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NEWSLETTER

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This Edition

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IS MY LAND CONTAMINATED?

The unexpected discovery of contaminated material beneath the surface of your site can have a catastrophic effect on your building project. Unearthing a surprise during excavation can instantly add significant time and cost to the project. This is a scary concept, however by asking a few simple questions you can dramatically reduce your chances of getting stuck in the mud:

Is my land contaminated?

Unfortunately, nobody can be certain whether your site is contaminated until the land is excavated. Whilst there is no way to change what lays beneath the surface, there are a number of steps that can be taken in order to provide you with the best information upfront to determine the risk of in-ground contamination and potential mitigation strategies. As with all elements of a construction project, the earlier you start the better.

So where do I start?

The shrewd developer will consider contamination as part of the due diligence process when purchasing land. Any significant and known contamination issues should be listed on a section 149 certificate as part of the sale contract for the land. However it goes without saying that the certificate will not include any contamination issues that are yet to be discovered, so the due diligence should not stop here.

Prior to purchasing land you may also choose to have a contaminated land consultant undertake a preliminary investigation of potential contamination. This investigation is known as a 'Stage 1 Investigation' under the SEPP 55 policy and includes a desktop investigation of the history and contamination potential for the site via review of certificates, aerial photographs, local geology maps and the like. A site walk is also recommended, though not compulsory.

What next?

It is highly likely that your stage 1 assessment will indicate that there is potential for contamination on your site. Should this be the case (or even if not) the contaminated land consultant may recommend further detailed investigations, known as a 'Stage 2 Investigation' under the SEPP 55 policy. This is an intrusive and costly test, so consideration should be given to when, and to what extent, the testing should be completed.

For brownfield developments, it may be tempting to wait until the site is no longer in use and existing buildings are demolished to undertake the testing, as this will provide the most accurate soil profile. However it is worth considering the consequences of waiting until this late stage to receive the (potentially) bad news. Early identification of contamination issues may impact your design and budget decisions, or even alter the feasibility of the project, so this is generally money well spent. The costs of the Stage 2 investigation can be reduced by combining it with the geotechnical investigation.

My land is contaminated. What now?

There are two options for dealing with contamination on site: tip it or bury it.

Burying contaminated material is only permitted under circumstances where it will not have a detrimental impact to human or environmental health. This will depend on the type of contamination, however, is typically only permitted for 'low-level' contamination such as non-putrescible GSW. It will also depend on the intended use of the land, as burying contaminated material is not permitted on sites with sensitive uses, such as schools. Other considerations in determining the method of remediation include whether future developments will be impacted by the decision and if the contamination is required to be listed on title.

The simpler way to deal with contaminated material is to remove it from the site. You may wish to negotiate the removal of the spoil as a lump sum under your head contract. The advantage of this is that it quantifies the problem early, however the disadvantage is that the excavation contractor will account for this risk in their price.

Alternatively, you may choose to have the excavation contractor remove the contaminated material on a cost-plus basis. This can be the most cost-effective method, however is difficult to control. Under this arrangement, the contractor should be required to

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IS MY LAND CONTAMINATED?
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maintain truck-run sheets, photographs, weighbridge dockets and tipping invoices in order to provide a fully transparent and traceable process.

What are the tricks of the trade?

- *Know the contamination types.* Refer to the EPA "Waste Classification Guidelines" for the different types of contaminated spoil under NSW legislation. Be aware of the sub-classifications – e.g. non-putrescible GSW (Recyclable) that are made by tips, but do not form part of the EPA guidelines.
- *Consider the time.* Removal of contaminated material can take extra time, so make sure that your contract is clear on whether the removal of contaminated material entitles the contractor to extra time or money, or both.
- *Make sure you're in the clear.* Older buildings that are demolished as part of development may often contain hazardous building materials such as asbestos. Always ensure that the contractor obtains a clearance certificate following the demolition of existing buildings in order to confirm that contaminated materials have not been spread into the soil.
- *Beware of cross-contamination.* Cross-contamination can change the classification of the spoil on your site, and increase your cost. For example, if you are aware of asbestos hotspots on your site, you may wish to pay to have a hygienist present during excavation in order to reduce the chances of all of your spoil being re-classified as asbestos contaminated material.
- *Ask about different testing methods.* Your contaminated land consultant should be able to inform you of different testing methods that may allow for a reduced classification of your contamination. For example, leachate testing is an effective way of reducing the classification of material classed as 'hazardous' due to high metal content by proving that the metals are unlikely to leach into surrounding soils.
- *Understand the bulk of it.* The simplest way to avoid confusion around volumes and weights is to list all rates in weight rather than volume. Should volumetric figures be required, be clear on whether you are talking about in situ material, or material post excavation. Soil 'bulks out' during excavation and increases in volume.

