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NEWSLETTER

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MANDATORY IHAPS FOR SYDNEY COUNCILS

Elected councillors have been stripped of their consent authority functions and Independent Hearing and Assessment Panels **(IHAPs)** will now be mandatory for all councils in the Greater Sydney Region* and the City of Wollongong.

Local planning panels must be constituted in the relevant local government areas by 1 March 2018 and once in place, consent authority functions are taken away from elected councillors.

Local Planning Panels

The amendments to the Environmental Planning and Assessment Act 1979 (NSW) **(EPA Act)** require councils within the Greater Sydney Region and the City of Wollongong to constitute a local planning panel for their area. Councils outside this area, may choose to constitute a panel but they are not required to do so. Councils may also elect to share a local planning panel with another council.

If a council already has an existing IHAP, the members of that IHAP are taken to constitute a local planning panel for the purposes of the EPA Act as at 1 September 2017 and are to continue until 1 March 2018.

Where a council does not currently have an IHAP, they are not required to constitute a local planning panel until 1 March 2018.

Each local planning panel is to comprise four members including:

(a) an approved independent person as chair of the panel with relevant expertise in law or government and public administration;

(b) two other approved independent persons with relevant expertise; and

(c) a representative of the local community who is not a councillor or mayor.

Relevant expertise for the purposes of appointment as one of the three independent members is expertise in at least one area of planning, architecture, heritage, the environment, urban design, economics, traffic and transport, law, engineering, tourism or government and public administration. The panel chair is required to have experience in law, or government and public administration.

The Minister will approve a pool of independent, qualified persons from which the chair and two other expert members must be drawn by councils. The Department of Planning and Environment is already calling for suitably qualified candidates to submit applications to be expert members of local planning panels. The closing date for applications is Sunday 17 September 2017.

It will be left to Councils to appoint a community member to their local planning panel.

Councillors, property developers and real estate agents will be ineligible to sit on planning panels.

Removal of Powers from Councillors

The EPA Act has also been amended to remove various powers in the EPA Act from councillors where a local planning panel is in place.

The EPA Act now provides that where a local planning panel is in place, the functions of council as a consent authority under Part 4 in respect of any such areas are no longer exercisable by elected councillors. The powers are now only exercisable on behalf of the council by:

