epm projects pty ltd

NEWSLETTER

WINTER 2016

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WHEN IS A DEVELOPMENT CONSENT REQUIRED?

A common question arises when our clients contemplate undertaking building work on their properties – "Do I need approval for this work?". The work could range from an internal fitout, to the demolition of an existing building and the construction of a new building. So how should you satisfy yourself about whether or not you require approval for building work?

It is useful to review the legislative definitions of 'building work' and 'development':

- **Building Work** means the physical activity involved in the erection of a building

- **Development** means the use or subdivision of land, the erection of a building, the carrying out work or the demolition of a building. Development is also defined as any other matter that is controlled by an Environmental Planning Instrument (**EPI**), including Local Environmental Plans and State Environmental Planning Policies.

Generally, work to improve a property beyond general maintenance requires some form of consent. However, in the case of work involving items of heritage significance, even the act of painting may require the consent of the local council. Importantly, "development" isn't limited to physical work and includes "the use of land".

"What type of approval do I need?"

The NSW planning system is structured such that there are a number of pathways to obtain development consent. These pathways depend on the nature of the development, as well as the development controls that apply to the land, including zoning, height controls and floor space ratios.

Exempt development allows for very minor works to be completed without a development consent provided they meet specified standards. This may include constructing new balconies, driveways, retaining walls and fences.

Complying development also requires the development to meet specified standards, but must be the subject of a Complying Development Certificate issued prior to construction. In each case, the exempt and complying development standards are codified and allow for an objective assessment of compliance.

Typically, Exempt & Complying development is specified in the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (Code **SEPP**), however, some land uses benefit from specifications prescribed in alternative EPI's. For example, the *State Environmental Planning Policy (Infrastructure) 2007* (**ISEPP**) provides a number of generous standards for educational establishments.

It is advantageous for a client to determine if a development can be exempt or complying as it removes the need to submit a development application (be that to Council or the NSW Department of Planning and Environment) and, therefore, also removes a significant amount of 'red tape'. Over many years, EPM has assisted clients to position their projects to be exempt of complying development and thereby benefit from significant time and cost advantages.

If a development does not meet the codified requirements of either exempt or complying development, then a **Development Application** (DA) must be submitted to the relevant local council. A DA allows for the subjective assessment of a development against planning controls and development guidelines. The assessment predominantly focuses on the impact of the development on the surrounding environment and community. It is therefore important when preparing a development application to gather a cohesive set of documents that clearly outlines the development, and its impacts and mitigation strategies in an effort to streamline the DA process and eliminate unfavourable assessments or onerous conditions.

EPM News Flash

EPM are proud to announce the appointment of Mark-Anthony Boutros in the role of Senior Development Manager. Mark has extensive experience in town planning and project feasibility, arriving at EPM from one of Sydney's largest developers. Mark gives EPM additional capacity to support our clients across the whole development lifecycle. EPM look forward to introducing Mark to you in the near future.

If you have any questions about statutory approvals or the potential of your future development, please contact us at EPM to arrange a complementary preliminary meeting.

The NSW planning process is widely regarded as one of the most complex in Australia. EPM has significant expertise in navigating the NSW Planning legislation and can assist in investigating the best approvals pathway for each individual project to ensure that risk in this process is managed appropriately.

Nicholas D'Ambrosio
Senior Project Manager,
epm Projects

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THE BENEFITS OF GETTING A QS INVOLVED EARLY WHEN BENCHMARKING

There is an inevitable question that arises during the beginning of a project: "How does this job compare on cost to other similar projects?" This is a perfectly logical and reasonable question, however finding any two projects that are completely similar from a cost perspective is not as easy as it may seem from first glance, and too often mistakes are made.

For example, a large workplace fitout project has a budget based on a $/m2 from another project recently completed by the architect. The budget is set, the design team take a tour of project XYZ, everyone loves it and off we go designing something of a similar standard, knowing that our project will obviously cost the same, right? Wrong!

After some rudimentary research, the QS discovers that the rate of $1,200/m2 from project XYZ was simply the head contract value. It did not include a cost for loose furniture, AV or IT equipment, professional fees, relocation costs or change management.

What will then often happen is the client understandably wants their project for $1,200/m2 as that is all the money available from the funding, so the design meetings start cutting cost. The QS has to tell the architect they can't afford an interconnecting stair on every floor and the feature ceilings in the breakout space have to go.

