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NEWSLETTER

WINTER 2017

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epm

This Edition

- Breaching Council Development Standards
- Draft Amendments to NSW Fire Safety Legislation
- AS 11000: General Conditions of Contract – Opportunity Lost?
- Simplifying the Planning System? Key Reforms Proposed to the Environmental Planning and Assessment Act 1979
- Can Money Buy Time? A Story all too Common in Construction Industry

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BREACHING COUNCIL DEVELOPMENT STANDARDS

A key aspect of negotiating the New South Wales planning system is the ability to obtain variations to development standards in Local Environmental Plans (LEPs). Development standards impose requirements on development, such as maximum height, floor space ratio and other critical parameters that determine the overall scope of a project.

Most LEPs contain a Clause 4.6, which sets out how to obtain a variation of development standards. Over the last two years there has been considerable tumult in the development sector following a series of important decisions in the Land and Environment Court (LEC).

In 2015, the LEC decision in *Four2Five v Ashfield Council* established that it was not enough for the consent authority to be satisfied that the proposed development will be consistent with the objectives of the development standard and the zone objectives. The LEC stated that, in addition, the consent authority must also be satisfied that there are other sufficient environmental planning grounds to justify contravening the development standard. That is a much stricter test than applied, for example, to the old SEPP 1 objections. The LEC's decision initially had the effect of making a variation to development standard almost impossible to obtain.

Many Councils seized on the decision in *Four2Five v Ashfield Council* as grounds to refuse any variation whatsoever to development standards. However, that position has become dubious following further LEC decisions in 2016, in particular those in *Micaul Holdings Pty Limited v Randwick City Council) and Moskovitch v Waverly Council*. As a result of those decisions, the LEC appears to have moved back to a position that more readily allows variations. That remains the position in mid 2017. Nonetheless, there is some ambiguity in some of the LEC decisions and some Councils continue to hold a line consistent with the earlier decision in *Four2Five v Ashfield Council*.

Regardless of legal technicalities, the variations with the best chance of success are those which show that the relevant variation results in a better environmental outcome than a compliant development. That is not always easy to achieve.

Non-compliances with key LEP development standards should be considered early in the project design process and in consultation with a town planner experienced in such matters.

Mark Bolduan

Manager, Urban Planning Group
EPM Projects

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DRAFT AMENDMENTS TO NSW FIRE SAFETY LEGISLATION

OVERVIEW

The NSW Government has released draft reforms to building regulations to improve fire safety standards in buildings. This is expected to come into force imminently.

Aside from the important benefits of improving the safety of occupants and fire fighters, changes will also benefit building owners and facility managers. From our experience, building owners and facility managers regularly experience frustration as a result of poor documentation and accountability around fire safety design and installations. Proposed changes to regulations, in addition to recent improvements to design standards, will go some way to assisting.

BACKGROUND

The changes relate to the Environmental Protection and Assessment Regulation 2000 (EP&A Regulation), which includes requirements and procedures for the certification of building works. A draft fire safety amendment was issued for public consultation in December.

The draft amendment follows a recent independent statutory review of fire safety and building certification legislation (the Lambert Report, 2015), public consultation and government review and response. Friends of EPM may have also attended a panel discussion at EPM's offices in November 2016 to discuss the key aspects of this.

The changes respond to key underlying problems including:

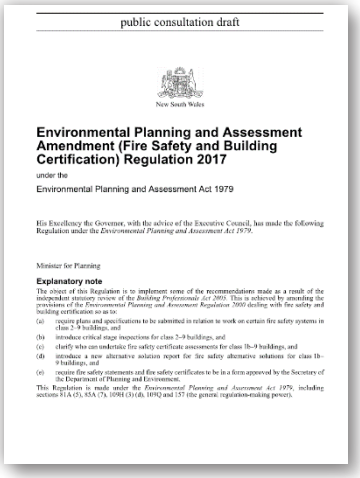
- A higher incidence of building defects in NSW than the rest of Australia. Where some defects have resulted in deaths.
- Consumers being vulnerable due to lack of expert knowledge and little consumer protection, particular in the residential sector. Arguably more consumer protection is afforded by a $10 toaster than a $1 million apartment.
- Complex NSW specific legislation, regulations and codes that are hard for the industry to understand and apply.
- An inefficient largely paper based approval system, with a lack of clarity on roles, responsibilities and accountability, with poor verification and checking of fire safety installations.