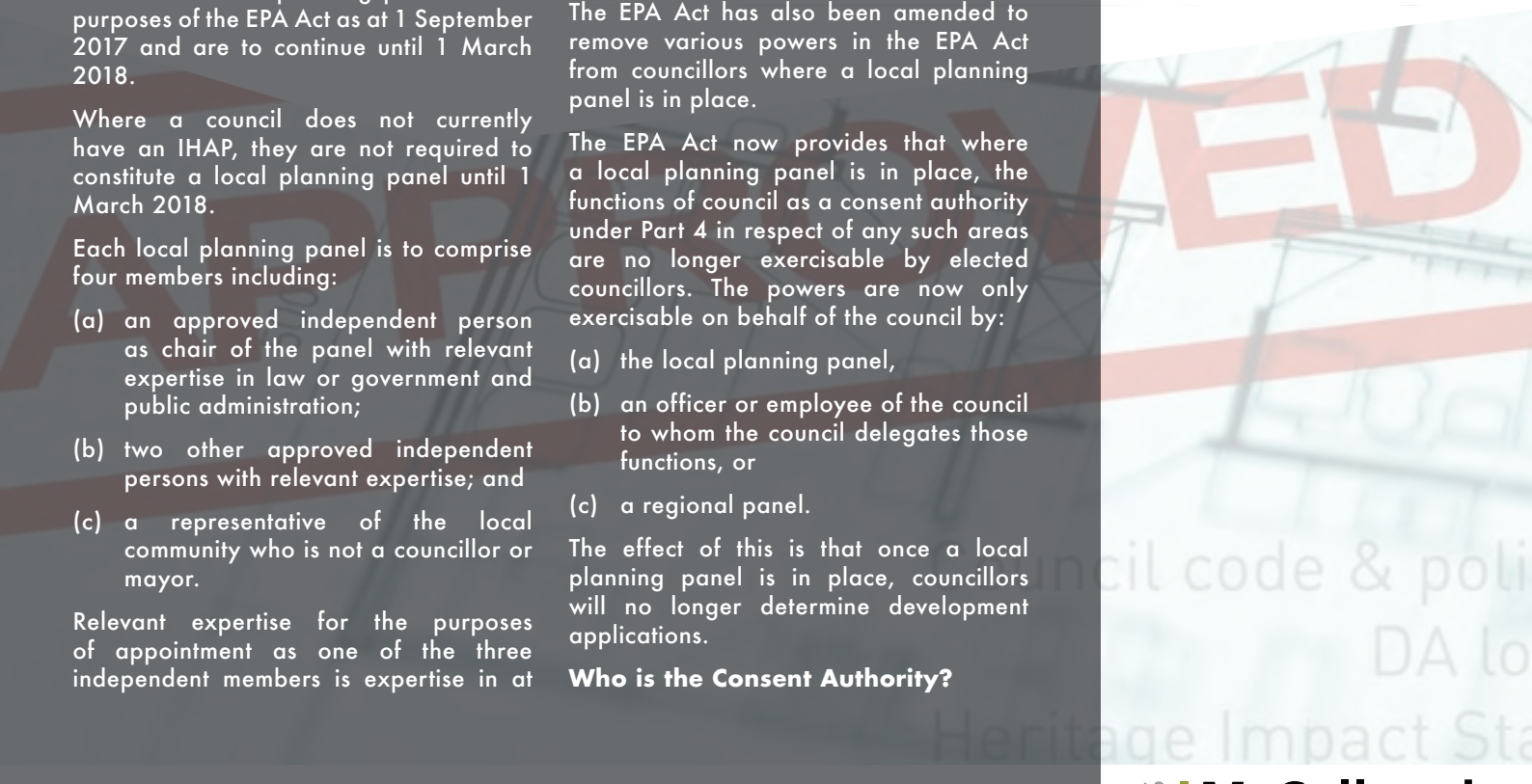
(a) the local planning panel,

(b) an officer or employee of the council to whom the council delegates those functions, or

(c) a regional panel.

The effect of this is that once a local planning panel is in place, councillors will no longer determine development applications.

Who is the Consent Authority?



Lawyers | McCullough Robertson

MANDATORY IHAPS FOR SYDNEY COUNCILS
(CONTINUED)

The Minister for Planning has stated that the introduction of local planning panels and removal of powers from councillors is designed to prevent corruption and provide strategic, streamlined and balanced decision making.

It is intended that the Minister will issue a direction which will require the following types of development applications to be determined by local planning panels:

(a) development applications with a capital investment value of more than $5 million;

(b) development applications for which the applicant or owner is the council, a councillor, a member of a councillor's family, a member of council staff or a state or federal member of parliament;

(c) development applications that receive more than 10 objections from different households;

(d) development applications accompanied with a voluntary planning agreement;

(e) development applications seeking to depart by more than 10% from a development standard;

(f) development applications associated with a higher risk of corruption, being:

  (i) residential flat buildings assessed under SEPP 65;

  (ii) demolition of heritage items;

  (iii) licensed places of public entertainment and sex industry premises;

  (iv) designated development;

(g) modification applications that meet any of the above criteria.

In other amendments which are yet to commence, the threshold capital investment value amount for referral of a development application to the regional planning panel will be increased from $20 million to $30 million.

Where a local planning panel is in place and a development application does not meet the criteria for determination by the local or regional planning panel, it must now be determined by council staff under delegated authority.

*The Greater Sydney Region includes the Sydney metropolitan area as well as the Blue Mountains to the west, Hawkesbury and Hornsby to the north and Wollondilly, Campbelltown and Sutherland to the south.

Samantha Daly

Partner
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THE DANGER OF PROVISIONAL SUMS

Why not just allow a provisional sum? This is often the question asked by a principal or the consultant team to address work that is not known or is yet to be quantified. In some circumstances, this may be a viable option however, provisional sums are fraught with issues associated with scope ambiguity, pricing and programme impact.

