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NEWSLETTER

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Cover image: Knox Grammar School KSSA – Civil Early Works

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WORK HEALTH & SAFETY - SAFETY IN DESIGN

Last issue we commented on some emerging trends following the changes to WHS Legislation in most Australian jurisdictions. In this issue we will look at the specific requirement for what has become known as the "Safe Design Report".

Kennedys

Legal advice in black and white

The concept of safety in design is not new. The process of reviewing a building design for its safety implications from as early as concept design, was a practice actively encouraged by WorkCover and equivalent organisations. It was at that time promoted as a practical means by which all parties involved in a project could meet their obligations in relation to health and safety of those constructing the building and the occupants of and visitors to the final product.

The uniform(ish) WHS regime takes this further and expressly requires:

(1) the person conducting a business undertaking (PCBU – often a building owner or occupier, such as the principal in a building project) to manage the risks arising from hazardous manual tasks. In determining the appropriate control measures the PCBU must have regard to, amongst other things, the design of the work area;

(2) the designer of a structure (at which hazardous manual tasks might be undertaken) to design a structure so as to eliminate or minimise the need for the hazardous manual task and report on the design features implemented to do so;

(3) the party commissioning the building (the principal) to consult with the designer to eliminate, or where that is not possible minimise the risks during construction;

(4) the designer of a structure or any part of a structure (emphasis added) to prepare a written report specifying the hazards during construction that are unique to the structure; and

(5) the principal to provide the report to the Principal Contractor. Purchasing a project after the design is completed does not alleviate the principal's obligations to obtain and provide the report to the relevant parties. It must take all reasonable steps to obtain the report that ought to have been prepared for the previous project owner.

The effect these requirements has led to the concept of a Safe Design Report which addresses the following two broad matters:

(1) WHS risks arising during the construction work; and

(2) design features incorporated to eliminate or minimise the risks in hazardous manual tasks in connection with the ultimate use and maintenance of the building.

Our anecdotal observation is that the latter is well understood. However our experience is that the first requirement is not getting much attention. Unlike the requirement in connection with WHS risks to the occupants and visitors of the finished building, there is an express obligation on the designer to provide a written report on the risks during construction. Accordingly responsibility for any deficiencies in, or absence of, the report will likely rest with the designer.

However this should not provide any comfort to project principals or building owners, as ultimately the principal/building owner faces their own strict statutory liabilities under the WHS regime. Should the worst occur it is unlikely that it will be good enough for a principal or building owner to simply say to the WorkCover investigator either:

(A) "we got the report" if a cursory look at it shows it is deficient; or

(B) "it was the designer's job to give me a report" when there is an obligation on the principal to consult with the designer and have regard to the risks both during and after construction.

As mentioned above, to the extent the report deals with risks during construction, it and any other information about the hazards or risks at on in the vicinity of where the work will be performed, must be provided to the Principal Contractor. If practical, this ought to be done at tender stage as addressing risks during construction may introduce substantial additional cost to the project.

Finally the report is a "living" document and must be updated as new information comes to light. This becomes the Principal Contractor's job after its appointment, but up until then the designer and the principal should continue to work together on it.

Helena Golovanoff
Partner

RESIDENTIAL AGED CARE – COMMONWEALTH CERTIFICATION

Commonwealth Aged Care Certification was part of the Government's structural reforms to residential aged care in 1997. It was introduced as a 10-year forward plan to improve the physical quality & safety of Government funded residential aged care buildings.

BLACKETT MAGUIRE+ GOLDSMITH

Fourteen years on, and the 10-year forward plan is still being applied to new and contemporary aged care building stock.

The forward plan was implemented by way of the Commonwealth Aged Care Certification Instrument and focuses on matters ranging from fire safety, access, lighting and WH&S.

Under the Act, Certification is mandatory if Approved Providers are to ask residents to make accommodation payments (bonds or charges) and for Providers to be eligible to receive concessional resident supplements.

The majority of the Certification Instrument requires the assessor to have a sound understanding of the regulations in relation to the Building Code of Australia and relevant Australian Standards.

