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NEWSLETTER

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green building council australia
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SCHOOLS – DO YOU HAVE A FALL-BACK STRATEGY?

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Private schools in NSW have grown to rely on the SEPP (Infrastructure) 2007 (ISEPP), for good reason. I have rarely found a situation where a school is not able to take advantage of the Exempt or Complying Development provisions of the ISEPP to construct, extend, refurbish or fitout a building or undertake some other form of development [ancillary to an "educational establishment"] and thereby avoid a complex, costly and lengthy Development Application process. The ISEPP also permits development of an "educational establishment" (with the consent of the Local Council) on land that is a "Prescribed Zone", even if such a use is prohibited under the relevant Local Environment Plan.

What is not widely understood is that a Complying Development Certificate is a form of Development Consent under the Environmental Planning & Assessment Act (1979) ('the Act') in the same way as a Development Application that is approved by a Local Council is a form of Development Consent. Consequently, a Complying Development Certificate can have the effect of overcoming a condition of a prior Development Consent that imposes a limit on the number of students that may occupy a site.
The ISEPP is a powerful and effective piece of legislation for schools that know how to use it properly.

However the impending change in the NSW Planning System means that the future of the ISEPP is limited, and the extent to which the provisions of the ISEPP will be adopted into the new planning system is uncertain. In the meantime, Councils across NSW have been progressively adopting the Standard Instrument Local Environment Plan (a process that started in 2006 and is nearing completion) which in some circumstances has resulted in schools being prohibited where they were permitted at the time the land was purchased.

This presents an obvious risk for schools that have purchased land with the intention of expanding their operations by relying on the ISEPP, but have not obtained Development Consent by the time that the new planning system comes into effect.

In a recent meeting with the Hon. Brad Hazzard, Minister for Planning & Infrastructure NSW, and the Department, EPM enquired about the future of the ISEPP as part of the new planning system. The response is confirmed in a letter from the Department as follows:

> *"The Infrastructure SEPP will continue to operate to make schools permissible in prescribed zones, although the form the SEPP takes may change as a result of the White Paper reforms".*

This provides some hope, but not certainty. Schools should therefore develop a fall-back strategy to avoid being left 'high and dry' with land that can't be developed for the intended purpose.

This fall-back could include obtaining Development Consent for an "educational establishment" now before the ISEPP changes or is repealed which should enable reliance on 'existing use rights' under the Act after the legislation changes.

An example follows:

Residential land is purchased by a school at a time when the LEP permits use of the land for an "educational establishment". The Council subsequently adopts the Standard Instrument LEP at which time the school has not yet obtained Development Consent for an "educational establishment". The zoning of the land remains unchanged under the new LEP, however the permitted uses pertaining to the subject zone no longer permits "educational establishments".

While ever the ISEPP is in place, the use of the subject land as an "educational establishment" is permissible because the land is a "Prescribed Zone" for the purpose of an "educational establishment" under the ISEPP. However if the "Prescribed Zone" provisions of the ISEPP are not adopted into the new legislation, then the school would not be able to rely on the ISEPP by which to seek the consent of Council develop and use the land for an "educational establishment".

A school should as part of its risk management strategy identify all the land that it owns for which it doesn't have Development Consent for an "educational establishment" and wherever possible obtain Development Consent now before the legislation changes. In the best case that the ISEPP is adopted into the new legislation, then it will be able to continue to enjoy the provisions to expand and intensify the use of the land. In the case that the ISEPP is not adopted into the new legislation, then subject to being able to demonstrate a continuing use of the land it will be able to fall back on "existing use rights".

A little bit of planning now may save a lot of embarrassment and cost later.

Andrew Graham
Managing Director

TOO LOW IS NO GO?

At what point does the lowest tenderer become less attractive than the next? It is becoming ever more important for the Client to have a good selection of conforming Tenders to scrutinise in their search for the best outcome.

Regularly, the deadline arrives, the tender box is opened and the range of offers revealed with one or more immediately standing out either too high or too low. Depending on specific circumstances, a "too high" tender can be viewed as a submission that says "We are too busy right now, but we also want your business in the future so we have submitted something". On the other hand, "too low" is not so easy to discard and this raises all sorts of questions in the minds of those whose role it is to scrutinise and make recommendations. Some would quickly discard the "too low" tender as too much of a risk. Others would ask a few questions to ascertain that pricing is in accordance with the tender documents. This in itself can raise questions as to the quality of the tender documentation even if there had not previously been an issue.

