

# JOHNSON WINTER & SLATTERY

L A W Y E R S

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Mr Ibrahim El-Kadomi  
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**BY EMAIL** ielkadomi@aia.nsw.edu.au

Dear Mr El-Kadomi

## **Advice on portable classrooms for AIA Strathfield**

We refer to your previous emails and conversation with Samantha Daly. You have requested advice in relation to portable classrooms which are currently in place at the Australian International Academy (**AIA**), Strathfield campus. In particular, you have asked whether the existing portable classrooms can be retained or replaced as exempt or complying development or development without consent under the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (ESEPP)*.

We note that we previously provided advice on this matter in November 2017, but the advice has now been updated to reflect changes to the ESEPP which came into effect on 15 December 2017 and which we informed you of via email in January 2018.

### **1 Background**

The AIA is an independent, registered co-educational school which owns and operates a number of schools in Australia and overseas, including the AIA Strathfield campus. The Strathfield Campus is located at 420 Liverpool Road, Strathfield South (**the School Site**). The school is operating under DA4-5/264 which was issued by the NSW Land and Environment Court in 2006. AIA also obtained a separate development consent from Strathfield Local Council (**Council**) for the construction of a single storey, freestanding structure containing two portable classrooms. The development consent for the classrooms (DA 2012/077) was granted on 13 November 2012, subject to a number of conditions.

In particular, Condition 6 of DA 2012/077 (**the Classrooms DA**) states:

*The portable classrooms are to be removed within three\* (5) years from the date of issue of an Occupation Certificate provided that the works associated with the Traffic Management Plan dated August 2006 and associated Site Plan DA-02J dated 13 October 2006 as required by Court approved Development Consent DA0405/264 are completed within 3 years from the date of issue of this Development Consent.*

*Should the traffic works not be completed within 3 years of the date of the issuance of the occupation certificate (or interim occupation certificate specific to these works), the portable*

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*classrooms shall be removed and no further extension of time to use the classrooms will be permitted.*

\*We have been informed that “three” is a typographical error and the correct time period is five years.

We have been provided with an Occupation Certificate (**OC**) for the Classrooms DA. This OC was granted on 26 June 2014. Condition 6 of the Classrooms DA requires the portable classrooms to be removed within five years of this date, which means they must be removed by 26 June 2019. We understand that AIA has a lease over the School Site until 2028 and would therefore like to keep the portable classrooms on site past 2019.

We note that Condition 6 of the Classrooms DA also requires AIA to have complied with a number of traffic controls. We have been informed that, although AIA has not fully complied with the controls, it has now largely complied and Council has informed AIA that Council is satisfied with the traffic works and will not be seeking to rely on Condition 6 to prevent further use of the portable classrooms.

## 2 Request for Advice

We understand that AIA would like to continue to use the portable classrooms which are currently on the School Site past June 2019 (the time at which the development consent for use of the classrooms expires). You have asked whether you can either install new portable classrooms or retain the current portable classrooms as exempt or complying development under the ESEPP. The ESEPP is a State Environmental Planning Policy which overrides local planning instruments such as *Strathfield Local Environmental Plan 2012 (Strathfield LEP)* to the extent of any inconsistency. If the classrooms can be maintained or constructed as exempt or complying development or development without consent under the ESEPP then development consent from Council is not required.

## 3 The School Site

The School Site is located at 420 Liverpool Road, Strathfield and is bounded by Liverpool Road, Hill Street and Hillcrest Avenue. We have been informed that AIA leases this site and uses a number of existing buildings on the site for the primary and secondary school.

Three buildings, known as *Leigh College*, *Vickery Hall* and *Brundah* sit on the School site and are currently used for classrooms and associated school facilities. These buildings are not registered on the State Heritage Register. However, they are listed as heritage items under the Strathfield LEP. Schedule 5 of the Strathfield LEP lists items of environmental heritage. Schedule 5 relevantly contains the following:

### Part 1 – Heritage Items

Suburb	Item Name	Address	Property Description	Significance	Item No
Strathfield South	Former Leigh College including E Vickery Memorial Hall – school	416-420 Liverpool Road	Lot 100, DP774567	Local	128
Strathfield South	“Brundah” – Victorian Italianate Villa	416-420 Liverpool Road	Lot 4, DP 773523	Local	129

Although there are only two listings of heritage items (being items 128 and 129), the item names refer to all three permanent buildings currently on the School site (*Leigh College*, *Vickery Hall* and *Brundah*).

Strathfield LEP also contains a Heritage Map which shows the Heritage items on the School Site. An excerpt from this map is shown below:



The above Heritage Map shows part of the School Site shaded as including items of heritage significance. We have marked the School Site boundary in yellow and heritage items 128 and 129 are underlined in red. The shaded area of the School site is the area affected by heritage items. The rest of the school site remains unaffected.