The other sections of the assessment document require discretion and judgment based upon knowledge of the aged care industry, good building practice and the quality of life that a facility is able to offer the resident taking into account the fabric of the building.

New and modified residential care facilities are today still being inspected and scored by the Dept's nominated consultant representative against the Commonwealth Assessment Instrument.

The current Certification Instrument, having been prepared and adopted in 1999, has various inconsistencies with current BCA and contemporary design facets, including incompatibility with current ESD initiatives and imposition of requirement for various fire safety systems that are superfluous in aged care facilities.

Whilst the Instrument is intended to offer Providers with subjective and interpretive options to achieve an acceptable certification assessment score, it generally comes down to the decision and opinion of the Dept's sole assessor.

In the absence of consistency in the way the Certification Instrument is commonly applied by the assessor, it is imperative that aged care Providers ensure the design and consultancy teams for aged care projects have appropriate and proven experience in the application of the Commonwealth Aged Care Certification Instrument.

David Blackett
Company Director

NEW PLANNING LAWS DELAYED

Lawyers | McCullough Robertson

On 22 October 2013, the long awaited and much commented-upon new planning laws were finally introduced into Parliament. *The Planning Bill 2013* and the *Planning Administration Bill 2013* are intended to, in the words of the Minister for Planning when introducing the bills, '*overhaul the State's planning laws and return local planning powers to local communities, restore powers to local councils and restore confidence and integrity to the planning system.*' The rhetorical emphasis on devolving and restoring powers to local communities and councils is significant, as it highlights not only the changes made to the bills since their exhibition in draft form, but also the approach the Opposition and cross-benchers are likely to take when debating the bills in Parliament.

Changes to the draft bills

The bills introduced into Parliament differ from the draft bills released in April 2013 with the '*White Paper – A New Planning System for NSW*' in a number of significant ways. These changes include:

(a) changing the objectives of the Planning Bill 2013 to include objectives such as: growing the State's economy and increased productivity; the promotion of transparent decision-making; the conservation of biodiversity; and the promotion of health and quality in the design and planning of the build environment;

(b) changing the mandatory community participation requirements to include the publication of reasons for decisions of planning authorities, including descriptions of how community views have been taken into account during the decision making process;

(c) not permitting the Minister to amend strategic plans without exhibition of the amendments, or without publishing reasons for the amendments; and

(d) code assessment of development has changed significantly from the April 2013 draft exposure bills, with: development standards in a code now applying strictly, requiring development to meet all of the standards in the code; and merit assessment with mandatory community consultation for the entirety of any development which exceeds any development standard in a code.