A provisional sum can be defined as an amount of money included in the contract sum to cover work and/or materials not known or detailed at the time of contract execution. An example could be signage on a project, as this may not be fully known or documented prior to construction commencement.

Some of the reasons the principal or consultant team may want to include provisional sums in a contract may include:

- The work associated cannot be defined by the client at contract execution e.g. as it is awaiting internal stakeholder review and input.
- The work cannot be quantified or costed, as site conditions prohibit the resolution, and/or there may be difficulty in obtaining lump sum pricing from specialised trades.
- The work is not identified until just before contract execution, and therefore provisional sums are added to avoid delaying execution.
- Consultants may feel the task of defining the work is too difficult.

The last point is often not disclosed by the consultant team as a reason for introducing provisional sums. Every provisional sum proposed should therefore be critically reviewed to confirm its necessity. If the work can be defined or quantified it should be captured in the documentation, so the provisional sum can be removed.

The danger of provisional sums relates to the ambiguity around scope, cost and time. If the provisional sums are not clearly defined in a contract, it leaves them open to interpretation. A recent example observed by EPM involved the use of a provisional sum to cover construction of a few isolated pad footings, due to the area being inaccessible at the time of tender. A provisional sum of $10,000 was included for work defined as "excavation and foundation construction". During the course of the works, the contractor claimed for all excavation and foundation construction under this provisional sum, rather than for the pad footings in question. This resulted in significant costs of over $100,000. The contract drafting and sum description allowed the contractor to broaden the scope of the sum, effectively shifting work from under the contract sum, to outside of it.

Another concern with provisional sums is how they are treated in the contract Construction Programmes. Typically, clients may expected that the time involved in undertaking provisional sum work is captured in such programmes. However, the contract in the above example did not contemplate extensions of time in relation to provisional sum work (only for variations), and the contractor was not entitled to an extension of time. If the treatment of provisional sums under the contract is not clear to both parties, disputes may arise as well as further costs and project delays.

When provisional sums are proposed during preparation of design documentation, remember to ask why the sums are necessary. Questions you may consider to omit provisional sums from the contract include:

- Can further investigation works be undertaken on site to confirm the extent of the work?
- Should the contract execution be delayed to allow the team to capture the scope?
- Is the project team doing enough to capture the scope?
- Can the work be treated as a variation under the contract post execution?

As illustrated in the example above, provisional sums should be avoided wherever possible. If provisional sums are necessary, ensure the sum is clearly described in the contract and have both parties agree on the interpretation prior to execution

Todd Ewart
Associate
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DANGEROUS CONSTRUCTION MATERIALS – WHAT ARE YOUR OBLIGATIONS?

As reported earlier this month, there is a flurry of activity from the NSW government as they look to manage the thorny issue of non-conforming building products. Audits in both Victoria and NSW have determined that a very large percentage of buildings may currently contain non-conforming aluminium composite panels, the product that was involved in the fires in the Lacrosse building in Melbourne in 2014 and the recent Grenfell Tower disaster, with an estimated 1,000 buildings in NSW containing the material.

The question on the minds of many building owners, managers and builders (and those who later occupy those buildings) is what should be done about it? And if you are an importer or supplier of building products, what are your obligations? Designers of structures that contain potential non-conforming building products are also nervous as to whether there may be liability issues involved in their design.

The scenario can be something like this:

The market is tight and in looking to secure cost savings, your building business has sourced some material for the construction of a job but the designers of the job have alerted you to the fact that they are not comfortable with the lack of traceability on the product. It comes through an importer in Australia but from a supplier overseas.

