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NEWSLETTER

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SAME, SAME OR DIFFERENT?

A REMINDER ABOUT THE LIMITATION ON AMENDMENTS TO PLANS IN THE LAND AND ENVIRONMENT COURT

In development appeal (Class 1) proceedings in the Land and Environment Court, the Court has the power to amend plans the subject of the proceedings. However such a power may only be exercised in circumstances where the amendments are not so significant that they result in a new application before the Court.

In the recent case of *Gregory v Central Coast Council* [2016] NSWLEC 1481, Registrar Gray dismissed an application by way of Notice of Motion (**NOM**) to amend a modification application.

The Applicant to the NOM had development consent for a three storey boarding house with 94 rooms. Under its original development application the Applicant sought consent for a four storey boarding house comprising 101 boarding rooms. The development application was referred to the JRPP and it recommended that the Applicants amend the development application to delete the fourth storey. The Applicant amended the development application to remove the fourth storey and replace it with a 'western wing' at ground level. The JRPP granted development consent with a deferred commencement condition which required the deletion of the 'western wing'.

Under the Applicant's modification application it sought to modify the development consent to delete the deferred commencement condition. The applicant subsequently decided that it no longer wanted to reinstate the 'western wing' and filed a NOM to amend its modification application to add a fourth storey.

Registrar Gray considered the usual question when determining a NOM to amendment a modification application being, whether the amendments to the modification application are so significant that they render the modification application a new modification application. Registrar Gray found that the proposed amendment rendered the application a new modification application and therefore the NOM should be refused.

This case is a useful reminder that once Class 1 proceedings are commenced in relation to a development application or modification application, it will be difficult to amend the application.

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INSOLVENCY RISKS – KEY POINTS FOR PARTIES TO REMEMBER

Insolvency has the potential to derail projects and cause significant losses for all project participants. This article will identify the signs that indicate when your project may be heading for trouble and provide some tips on how to handle the situation.

INSOLVENCY WARNING SIGNS

Large Claims under the Security of Payment Act

It is common for contractors and subcontractors facing solvency issues to commence adjudication process under the Building and Construction Industry Security of Payment Act 1999 (**SOPA**) for large claims that are otherwise unforeseen by the Project Manager or Principal. Given the short timeframe to respond, and the chance of a "lucky dip" adjudication determination, the opportunity for one last grab for cash can be all too tempting for a contractor or subcontractor facing insolvency. A common but not universal feature of such claims is large unarticulated "variations" that may involve significant delay and disruption elements.

Kennedys recently acted for the Principal in the case of Hakea Holdings Pty Limited v Denham constructions Pty Ltd [2016] NSWSC 1120 (**Hakea**), which confirmed that where a contractor is insolvent, the operation of s 553C of the Corporations Act will set off claims for damages by the Principal against any judgment obtained by the Contractor under SOPA legislation.

Contractor Statements

Downstream payment issues can be one of the first signs of solvency problems with the immediate contractor. The SOPA directly addresses this with the requirement for the provision by contractors of a '**Supporting Statement**' with any payment claim (SOPA s13(7)). The failure to include a supporting statement by a Contractor can 'invalidate or render ineffective service' of the payment claim (Kitchen Xchange v Formacon Building Services [2014] NSWSC 1602).

In addition to the SOPA Supporting Statement, contractors are required to submit '**Subcontractor's Statements**' in accordance the Industrial Relations Act 1996 (NSW) (confirming that remuneration to employees has been paid), the Workers Compensation Act 1987 (NSW) (confirming that all workers compensation insurance premiums have been paid) and the Payroll Tax Act 2007 (NSW) (confirming that all necessary payroll tax has been paid).