Current status of the bills

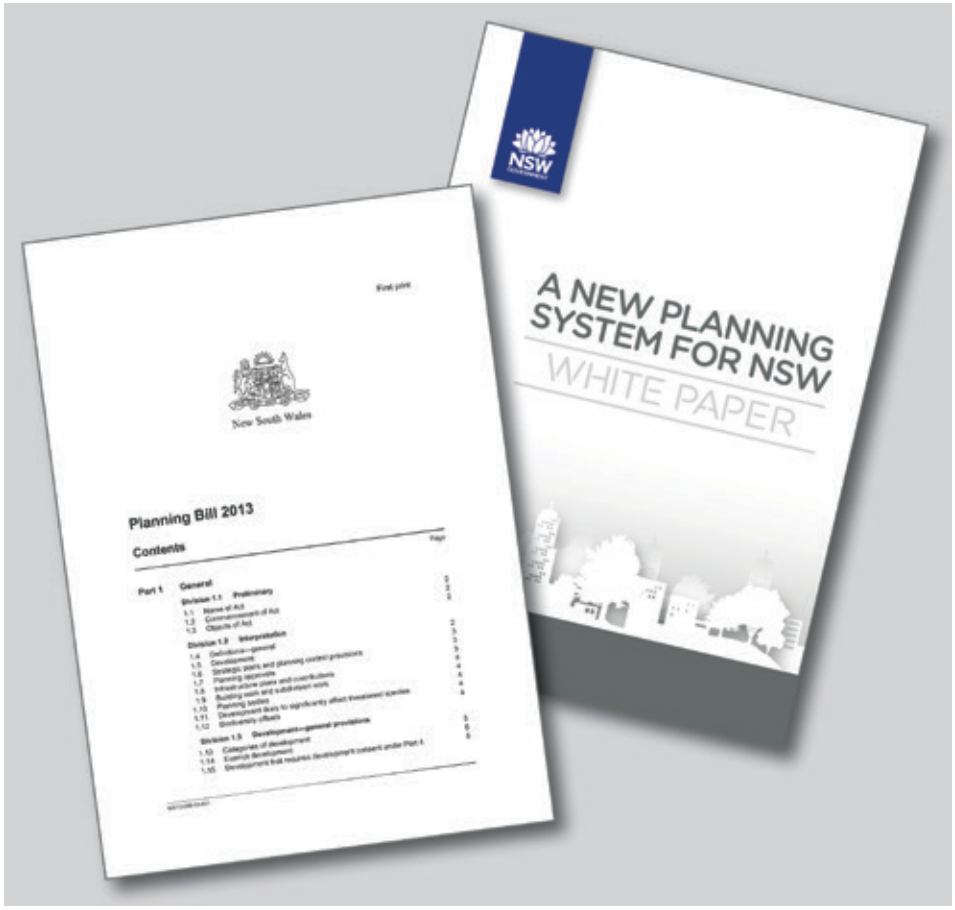
The two bills passed through the Legislative Assembly without amendment on 30 October 2013, and on the same day were sent to the Legislative Council for debate. Given that the Government does not have an outright majority in the Legislative Council the Bills met with significant opposition, and the Legislative Council proposed approximately 40 amendments, many of which were significant. These amendments include severely limiting the scope of Code Assessable development, overhauling the definition of Environmentally Sustainable Development to include concepts such as the precautionary principle and intergenerational equity, and removing the limit on third party objector appeals after a Planning Assessment Commission has conducted a public hearing.

The amendments were sent back to the Legislative Assembly for debate on 27 November 2013. The Planning Minister, Brad Hazzard then withdrew the Bills from consideration, characterizing the amendments as 'bastardis[ing]' the Government's proposed legislation. Minister Hazzard has said that the Government would reconsider its position before Parliament resumes in 2014. Whether this means the Government will accept the amendments, withdraw the Bills and go back to the drawing board, or negotiate some comprise remains to be seen.

Danielle Le Breton, Senior Associate and James Innes, Lawyer

WILL THE NEW PLANNING SYSTEM BE A CLASS ACT TO FOLLOW?

DFP examines if the NSW planning reforms will result in a new Act that actually meets the expectation of providing a better planning outcome whilst simplifying the system.



On 22 October 2013, the NSW Government introduced the Planning Bill 2013 (Planning Bill) and Planning Administration Bill 2013 into the NSW Parliament with a view to debate the matter before replacing the current planning legislation, the Environmental Planning and Assessment Act 1979 (EP&A Act 1979).

This action follows an Independent Review that was undertaken in July 2011 which led to the release of the Green Paper in July 2012 followed by the White Paper in April 2013 prior to the preparation of the current Planning Bill.

The planning reform process has evolved significantly from its inception, prompting some critics to question whether NSW is actually better off with the current system under the EP&A Act 1979 (albeit with a degree of refinement), rather than a whole new Act.

Initially, the planning reforms were proclaimed as being the once-in-a-generation opportunity to improve the current system by simplifying it in order to reduce unnecessary impediments to development whilst still ensuring appropriate protection and conservation of the environment.

However, following significant input from the community, industry stakeholders and political pressure, the current reforms could be interpreted as being a watered-down compromise that may end up being not unlike the current EP&A Act 1979, but under a different name. A similar transition was noted under the EP&A Act 1979 when Part 3A was repealed, only to be replaced by State Significant Development provisions. Arguably the same cat, just skinned a different way.

Whilst many (including those directly involved with the planning reform process) may be caught up in the momentum of change, even if now only for the sake of change, it would not necessarily be counterproductive for the NSW Government to revert back to the independent recommendations of the NSW planning system review before introducing any new Act.