Inevitably, the project is completed on or close to budget but the client isn't very happy and the design team know they delivered less than they could have. The builder found it a nightmare because she/he has stepped into a project that is underfunded and there is no money to pay for variations – for the builder or the design team.

Often the early involvement of a QS can save substantial funding costs by pointing out how the benchmark is over specified for the project in hand.

How to avoid the pitfalls of inadequate cost benchmarking? First, ask yourself a few simple questions when thinking about benchmarking one project against another:

1. What is "included" and what is "excluded"? Both from your own project costs and the ones you are using as a yardstick. For example, the simple addition or omission of GST can throw you out by 10% before you get started.

2. What type of project are you undertaking? Different project types have different cost profiles; one office is rarely just like another even within the same building.

3. When and where will you be building your project? Escalation and regional cost variances can be considerable. It is no use comparing your 2016 Sydney CBD fitout to a similar 2014 Melbourne Office.

Obviously, the most important point is to get the right advice at the right time.

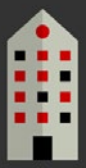
Get the benchmarking right for build and funding purposes, get the right expertise to establish your budget and get the true costs from day one... to avoid disappointment and issues later.

Luke Foster

Executive Quantity Surveyor, MBM

PROJECT INCLUSIONS

What is "included" and what is "excluded"? Both from your own project costs and the ones you are using as a yardstick. For example, the simple addition or omission of GST can throw you out by 10% before you get started.



PROJECT TYPE

What type of project are you undertaking? Different project types have different cost profiles; one office is rarely just like another even within the same building.

PROJECT LOCATION

When and where will you be building your project? Escalation and regional cost variances can be considerable. It is no use comparing your 2016 Sydney CBD fitout to a similar 2014 Melbourne Office.

mbm

LOVE THY NEIGHBOUR

So you have worked hard to obtain that rarefied of all Australian dreams, obtaining your own parcel of girt by sea. If this small portion of land happens to reside within the urban limits of Sydney, chances are you had to beg, steal or kill for that twenty percent deposit and are now looking forward to outright ownership of your property in the year 2050.

Notwithstanding your crushing debt, you now wish to do something even more dense and develop/renovate your property. Luckily for you, to avoid the teeth pulling exercise of lodging a Development Application to Council, the NSW State Government introduced the fast tracked Complying Development system, which will allow you to "design by numbers" and have your approval within a week. This compared to the fifty-two weeks some Council's require to assess the potential impact of a new bird bath, can only be considered a good thing.

Along with fast approval time frames, the use of CDC's originally provided a greater benefit, the ability to avoid open discussions with your surrounding neighbours about your proposed development plans.

Now, I am sure that most of you, like myself, avoid daily contact with your neighbours. The war for the small portion of kerb on the rear laneway to place your bins, on bin night, has become a vicious front in the mean streets of Stanmore. So imagine being held at ransom, by neighbours, should I wish to place a studio on top of my garage with a small window which complied with all statutory and non-statutory planning controls, but they considered it an eyesore from their second guest bedroom and as such object to its construction.

In the good old days (back in 2014), I could undertake my works and only let my neighbours know that I was about to start construction in two days. However, after thousands of angry calls to local Councils from residents whom feel cheated that they couldn't pass subjective comments on development plans, the NSW Department of Planning modified the Environmental Planning and Assessment Regulations, requiring that Certifiers provide neighbours with notification letters, fourteen days prior to the approval of the Certificate.

There was a catch however, the letters to neighbours could not contain plans or any specific details of the development for security reasons. The letter is just to inform that a Complying Development application has been received and that works may commence in two weeks, should the approval be granted. In response to the new and improved notification letters, the shift of enquiries moved to the Certifier, with countless neighbours being told politely that 'no' they cannot see the plans and 'no' they cannot formally object to the development. This approach was called proactive by the Department of Planning however lip service may seem a more appropriate title.

Now enter NSW Planning Minister, Rob Stokes who as of last month is proposing to seek amendments to the NSW planning legislation that would require applicants of developments seek consultation with their neighbours, prior to an application for development to discuss their opinions and concerns of a future adjacent development.