Building owners and facility managers regularly experience frustration as a result of the above issues. Shortfalls in installations and documentation normally comes to light when annual testing or building modifications occur. Subsequently it isn't always clear who is responsible due to the many parties involved in fire safety design and installations. For example BCA consultants and Certifiers deal with matters of BCA compliance, fire safety engineers address departures to BCA provisions through fire engineered Alternative Solutions, and fire services and mechanical designers design the fire related systems. Various contractors then supply, commission and install fire systems.

Summary of Draft Amendments

The following summarizes fire safety changes included in the draft EP&A Regulations amendment. It may surprise many that these are not current requirements:

1. All fire related systems are to be designed, installed, commissioned and checked annually by 'competent fire safety practitioners'. Currently there is no accreditation requirement for those performing these works. Guidance on how competency is defined is still to be published.
2. Design documentation for the installation or modification of fire safety systems is to be submitted to a building certifier prior to any works commencing. This is to minimise defective installations, and is to ensure comprehensive design documentation on site for the duration of construction, and for ongoing maintenance.



public consultation draft

New South Wales

Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017

under the

Environmental Planning and Assessment Act 1979

His Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Environmental Planning and Assessment Act 1979*.

Minister for Planning

Explanatory note

The object of this Regulation is to implement some of the recommendations made as a result of the independent statutory review of the *Building Professionals Act 2005*. This is achieved by amending the provisions of the *Environmental Planning and Assessment Regulation 2000* dealing with fire safety and building certification so as to:

(a) require plans and specifications to be submitted in relation to work on certain fire safety systems in class 2–9 buildings, and

(b) introduce critical stage inspections for class 2–9 buildings, and

(c) clarify who can undertake fire safety certificate assessments for class 1b–9 buildings, and

(d) introduce a new alternative solution report for fire safety alternative solutions for class 1b–9 buildings, and

(e) require fire safety statements and fire safety certificates to be in a form approved by the Secretary of the Department of Planning and Environment.

This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including sections 81A (5), 83A (7), 109H (3) (d), 109Q and 157 (the generic regulation-making power).

Umow Lai

DRAFT AMENDMENTS TO NSW FIRE SAFETY LEGISLATION
(CONTINUED)

3. New exemptions apply for minor works associated with existing fire systems designed to old standards, where strict compliance to a new standard is unreasonable and impracticable. This is on the basis that modifications don't reduce existing operational performance. Peer review will however be required by a 'competent fire safety practitioner'. This will generally apply to base-build infrastructure (e.g. fire hydrant pumps and Fire Indicator Panels), rather than for new hardware (e.g. new sprinkler heads, hydrant outlets and EWIS speakers).
4. New critical construction stage inspections, where certifying authorities inspect fire compartmentation and associated services penetrations prior to covering by ceilings etc.
5. Discretion for Fire and Rescue NSW to inspect and assess fire safety system installations in any multi-unit residential buildings.
6. For building works involving installing, extending or modifying a fire safety measures, an Occupation Certificate cannot be issued without a Fire Safety Certificate from a 'competent fire safety practitioner', in a standardised format. This Certificate is important because it defines all critical fire safety measures and the routine (typically annual) certification requirements.

   Until an accreditation framework is implemented, guidelines are intended to be published to assist PCAs in identifying competency.
7. Clarifications are provided around Fire Engineering (Alternative Solution) Reports to support non-standard fire safety designs. In addition, any resulting additional measures relied upon by Fire Engineering Reports now need to be inspected for conformance by the Certifying Authority at the conclusion of a project. Currently only the Fire Safety Engineer needs to review works for conformity.
8. Fire Safety Statements (typically Annual, which confirm the ongoing performance of critical fire safety measures) must now be undertaken by 'competent fire safety' practitioners. Currently the requirement is for a 'suitably qualified person' (in the opinion of the building owner).

Other Changes to Standards

On a similar note, recent changes to Australian Standards that are now in force will further improve the quality of design and installation documentation. Fire Detection and Alarm standard AS1670.1 2015 and Mechanical Fire and Smoke Control standard AS1668.1 2015, which are now referenced by the BCA 2016, aim to ensure that comprehensive documentation is provided by designers on how fire related systems are supposed to work, interface and ongoing testing requirements.

Conclusion

The draft regulatory amendment and recent changes to design standards are a positive step in creating higher standards of design, installation, commissioning and annual inspections.

Given that the industry can be slow to change common practices, progress will be reliant on enforcement by Building Certifiers in particular. Building owners, developers and facilities managers should also stay vigilant on processes being followed and documentation being provided by consultants and installers, in addition to playing their part in maintaining good record keeping of all building fire safety documentation.