We understand that the portable classrooms are located at the rear of the main buildings, close to the Southern boundary of the School Site (near Hillcrest Avenue). The portable classrooms are thus located on a part of the School Site which is not affected by a heritage item under the Strathfield LEP.

#### 4 Exempt Development under the ESEPP

##### 4.1 Exempt development requirements

Construction of portable classrooms is not a form of exempt or complying development under the Strathfield LEP. However, AIA may be able to rely on the ESEPP to maintain the current portable classrooms or install new portable classrooms without requiring development consent from Council.

Clause 38 of the ESEPP reads as follows:

##### *38 Existing Schools – exempt development*

- (1) *Development for any of the following purposes is exempt development if it is on land within the boundaries of an existing school and complies with any requirements of this subclause that apply to the development:*

.....

*(f) walking paths (including raised walking paths), boardwalks, ramps, minor pedestrian bridges, stairways, gates, seats, barbecues, shelters and shade structures,*

.....

*(l) a short-term portable classroom (including its removal):*

*(i) that is not more than 1 storey high, and*

*(ii) that is more than 5 metres from any property boundary with land in a residential zone and more than 1 metre from any property boundary with land in any other zone, and*

*(iii) that is removed within 24 months of being installed.*

.....

*Note: Exempt development must also comply with the general requirements in clause 17.*

Clause 17 of the ESEPP reads as follows:

##### *17 General requirements for exempt development*

- (1) *This clause applies to any development that this Policy provides is exempt development.*

.....

(3) *To be exempt development, the development:*

(a).....

(e) *if it is likely to affect a State or local heritage item or a heritage conservation area – must involve no more than minimal impact on the heritage significance of the item or area, and be in accordance with any applicable heritage conservation management plan,”*

AIA can therefore rely on the exempt development provisions in the ESEPP to maintain and/or install new portable classrooms provided that:

- The portable classrooms are only one storey high;
- The portable classrooms are more than 5 metres from any property boundary (as the School Site and surrounding properties are zoned Residential 2(b) under the *Strathfield Planning Scheme Ordinance 1969* land zoning map);
- The portable classrooms are removed within 24 months of being installed;
- The portable classrooms will have no more than minimal impact on the heritage listed buildings on the School Site or any adjacent sites; and
- Any requirements in a heritage conservation management plan are met.

Importantly, clause 38(1)(l) of the ESEPP requires that portable classrooms will only be exempt development if they are removed within 24 months of being installed. This means that:

- AIA can install new portable classrooms as exempt development under the ESEPP (provided the development standards in clause 17 and 38 of the ESEPP are met) but these will need to be removed within 24 months of being installed; and
- AIA cannot rely on the exempt development provisions of the ESEPP to maintain the current portable classrooms past June 2019 (per the Classrooms DA). This is because the ESEPP provision regarding portable classrooms clearly applies only to short-term portable classrooms and cannot be relied upon for ongoing use of the portable classrooms which were legally installed in 2014 under the Classrooms DA.

#### **4.2 What can AIA carry out as exempt development?**

If AIA wishes to install portable classrooms as exempt development you can:

- Remove the existing portable classrooms in June 2019, as permitted under the Classrooms DA (a separate DA is not needed for the classroom removal); and
- Install new portable classrooms which must be removed and replaced by June 2021 (presuming they are installed in June 2019). The AIA can continue to rely on the exempt development provisions of the ESEPP to remove and install portable classrooms every two years. However, as the School intends to operate on the School Site until 2028 this is likely to be a disruptive and inefficient means of maintaining adequate classrooms.

We note for completeness that to be exempt development under clause 17 the development must not involve the removal or pruning of a tree or other vegetation that requires a permit or development consent for removal or pruning, unless that removal or pruning is undertaken in accordance with a permit or development consent. We have assumed that any portable classroom development will not require the removal of a tree, however please let us know if this is not the case and we can provide further advice as to Council's requirements with respect to tree removal.

We have not been provided with information as to the exact location of the classrooms and whether they are more than 5 metres from all relevant property boundaries. We note that the setback requirements apply to all property/lot boundaries, irrespective of whether or not the properties are located within the School Site. We understand that the School Site is made up of two lots, and therefore to be exempt development the portable classrooms must be located at least 5m from the boundary with the other school lot, as well as any adjacent properties (outside the School Site).