If this were to become mandated, the impacts would be understandably interesting. Picture seeking consultation with a neighbour of whom will lose their privacy or solar access to a backyard as a result of a second storey development that complies with the planning requirements specified under the CDC provisions. This would be even more interesting should consultation be required between a developer of newly zoned R4 portion of land allowing for high density residential and the surrounding existing low scale residential community.

As a Certifier and ex town planner within the NSW planning framework, I strongly believe that emotion should be taken out of development assessment as it adds a variable that cannot be quantified, adding to the minefield which is the statutory approval process. Notwithstanding my personal opinion, should this legislation come into effect, it would be hard for the "not in my backyard" mentality to not take hold, which is strange as almost every objector, always forgets that their property was at one time, constructed itself.

And finally, should you be put in the position where you are required to consult with your neighbours on your development, I recommend not bringing up the proposal until after the sixth bottle of red has been consumed.

Alex Mullin
Director, Construction Certification Solutions

CONSTRUCTION CERTIFICATION SOLUTIONS

BRACE FOR CHANGE

The second half of 2016 is shaping up to be a period of significant change for planning in New South Wales (**NSW**) with new legislation destined for Parliament.

However, the memory of previously proposed changes to the planning system in 2013 that failed to succeed through Parliament is likely to be a key issue for both community and industry stakeholders alike. ABC media reports: *"At the time, the Government was criticised by some interest groups for limiting citizens' legal rights to challenge development decisions, and for placing an emphasis on growth at the expense of environmental protection".*

While both the NSW government and opposition appear to agree that the current laws need to be updated, what is required is change that gives effect to overall benefits to all stakeholders as opposed to change for the sake of change.

Reforms that are likely to be under consideration include, *inter alia:*

- Easier-to-use application and approval systems with increased transparency and appropriate accountability mechanisms;
- Clarification of the hierarchy and relationship among state, regional and local plans;
- Pre-DA lodgement consultation with neighbours; and,
- A focus on good design.

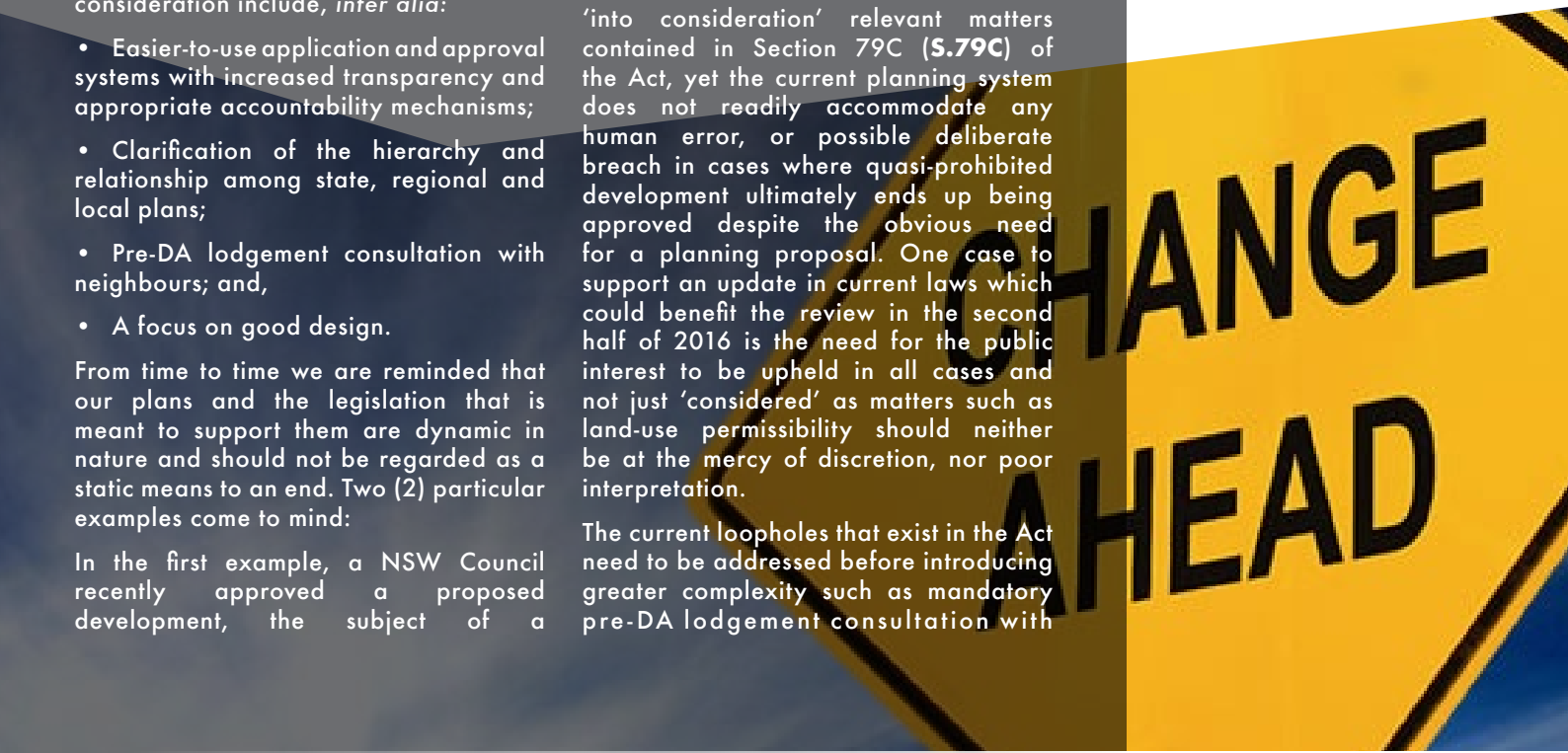
From time to time we are reminded that our plans and the legislation that is meant to support them are dynamic in nature and should not be regarded as a static means to an end. Two (2) particular examples come to mind:

In the first example, a NSW Council recently approved a proposed development, the subject of a development application (**DA**) which did not properly fit the relevant definition in the Local Environmental Plan (**LEP**). In this case, the Council may have inadvertently overlooked the proper characterisation of the development by approving a caravan park without any provision for caravan sites despite this being a requirement in the LEP definition. The result was the approval of development that is not permitted in the zone, which would normally require submission of a planning proposal to amend the LEP.

Consideration of Section 123 (**S.123**) of the Environmental Planning and Assessment Act 1979 (**the Act**) pertaining to *'Restraint etc. of Breaches of this Act'* placed an emphasis on whether or not the consent authority did *"take into consideration"* matters as are of relevance to the development (i.e. the provisions of any environmental planning instrument and/or the public interest, just to name a few).

The Council contended that it had taken 'into consideration' relevant matters contained in Section 79C (**S.79C**) of the Act, yet the current planning system does not readily accommodate any human error, or possible deliberate breach in cases where quasi-prohibited development ultimately ends up being approved despite the obvious need for a planning proposal. One case to support an update in current laws which could benefit the review in the second half of 2016 is the need for the public interest to be upheld in all cases and not just 'considered' as matters such as land-use permissibility should neither be at the mercy of discretion, nor poor interpretation.

The current loopholes that exist in the Act need to be addressed before introducing greater complexity such as mandatory pre-DA lodgement consultation with



STATE PLANNING SERVICES

BRACE FOR CHANGE
(CONTINUED)

neighbours. Often increased complexity is also associated with unpredicted outcomes and given that S.79C of the Act does not currently recognise the overarching metropolitan strategy as a matter for consideration as part of the assessment of a DA, the priorities for any future change should focus on the fundamental issues.

In the second example, Clause 4.6 of the Standard LEP (**Clause 4.6**) pertaining to *'exceptions to development standards'* has regularly been compared with the provisions of State Environmental Planning Policy No. 1 (**SEPP 1**). Much has been written about the initial conservative approach to Clause 4.6 in the NSW Land and Environment Court (**the Court**) with later clarification and subsequent consideration through the NSW Court of Appeal highlighting that matters should be considered on a case-by-case basis, i.e., development standards should not be regarded as sacrosanct where justifiable circumstances exist and flexibility will lead to an improved outcome.

The initial conservative approach to Clause 4.6 is a case of the proverbial 'tail wagging the dog' as we must remind ourselves from time to time that legislation is designed to support and implement the plans that are adopted by the Government on behalf of the community. It is not the role of the Court to engage in town planning that fuels a reactive-based approach which is counter-productive to consent authorities, the community and applicants alike. Often the objective behind the rationale for change to planning law becomes a casualty of "the process" and caught up in the momentum of the change itself, thus leading to ineffectiveness and/or poor planning legislation and regulations which do not reflect the original intent of the proposed changes.