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AS 11000: GENERAL CONDITIONS OF CONTRACT – OPPORTUNITY LOST?

Facts

The AS2124-1992 and AS4000-1997 General Conditions of Contract have been widely used forms of contract across the Australian construction, engineering, and infrastructure sectors. However, there have been a number of developments since these standards were drafted, including the introduction of GST and developments in security of payment legislation and case law. In early September 2013, Standards Australia formed a technical committee to conduct a revision of these forms as well as the myriad of Australian standards related to those general conditions. This resulted in the drafting of a new national standard form contract AS11000 which aimed to be both 'user friendly', and supersede the previous forms to factor in changes in law while providing a more balanced approach to risk allocation.

Key issues addressed

The key changes proposed in the AS11000 are set out below.

- Clause 2 sets out obligations on the parties to act in good faith and follow early warning procedures.
- Clause 10 allows service of notices to be made by email.
- Clause 35 lists the specific requirements for programming that the contractor must include.
- Clause 37.4 aims to replace the 'qualifying cause of delay' definition used in AS 4000 with the 'causes of delay' which include events beyond the reasonable control of the contractor.
- Clause 37.2 states the contractor is obliged to provide the superintendent with a notice of delay within five business days of becoming aware of anything that could cause delay and advise whether it intends to claim an extension of time (EOT) for the delay.
- Clause 37.9 offers the superintendent 20 business days (compared to the previous 28 days) to make its assessment of an EOT and also entitles the superintendent to request further information from the contractor, which could practically extend the timeframe for another 20 business days.
- Clause 32.1 refers to 'non-compliant work', rather than 'defective work' and the contractor is required to rectify any work not complying with the contract without having to wait on the superintendent to issue directions.
- Clause 45 offers alternative dispute resolution options to suit a range of different construction projects such as mediation, arbitration, conferences, expert determination, litigation as well as the option for a contract facilitation or dispute resolution board.

Recent Announcements

Unfortunately the new standard was not well received, and on 4 April 2017, despite the long lead up to the release of this document, Standards Australia announced that all work on the draft AS11000 had ceased and that it would not be released as an Interim Standard or an Australian Technical Specification since '*the document was not supported by the full spectrum of interests*'.

Consequences

Due to the shortfalls of AS 2124-1992 and AS 4000-1997, parties to a contract will need to continue amending the AS 2124-1992 and AS 4000-1997 to address their inadequacies which have yet to be resolved. Notwithstanding, hope is not lost in a potential resurrection of the AS 11000 as Standards Australia acknowledged it remains '*committed to engaging in further consultation with all stakeholders to determine the future of AS 11000*'.

Helena Golovanoff, Garth Campbell and Zoe Dennis, formerly of Kennedys, have now moved to Holding Redlich. Please contact Holding Redlich should you require further information.

Natalie Khoury and Garth Campbell

Special Counsel
Holding Redlich

HOLDING REDLICH

SIMPLIFYING THE PLANNING SYSTEM? KEY REFORMS PROPOSED TO THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

On 9 January 2017, the Department of Planning and Environment (**DPE**) announced proposed changes to the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) under a draft *Environmental Planning and Assessment Amendment Bill 2017* (NSW) (**Bill**). Consultation for the Bill has now ended. The final Bill is yet to be released and introduced into Parliament.

Whilst the Bill proposes many substantial changes to the existing EP&A Act, some of the more significant changes proposed are:

(a) Local communities will have greater opportunity to participate in strategic planning. Consent authorities will need to prepare a community consultation plan explaining how they will engage the community in plan-making and development decisions. Applicants for State significant development will need to demonstrate how they consulted with the community prior to lodgement of their application;

(b) DCPs will be standardised, making them easier to understand. However, the content and management of DCPs is a matter for each individual local council and therefore many of the current frustrations with DCPs are likely to remain;

(c) Transitional arrangements in respect of Part 3A under the EP&A Act are to be repealed. All modifications of existing Part 3A approvals will be subject to the current state significant development pathway which will require the project as modified to be "substantially the same" as the Part 3A development as approved at the date of repeal of the transitional provisions. This will make it far more difficult for proponents to modify Part 3A approvals and many modifications will instead need to be approved as a new and separate stand-alone development applications;

(d) The Planning Assessment Commission (renamed the Independent Planning and Assessment Commission) will be reformed so that it will no longer review development applications which are referred to the Commission but instead may guide the Department of Planning and Environment in its assessment function;

