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CLAUSE 4.6 REQUEST TO VARY THE HEIGHT OF BUILDINGS DEVELOPMENT STANDARD

23 TASMAN STREET, DEE WHY

1. Introduction

This clause 4.6 variation request has been prepared in support of a building height breach associated with a development application proposing alterations and additions to the dwelling In the preparation of this variation request consideration has been given to architectural plans prepared by Cad Draft Pty Ltd.

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney [2019]* NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2. Warringah Local Environmental Plan 2011

2.1. Clause 4.3: Height of Buildings

Pursuant to Clause 4.3 of the LEP the height of any building on the land shall not exceed a height of 8.5 metres. The objectives of this clause are:

a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*

c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

Building height is defined as follows:

> ***building height*** *(or* ***height of building****) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift*

overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

Ground level existing is defined as follows:

ground level (existing) means the existing level of a site at any point.

We note that Council has adopted the interpretation of ground level (existing) as that established in the matter of *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582* where at paragraphs 73 and 74 O'Neill C found:

73. The existing level of the site at a point beneath the existing building is the level of the land at that point. I agree with Mr McIntyre that the ground level (existing) within the footprint of the existing building is the extant excavated ground level on the site and the proposal exceeds the height of buildings development standard in those locations where the vertical distance, measured from the excavated ground level within the footprint of the existing building, to the highest point of the proposal directly above, is greater than 10.5m. The maximum exceedance is 2.01m at the north-eastern corner of the Level 3 balcony awning.

74. The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.

The proposed works will see an increase in building height to 9.08m which is a variation of 580mm or 6.8%. The building height is shown on the section drawing provided below:

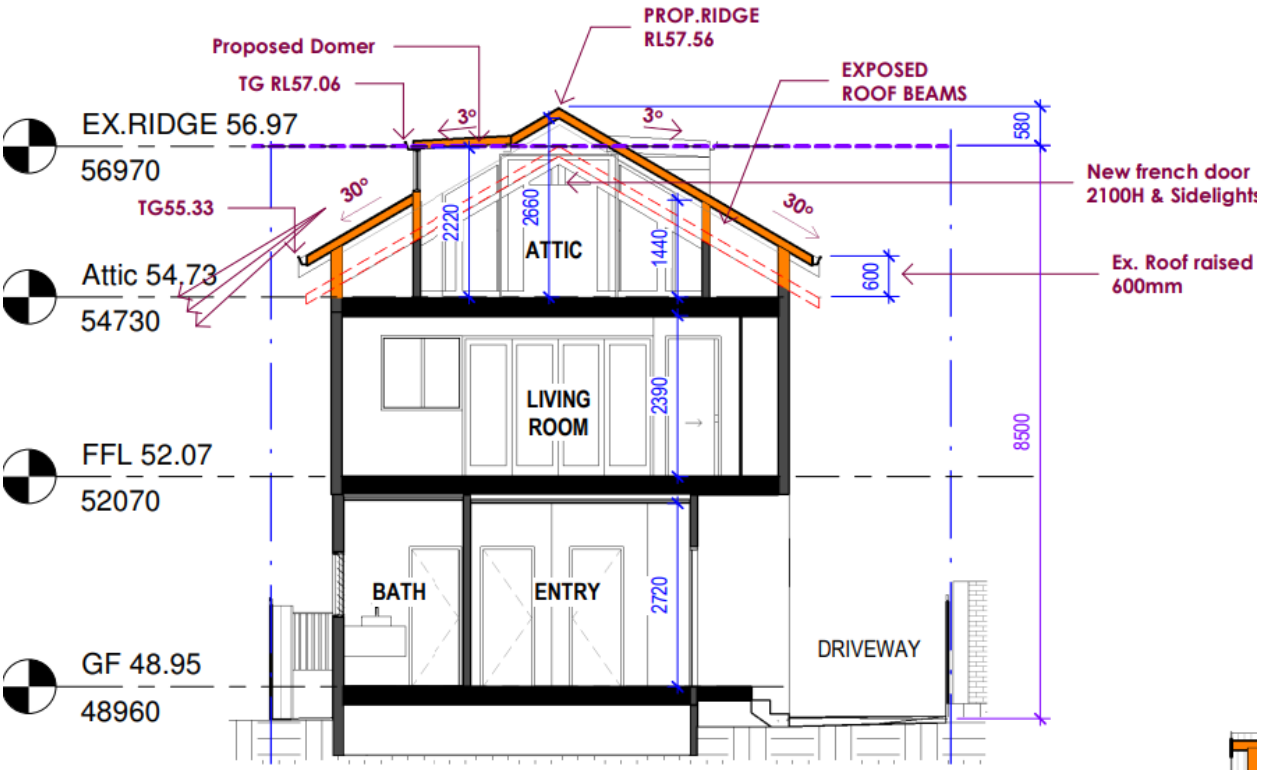

Image 1: Section showing the extent of the building height variation

2.2. Clause 4.6 – Exceptions to Development Standards

Clause 4.6 of LEP provides a mechanism by which a development standard can be varied. The objectives of this clause are:

a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action")* provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [1], [4] & [51*] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

> *"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."*

The legal consequence of the decision in Initial Action is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Pursuant to clause 4.6(2) consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

This Clause applies to the Clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) states that consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed development does not comply with the height of buildings provision at 4.3 of LEP which specifies a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) states consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Director-General has been obtained.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under the Environmental Planning and Assessment Regulation 2021, the Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) states that in deciding whether to grant concurrence, the Director-General must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
(b) the public benefit of maintaining the development standard, and
(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck$ v Byron Shire Council (1999)* 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3A of LEP from the operation of clause 4.6.

3. Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

> *17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
>
> *18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
>
> *19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
>
> *20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47]. Australian Company Number 121 577 768 Alterations and Additions 10 Aiken Avenue, Queenscliff | Page 40*
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> *21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

> *22. These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3A of WLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
    (a) compliance is unreasonable or unnecessary; and
    (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3A of the LEP?

Clause 4.6 of LEP provides a mechanism by which a development standard can be varied. The objectives of this clause are:

a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*

b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Pursuant to clause 4.6(2) consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

4. Request for variation

4.1. Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council [2007] NSWLEC 827*.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Height of Buildings Standard and Objectives

Pursuant to Clause 4.3 LEP the height of any building on the land shall not exceed a height of 8.5 metres. The objectives of this clause are:

a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

Comment: The minor increase in height is to achieve compliant ceiling heights within the attic. The existing dwelling height is 8.5m and the 580mm increase does not create a dwelling that is incompatible with surrounding development. The design has preserved the pitched roof form with the dormer windows modest in scale and setback further from the front façade. In that regard, the dwelling will continue to present as a 2 storey dwelling with attic roof space.

In this context, consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council (2005) NSW LEC 191*, I am of the opinion that most observers would not find the height of the breaching elements offensive, jarring or unsympathetic in a streetscape context having regard to the built form characteristics of development within the sites visual catchment. Accordingly, it can be reasonably concluded that the proposal is compatible with its surroundings.

The proposal is consistent with this objective

b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*

Comment: The area of non-compliance does not contribute to any unreasonable visual impacts or amenity impacts with regard to views, privacy or overshadowing. The shadow diagrams provided demonstrate that no additional overshadowing will occur to private open space areas nor will it impact on windows to adjoining dwellings. No privacy concerns are a result of the non-compliance which is confined to the top of the pitched

roof. No view corridors enjoyed by adjoining dwelling are impacted by non-compliant area of the dwelling.

c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

Comment: No adverse impacts to the coastal areas or Warringah's scenic quality.

d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

Comment: As mentioned above, the design has sought to preserve the existing streetscape presentation of the dwelling by maintaining its pitched roof form. As such, the resultant height breach does not significantly alter the dwellings presentation when viewed from the public domain.

4.2. Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

> *23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
>
> *24. The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*
>
> *The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

Sufficient environmental planning grounds exist to justify the height of buildings variation. Specifically, the environmental planning grounds to warrant the variation are as follows:

- The design of the works will generally maintain the buildings form insofar that it will still present as a 2 storey dwelling with an attic roof space. In this regard, the dwelling will continue to contribute positively to the streetscape and would not be seen as jarring or offensive above that of the existing dwelling. Its existing bulk and scale is not significantly increased due to the non-compliant height.

- The existing attic space does not strictly achieve compliance with the ceiling height requirements and the increase in height along with the dormers will allow for compliance to be achieved. The existing circumstance presents an awkward situation where it is high enough for it to be used for habitation but does not achieve compliant head clearances. The proposal will facilitate improved amenity of the attic space for the occupants.

- Providing increased floor space at the attic level reduces potential greater impacts that would occur from developing out towards the rear boundary with regard to view impacts. Converting the existing attic space into a compliant habitable space limits impacts on the land with it being confined within the building footprint. This represents good design.

- The variation does not give rise to any privacy, overshadowing or view loss concerns.

- The variation proposed is minor and within 10% of the control.

In this regard, I consider the proposal to be of a skilful design which responds appropriately and effectively to the topography with the minor breach to the roof at the rear of the site not resulting in any significant amenity impacts or unreasonable visual bulk.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).

- Approval of the variation would promote good design and amenity of the built environment (1.3(g)).

- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)). It is noted

that in Initial Action, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

It is noted that in Initial Action, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

> *87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

There are sufficient environmental planning grounds to justify contravening the development standard.

4.3. Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the R2 Low Density Residential zone

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

> "The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)."

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.4. Secretary's concurrence

By Planning Circular dated 20 May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings.
- Variations exceeding 10%; and
- Variations to non-numerical development standards. The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determinations are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can be assumed in this case.

5. Conclusion

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

a) that the contextually responsive development is consistent with the zone objectives, and

b) that the contextually responsive development is consistent with the objectives of the height of buildings standard, and

c) that there are sufficient environmental planning grounds to justify contravening the development standard, and

d) that having regard to (a), (b) and (c) above that compliance with the building height development standard is unreasonable or unnecessary in the circumstances of the case, and

e) that given the development's ability to comply with the zone and height of buildings standard objectives that approval would not be antipathetic to the public interest, and

f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and

g) Concurrence of the Secretary can be assumed in this case.

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

b) that there are sufficient environmental planning grounds to justify contravening the development standard.

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

William Fleming

BS, MPLAN

Boston Blyth Fleming Pty Ltd.

Yours Sincerely

William Fleming
BS, MPLAN
Boston Blyth Fleming Pty Ltd
Director