Although there are Heritage items on the School Site, these buildings do not prevent exempt development being carried out on the School Site pursuant to the ESEPP provided the 'minimal impact' criteria is satisfied. In this regard, we have been provided with a Statement of Heritage Impact report (**Heritage Report**) prepared for AIA by Perumal Murphy Alessi Heritage Consultants dated January 2010. In this Heritage Report, it states

*The proposed new temporary classroom and path are considered acceptable as they will have no impact on the fundamental significance of the heritage listed items on the site. No change is proposed to the main buildings as a result of this application or their relationship and visibility to the front garden and main street frontages. (see page 9 of Heritage Report)*

.....

*In Summary, it is considered that the proposed temporary structure to be located at No 416-420 Liverpool Road, Strathfield South is acceptable on Heritage Grounds.*

*The structure will create no adverse impact on significant buildings, Brundah and Leigh Hall, is temporary and will improve the use and amenity of the site. (see page 12 of Heritage Report)*

Provided that the portable classrooms are more than 5 metres from any property boundary, AIA can rely on the ESEPP to install new portable classrooms after the existing classrooms are removed in accordance with the Classroom DA. However, such classrooms can only remain for a maximum of two years before they must be removed (and replaced if needed). This development pathway is therefore not an ideal avenue for maintaining portable classrooms on the School site from June 2019 until 2028.

We understand that there is also a small path which leads to the portable classrooms. If a new path needs to be constructed this can also be carried out as exempt development under clause 38(1)(f) of the ESEPP.

## **5 Development without consent under the ESEPP**

### **5.1 What constitutes development without consent?**

If AIA wishes to either continue to use the existing portable classrooms beyond 2019 or to install new portable classrooms which will remain for more than two years, it may be able to do this as 'development without consent' under clause 36 of the ESEPP.

Clause 36 of the ESEPP is as follows:

*(1) Development for any of the following purposes may be carried out by or on behalf of a public authority without development consent on land within the boundaries of an existing school:*

*(a) construction, operation or maintenance, more than 5 metres from any property boundary with land in a residential zone and more than 1 metre from any property boundary with land in any other zone, of:*

.....

*(ii) a portable classroom (including a modular or prefabricated classroom) that is not more than 1 storey high;*

.....

*(e) demolition of structures or buildings (unless a State heritage item or local heritage item).*

Although 'development' is not defined in the ESEPP or the Codes SEPP, it is defined in the *Environmental Planning and Assessment Act 1979* (NSW) to mean:

- (a) The use of land, and*
- (b) The subdivision of land, and*
- (c) The erection of a building, and*
- (d) The carrying out of a work, and*
- (e) The demolition of a building or work and,*

- (f) *Any other act, matter or thing that may be controlled by an environmental planning instrument.*

Furthermore, under the *Environmental Planning and Assessment Regulation 2000*, a registered non-government school, such as AIA, is a public authority.

As 'development' includes the use of the land, AIA can rely on clause 36 to carry out the following as development without consent:

- Continue to use the current portable classrooms beyond 2019;
- Remove the existing portable classrooms at a point of time after June 2019 (i.e. AIA does not need to rely on the School DA to remove the existing portable classrooms); and
- Install new portable classrooms which can remain on the School Site indefinitely (unlike the exempt development provisions, the development without consent provisions of the ESEPP do not require portable classrooms to be removed within 24 months).

As outlined above, clause 38 of the ESEPP applies to "development" which includes the use of land. Furthermore clause 36(1)(a) clearly allows for the operation and maintenance of a portable classroom, in addition to the construction of a classroom. Therefore in our view AIA can rely on the ESEPP to continue to use/ operate the existing portable classrooms (provided the boundary requirements are met) and does not need to remove the existing classrooms in 2019 and replace them with new ones.

We note that the AIA can only rely on clause 36 and maintain and install the portables as development without consent if it complies with clause 36(2) and specifically the development:

- Does not require an alteration of traffic arrangements (for example, a new vehicular access point to the school or a change in location of an existing vehicular access point to the school);
- Does not allow for an increase in the number of students the school can accommodate or the number of staff employed at the school that is greater than 10% (compared with the average of each of those numbers for the 12 month period immediately before the commencement of the development); and
- Would not result in a contravention of any existing condition of the most recent development consent (other than a complying development certificate) that applies to any part of the school, relating to hours of operation, noise, car parking, vehicular movement, traffic generation, loading, waste management, landscaping or student or staff numbers.

Our understanding is that the removal of the existing portable classrooms and replacement of these classrooms with new ones will neither alter traffic arrangements nor impact on student numbers, nor will it contravene any conditions of the development consent applying to the School Site relating to hours of operation, noise, car parking, vehicular movement, traffic generation, loading, waste management, landscaping or student or staff numbers.

