



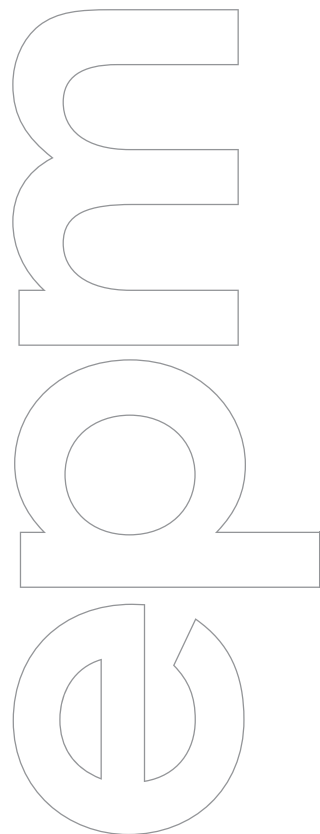
NEWSLETTER

SUMMER 2018

This Edition

- The Education SEPP
– One Year On
- Building and Construction
Industry Security of Payment
Amendment Bill 2018
- NBCS - Is This The Workplace
Of The Future?
- Fostering A Positive Relationship
With Your Contractor

HCF Brookvale Dental Fitout © Levitch Design Australia



THE EDUCATION SEPP – ONE YEAR ON

Time flies when you're having fun! Believe it or not it has been over 12 months since the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (ESEPP)* commenced.

As we enter our second year of the ESEPP, we take this opportunity to remind schools about some of the key aspects of the policy that should be considered in any development planning:

- The ESEPP provides for multiple approval pathways for different categories of school development. Schools should consider these pathways and the opportunities available to them carefully when designing or reviewing their school development plans.
- The provisions of the ESEPP (relating to exempt and complying development and development without consent) apply to proposed development within the boundaries of an existing school. For land to be considered to be within the boundaries of an existing school, the land must be being lawfully used for an educational purpose (that is, in compliance with an existing valid development consent). Further, development can only be carried out as development without consent or complying development if it complies with certain existing conditions of the most recent development consent that applies to any part of the school. Therefore, having a good understanding of your current planning approvals is essential.
- Complying development is not permitted on land on which a State or local heritage item is located. However this restriction applies only to the part of the land that is described and mapped on the heritage register (for State listed items) or the environmental planning instrument (for local listed items). Schools should review any heritage listings closely to confirm whether or not the listings will prevent the complying development pathway for future development.
- The development standards for complying development are to be strictly applied – this means that if a development does not comply with any of the standards in Schedule 2 of the ESEPP then the development will not be able to be carried out as complying development. The setback standards apply to adjacent lots, including land owned by a school.
- If a school development is proposed on land mapped as bushfire prone land it cannot be complying development. However schools should check the bushfire prone land mapping carefully to check whether this restriction applies to your specific development.
- The need to remove a tree may mean that your development cannot be exempt or complying development (unless an approval is first obtained from council). However there are a number of important exceptions to this general principle that schools should consider and seek advice on if necessary.
- If a proposed complying development will result in the school being able to accommodate 50 or more students, the complying development certificate application must be accompanied by a certificate from RMS certifying that the impact on the surrounding road network is acceptable. This process can in many cases be slow and may also require consultation with the local Council at RMS' request.
- Record keeping is essential for all

THE EDUCATION SEPP – ONE YEAR ON

(CONTINUED)

approval pathways, but particularly for development without consent given that a failure to keep the necessary records is an offence under the planning legislation.

- Under the ESEPP, schools may be permissible with development consent in zones where they would otherwise be prohibited under the relevant local environmental plan. While schools may be permissible with consent, the merits of the development application will still be assessed in detail by the consent authority, including consideration of the objectives of the zone in which the school development is proposed to be located. Any provisions of a development control plan that specify a requirement, standard or control in relation to development permitted with consent under the ESEPP will have no effect.
- In addition to planning approvals, schools should consider whether other approvals may be required for a proposed development, eg an approval under the Roads Act. Also remember that ss 7.11 and 7.12 development contributions may apply to complying development.
- The thresholds for State significant development for schools changed at the same time as the ESEPP commenced. All new schools as well as any additions or alterations to schools with a capital investment value of greater than \$20M will be required to be assessed as State significant development. This pathway is substantially different to a standard Part 4 development application process.

Under the ESEPP the Minister must conduct a review of the policy as soon as practicable after 12 months of the policy being in place – which is now. Therefore we encourage schools to share both positive and negative experiences that they are encountering with use of the ESEPP with the Department of Planning and Environment as part of this review process.