On-site slowdown and leapfrog claims by subcontractors

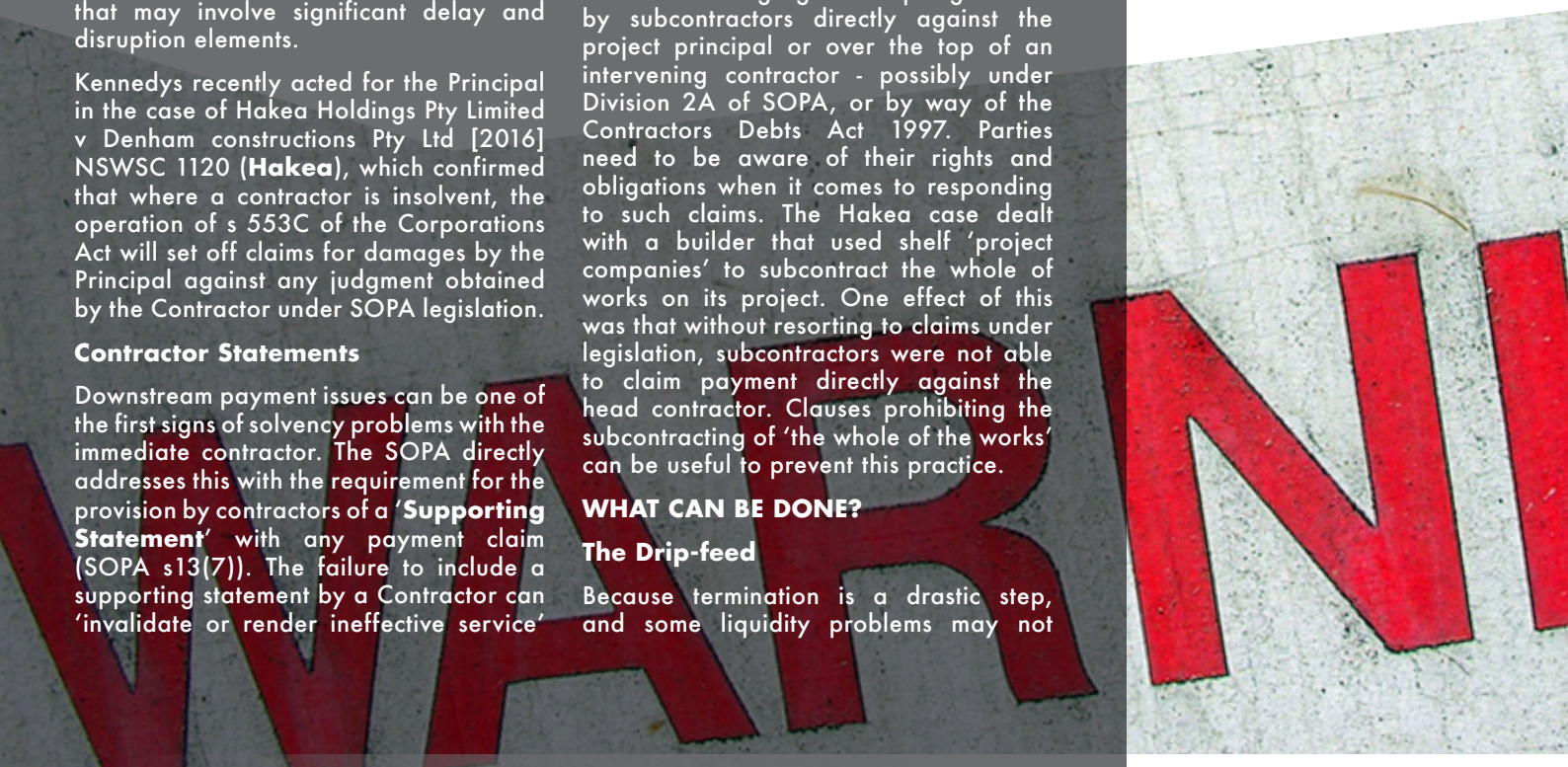
If you notice that activity on site has started to slow, one reason may be that subcontractors have not been paid. There may also be scuttlebutt around the industry or worksite that a certain company hasn't been paying their subcontractors. This can be the first sign of trouble.

Another warning sign is "leapfrog" claims by subcontractors directly against the project principal or over the top of an intervening contractor - possibly under Division 2A of SOPA, or by way of the Contractors Debts Act 1997. Parties need to be aware of their rights and obligations when it comes to responding to such claims. The Hakea case dealt with a builder that used shelf 'project companies' to subcontract the whole of works on its project. One effect of this was that without resorting to claims under legislation, subcontractors were not able to claim payment directly against the head contractor. Clauses prohibiting the subcontracting of 'the whole of the works' can be useful to prevent this practice.

WHAT CAN BE DONE?

The Drip-feed

Because termination is a drastic step, and some liquidity problems may not



Kennedys

Legal advice in black and white

INSOLVENCY RISKS – KEY POINTS FOR PARTIES TO REMEMBER (CONTINUED)

be permanent, if the early warnings are heeded, it is possible to work with a particular contractor or subcontractor to keep the project going, especially if PC is on the horizon. Direct payment of subcontractor claims, and vigilant project management can assist in walking this particular tightrope. It is important in this situation to keep payments going to subcontractors while the issues are being worked through, however, also not to let payments get too far ahead of actual construction progress, and it is also important to set up any such direct payments properly to limit leapfrog claims as mentioned above.