In addition to possible civil liability of the builder for breach of contract, there are also obligations based on the requirements of WHS legislation as follows:

- The duty on both the importer and the supplier of materials is to ensure, so far as reasonably practicable, that the materials are without risks to the health and safety of persons who, at a workplace, use the structure for a purpose for which it was designed or manufactured.
- Importantly, both the importer and supplier have duties in relation to carrying out any analysis, testing or examination of the building product (or ensuring they are carried out) which may be necessary to ensure the building product is without risks to the health and safety of persons. Not only that, but they have to give adequate information to any end users of the product about necessary conditions to ensure its safety.
- And for the designer, the question is more complex because it will depend on the level of their involvement in actually specifying the type of building product to be used.
    - In some cases, designers will not specify a particular product for their design. In that case, there will a question as to whether they need to warn the end users of their design about the dangers of sourcing certain products such as ACP, or whether there is an obligation to 'check on' the implementation of their design. A lot will depend on the level of control or influence the designer has on the particular project in question.
    - If designers specify the product, then they are obliged to make sure it is safe and so if they are getting in products which they are not certain of its origin or compliance with Australian standards, they will be exposed to liability. That is, unless they can demonstrate that they took steps to obtain information about the analysis, testing or examination of the building product which demonstrates that the building product is safe.
- The builder also must be able to demonstrate that they took steps to obtain information about the analysis, testing or examination of the building product which demonstrates that the building product is safe. This could come from information supplied by the importer or designer.
- And finally, the owner of the structure. What do they do now if, after many years of construction, there is little contact available from the builder about the building products used in the construction? Well, the first step would be to take all steps possible to get the information from the builder and, if that fails, look at undergoing testing for potential non-conforming building products. The obvious one being ACP. It may then require remediation work or other modifications to eliminate or reduce the risk of injury.

This is a challenging area and, because of the potential widespread use of non-conforming building products, it is a matter that impacts on a large number of organisations and individuals throughout the entire procurement and construction chain. Please contact us should you require assistance.

Garth Campbell and Helena Golovanoff
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SIMPLIFICATION OF BIODIVERSITY CONSERVATION LEGISLATION

Commencement of new legislation

On 25 August 2017, the Biodiversity Conservation Act 2016 (BC Act) commenced. The BC Act follows an extensive consultation process undertaken by the NSW Government in conjunction with a wide range of stakeholders. The BC Act aims to simplify the legislative framework through repeal of existing biodiversity conservation laws.

The legislation which was repealed following the commencement of BC Act is:

- *Threatened Species Conservation Act 1995* (TSC Act)
- *Nature Conservation Trust Act 2001*
- Parts of *National Parks and Wildlife Act 1974*

Biodiversity Offsets Scheme

The BC Act introduces a biodiversity offsets scheme (BOS). Under the BOS, the potential biodiversity impact or benefit of a development site or stewardship site is determined in accordance with a consistent biodiversity assessment method (BAM). When the biodiversity impact has been assessed by a consent authority, the conditions of consent will require that the proponent offset any negative impact.

Proponents will be able to offset impacts by either purchasing credits or making payments into a Biodiversity Conservation Fund. These credits will be generated by landowners entering an agreement to protect and manage their land in exchange for credits. The holder of biodiversity credits will be able to trade them on a credit market.

Serious and Irreversible Impacts on Biodiversity

Development consent cannot be granted for non-State significant development if the proposal is determined by the consent authority to have serious and irreversible impacts on biodiversity values. Serious and irreversible impacts include developments which increase the risk of species extinction or are considered particularly severe.

Biodiversity Conservation Licence

The BC Act creates offences for 'harming animals' and 'picking plants', as well as damaging areas declared to be of outstanding biodiversity value and damaging habitat. Defences are available, including authorisation under a biodiversity conservation licence.

A new system for listing and protection of threatened species and threatened ecological communities is created under the BC Act. Low risk activities are exempt and certain activities being able to be carried out in compliance with a code, without the need for a licence.

Native Vegetation Clearance

Amendments to the Local Land Services Amendment Act 2016 (LLS Act) have resulted in the repeal of the Native Vegetation Act 2003. Land clearing on urban land will require development consent under the Environment Planning and Assessment Act 1979.