If you have any questions about the application of the ESEPP, the preparation of a submission as part of the current review of the ESEPP, or the approval requirements for your future development plans, please contact us.

Samantha Daly | *Partner*
Johnson Winter & Slattery

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT AMENDMENT BILL 2018

On 21 November 2018 the NSW Government passed the Building and Construction Industry Security of Payment Amendment Bill 2018 (the **Bill**). The Bill forms part of New South Wales' formal review of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**) which commenced in 2015. The amendments also form part of NSW's response to the Murray Report into Security of Payment legislation around Australia. The Bill is awaiting assent and will commence on a day yet to be determined.

Key Changes

Progress Claims and Progress Payments

Under the Bill, any person who has undertaken to perform work or supply goods and services under a construction contract (**Claimants**) will be entitled to receive progress payments. The key difference when compared to the previous regime is that entitlement to receive a progress payment will no longer be triggered by a reference date.

Claimants will be entitled to make monthly payment claims on and from the last day of the named month in which work was first carried out or goods and services first supplied. This amendment is designed to prevent respondents from delaying progress payments through contractually providing a different regime of reference dates. If provided for under contract, payment claims may be made earlier than the last day of a named month. The Bill further entitles Claimants to make payment claims in circumstances where a contract has been terminated, essentially negating recent case-law which determined the opposite. A post-termination payment claim may be served on and from the date of termination.

The Bill also shortens the maximum payment period for progress payments. Progress payments made by a head contractor to a subcontractor will need to be paid within 20 business days, rather than 30 business days.

As was the case when the SOPA was first introduced, payment claims must again be expressly endorsed as being made under the Act.

Adjudication

Several changes have been made to the adjudication process. Parties seeking to settle a claim after adjudication had been lodged historically faced uncertainty under the SOPA. The Bill expressly provides for the withdrawal of an adjudication application at any time before an adjudicator is appointed. If an adjudicator has been appointed and the respondent objects to the withdrawal, the adjudicator must determine whether it is in the interests of justice to uphold the objection.

In *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140, the Supreme Court of NSW held that jurisdictional error invalidates the whole of an adjudicator's determination. In response to this, the Bill provides the Supreme Court with new powers to sever part of an adjudicator's determination affected by jurisdictional error. This amendment removes the incentive to challenge determinations with minor errors in an attempt to set aside an entire determination.

The Bill enables the Minister for Innovation and Better Regulation to make an enforceable code of practice for Authorised Nominating Authorities (**ANA**). The Department of Finance, Services and Innovation will develop the code of practice alongside interested stakeholders. The code of practice will clarify the expectations, responsibilities

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT AMENDMENT BILL 2018 (CONTINUED)

and obligations of ANAs. Failure to comply with the code of practice will be grounds for withdrawing authorisation.

Corporations in liquidation

The Bill prohibits a claimant corporation in liquidation from taking any steps under the SOPA. This is consistent with various cases over the past few years in which the courts set aside various decisions on the basis that the “pay-now-argue-later” basis of the SOPA was undermined if a company in liquidation was able to obtain payment through the SOPA process, as a respondent would be prevented from suing for recovery because the payment would form part of the distribution pool for the Claimant’s creditors.

Investigation and Enforcement

The Bill introduces a more robust investigative and enforcement framework. Authorised officers will be provided with new powers to investigate, monitor and enforce compliance with the SOPA, including powers of entry to premises. Let’s hope that the small team within the Department of Fair Trading is provided with the resources necessary to use these powers!

There are numerous other minor technical changes to the SOPA brought in by the Bill. Look out for the assent date and any transitional provisions as you can be sure to be applying the appropriate regime to your construction industry-related business dealings.

Helena Golovanoff | *Partner*
Holding Redlich

Lauren Stables | *Graduate*
Holding Redlich

NBCS - IS THIS THE WORKPLACE OF THE FUTURE?

I am often asked, "What is the workplace of the future?" says WMK Architecture's MD, Greg Barnett.

"And I point to the Northern Beaches Christian School (NBCS) as a possible answer."

In what is perhaps the ultimate in environmentally sustainable design, the school is an adaptive, agile environment, with engaging multi-use indoor/outdoor spaces, flexible mobile furniture with fully-connected mobile technology. All this is complemented by natural daylight and ventilation, automated windows and glazed walls, and fully powered by the sun. At its heart sits a café serving organic food.