Clause 4.6, like SEPP 1 recognises the need for flexibility in an environmental planning instrument (subject to criteria of course). Any future changes to the NSW planning system should avoid ambiguity, so that stakeholders do not need to default to the Court in order to determine, or clarify the actual intent of the plan.

In bracing for change to the NSW planning system in the second half of 2016, please contact State Planning Services regarding any changes that may impact on your development.

John McFadden

Managing Director,
State Planning Services

STATE PLANNING SERVICES

COUNCIL AMALGAMATIONS - POTENTIAL IMPLICATIONS FOR DEVELOPERS

Since January 2016, 48 merger proposals have been referred to the Chief Executive of the Office of Local Government (**OLG**), who has delegated the examination and reporting process required by the *Local Government Act 1993* to a number of Delegates. The Delegates are in the process of preparing reports on each of the merger proposals, which will be reviewed by the Minister for Local Government (The Honourable Paul O'Toole) and the independent Boundaries Commission.

On 12 May 2016, 19 new councils were announced, effective immediately. Another nine proposed merger councils have been given in principle support from the Minister for Local Government although the mergers have been postponed pending the outcome of a number of current Court proceedings. The effect of the amalgamations is that councillors were stood down and have been replaced with an administrator and an interim general manager, who will be in place until **9 September 2017**, the date set for elections for new councils. This is 12 months later than the election date for councils not being merged.

The NSW Government's Stronger Councils website identifies that implementation of new councils will be supported by Local Representation Committees, which will be formed by the Administrator. Additionally, the Administrators are to establish Implementation Advisory Groups to provide advice to the new councils on Implementation Plans.

New councils will receive government grants up to $15 million to invest in community projects and up to $10 million to streamline administrative processes and cut red tape. Any unspent funds are able to be redirected to community projects.

It is expected that new councils for the most part will aim to operate under a 'business as usual' model, and for already approved developments, little is likely to change. We note that there may be delays in voluntary planning agreements being approved due to councils being reluctant to enter into agreements that have financial implications during the merger period. Sydney councils will also have additional obligations to implement changes to local environmental plans that meet requirements imposed by the Greater Sydney Commission.

Under the *Local Government (Council Amalgamations) Proclamation 2016* (**Proclamation**), new councils are to use best endeavours to facilitate the operation of the Proclamation, including sharing information, agreeing about required matters and working co-operatively with other councils.

The Proclamation identifies that:

(a) new councils must:

  (i) have an operational plan in place by 1 August 2016;