Termination under the Construction Contract

Termination for solvency issues should be a last step in a process that will hopefully have been managed such that the termination itself will not cause too much disruption to the project. The solvent party will usually be entitled to terminate immediately without notice under the Contract, however the right terminate will possibly be subject to an implied obligation of good faith or reasonableness and termination notices must therefore be very carefully drafted.

CONCLUSION

Project participants should be sensitive to insolvency risks and be in a position to head off problems and protect themselves from loss due to insolvency of other parties. The best way to ensure this is through preparation, and in particular being familiar with the relevant legislative regimes and making sure that contracts are appropriately and clearly drafted to protect the parties, but there is no substitute for good project management.

Garth Campbell & Joe Dowling
Lawyer
Kennedys

THINGS TO CONSIDER IN POST-TENDER VALUE ENGINEERING

What is Value Engineering (VE)?

This is a term commonly used by the industry to describe the process of reviewing design and identifying cost saving alternatives. A simple example of this is the substitution of an alternate, economical light fitting.

How and when is value engineering undertaken on projects?

Value engineering is essential for any project, particularly those struggling to meet an approved budget, and is typically undertaken during design development. As design progresses, a project quantity surveyor can review design with the assistance of the design consultants, and present cost saving alternatives for consideration. Once an alternative is deemed acceptable, the documentation is amended to reflect the decision.

Why might a client undertake value engineering post tender?

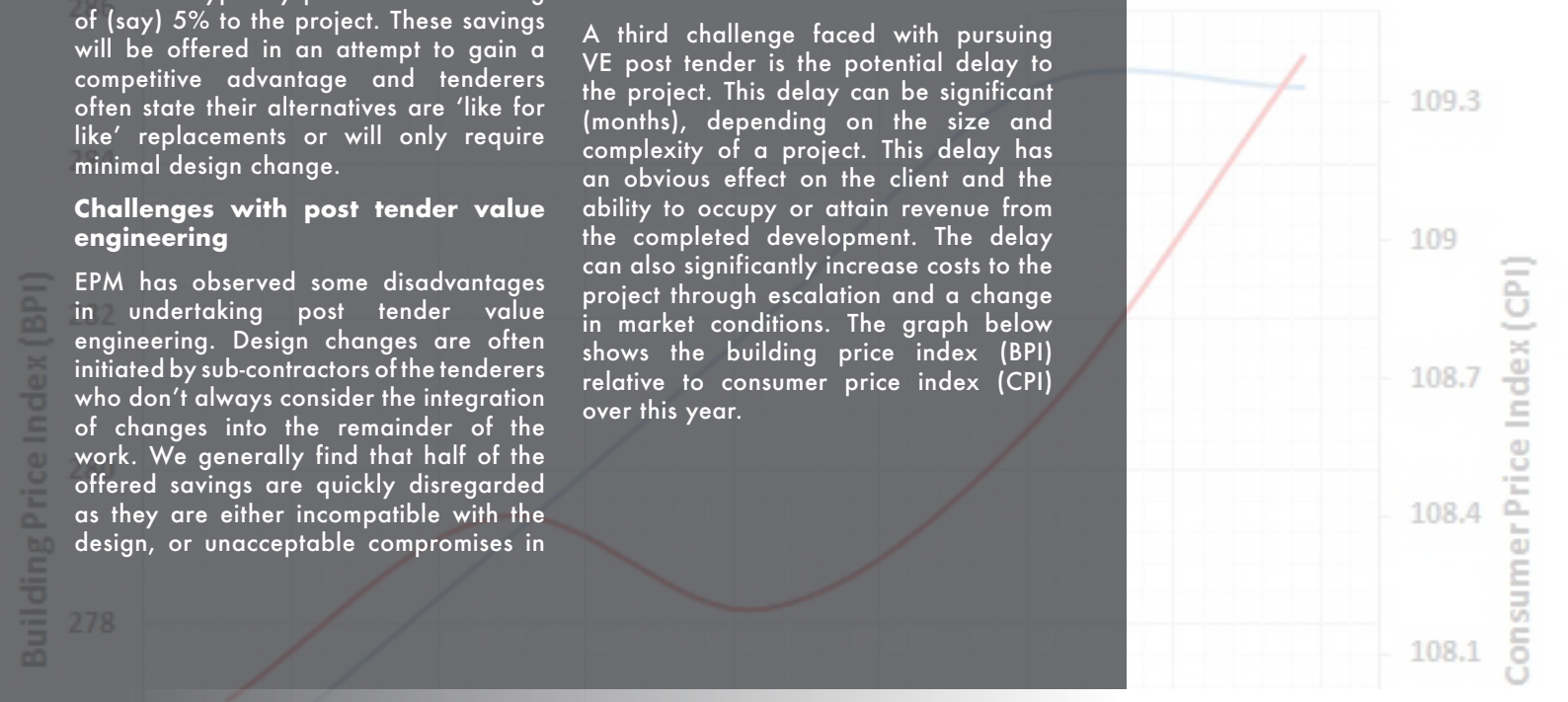
During a tender process, most tenderers will (often unsolicited) submit a list of cost saving alternatives within their submission, which can typically present a cost saving of (say) 5% to the project. These savings will be offered in an attempt to gain a competitive advantage and tenderers often state their alternatives are 'like for like' replacements or will only require minimal design change.