(e) Consent authorities and the Court will be prevented from approving a modification application for works already carried out in contravention of the consent;

(f) Consent authorities will be required to consider the statement of reasons for the original consent when determining a modification application;

(g) A Complying Development Certificate (**CDC**) may be declared invalid in the event it does not comply with the relevant standards in a State Policy. As such, proceedings may now be brought to challenge the validity of a CDC. This resolves the issue identified in *Trives v Hornsby Shire Council* [2015] NSWCA 158, where the Court held that where an accredited certifier is satisfied that development proposed under a CDC meets the relevant standards in a State Policy, their opinion cannot be challenged provided it is reasonable;

(h) Local councils be given the power to issue a temporary stop work order where work has been approved by a CDC. This will give Council the opportunity to investigate whether the project is being constructed consistent with a CDC at any stage of the development;

(i) A CDC may be issued subject to a deferred commencement condition;

(j) The regulations may identify types of CDCs for which an accredited certifier may not issue a complying development certificate and only council can issue a CDC; and

(k) The ability for the Minister to direct a council to refer certain development applications to an Independent Hearing and Assessment Panel for review

Whilst many of the proposed reforms are positive for developers, there are a number of reforms that have the potential to add complexity, time and cost to development. We encourage developers to consider the proposed reforms in detail during this period prior to the reforms commencing to understand how the reforms may impact on their future development plans.

Samantha Daly

Partner
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Lawyers | McCullough Robertson

CAN MONEY BUY TIME? A STORY ALL TOO COMMON IN CONSTRUCTION INDUSTRY

The project started off swimmingly – teams were springing into action, sod was being turned, and the outlook was positive. Then you hit a hurdle: bad weather, bad ground, bad design, the wheels started to fall off and before you knew it you had that heart-sinking realisation that we have all had at one time or another: you're not going to make it.

So what now? Hope for the best? Accept that you're going to be late? Quit your job and fly some place warm? All good options, but sooner or later someone is going to have a lightbulb moment: "let's accelerate!".

So, what is acceleration? In short, acceleration involves trading something (typically money) for a reduction of the construction programme. The cost can be borne by the contractor or the principal, though the latter is more commonly the case, and is the focus of this article. In this article, I will explore the key concepts of acceleration, what to look out for, and most importantly, *what questions to ask*.

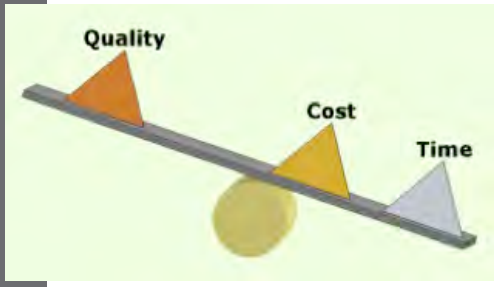
Your construction contract probably includes a provision for the superintendent to request an acceleration proposal from the contractor. If it does not, you can still reach an acceleration agreement as a deed to the contract. But before asking the contractor for an acceleration proposal, there are a few questions that you should ask yourself:

Am I throwing money at the problem?

Acceleration can occur in order to enable a principal bring forward the original deadline, or in order to make-up for a delay as outlined above. If you are considering accelerating to make up for a delay, ask yourself *what caused the delay in the first place? Are there issues with the design? Has the contractor under-resourced the project? Are the consultants taking too long to respond to RFI?* If the answer to any of these questions is yes, accelerating will only land you back at square one but with a lighter wallet. You need to fix these problems before you even think about accelerating – you cannot stitch the wound until you have stopped the bleeding.

What risks am I creating?

Recognise that whilst there are things that we can do to speed up a project, at the end of the day money cannot buy time. By reducing the programme of a project, you may be adding pressure to the other elements of your project: cost and quality. A builder who is rushed will struggle to achieve the same level of quality as one that takes his time – more haste less speed as Mother used to say.



If, however, you have considered these factors and still believe that acceleration is the answer, it is time to ask your contractor for an acceleration proposal. You should request that the proposal include the following key elements at a minimum:

A new programme

It is important that the new programme is carefully scrutinised, as this will become the new contract programme if the acceleration proposal is accepted. At the very least, you should ask yourself the following questions:

Does the new programme actually meet your new deadline? Check for any tasks that finish after the date for practical completion and ask yourself whether this is realistic. If you see items such as commissioning, defects or training occurring after the practical completion date, ask yourself whether this will actually allow you to commence operation of your facility within the timeframe you require.