Ryan Mooney
Senior Project Manager
EPM Projects

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HOW MANY DAYS IS 10 DAYS?

The construction industry, perhaps more so than any other industry, relies heavily on the use of contracts. These contracts exist between suppliers and sub-contractors, sub-contractors and head contractors, head contractors and clients and also between clients and their consultant team, often with sub-consultants engaged by primary consultants. A contract can consist of a tender, quotation, fee proposal or supply agreement, offered verbally and/or in writing, and subsequently accepted.

From this point on, works commence and payment claims are made. In the construction industry, all of these payment claims are deemed to be made under the Building Construction Industry Security of Payment Act 1999 (NSW) whether it is stated on the claim or not.

✓More than once, I have heard it said that the Act is designed to work strongly in favour of contractors. This is incorrect. The Act simply attempts to ensure that any person who undertakes to carry out construction work or supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work or supplying those related goods and services.

As professional Quantity Surveyors, we are best placed to assess the value of progress payments under the Act i.e. to produce a "Payment Schedule". A Payment Schedule is a notice, which must be served on a claimant within 10 business days of receiving the payment claim, if you do not intend to pay the full amount of a payment claim.

In preparing the payment schedule under the Act there are numerous provisions we need to work to. The most important, yet frequently misunderstood of these provisions is the counting of days. Under the Act, a payment schedule must be posted, delivered or faxed to the claimant within 10 business days of receiving the payment claim (Note: the contract may provide for a shorter period than 10 business days, however a contract seeking to extend the period for the provision of a payment schedule beyond 10 business days is void.)

Business days are any days excluding weekends and public holidays in your given state. Importantly, Day 1 is not the day you issue the payment claim. Day 1 is the next business day. For example, if a payment claim were issued on a Monday, Day 1 would be Tuesday, Day 2 would be Wednesday and so on, with Day 10 falling on the Monday exactly one fortnight after the payment claim was issued (assuming no public holidays fall within this time).

Monday	Payment Claim issued
Tuesday	Day 1
Wednesday	Day 2
Thursday	Day 3
Friday	Day 4
Saturday	Weekend
Sunday	Weekend
Monday	Day 5
Tuesday	Day 6
Wednesday	Day 7
Thursday	Day 8
Friday	Day 9
Saturday	Weekend
Sunday	Weekend
Monday	Day 10

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HOW MANY DAYS IS 10 DAYS?
(CONTINUED)

If, for example a payment claim were issued in late December, the counting of days would not be so simple. Given recent amendments to the Act, the days between 25 December and 1 January are also excluded. This has a significant impact on the counting of days, as shown in the example below, for the 2016 December period.

✗ Failure to submit a payment schedule within the allocated time means the respondent is liable for the full amount claimed. Furthermore, if the claimant sues for recovery of that amount, the respondent cannot raise any defence based on the construction contract or raise any cross-claim.

This emphasises the importance of using an experienced, professional Quantity Surveyor to ensure payment schedules are prepared in a concise and timely manner in order to ensure clients are not forced into paying erroneous claims and exposing themselves to considerable financial risk.

Luke Foster
Associate Director, MBM

Monday, 19 December 2016	Payment Claim issued
Tuesday, 20 December 2016	Day 1
Wednesday, 21 December 2016	Day 2
Thursday, 22 December 2016	Day 3
Friday, 23 December 2016	Day 4
Saturday, 24 December 2016	Weekend
Sunday, 25 December 2016	Public Holiday
Monday, 26 December 2016	Public Holiday
Tuesday, 27 December 2016	Public Holiday
Wednesday, 28 December 2016	N/A
Thursday, 29 December 2016	N/A
Friday, 30 December 2016	N/A
Saturday, 31 December 2016	Weekend
Sunday, 1 January 2017	Public Holiday
Monday, 2 January 2017	Public Holiday
Tuesday, 3 January 2017	Day 5
Wednesday, 4 January 2017	Day 6
Thursday, 5 January 2017	Day 7
Friday, 6 January 2017	Day 8
Saturday, 7 January 2017	Weekend
Sunday, 8 January 2017	Weekend
Monday, 9 January 2017	Day 9
Tuesday, 10 January 2017	Day 10