Challenges with post tender value engineering

EPM has observed some disadvantages in undertaking post tender value engineering. Design changes are often initiated by sub-contractors of the tenderers who don't always consider the integration of changes into the remainder of the work. We generally find that half of the offered savings are quickly disregarded as they are either incompatible with the design, or unacceptable compromises in quality. A recent example observed in a tender submission included the deletion of an entire building from the proposed development. Disregarded cost saving alternatives may half the savings initially offered.

A second challenge with the alternatives is the 'residual' actual cost saving achieved. Changes will inevitably require further input from the project design team to review, confirm compatibility, and re-work design and documentation. The client will typically bear the costs for this work. The updated documentation is eventually released to tenderer/s for re-repricing and to confirm their offered saving. The initial offered saving is rarely realised as tenderer/s regularly argue the documented alternative is not as proposed, or the market conditions have changed. Of the 2.5% remaining in initial cost savings the actual realisation may be in the order of 1-2%. In the alternative, if a contract is let without re-documentation of the changes, there is a risk of ambiguity and poor design co-ordination in the contract documents, which creates further risk.

A third challenge faced with pursuing VE post tender is the potential delay to the project. This delay can be significant (months), depending on the size and complexity of a project. This delay has an obvious effect on the client and the ability to occupy or attain revenue from the completed development. The delay can also significantly increase costs to the project through escalation and a change in market conditions. The graph below shows the building price index (BPI) relative to consumer price index (CPI) over this year.



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THINGS TO CONSIDER IN POST-TENDER VALUE ENGINEERING (CONTINUED)

As we can see, the BPI in blue shows a steady quarterly increase of 1% or annual increase of 4% whereas CPI in red shows a fluctuating trend with an average quarterly increase of 0.32% or annual increase of 1.29%.

A recent example observed an increase of 2% in construction costs over a number of months whilst VE was pursued. This is a significant increase in project cost for escalation and market conditions alone.

The fourth challenge faced is related to intellectual property. If VE is pursued post tender, the client will often be working with a preferred tenderer through the process, who is in turn likely to be relying upon the intellectual property of its suppliers. Should the preferred tenderer be unsuccessful and the client proceed with another contractor, the client could be faced with intellectual property claims from the initial tenderer or those suppliers.

Concluding remarks and recommendations

As presented above, the initial lure of a 5% saving via cost saving alternatives presented by tenderers may not be realised through a post tender VE process. The actual savings can often be negligible or in some circumstances, the VE process may result in an increase in costs to the project due to BPI escalation and a change in market conditions. This highlights the importance of effective VE through the design development phases of the project.

EPM has several detailed publications on the various project delivery methods available to clients. We invite you to contact EPM for further information on procurement methods.

Todd Ewart
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THE VALUE OF COUNCIL ENGAGEMENT DURING DESIGN

Designing a building in New South Wales can be a tricky business. The applicable planning policies that regulate the way architects design in this state are complex and multi layered, ranging from local council controls, regional controls, through to state wide planning instruments such as SEPP 65 and SEPP Seniors Living. The planning approval process also inevitably consists of proposals being subject to multiple reviews by different planning authorities, each with its own mandate and vision of what constitutes responsible design.