The following are a few of the questions which may be considered in regards to 'lowest' tenders:

- Can the lowest tenderer see opportunities in the documentation for large scale variations later on?
- Have other tenderers priced in a bit of risk at this point?
- Is the lowest tenderer buying the job for any reason?
- Did the lowest tenderer issue many RFI's during the tender perior and can we be confident that they have understood what is required?
- Are they too low. Do we give them the opportunity to present their tender or pull the pin now?
- Have they got suitable experienced management priced in to cover the successful implementation and completion of the project?
- Do we identify where they are low and give them an opportunity to clarify any discrepancies?
- Are we confident in the completeness of the Tender Documentation (is it fully co-ordinated, where are the gaps?)
- If we discard the 'too low' tender too soon, are we passing up the potential opportunity for the Client to engage a genuinely proactive and commercially viable contractor with good ideas?
- Do you engage the lowest tenderer but put aside an additional contingency to cover possible future short falls in their tender.

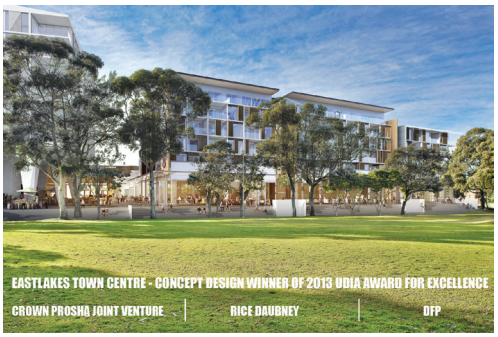
'Too Low' can shake up the process and make things a little harder than they should be. Sometimes, there just isn't the time and decisions need to be made to meet "The inflexible Project Deadline". Therefore, in some cases, 'Too Low is No Go".

Damon Bissell
Associate Director

ENVIRONMENTAL IMPACT STATEMENT OR STATEMENT OF ENVIRONMENTAL EFFECTS?

planning consultants

DFP explains that it is important to know the difference between a Statement of Environmental Effects and an Environmental Impact Statement as each will have significantly different time and cost implications depending on the type of project.



What is the difference?

If a development application (DA) to a consent authority is either 'State Significant Development', or 'Designated Development' an Environmental Impact Statement (EIS) will be required. However, for other development applications involving non-State Significant Development or non-Designated Development, A Statement of Environmental Effects (SEE) will be required to accompany a DA.

Both statements identify the impacts of a project on a site for consideration by the consent authority (usually either a Local Council, or the NSW Minister for Planning and Infrastructure) and outline the required mitigation measures for those impacts in order for a project to be considered acceptable.

An EIS is typically more comprehensive than an SEE usually because it is associated with a project that is far more significant in scale and with a higher propensity to create adverse impacts on the environment. However, whilst the two types of statement are often confused, the structure and content of each statement differ to the extent that the Environmental Planning and Assessment Act (EP&A Act) 1979 and Environmental Planning and Assessment Regulation (EP&A Regulation) 2000 prescribe various matters for each statement to address.

A consent authority requires an EIS or SEE (but not both) to accompany a DA to make an informed assessment of a proposal prior to making a determination in the form of either an approval or refusal. In the case of an EIS, it is necessary to apply to the Director General before this type of document is prepared in order to identify any specific requirements to be included in the EIS. No such application to the Director General applies in the case of an SEE for a DA.

What information is required to be included in an SEE?

An SEE is to include the following information:

(a) the environmental impacts of the development,

(b) how the environmental impacts of the development have been identified,

(c) the steps to be taken to protect the environment or to lessen the expected harm to the environment,

(d) any matters required to be indicated by any guidelines issued by the Director-General for the purposes of this clause.

Section 79C of the EP&A Act 1979 provides relevant matters for consideration for the purposes of addressing the above SEE requirements.

What information is required to be included in an EIS?

Unless the Director General indicates otherwise, an EIS is to include the following information:

(a) a summary of the environmental impact statement,

(b) a statement of the objectives of the development, activity or infrastructure,

(c) an analysis of any feasible alternatives to the carrying out of the development, activity or infrastructure, having regard to its objectives, including the consequences of not carrying out the development, activity or infrastructure,

(d) an analysis of the development, activity or infrastructure, including:

(i) a full description of the development, activity or infrastructure, and

(ii) a general description of the environment likely to be affected by the development, activity or infrastructure, together with a detailed description of those aspects of the environment that are likely to be significantly affected, and

(iii) the likely impact on the environment of the development, activity or infrastructure, and

(iv) a full description of the measures proposed to mitigate any adverse effects of the development, activity or infrastructure on the environment, and

(v) a list of any approvals that must be obtained under any other Act or law before the development, activity or infrastructure may lawfully be carried out,

(e) a compilation (in a single section of the environmental impact statement) of the measures referred to in item (d) (iv),

(f) the reasons justifying the carrying out of the development, activity or infrastructure in the manner proposed, having regard to biophysical, economic and social considerations, including the principles of ecologically sustainable development set out in subclause (4).