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RAISING THE BAR WITH RESPECT TO PLANNING REFORM

Urban and regional town planning consistently needs to produce increasingly better outcomes over time, but beyond the prominent trend of addressing the control and regulation of development, the appointment of a Chief Planner to the NSW Department of Planning and Environment may place an emphasis on strategic planning as the best way in which to engage in planning reform.

Planning reform is both a necessary and inevitable process that is improved by the informed participation of all stakeholders and interest groups and is highly regarded as being in the public interest. Revolutionary (as opposed to evolutionary) planning reform may potentially represent a form of planning utopia, but nevertheless, it is achievable if coordinated with the appropriate education of all participants and a focus on the satisfaction of an outcomes-based approach, rather than a process-based (or regulatory/bureaucratic) approach.

Balancing the flexibility associated with more effective strategic planning and the certainty that is required in the development industry remains a key challenge. In 1998, the accredited certification scheme was successfully privatised (in-part) and resulted in a transformation of the building industry. Is it now time to provide the necessary environmental planning instruments and accompanying legal framework to investigate adopting a similar system in order to do the same for planning in NSW?

For example, with appropriate strategic planning and a more streamlined planning system where environmental assessment and community consultation/participation occur from the outset at the strategic/zoning stage, rather than at the statutory/development application (**DA**) stage, the planning system in NSW has the potential to accommodate all development below a capital investment value (**CIV**) threshold of $50 million as part of a complying development certificate (**CDC**). In the case of a DA, there is also the potential for 40-day deemed approvals (instead of 40-day deemed refusals) for development in excess of $50 million CIV.

The above examples may be hypothetical and neither right, nor wrong, but without open discussion of these types of matters, progress that is necessary for the planning system in NSW to advance with the times will stall. Input from all industry stakeholders and community representatives is required if government is to be able to effectively facilitate raising the bar in terms of planning reform. After all, how else can community values and objectives make their way into environmental planning instruments such as local environmental plans and state environmental planning policies?

Whilst a new Act is unlikely to emerge in the near future to support this, greater refinement of the existing Environmental Planning and Assessment Act 1979 and associated environmental planning instruments is expected in late 2016. Therefore, it will be important to monitor these changes and how they will affect your next project.

John McFadden
Managing Director
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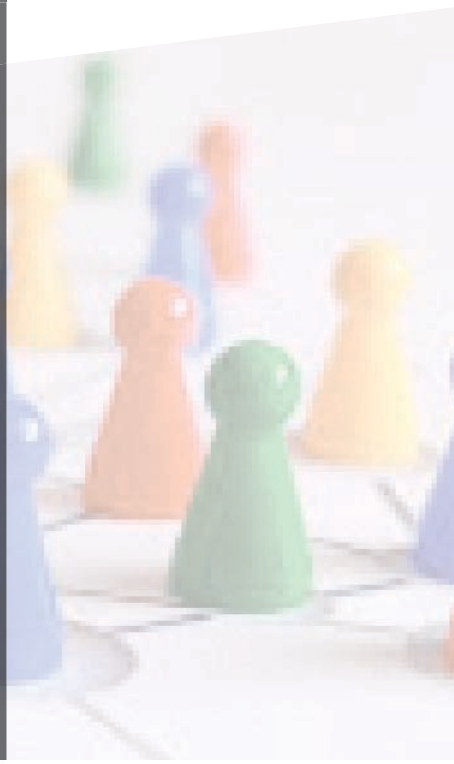

STATE PLANNING SERVICES

REMOVAL OF TREES THAT POSE A RISK TO SCHOOL CHILDREN

If a tree that is located on an 'existing educational establishment' poses a risk to human health or safety it may, in certain circumstances, be removed as 'exempt development' under State Environmental Planning Policy *(Infrastructure) 2007* (**ISEPP**).