Has the critical path changed? Have all the tasks suddenly become critical? If so, challenge the logic of this. It may be the case that accelerating the works requires the contractor to run multiple simultaneous critical paths, but not all tasks should be critical, and the logic should still make sense. If it doesn't, it's possible that the contractor isn't playing fair (I have even seen task bars on a programme manually coloured red so that they appear critical!).

Critical tasks create a risk for the principal as there is no float under which a task can be delayed before it becomes critical and delays the project.

Have all of the tasks just been shifted toward the end of the programme? The programme needs to be realistic. If the contractor's plan is that they'll perform all of their sequential tasks simultaneously, then they haven't given it the thought required – "she'll be right

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CAN MONEY BUY TIME? A STORY ALL TOO COMMON IN CONSTRUCTION INDUSTRY
(CONTINUED)

mate" isn't going to help anyone here. If the carpet cannot be laid until the floor is built, no amount of wishful thinking is going to change that fact. Overlapping tasks can achieve a slightly more efficient programme, but the only way to achieve a real reduction in programme is to do things faster. The contractor should be able to explain how these tasks will be shortened. In particular, look out for reduced lead times – unless the contractor has reached an arrangement with the supplier, this could be another case of wishful thinking.

The cost of acceleration

Ask for a detailed itemised cost breakdown. Not only will this allow you to determine whether you are getting value, it will serve as a useful insight into how the contractor intends to achieve the accelerated programme.

Is the contractor proposing different equipment? This can be a great way to reduce time, particularly for bottleneck items such as cranes or material hoists. Upsizing a crane or introducing it into the project earlier than planned can be very effective.

Will extra personnel be appointed? Many hands make light work, and appointment of extra personnel (project managers, site managers, foremen) will allow the contractor to oversee more subcontractors at the one time.

Is the contractor proposing split shifts? Be careful here. If the contractor is proposing split shifts, ask whether they plan to change the working hours. If so, there may be implications with council or your neighbours that have not been fully considered.

Are alternative construction materials or techniques being proposed? As tempting as it may be to latch on to a golden bullet, remember that neither you nor the contractor has designed the project. Make use of your consultants, and ask the question – they may have a reason for designing things the way they did.

The finer details

How is the contractor going to get paid? The most important thing that you will need to agree with your contractor is how they get paid for acceleration. On one hand, it is going to cost the contractor to undertake the acceleration and they will expect that they are reimbursed for this at the time they incur the costs. On the other hand, you could pay the contractor in full and not achieve a single day of acceleration, in which case you have paid for something that you do not receive. It is difficult to reconcile these positions, and as such the best option generally involves some kind of division of the risk. It may be that you agree to pay a portion of the acceleration costs upfront, and the remainder under a bonus scheme contingent on the contractor hitting the required date.

Does the deal change the risk profile of the contract? An acceleration proposal should be a standalone deal. If the contractor is asking you to shift the risk profile of the contract, think very carefully about the implications of doing so. Common examples are:

Shifting the risk of delays, particularly inclement weather. If you are being told that the contractor can achieve the new date 'weather permitting', don't be wishful – you are not god and you don't control the weather.

Reducing or eliminating liquidated damages. This is the worst thing that you could do. Think objectively: without liquidated damages, there is no tangible contractual difference between the date for practical completion and the next day. Acceleration requires you and the contractor to work together, but at the end of the day you need to protect your position - do not tear up your prenup!

To sum up: acceleration is very tricky to get right – at the end of the day, none of us can invent time. If you are considering accelerating to get yourself out of trouble, have a long hard think about whether you are just delaying the inevitable – it may be time to face the music. If you do choose to accelerate, following the principles above will give you the best chance of success. As always, don't be shy to ask the hard questions.

Ryan Mooney

Group Executive
EPM Projects

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Pymble Ladies College Centenary Precinct Project
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Announcing our new Associates, Todd Ewart and Danaë Bain

EPM is proud to announce the promotions of Danaë Bain and Todd Ewart to the positions of Associate.

These newly created positions are part of our strategic plan to ensure that EPM continues to be a high-performing business well into the future. At the core of this strategy is our unwavering commitment to the wellbeing of our staff and the success of the projects that we manage for clients. Strengthening our management team through these promotions enables greater business and project oversight and increased support for clients and staff.

We congratulate Danaë and Todd on their well-earned promotions and we look forward to their continued success along with the success of the projects that they oversee.

Supporting Clients Nationally

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