We also note that clause 36 does not contain any requirements relating to heritage impacts (however we note that the school must consult with Council in respect to the development, as discussed in detail below). Consequently, in the event that the portable classrooms are likely to have more than a 'minimal impact' on a heritage item (and thus not be carried out as exempt development), the portable classrooms may be able to be retained or removed and replaced as development without consent. The same setback and height requirements as the exempt development pathway (ie setback of 5m and height of maximum one storey) would apply under this pathway.

## **5.2 What does AIA need to do to carry out development without consent?**

Development without consent is different to exempt development and requires the school to self-assess and self-determine the development prior to the development commencing in accordance with the *NSW Code of Practice for Part 5 activities, For registered non-government schools, August 2017 (Code)* – copy **attached**.

This Code requires the school to self-assess and self-determine the development and also includes a number of consultation requirements. The level of consultation required to be undertaken will reflect the level of potential environmental impact (including impacts on surrounding properties and the community) and the anticipated level of community interest in the development. The AIA will need to write to any relevant government agencies, the local Council and all neighbours the AIA considers relevant regarding the proposed development. The AIA will also be required to consider all submissions received within 21 business days and keep written records of all consultation which AIA undertakes regarding the development and submissions on the proposed development. We note that development without consent may have more than a minimal impact on heritage items, however if this is the case the proponent must first consult with council (and taken into consideration any response received from council).

Part 3 of the Code outlines the process the AIA must undertake when assessing a development for the purposes of development without consent.

In the event that AIA seeks to rely on the development without consent pathway, it is critical that it complies with all aspects of the Code as a failure to comply with the Code will be a breach of the planning legislation. If you decide to rely on the development without consent provisions we are able to provide further assistance with regards to your obligations under the Code.

## **6 Complying Development under the ESEPP**

If the School is unable to comply with the requirements set out above for exempt development or development without consent, then the portable classroom development may be able to be carried out as complying development. There are a number of development standards set out in Schedule 2 of the ESEPP that would need to be complied with for a complying development certificate to be issued by a private certifier. In addition, complying development is not permitted to be carried out on any land which is mapped as an item of environmental heritage under the Strathfield LEP.

Given the development of the portable classrooms can be carried out as exempt development or development without consent, this is the least attractive development pathway and we have not provided further detail on the requirements for complying development in this advice. However please let us know if you require further information in relation to this pathway.

## **7 Our Advice**

AIA has a number of options for the continued use of the existing portable classrooms and the replacement of these classrooms with new portable classrooms as follows:

- AIA can rely on the current development consent to maintain the existing portable classrooms which are already on the School Site until June 2019. AIA can also rely on this DA to remove the current classrooms at any time up until June 2019. If AIA wishes to use portable classrooms past this date you will need to rely on either the exempt development or development without consent provisions of the ESEPP (or obtain a complying development certificate or a new development consent). If AIA wishes to remove the portable classrooms after June 2019 it will also need to rely on a provision in the ESEPP;
- AIA can rely on clause 38 of the ESEPP to install new portable classrooms as exempt development but these classrooms will need to be removed after 24 months from the date they were installed. In theory AIA can continue to remove and install new portable classrooms as exempt development every 2 years but this is not a recommended approach; and
- AIA can rely on clause 36 of the ESEPP to either continue to operate the existing portable classrooms or to install new portable classrooms (which remain indefinitely) as development which does not require consent (presuming that the portable classrooms do no impact on traffic of increase student numbers) if the Code is complied with.

We recommend that AIA carries out a survey of the current portable classrooms. If the current classrooms are more than 5 metres from the property boundary, and following an assessment and approval of the classrooms under the Code, AIA can rely on the development without consent provisions of the ESEPP to continue to operate the portable classrooms. However, if the current classrooms are closer to the boundary, then AIA will first need to remove the current classrooms by 26 June 2019 in accordance with the current valid development consent. AIA can then rely on the ESEPP to install new classrooms that are not more than 1 storey high and are more than 5 metres from all property boundaries. AIA can also rely on the exempt development provisions of the ESEPP for the pathway which leads to the portable classrooms.

Although there are heritage items on the School Site, we understand that these items are in a different location to the portable classrooms and as such are unlikely to be materially impacted by the classroom development. Therefore the existence of these heritage items on the School Site do not prevent AIA relying on the ESPP to continue to use the current portable classrooms or to install new classrooms. The new classrooms should be placed at the same site as the old classrooms. If there is a change to the location of the portable classrooms, AIA will need to obtain further advice from heritage experts to ensure that there is minimal impact on the heritage items with the classrooms in the new location if they wish to rely on the ESEPP to install the new classrooms as exempt development.

If you have any further queries or would like to discuss please feel free to contact us.

Yours Sincerely,

A handwritten signature in blue ink, reading "Johnson Winter & Slattery". The signature is written in a cursive style and ends with a long, sweeping horizontal line that curves downwards at the end.