Given the time and cost implications involved, it is important to know the difference between what type of development will require an EIS or an SEE.

Please contact DFP for town planning assistance with your next project.

John McFadden
Partner

NEW WHS REGIME

Kennedys

Legal advice in black and white

How are we travelling?

On 1 January 2012 a number of Australian jurisdictions moved to the much anticipated harmonised Work Health and Safety regime. At the time of writing Victoria and Western Australia are the only two to have not moved across, with WA maintaining its commitment to do so and Victoria having confirmed that it will not.

The new regime introduced some significant changes in the approach to responsibility for workplace safety. For the construction industry, some aspects are familiar, while others are new.

In the nearly two years since the regime came into effect in a number of states and territories some interesting trends have emerged.

A obvious positive development is that new focus is now given to WHS across all manner of undertakings, although in our experience the manifestation of this is not always been appropriate.

For example, a duty holder will not necessarily discharge their obligation by contracting another person or entity to perform the obligation. There is nothing wrong with engaging a third party to undertake a WHS related task. However if that third party is not qualified or fails to discharge the contracted obligation, while depending on the circumstances, the duty holder may have a cause of action against that third party for breach of contract or negligence, the duty holder may still be left with the undischarged duty under the WHS regime. Accordingly, careful attention should be paid when engaging others to perform WHS related tasks.

In future editions we will look at a number of other aspects of the WHS regime and how it is working within the industry.

Helena Golovanoff
Partner

CHANGES TO NATIONAL SITE CONTAMINATION GUIDELINES TO MAKE ASSESSMENT MORE EXPENSIVE, BUT REMEDIATION CHEAPER

Lawyers | McCullough Robertson

On 16 May 2013 new national guidelines came into effect for the assessment of site contamination. The *National Environment Protection (Assessment of Site Contamination) Measure 1999* (**ASC NEPM)** was updated, and the Environment Protection Authority adopted the ASC NEPM as one of its approved guidelines. The ASC NEMP applies to small and large investigation projects – so there is no threshold under which a small scale assessment could avoid having to apply the updated guidelines. The ASC NEPM is used by environmental consultants undertaking site assessment work as well as by the EPA and other regulators (e.g. Local Councils) responsible for auditing site assessments.

The development application process, due diligence before purchasing a property, compliance with reporting obligations under the Contaminated Land Management Act 1997, and obeying EPA investigation orders are just some of the situations in which site assessments, conducted in line with the new ASC NEPM guidelines, will take place.

The key updates in the ASC NEPM relate to ecological and health risk assessment and guidelines for asbestos and petroleum hydrocarbons. The Commonwealth estimates that the amendments will increase site assessment costs up to 10-15% ($32 million nationally), but the Commonwealth is also confident that the benefits of the updated ASC NEPM – reductions in remediation costs as well as better health and environment protection outcomes – will offset the increased costs of assessment.

Whether the benefits of the updated ASC NEPM will actually offset the increases in site assessment costs remains to be seen. According to the Commonwealth, the amendments have broad industry support, and given the ASC NEPM went unamended for 14 years, it's unlikely to be amended again soon.

Patrick Holland
Partner

DESIGN COMPLIANCE -VS.- INNOVATIVE DESIGN

BLACKETT MAGUIRE+ GOLDSMITH

Now more than ever, contemporary building designers are pushing the boundaries of design innovation in order to accommodate client expectations and industry-wide recognition.

In the capacity as a BCA consultant and a certifying authority for large scale and complex projects, we are seeing a consistent and frequent approach to innovative building design. Constant-changing statutory, client & community influences, including ESD initiatives; enhanced accessibility requirements; enhanced fire safety requirements; client & market demands and, of course the pressure for industry-wide design recognition, are contributing factors in the development of some of the most innovative and spectacular building designs being witnessed across Australia today.

The Building Code of Australia (BCA), being a performance-based document, is forever being tested, reviewed and amended to accommodate the ever-changing boundaries for compliance.

To accommodate this situation, and to maintain sustainability of current-day design expectations, the building code compliance & certification industry must also successfully adapt to change and have the ability to apply an open mind toward new design concepts in unison with the design industry.

In the words of Charles Darwin, ''It's not the strongest of the species that survive, nor the most intelligent, but the ones most responsive to change''.

Gone are the days where the building codes dictated design. Today it is design that dictates the building codes and the need for regulators to think ''outside the square'' in the compliance assessment process.

As a result architects and builders are encouraged to continue to push and expand the boundaries of design innovation, to explore options of cost-effective building systems and construction techniques.

At the same time, the building code compliance & certification sectors need to be sure to maintain the appropriate and critical balance between accommodating and promoting innovative design concepts and also maintaining accountability to community expectation in terms of building safety, amenity and accessibility.

David Blackett
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