This type of environment poses a real challenge for a development team, particularly for architects who have to filter a whole series of considerations such as brief, market acceptance, budget, regulations, efficiencies in design, environmental context and the clients overall vision in order to reach a design outcome that not only is acceptable by council but also commercially viable and fit for purpose.

What this challenging planning environment does do however, is force architects to be their best in proposing design solutions that are innovative and contribute positively to the urban context they sit in. Because of this, Sydney is leading the way in terms of how to sustainably and intelligently accommodate its population growth without compromising its urban fabric. This is in contrast to cities like Melbourne, where years of planning policy that allowed development teams to essentially bypass local councils has resulted in a level of soul searching amongst the development community and the wider public in relation to a number of recent developments and their contribution to the city as a whole, as well as the amenity they offer to occupants.

Given this background, our belief is that the best way to design a building that will get a development consent while still being commercially viable is through a sustained, pro-active engagement with council during the design and development application phases. This can be through formalised processes such as Pre-DA meetings and Design Review Panels and informally, through meetings arranged by the development team on specific issues and regular phone and email contact.

This engagement with council should result in three key outcomes:

Council has 'buy-in'

Actively being involved in the evolution of a project's design and offering suggestion for change allows council to feel that they are one part of the process rather than being treated as 'gate-keepers' only to be approached occasionally, and with an undercurrent of 'Us vs Them'.

Clarifying the precedence and importance of planning controls

The layered structure of relevant planning controls (local/regional/state) and the fact that these controls are so comprehensive, and sometimes contradictory, can lead to situations where clarification is needed on which of the controls have precedence and which controls have the greatest importance from council's perspective. Knowing what council deems sacrosanct and what they are prepared to be flexible on, based on a reasonable request, is vitally important.

A tangible example of this situation occurring on one of our projects relates

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THE VALUE OF COUNCIL ENGAGEMENT DURING DESIGN (CONTINUED)

to setbacks. What we found when we engaged with council was how open they were to a reduced setback arrangement for certain portions of the development, in direct opposition to their own DCP controls. The end result of the process was a development that allowed for a more efficient floorplate while still being acceptable to council, something that could not have happened had we not engaged with them through the design review panel process.

A forum for presenting ideas that push the envelope

Often, commercial pressures in relation to yield, conforming to end user requirements, designing to a budget, and even the architects own thinking on what constitutes a good design outcome for the site means that development proposals cannot satisfy all required planning controls. For us, the process of engaging with council provides a forum where we can present the design and more importantly explain **why** we are seeking to pursue a non-compliant solution.

We recently designed an apartment development in Epping where DCP controls stipulated that buildings could be no longer than 35 metres. Through our engagement with council over a series of specially arranged meetings we successfully argued that a 52 metre long building articulated with deep recesses was a better design outcome given the orientation, context and size of the site.

What we have consistently observed is that council planning officers are more open to non-compliant design outcomes as long as they have a clear rationale behind them and that the development team has created an environment where they are actively seeking to explain the reasoning behind the proposal, prior to the actual Development Application being submitted.

It should be noted that council engagement should not stop once the Development Application has been lodged for assessment. A good development team should continue to interact with the assessing officers – it is sometimes better to organise a meeting to answer queries rather than sending a written response because once again, you are creating an opportunity to explain the process behind the proposal.

Ultimately our job is to design great buildings that our clients are happy with and planning controls and authorities are there to ensure that any development seeks to preserve or enhance the quality of our cities. These are not mutually exclusive goals and the ability to work closely with council is key to achieving a shared vision of a development that embodies good design, meets its brief and contributes positively to its context.

Amit Julka
Director
Plus Architecture

plus architecture

DEVELOPMENT CONSENTS – SOMETIMES, WHAT'S THE POINT?

You have spent the last twelve months at Council seeking development approval for your new mixed use development containing basement car parking, commercial suites and apartments.

Throughout your negations with Council, you concede the following; all units will be one or two bedrooms, satisfying Council's car parking provisions, to preserve residential amenity; the ground floor commercial suites will only be utilised as office premises; and finally 30% of all units will be constructed to be adaptable (disabled). Each of these concessions will hurt the development financially. However, as Council are the only Consent Authority, you have no option but to accept it's requirements.

So, when time comes for construction, provisions of the EP&A Act and Regulations require that the Certifier satisfy themselves that the Construction Certificate plans comply with the approved Development Consent plans and Conditions of Consent.

Once the building is completed, the legislation also requires that the development be "not inconsistent" with the development approval issued by Council. If all is fine, an Occupation Certificate is issued and the building is considered fit for occupation and use.