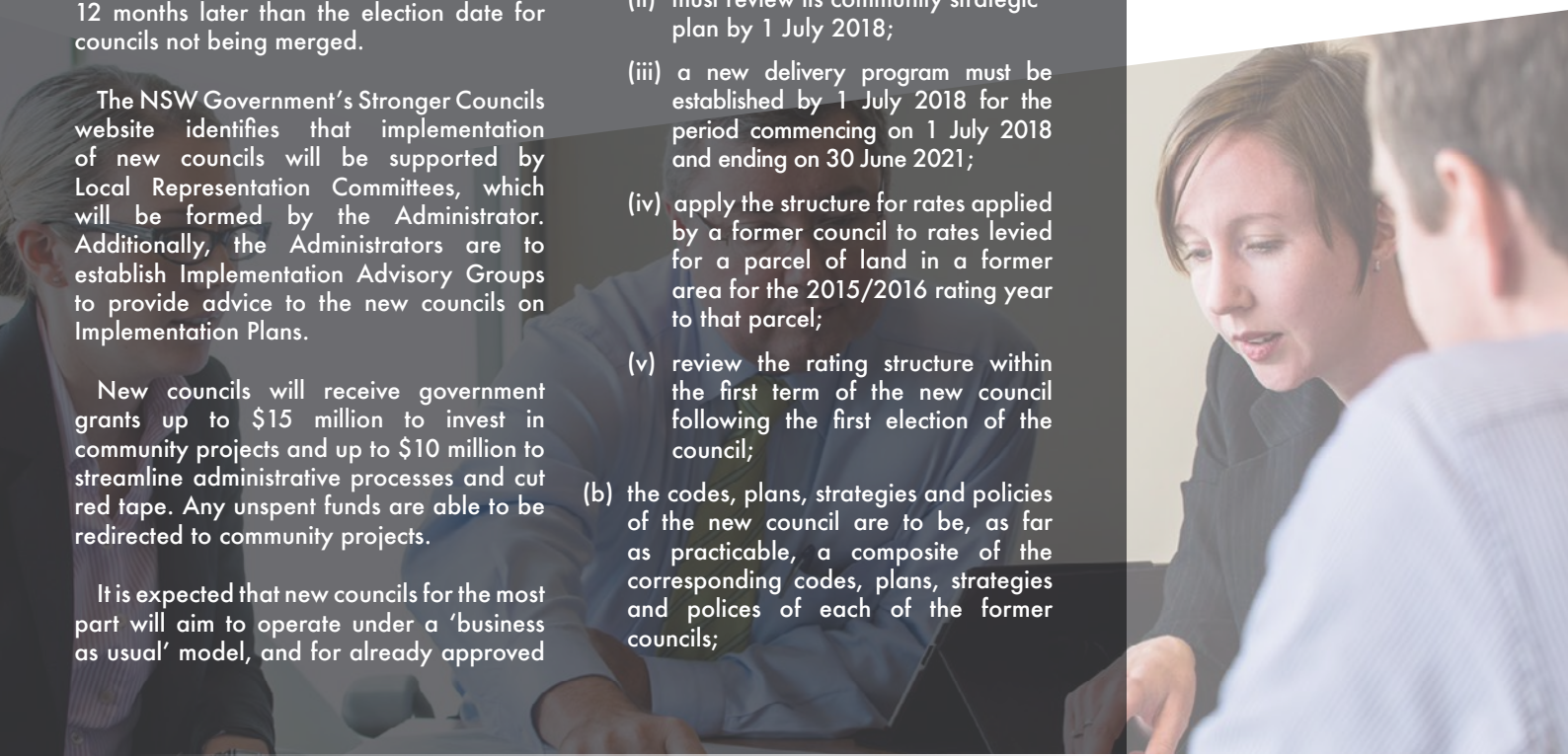
  (ii) must review its community strategic plan by 1 July 2018;

  (iii) a new delivery program must be established by 1 July 2018 for the period commencing on 1 July 2018 and ending on 30 June 2021;

  (iv) apply the structure for rates applied by a former council to rates levied for a parcel of land in a former area for the 2015/2016 rating year to that parcel;

  (v) review the rating structure within the first term of the new council following the first election of the council;

(b) the codes, plans, strategies and policies of the new council are to be, as far as practicable, a composite of the corresponding codes, plans, strategies and polices of each of the former councils;



Lawyers | McCullough Robertson

COUNCIL AMALGAMATIONS - POTENTIAL IMPLICATIONS FOR DEVELOPERS
(CONTINUED)

(c) a development control plan or contributions plan that applied to a former area immediately before the amalgamation day continues to apply to that part of the area of the new council that consists of the former area;

(d) the code of conduct for a new council is to be the model code until a code of conduct is adopted by the council in accordance with the *Local Government Act 1993;* and

(e) specific requirements for new councils are set out in Schedules 1 to 17 of the Proclamation (and set out in the schedules to the *Local Government (City of Parramatta and Cumberland) Proclamation 2016* for Parramatta and Cumberland.

Once amalgamations have come into effect, the newly formed councils will be in the position of having two or three planning teams all in different locations, all operating under different local environmental plans and council operational policies. In the transitional phase, it is anticipated that:

(a) changes to political makeup of councils and overall strategic direction for newly formed councils are likely to occur;

(b) administrative functions between two or more amalgamating councils are likely to be consolidated prior to changes to planning instruments;

(c) administrative functions are likely to be merged over a period of 9-15 months;

(d) there will be substantive changes to existing local environmental plans, development control plans and zoning - changes to these planning instruments are expected to take at least 18-24 months;

(e) it is anticipated that 'transitional provisions' will be put into place to enable undetermined development applications to be assessed under previous plans and zonings; and

(f) after new planning instruments are in effect, there are likely to be delays in development application processing due to new town planning personnel or less staff under the amalgamated structure, as well as uncertainty as to how to apply new planning instruments.