This would allow an assessment of whether or not the outcome associated with any new Act that will follow the Planning Bill will in fact address the independent recommendations. This basic procedure (which is predicated on the assumption that common sense should prevail) could go a long way towards restoring public confidence in the underlying integrity of the system. After all, NSW does deserve to have a planning system that is a Class Act to follow, so questioning whether the new planning system would be better, or simpler is not at all unreasonable.

Please contact DFP if you wish to improve your understanding of how the new planning system is likely to affect your next project.

John McFadden
Partner

EARLY WORKS CONTRACTS

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Depending on the size of project, the time taken from its 1st inception through to final commissioning and handover can span several years. Typically, the construction phase duration of a project will be proportionately less than the duration of time taken to develop the design, gain statutory approvals and complete the documentation ready for construction.

The time taken in the stages leading up to construction invariably takes longer than anticipated for reasons most commonly connected with the gaining of statutory approvals or project funding. Protraction of these early phases ultimately places pressure on the allotted construction period as the date for completion of the project typically remains fixed.

With the aspect of time being the key factor influencing the overall project delivery, an option that may be available to expedite the construction phase of the project is to undertake an early works contract. An early works package of work will concentrate on activities of a civil and services nature that serve to enable a "running start" for the following Contractor responsible for delivery of the building project. The early works will rely on Development Consent and in most cases a Construction Certificate will be required. Fundamentally, the documentation for early works can be consolidated at an early stage of the documentation phase allowing for the package of works to be tendered and awarded during the local Authority approval phase. This means that upon receipt of a Development Consent, an Early Works Contractor can be ready and waiting for a start on site immediately following the issue of a Construction Certificate.

The primary advantage of an Early Works contract is the preservation of project time. It allows for an early start to the construction programme, thus reducing the construction period of the following major works contract. Gaining such benefit of time will introduce some additional considerations for the Client and these include:

- Cost of the project will be higher as there will be a component of "doubling up" on tasks such as site establishment and demobilisation of 2 separate contractors.
- Coordination of design between the early works and following major works will require particular diligence
- Liability for early works errors or omissions will require attention in the contract documentation
- The calibre of Contractor suitable for the smaller contract value of early works needs close scrutinising
- The completion of the early works package may finish well ahead of the start of the following major works contract (for various reasons) thus giving the perception of the site being idle or stopped

As always, the cost of these factors above must be weighed up against the benefit gained by preserving project time and completing the project as targeted.

Mark Blizard
Director

ARE YOU COVERED?

When it comes to the insurance of buildings, care must be taken to ensure all parties are covered.

In addition to Quantity Surveyors providing a Cost Management service to the construction industry for all types of building works they are also engaged to undertake valuations on buildings for insurance purposes. The valuation is based on the replacement of the building in the event of a total loss and takes into account costs such as demolition, professional fees, programming and escalation, however, it does not include the following:-

- Land costs
- Owners or tenants fit-outs, contents, furnishings or personal effects
- Loss of revenue from date of building loss to time of reinstatement
- Rates , taxes and similar outgoings
- Costs incurred for alternative or temporary accommodation
- Holding charges (loan repayments etc)
- BCA compliance upgrade costs

It is most important that building owners and tenants are aware of what is covered by the building insurance policy and what they are responsible for, and specifically, that they are covered for the excluded items noted above. This is also the case with buildings that have a strata title where the owner of a lot and the owners corporation must have a clear understanding / agreement as to who is responsible for what and that suitable insurance is taken out to cover each relevant party.

From our experience it is a concern that particularly in residential strata properties lot owners and the owner's corporation have not defined the boundaries of responsibility and either party could be either under- or over-insured that in some instances can lead to a dispute. The dispute may not only be in regards to insurance cover, but also as to who is responsible for maintenance and replacement of some items. Items such as tiled floors, membranes, taps, toilets, hot water units, internal doors, kitchen cupboards, built-in wardrobes etc are items that can be challenged when it is not clear who is responsible for insurance and maintenance.

The above mentioned instances sound relatively straight forward but must be studied carefully to ensure that adequate insurance coverage is in place and the maintenance and repair of items are managed accordingly.

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