amount of \$3,229,202.50. Southern Han served a payment schedule in response stating that Lewence has been overpaid by the sum of \$64,909.67. Lewence then lodged an adjudication application and the adjudicator determined the claim in Lewence's favour in the amount of \$1,221,051.08.

## Issues in Dispute

Southern Han applied to set aside the adjudicator's determination in the Supreme Court. It contended that the existence of a reference date was an essential requirement for a valid payment claim under the Act, and that without a valid payment claim the adjudicator had no power to determine an adjudication application.

Southern Han claimed that in circumstances where either:

- the works were taken out of Lewence's hands; or alternatively
- Lewence had in fact validly terminated the contract,

there would be no valid reference date in respect of which Lewence could have made a payment claim. This was accepted by the Supreme Court, but overturned by the New South Wales Court of Appeal on appeal. Southern Han then further appealed the case to the High Court.





# THE REQUIREMENT FOR A REFERENCE DATE UNDER A CONTRACT FOR THE MAKING OF A VALID PAYMENT CLAIM: SOUTHERN HAN BREAKFAST POINT PTY LTD (IN LIQUIDATION) V LEWENCE CONSTRUCTION PTY LTD (CONTINUED)

## Judgment and Reasoning of the High Court

The Court ruled unanimously that the existence of a reference date under a construction contract is a precondition to the making of a valid claim under The Act. The Court interpreted the relevant parts of the Act (sections 8 and 13), to mean that a person who has undertaken to carry out construction work under a construction contract is entitled to a progress payment **only on and from each reference date under the construction contract.**

That being the case, the Court then considered the interpretation of the terms of the Contract, and whether a reference date actually existed in circumstances where the contract had been either suspended or terminated. The Court noted that if the work had been validly taken out of Lewence's hands, the relevant clauses of the Contract stated that payment was suspended and therefore there could be no reference date. If, in the alternative, Southern Han hadn't validly taken out the work but the Contract had instead been validly terminated by Lewence, then there would also be no reference date. This is because the Act is limited to only securing payments claimed for work **carried out under a construction contract.** Where the contract is terminated, unless the contract specifically says otherwise, reference dates and the entitlement to claim will disappear.

The Court's judgment will no doubt be of great interest to parties in the drafting of payment clauses under construction contracts. In some ways it may also be seen to represent a minor correction or clarification of the policy of the Act, and consequently, the balancing of the purchaser's and the supplier's interests. Unless the contract specifically provides for a reference date after termination, a contractor ordinarily won't be able to make a claim for payment after termination. This limits potential for the security of payment regime to be used for a 'last minute cash grab' by an insolvent contractor after termination of their contract.

**Joseph Dowling & Garth Campbell**  
Lawyers  
Kennedys



**Kennedys**

Legal advice in black and white



# DRAFT EDUCATION AND CHILD CARE SEPP

On 6 February 2017, the Department of Planning and Environment (**DPE**) released the following for consultation:

- (a) Draft *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* (**Education and Child Care SEPP**) which will replace Division 3 of the *State Environmental Planning Policy (Infrastructure) 2007* (**ISEPP**);
- (b) Draft *Environmental Planning and Assessment Amendment (Schools) Regulation 2017* (Draft **Regulation**) which will amend the *Environmental Planning and Assessment Regulation 2000* (**EPA Regulation**);
- (c) Draft *Standard Instrument (Local Environmental Plans) Amendment Order (No 2) 2016* which will amend the Standard Instrument – Principal Local Environmental Plan;
- (d) Draft 'Code of Practice for Part 5 activities for registered non-government schools', February 2017;
- (e) Draft 'Planning Circular – Regulating expansion of schools' (**Draft Planning Circular**);
- (g) Draft 'Better Schools – A design Guideline for schools in NSW'.

The Education and Child Care SEPP will be a standalone State Environmental Planning Policy for education and childcare providers.

## WHAT IS IN IT FOR SCHOOLS?

- 1. Changes to student staff caps.** The DPE has issued a new Planning Circular in relation to student caps which provides that a condition of consent limiting student staff numbers at a school should only be imposed if it is necessary to impose such a condition for a **valid planning reason** supported by strong evidence (for example, traffic impacts).
- 2. Non-government schools are to be recognised as a public authority.** The Draft Regulation amends the EPA Regulation to recognise a 'non-government school' as a 'public authority'

to enable schools to carry out exempt development and development permitted without consent in accordance with the Education and Child Care SEPP.

- 3. Updated Development standards for complying development.** The Development Standards for complying development will be set out in Schedule 2 of the Education and Child Care SEPP and will include, amongst others, the following standards:

**(a) Building Height** – Maximum 4 storeys and 22m

**(b) Setbacks:**

- i. Building height up to 12m - 5m from land zoned residential and 1m from all other land;
- ii. Building height up to 15m - 8m from land zoned residential and 2.5m from all other land;
- iii. Building height up to 22m - 10m from land zoned residential and 4m from all other land.