Felicity Douglas

Lawyer, McCullough Robertson

LESSONS FROM *HUTCHISON V GLAVCOM* - ENSURE YOUR PAYMENT CLAUSES DON'T FALL AFOUL OF THE *BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT*

In this article, we will look at the recent decision of the NSW Supreme Court in J *Hutchison v Glavcom* and the important points arising from the case about contract drafting, namely:

1. When amounts owing by a subcontractor can be set off against a payment claim; and

2.Whether contractual provisions imposing conditions on the payment of a payment claim are void.

Background

In mid-2014, Glavcom was engaged by Hutchison to design and install joinery in the Bondi Pacific, a mixed-use redevelopment of the old Suiss Grand Hotel, for a contract sum of $5.3M. The contractual date for practical completion was 21 April 2015.

Hutchison was required to give Glavcom access to the site in August 2014. Access was not until early April 2015, only two weeks before the date for practical completion. Glavcom did not claim an EOT under the subcontract and neither did Hutchison unilaterally grant one. Understandably, Glavcom did not achieve practical completion by 21 April.

Later in 2015, Glavcom served Hutchison with a payment claim for $2.9M. Hutchison issued a payment schedule in response for -$6.2M. This negative amount was comprised mostly of a $4.3M claim for liquidated damages. An adjudicator determined that $1.2M was payable by Hutchison to Glavcom.

Contractual set offs in a payment claims

The Court upheld the adjudicator's rejection of Hutchison's claims for LDs on the basis that Hutchison could not take advantage of its own breach – i.e. delaying Glavcom's access to the site.

In addition, the Court held that due to an absence of any contractual provision for the calculation of the progress payment in the Subcontract, the adjudicator would not have been able to deduct LDs in the payment claim anyway as there was no set off mechanism. The Court concluded that the amount of a progress payment was to be determined under s 9 of the *Building and Construction Industry Security of Payment Act* 1989 (**Act**) by reference to the value of the relevant work only.

Contractual conditions on payment of a payment claim

Under the subcontract, it was a precondition for the existence of a reference date for payment that Glavcom submit declarations concerning the payment of employees and subcontractors. It was later discovered that Glavcom had not paid its workers compensation insurance premiums, in contradiction with its subcontractor statements.

The Court held that contractual provisions creating preconditions to the existence of a reference date, if they do not otherwise facilitate the purpose of the Act, are void or voidable under s 34 of the Act.

