BuildLaw: In Brief

Subtle but significant change to NEC4 (ECC)

NEC has remained true to its core values in its latest update of contracts in the form of the NEC4. There is still a clear focus on issuing a contract in simple English which drives good project management and flexibility and the NEC website is keen to highlight this fact by describing the new suite of NEC4 contracts as *"significant evolution, not revolution"*. Clarity is still at the heart of contract to drive effective project management.

Robert Weatherly recently noted in of Mills & Reeve's Practical Completion blog that a subtle, but useful change has been the compensation event at clause 60.1(14) which identifies 'Client (previously Employer) risk' events. Previously Client risks were defined as any event "stated in this contract" and it was often argued that the definition should could be construed broadly to include anything contained in the ancillary documentation including the Risk Register notwithstanding that the Risk Register is intended to be nothing more than a tool for the Project Manager to manage risk. Clause 60.1(14) of NEC4 now clearly refers to Client risks as being those "stated in these conditions of contract", thereby limiting the risks to those contained in the Core Clauses (mainly clause 80.1), the W to Z clauses, and those listed in the Contract Data, where additional Client risks can be recorded, if there are any.

BEAL CodeMark product certification body accreditation suspended

As of 12 September 2018, BEAL Certification Service Limited's (BEAL) accreditation as a CodeMark product certification body under the Building Act 2004 has been suspended by the Joint Accreditation System of Australia and New Zealand (JAS-ANZ).

The suspension is due to BEAL not meeting CodeMark scheme accreditation requirements. The suspension may be lifted by JAS-ANZ if BEAL resolves the issues that led to its suspension – BEAL has been given until 3 October 2018 to resolve the issues.

While suspended BEAL cannot evaluate and certify any new building products. All current CodeMark product certificates issued by BEAL remain valid and can be relied on by building consent authorities.

JAS-ANZ is appointed by MBIE and is responsible for the accreditation and ongoing monitoring of product certification bodies for the CodeMark product certification scheme.

Building Amendment Bill

The Canterbury and Kaikōura earthquakes highlighted gaps in current legislation for managing buildings after an emergency, including the need to better manage the transition from civil defence emergency management powers to business-as-usual powers under the Building Act.

The Building Amendment Bill has been introduced to Parliament and had its first reading on 11 September 2018, with the aim of creating a better process around management and investigation powers for buildings post-earthquakes.

The Bill amends the Building Act 2004, and proposes two new sets of powers for territorial authorities and the Ministry of Business, Innovation and Employment (MBIE) to improve the system for managing buildings after an emergency and to provide for investigating building failures.

The Bill proposes new powers that aim to address risks to people and property from buildings during and after an emergency. The proposed amendments seek to create a system that is clear, has proportionate impacts on personal and property rights, and ensures that heritage values are appropriately recognised.

Managing buildings after an emergency

The Bill introduces into the Building Act an end-to-end process for managing buildings from response to recovery following an emergency.

The Bill provides powers to territorial authorities (and where a state of emergency or transition period is in force, the relevant civil defence emergency management person) to manage buildings during and after an emergency event, including among others:

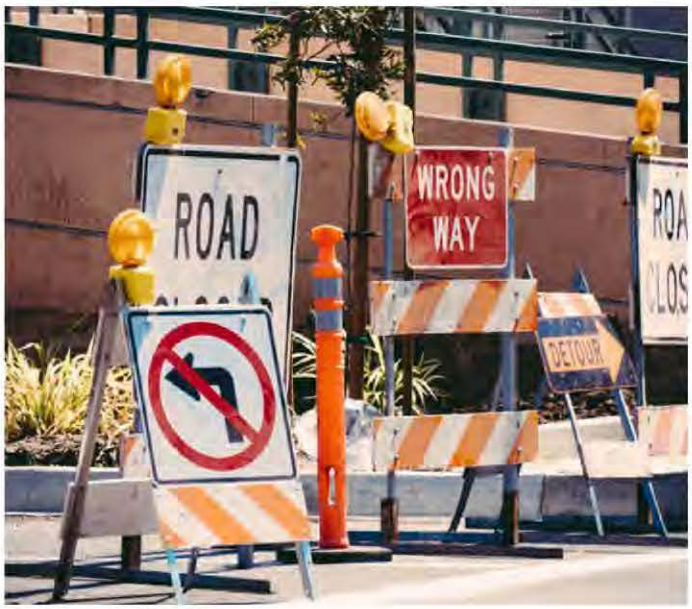
- inspecting and placing notices on buildings;
- evacuating and restricting entry to buildings;
- closing roads and cordoning streets;
- requiring further information from building owners, such as detailed engineering assessments; and
- demolishing or carrying out works to buildings that pose a risk of injury or death (including through impacts to critical infrastructure) or a risk of damage or disruption to neighbouring buildings, critical infrastructure, and public thoroughfares.