We now have a completed development with no three bedroom apartments, no retails outlets and what some may consider an excessive level of adaptable disabled rooms, which have a slim to no chance of being purchased by a member of the public in a wheelchair.

Let us imagine the Base Build Occupation Certificate was issued at 12 noon. It's 12.01pm and we now utilise the provisions of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008. 2008 (SEPP). Under a Complying Development Certificate for the same development we can do the following: -

- Allow the fitout and use of retail outlets, cafes and restaurants into all commercial suites not withstanding any previously imposed conditions of consent restricting the proposed use.
- Conduct internal alterations to any unit creating additional bedrooms (subject to light and ventilation requirements) without any consideration for Council's car parking controls.
- Delete all adaptable rooms and create new internal layouts under the provisions of the SEPP.

So, the question is, what's the point of Council Planning Controls that can be disregarded by the Comply Development provisions?

The next question to ask is, should a Certifier be able to modify a set of construction plans to be consistent with the Complying Development Controls but potentially inconsistent with the stamped Development Application plans which may restrict the issuance of the base building Occupation Certificate?

The above is a question that Certifiers ask themselves on a daily basis, the Building Professionals Board will not provide any formal guidance regarding the matter. My personal opinion on the matter is that the legislation should be taken into account during the physical construction processes and real world scenarios we all face with each new development, and not hide behind a veil of red tape and double English.

Wouldn't it be nice if each separate planning legislation that forms the basis of all construction projects in our fine State took each other into consideration - just a thought?

Alex Mullin
Director
Construction Certification Solutions

CONSTRUCTION CERTIFICATION SOLUTIONS

BUYING AND SELLING PLANNING DECISIONS

In November 2016, the NSW Department of Planning and Environment released a Draft Practice Note pertaining to Planning Agreements together with a Draft Planning Circular pertaining to Strategic Planning and Infrastructure Funding. In addition, the NSW Minister for Planning has released concurrently a Draft Planning Agreement Direction under Section 93K of the *Environmental Planning and Assessment Act 1979* to identify standard requirements for negotiating or preparing planning agreements.

While these documents will be on public exhibition until late January 2017, the egregious title of this article is likely to generate intense and robust discussion from all stakeholders regarding the potential for misuse of funding mechanisms to support the provision of public benefits and services.

The Minister for Planning has stated that *"Councils should be able to capture a reasonable share of the uplift in value from a rezoning, to help pay for community facilities and amenities"*. There is concern with this funding mechanism within the industry from both developers and the community alike. Despite a Voluntary Planning Agreement (VPA) being necessary in order to allow for flexibility in the planning system to accommodate matters that cannot be anticipated in a S.94 contributions plan, a VPA that includes so-called 'value capture', or other matters outside the realms of implementing environmental planning instruments can end up being anything but voluntary.

Some local environmental plans in NSW already contain clauses which require 'satisfactory arrangements' to be made for the provision of designated State public infrastructure before the subdivision of land in an urban release area, yet in order to obtain this certificate from The NSW Department of Planning and Environment a planning agreement is required.

Although no parties to an agreement are meant to be under duress when entering into a planning agreement, there is a clear opportunity for misuse of these adopted mechanisms as often a development consent will not be issued by a consent authority unless the 'satisfactory arrangements' certificate is issued. Often the basis of the fee associated with achieving this (in excess of $93,000 per hectare for one recent SPS client) lacks detail in terms of how, when, where and by whom the funds will be spent or in some cases how the fee was determined in the first place particularly when 'flexibility' is built into the way in which a local government makes such a determination out of the public view under a 'commercial in confidence' rubric.

S.94A has already shown its tendency to be used by some Councils in NSW as a proverbial 'cash cow' given that unlike a conventional S.94 contributions plan, S.94A does not rely upon nexus (a demonstrable link between the monetary contribution or works-in-kind and the demand created by the proposed development for public amenities and services.

Value capture (in its various forms) is likely to end up being another tax for development and may leave the clear impression that State and local governments are not genuinely interested in upholding the integrity of town planning principles but rather favour the balancing of budgets. If the proposed new changes to planning agreements become legislation, the submission of a development feasibility analysis to a consent authority is likely to become the norm for any significant DA in the future and yet another burden on development.

Buying and selling planning decisions may not be what is intended as part of the proposed changes to planning agreements by the Minister, but the mechanisms will exist for this to occur even though the rhetoric emerging from the exhibition material suggests otherwise.

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