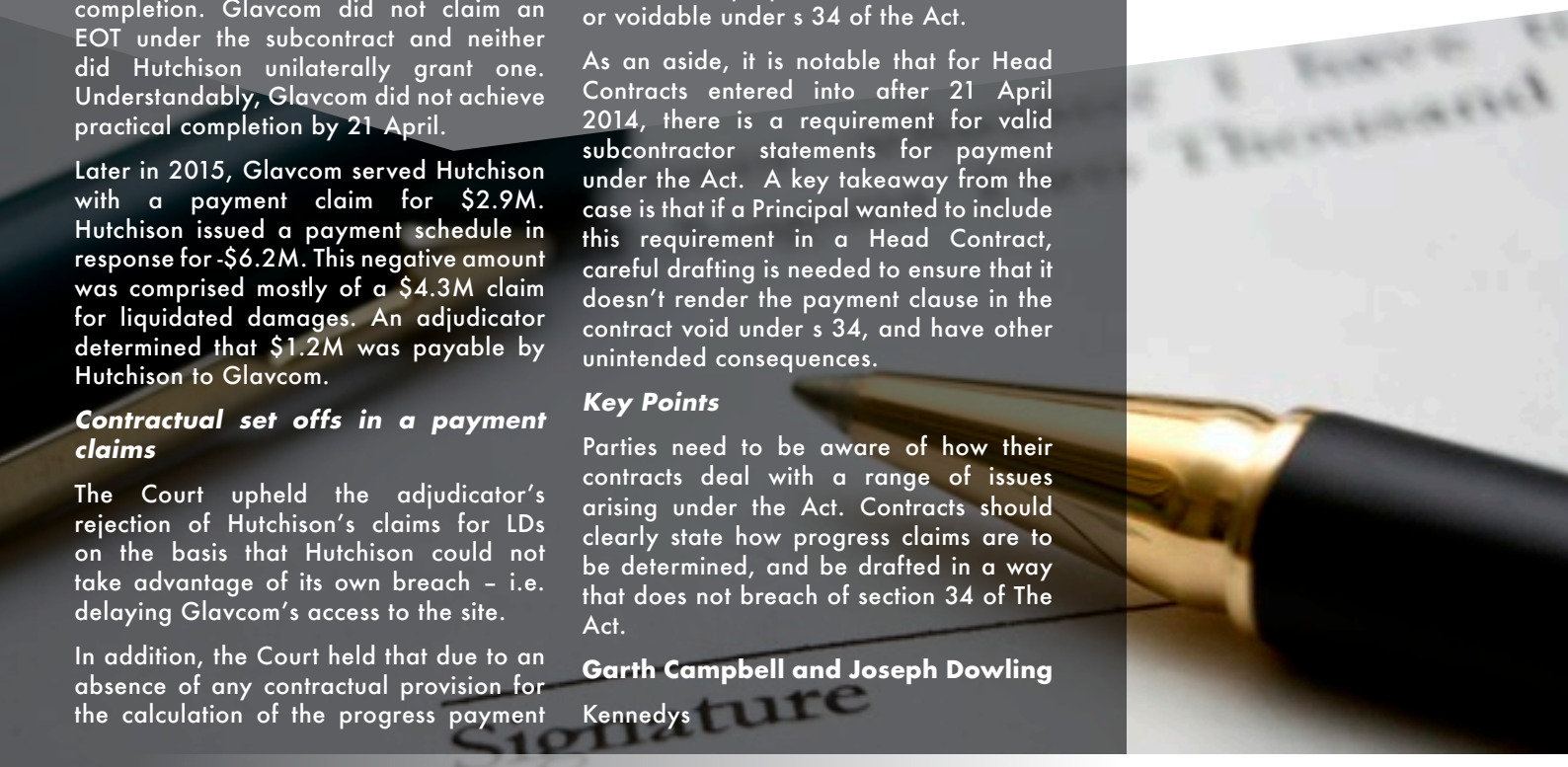
As an aside, it is notable that for Head Contracts entered into after 21 April 2014, there is a requirement for valid subcontractor statements for payment under the Act. A key takeaway from the case is that if a Principal wanted to include this requirement in a Head Contract, careful drafting is needed to ensure that it doesn't render the payment clause in the contract void under s 34, and have other unintended consequences.

Key Points

Parties need to be aware of how their contracts deal with a range of issues arising under the Act. Contracts should clearly state how progress claims are to be determined, and be drafted in a way that does not breach of section 34 of The Act.

Garth Campbell and Joseph Dowling

Kennedys



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Contact Us

www.epmprojects.com.au

supporting clients nationally

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

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

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

Acknowledgements

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

Lawyers | McCullough Robertson

Felicity Douglas - Lawyer
Environmental Planning Law
McCullough Robertson
Level 16, 55 Hunter Street Sydney NSW 2000
Ph: (02) 9270 8610 **Fax:** (02) 9270 8699
E PHolland@mccullough.com.au
www.mccullough.com.au

STATE PLANNING SERVICES

John McFadden - Managing Director
Strategic & Statutory Planners
State Planning Services
P.O. Box 394
Pyrmont NSW 2009
Ph: (02) 9552 1525 **Fax:** (02) 9552 1525
E jmcfadden@stateplanningservices.com.au
www.stateplanningservices.com.au

Kennedys
Legal advice in black and white

Garth Campbell and Joseph Dowling
Construction Law
Kennedys
Level 31, 2 Park Street Sydney NSW 1235
Ph: (02) 8215 5999 **Fax:** (02) 8215 5988
E h.golovanoff@kennedys-law.com.au
www.kennedys-law.com.au

mbm

Luke Foster - Executive Quantity Surveyor
Construction Consultants
MBMpl Pty Ltd
Level 7, 68 Pitt Street, Sydney NSW 2000
Ph: 02 9270 1000
E lukef@mbmpl.com.au
www.mbmpl.com.au

CONSTRUCTION CERTIFICATION SOLUTIONS

Alex Mullin - Director
Accredited Construction Certifiers
Construction Certification Solutions
Suite 606, 6A Glen Street, Milsons Point NSW 2061
Ph: 02 8033 2919
E amullin@ccsolutions.net.au
www.ccsolutions.net.au