The pedagogy of this school is all about learning – not teaching. With multi-nodal activity-based learning zones, teachers that are in fact learning facilitators, there are no classrooms, no desks, and not even fixed walls. Self-driven learning, shared spaces, and collaboration flourish and where the mobile phone is embraced as learning not banned. "In a few short years, these students will be working for us," says Greg.

These people will be confident and self-driven, they will be non-hierarchical and negotiate with their manager or seniors, they will be integral members of self-managed teams and they will not want a traditional 'boss'.

And they won't need offices, workstations or fixed places to work. They will need engaging, flexible workspaces and fast and seamless technology.

They'll desire a workplace that is warm, textured and inviting, humanizing and reflective of the ethos and culture of the organisation that they are working with and that encourages sharing and collaboration.

Designed by WMK and delivery managed by EPM, the NBCS features a café at the heart of the school. A central location where teachers and students can come together to collaborate, share ideas and communicate in a casual environment.

Perched over the café and centre of the school is an indoor/outdoor semi-translucent canopy that houses photovoltaic solar panels that power the school. Pavilion buildings with openable walls surround the central indoor and outdoor space and these spaces feature huge interactive screens underpinned by technology with full wireless connectivity.

WMK created malleable and agile environments – but also purpose-built precision spaces. Quiet rooms provide space for focused attention and meetings, while specialist zones have been created for disciplines such as music and science.

The indoor/outdoor spaces are used for learning and collaboration – including the café seating. And cleverly this learning space is not regarded as Floor Space Area by the local council or the Building Code of Australia.

The pavilion buildings also house flexible spaces that accommodate multi-nodal learning, activity caves learning and the ultimate in flexible collaboration space.

Regarded as leading edge and world class, the NBCS isn't an office – it's a school. But it is a forerunner to the office of the future and in fact something that we are seeing starting to take shape now.

Greg Barnett | *Managing Director*
WMK



Northern Beaches Christian School © Brett Boardman Photography

FOSTERING A POSITIVE RELATIONSHIP WITH YOUR CONTRACTOR

Relationships. It may be the one thing that makes the procurement of a construction project different from any other procurement arrangement in the modern world.

Now, you may have a relationship with your barista, but let's say next time you cross the road and try that new place everyone's been raving about – you're probably going to get an excellent coffee. So, you could argue that while it may make your morning more pleasant, the relationship is not essential to the quality of the product. In fact, the coffee at that new place may be so good that you end up switching for good.

Unlike the purchase of your morning coffee or the latest flat screen TV, the procurement of a new building is delivered progressively through the course of time, is always bespoke, and therefore, by its nature, involves a considerable amount of risk.

In response to this challenge, the industry has grown and become more sophisticated through the development of a wide range of procurement methods. These don't necessarily eliminate the risk, but instead distribute it between the parties in varying degrees depending on the capacity and appetite for risk by each of the parties. Considering your priorities and selecting the right procurement method is an important part of every construction project, and I would encourage you to read our white papers on this topic. However, at the end of the day, no matter which procurement method you select, no matter how detailed your contract documentation or how robust your contract, you will inevitably hand over the reins to a contractor who will have ultimate control of the quality of the works, both visible and concealed, and the time in which they are delivered.

In my experience, when relationships are positive, the contractor is more proactive and innovative and becomes invested in the success of the project for its clients, often going over and above its contractual

obligations to further this success. However, when the relation sours, the contractor can become contractual, simply doing the bare minimum (sometimes less). Works slow down, variation and extension of time claims increase and more time is spent (or wasted) administering these than just getting on with the project.

So, here are my key tips on fostering a positive relationship with your contractor:

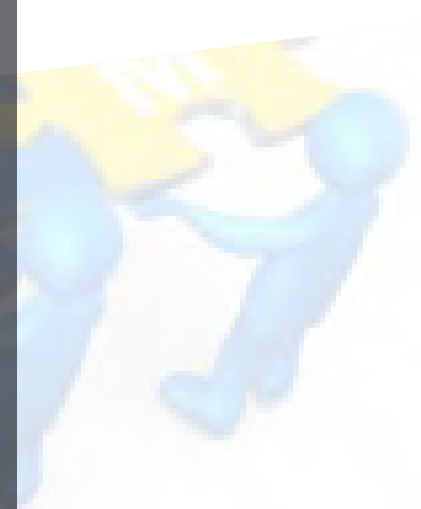
Reveal your objectives and your reasons for them

As a project manager, we often have the benefit of being involved in a project from its inception. We develop a deep understanding of the objectives for our clients and their reasons for these. As a crude example consider a school that is constructing a new facility in order to accommodate a larger student population. The project comprises a car-park and several general learning areas, however only the car park is required to facilitate the higher student population.