If a school has a concern that a tree poses a risk to human health or safety, a report should be obtained from an appropriate qualified expert that confirms that the removal of the tree is necessary because of the risk posed by the tree, usually from falling branches.

If the tree removal is likely to affect a State or local heritage item or heritage conservation area, it may not be removed as exempt development under the ISEPP, if it will have more than a minimal impact on the heritage significance of the item or area.

Even if the removal of a tree is exempt development under the ISEPP, in the event the tree is listed as a threatened species or endangered, critically endangered or vulnerable ecological community under the Threatened Species Conservation Act 1995 (for example, the subject tree is a Sydney Blue Gum), a licence under section 91 of that Act should be obtained from the Office of Environment and Heritage to remove the tree.

If a tree can be removed as exempt development under the ISEPP, then it may be done so notwithstanding that a relevant Local Environmental Plan provides that the subject tree is not permitted to be removed without development consent or a permit from Council. The ISEPP specifically states that it will prevail to the extent of any inconsistency between it and any other environmental planning instrument.

To ensure that the relevant local Council does not take issue with the removal of a tree pursuant to the ISEPP, it is recommended that specific advice is obtained in circumstances where a school proposes to rely on the ISEPP to remove a tree without development consent.

Samantha Daly
Partner
McCullough Robertson Lawyers

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"YOU'LL BE LOOKED AFTER"

A REMINDER ABOUT THE POTENTIAL FOR STATEMENTS AND REPRESENTATIONS TO BECOME BINDING ON PARTIES IN COMMERCIAL TRANSACTIONS

The recent High Court case of *Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd 2016 HCA 26,* has revisited the legal concepts of collateral contracts and estoppel.

The tenants (Cosmopolitan) held two 5 year leases with the landlord (Crown) in the Crown Casino Complex in Melbourne under which they operated two restaurants. In early 2005 negotiations started between Crown and Cosmopolitan for new leases.

A condition of the lease was for Cosmopolitan to carry out major refurbishments. Concerned about the costs, Cosmopolitan had sought from Crown an option in the new lease for renewal, however Crown only offered leases for a 5 year term with no option for renewal. Under the new leases Crown was required to give notice to Cosmopolitan 6 months before the end of the lease as to whether the lease would be renewed, continued, or Cosmopolitan required to vacate.

Towards the end of the lease, Crown sought tenders for new leases of the premises and 6 months before the expiration of the lease gave notice to Cosmopolitan to vacate.

Cosmopolitan brought proceedings in the Victorian Civil and Administrative Tribunal (VCAT) and alleged that Crown had made statements to the effect that Cosmopolitan would be given a further 5-year lease after the 2005 leases ended.

Cosmopolitan's director gave evidence about this having occurred on a number of occasions. Despite finding that the director was 'prone to embellishment and exaggeration about Crown's statements', VCAT did accept the handwritten notes of the Director's bank manager from a meeting that confirmed that a Crown representative had said that Cosmopolitan:

Would be 'looked after at renewal time', and that the leases had been limited to a five year term only [to] be aligned with other tenants' leases.

The basis of Cosmopolitan's argument was that the statement was a promise and that it either:

1. Resulted in a collateral contract being formed; or
2. Created an estoppel preventing Crown from acting contrary to the promise.

The VCAT agreed and found that the statement both resulted in a collateral contract and created an estoppel. As such Crown was obliged to have offered further leases on the same terms as the 2005 leases.

This was reversed on appeal to the Supreme Court of Victoria, and on a further appeal the Court of Appeal held that although there was no collateral contract there was a binding estoppel on Crown. Crown appealed the matter further to the High Court

The High Court held (by a 5:2 majority):

1. There was no collateral contract because the statement made by Crown could not have been understood to bind Crown to offer a further lease as it did not have the quality of a contractual promise. A 'reasonable person' in Cosmopolitan's shoes would not have understood the statement as a binding contractual promise; and
2. There was no estoppel preventing Crown from going against what it had said about the lease because the representation was unclear and ambiguous and not able to be understood in the particular sense to provide a basis for the assumption or expectation upon which Cosmopolitan apparently acted.

Although ultimately Crown was not bound to its statement, the case highlights the importance of wariness in contractual negotiations and being alive to the unintended consequences that statements or assurances may have.

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