Mark Bolduan
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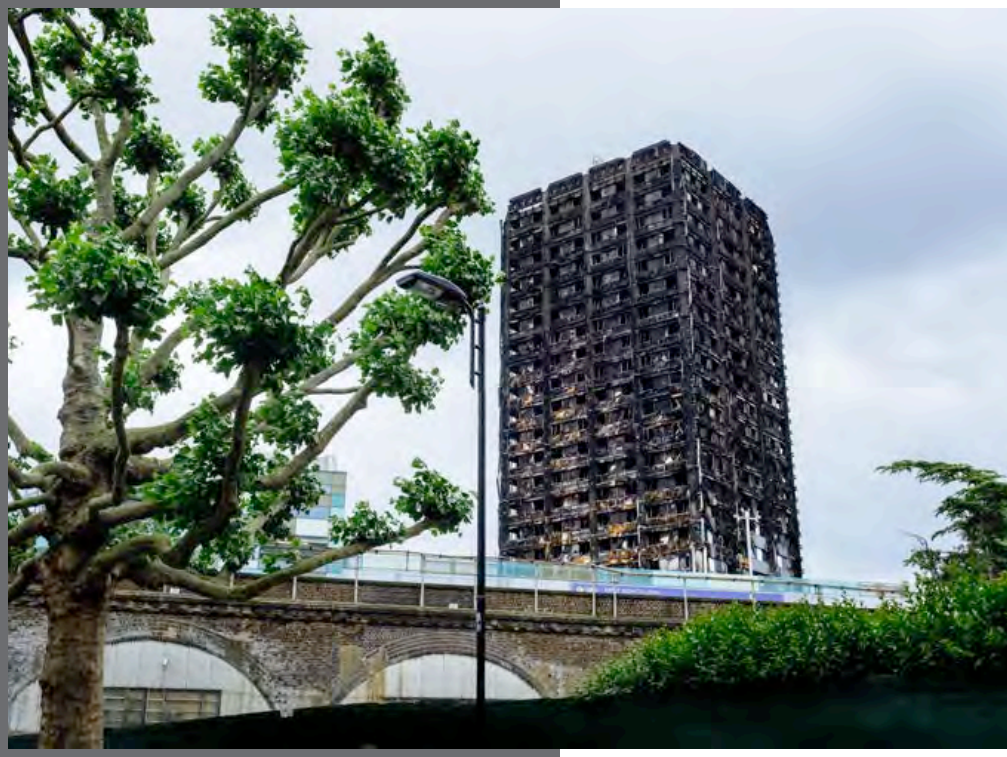
GRENFELL – A PHOTO ESSAY

The Grenfell fire disaster which happened in London earlier this year brought a number of fire safety issues to international attention. A lot has been written on this topic in the media and on social media sources, such as LinkedIn. The intent of this article is not, however, to present a technical evaluation. Whilst not everything written in the media is factually accurate, critical shortfalls in fire safety such as the flammability of the façade, the lack of smoke detection, alarm facilities, sprinklers and fire compartmentation are generally well understood. This article instead shares personal observations and accompanying photographic images taken during an impromptu visit to the Grenfell site in the aftermath of the disaster, focusing more on human than technical aspects.



My first sighting of the tower was from Portobello Markets in West London, 1 km away. The burnt wreckage of the Grenfell social housing scheme looms large across the Borough of Chelsea and Kensington, which is the wealthiest district in London. The wealth gap has been a cause of social unrest in the aftermath.

Moving closer to the site, missing persons posters filled the streets, asking for information on lost loved ones, on men, women and children of all ages and backgrounds. The saddest part was seeing families and friends writing 'RIP' on posters, or removing them in tears.

There were also many angry and upset residents berating authorities for doing little to help them in their hour of need. They were seeking answers on how this was able to happen in the first place, and why they have to live in unsafe buildings just because they are not from privileged backgrounds.

The most positive sight was the strength of support from the community. Vans were delivering donated food and clothing. Community stations were set up for victims who needed counselling or advice. Much of the anger observed in the UK for the following weeks has moved away from the fire safety shortfalls towards the poor response of authorities, who had no plan for providing displaced residents with shelter, food or any support.

For me personally, seeing the aftermath of this tragic disaster was a poignant reminder – that we are designing and constructing buildings for human beings. In our daily job, our role often focuses us more on the technical, regulatory, financial and practical aspects of construction than on the human element.

At the same time, whilst this is a very emotive topic, it is also important that the response by the industry and regulators is rational and holistic.

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