Initially you may choose to reveal your time objectives to your contractor. You may even reveal that the car park should be delivered before the class rooms. However, if you choose to withhold the reasoning behind this – that the car-park is more important as it satisfies an immediate need through the increase student population – then you are denying your contractor the opportunity to become invested in your objectives and to be proactive achieving them.

Prepare and maintain good quality contract documents

Contractors love good quality, complete, accurate and fully coordinated documentation. Whether this is fully designed architectural and engineering drawings or a principal's project requirements document. Try to have a single set of instructions that aren't overly qualified or have to be read



FOSTERING A POSITIVE RELATIONSHIP WITH YOUR CONTRACTOR

(CONTINUED)

in conjunction with several hundred emails, instructions or verbal directions. Make an allowance within your consultant budget to have the project documents revised during construction to address latent conditions or changes in the project scope.

If you need to give verbal instructions, follow these up in writing and with revised contract documents.

Make up your mind

Change during construction phase is inevitable. It's practically impossible for a developer to fully document its requirements, and for consultants to have perfectly understood and translated these requirements into construction documents before construction commences. However, this should only result in a small and manageable amount of change.

There aren't many things that become more disruptive to a construction project than unrelenting, last-minute, piecemeal changes that often result in abortive work and delays. The worst of these are changes that result in works going on-hold for an extended period of time while a decision is made, or those that constantly change back and forth between two options.

Give them room to move

When planning a construction project that occupies only a portion of your site, consider the contractors requirements for site accommodation, materials storage and handling, access for construction vehicles, scaffolding and cranes. You should aim to give the contractor as much space as you can afford, rather than the minimum you think they need. Space plays a significant role in methodology which means that it can indirectly influence programme and cost.

Don't sweat the small stuff

Construction projects are complex. The contractor's job is not easy. So, don't make it needlessly harder. If I had a penny for the number of times I see the relationship between perfectly capable contractors and their clients slip into dispute and disrepair over the most insignificant issues.

As the superintendent of a construction contract, we often find ourselves in the uncomfortable position of barring contractor's otherwise legitimate claims, based on a contractual technicality. We are not a party to the contract, and it is not our place to wield our client's digression in this regard. However, as a project manager interested in the overall success of a project, and the contractor's key role in this success, we would often recommend that our clients consider whether taking advantage of a technical error (albeit an entitlement) will actually materially further their objectives, and how the impact on the relationship may be counterproductive in this regard.

Jordan Graham | Project Manager
epm Projects Pty Ltd



Ascham School Centre for Science © Paramount Photography

Contact Us

www.epmprojects.com.au

PO Box 1034
North Sydney NSW 2059
Level 2, 146 Arthur Street North Sydney
NSW 2060
Ph: (612) 9452 8300
Fax: (612) 9452 8388

Key Contacts

Andrew Graham
CEO
Mobile: 0419 732 021
Email: agraham@epmprojects.com.au

Johan O'Brien
COO
Mobile: 0414 917 904
Email: jobrien@epmprojects.com.au

Stephen Welsh
Group Executive
Mobile: 0417 307 860
Email: swelsh@epmprojects.com.au

Mark Blizard
Group Executive
Mobile: 0438 126 778
Email: mblizard@epmprojects.com.au

Ryan Mooney
Group Executive
Mobile: 0423 835 253
Email: rmooney@epmprojects.com.au

Acknowledgements

The following organisations regularly partner with EPM and contributed to the content of this newsletter.

 **HOLDING REDLICH**

Helena Golovanoff - Partner
Lawyers
Holding Redlich
Level 65, MLC Centre, 19 Martin Place
Sydney NSW 2000
Ph: (02) 8083 0410 **Fax:** (02) 8083 0399
E: helena.golovanoff@holdingredlich.com
www.holdingredlich.com

WMK

Greg Barnett - Managing Director
Architects
WMK Architecture
Level 2, 364 Kent Street
Sydney NSW 2000
Ph: (02) 9299 0401 **Fax:** (02) 9299 0402
E: gbarnett@wmkarchitecture.com
www.wmkarchitecture.com

**JOHNSON
WINTER &
SLATTERY**

Samantha Daly - Partner
Environmental Planning Law
Johnson Winter & Slattery
Level 25, Bond Street
Sydney NSW 2000
Ph: (02) 8274 9524
E: samantha.daly@jws.com.au
www.jws.com.au

epm
projects pty ltd