**(c) Materials** – External walls must be constructed with non-reflective materials.

**(d) Overshadowing** - Buildings must not reduce solar access to habitable rooms and private open space of adjoining residential properties to less than 3 hours between 9am and 3pm on the winter solstice.

**(e) Privacy** – Windows must be designed to preserve privacy of adjoining residential dwellings.

**(f) Landscaping** – Landscaping must be provided for a new building constructed adjacent to land zoned residential – at least 3m wide along common boundary and contain trees or shrubs that are suitable for screening.



# DRAFT EDUCATION AND CHILD CARE SEPP (CONTINUED)

## **4. School-based child care facilities.**

The Education and Child Care SEPP includes provisions that enable development of school-based childcare that is used to provide out-of-school-hours care (including vacation care) for children, within existing school sites. School-based child care may be carried out:

- (a) As exempt development, if no works are required; or
- (b) As complying development, if works are required; and
- (c) Provided that it complies with the existing development consent, the development standards are met and a Service Approval has been obtained from the Department of Education.

## **5. Expanded exempt development provisions that enable minor works to be undertaken in connection with existing schools, including non government schools.**

The following are examples of exempt development that will be permitted provided that the development standards are met:

- (a) One storey portable classrooms;
- (b) Removal of trees if they pose a risk to safety or damage to infrastructure;
- (c) Demolition of certain development that would be exempt development and that is not a heritage item or in a heritage conservation area;
- (d) Play equipment, sporting fields and courts;
- (e) Walking paths, seats, shelters and shade structures;
- (f) Routine maintenance works and landscaping and environmental works.

## **6. Provisions that permit multiple categories of development as development without consent provided it is on land in a prescribed zone and in connection with an existing school, including non-government schools.**

The following are examples of development without consent that will be permitted without consent provided an environmental assessment of the likely impacts of the proposed development has been carried out in accordance with Part 5 of the *Environmental Planning and Assessment Act 1979*:

- (a) One storey buildings, such as, library, administration, classroom, tuckshop, cafeteria or bookshop;
- (b) A car park not more than one storey high;
- (c) Minor alterations or additions to existing buildings.

## **7. Complying development provisions for existing schools, including existing non-government schools.**

The following are examples of complying development that will be permitted within the boundaries of an existing school provided that the development standards are met:

- (a) Additional classrooms and educational facilities;
- (b) A car park;
- (c) Outdoor learning areas;
- (d) Demolition of a building that has an area no greater than 250 square metres;
- (e) Minor alterations or additions to existing buildings.

# DRAFT EDUCATION AND CHILD CARE SEPP (CONTINUED)

## NEGATIVES FOR SCHOOLS

8. If the SEPP is made in its current form, complying development will no longer be able to be carried out on land that comprises an item that is listed on the local or State heritage register.
9. Complying development can not involve underground development.
10. The guidance document released with the draft Education and Child Care SEPP has indicated a proposal that Council certifiers will be the only responsible body for issuing complying development certificates for schools.
11. Boarding schools and student accommodation have been excluded from the Education and Child Care SEPP.

## NEXT STEPS

Submissions are due on 24 March 2017.

You should consider whether you would like to make a submission.

You should also think carefully about whether you should act on any of your development plans before the Education and Child Care SEPP comes into effect.

### **Samantha Daly**

Partner  
McCullough Robertson



## Contact Us

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

*supporting clients nationally*

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

The following organisations regularly partner with EPM and contributed to the content of this newsletter.



**John McFadden** - Managing Director  
*Strategic & Statutory Planners*  
State Planning Services  
P.O. Box 394  
Pyrmont NSW 2009  
Ph: (02) 9552 1525 Fax: (02) 9552 1525  
E [jmcfadden@stateplanningservices.com.au](mailto:jmcfadden@stateplanningservices.com.au)  
[www.stateplanningservices.com.au](http://www.stateplanningservices.com.au)



**Damon Bissell** - Director  
*Quality Surveyors*  
MDA Australia  
Level 3, 160 Pacific Highway  
North Sydney NSW 2060  
Ph: (02) 9929 8000 Fax: (02) 9929 8363  
E [numbers@mda-aust.com.au](mailto:numbers@mda-aust.com.au)  
[www.mda-aust.com.au](http://www.mda-aust.com.au)

## Kennedys

Legal advice in black and white

**Joseph Dowling & Garth Campbell** - Lawyers  
*Construction Law*  
Kennedys  
Level 31, 2 Park Street Sydney NSW 1235  
Ph: (02) 8215 5999 Fax: (02) 8215 5988  
E [joseph.dowling@kennedyslaw.com](mailto:joseph.dowling@kennedyslaw.com)  
[www.kennedys-law.com.au](http://www.kennedys-law.com.au)



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