Investigating building failures

The Bill proposes amendments to the Building Act that provide MBIE with a clear set of legislative powers to investigate significant building failures to determine the circumstances and causes of those failures. The key focus of the proposed powers is to learn lessons in order to improve building regulation to help avoid similar occurrences in the future. The Bill proposes that the powers of investigation can be used only when there has been a building failure that resulted or could have resulted in serious injury or death.

The amendments in the Bill will enable MBIE, on its own initiative or at the request of the Minister responsible for the Building Act, to investigate the circumstances and causes of building failures, including to:

- secure, or direct any person to secure, the site to be investigated for a reasonable period;



• enter a property and carry out inspections (which may include the taking of samples and evidence);

• require information relating to the building failure from any person who might hold relevant information;

• share relevant information related to the building failure with the regulatory bodies responsible for handling complaints and discipline in the building and construction sector; and

• publish reports and findings.

Submissions on the Bill are now being accepted and will close on 25 October 2018.

MBIE seeking feedback on proposed new edition of Acceptable Solution (C/AS2) publishes guide to altering existing buildings

MBIE is seeking your feedback on a proposal to publish a new edition of Acceptable Solution (C/AS2) – a merger of the six separate Fire Acceptable Solution documents (C/AS2-7). The consultation runs from Monday 3 September 2018 until Friday 30 November 2018.

The proposed C/AS2 amends a number of omissions and inconsistencies following stakeholder engagement in recent years on the draft edition of the new Acceptable Solution.

In particular, three technical issues have been identified and included in the proposed C/AS2 Acceptable Solution as changes to performance settings:

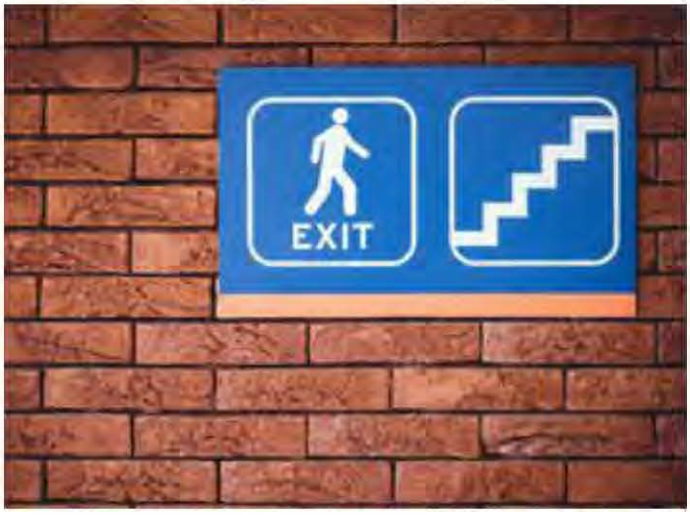
• adjusting the setting to prevent buildings within 1m of the boundary being constructed with no fire separations (eg all glass facades located on the property boundary)

• removing "capable of storage consideration" and replacing it with a metric as per the settings prior to 2012

• simplifying the content in C/AS2 by referencing D1/AS1 (Acceptable Solution for access routes) rather than repeating the content from D/AS1.

The consultation is a major piece of work focusing on Building Code clause C – Protection from Fire that requires targeted engagement with stakeholders who have previously contributed. Any changes as a result of the consultation will come into effect with the bi-annual Building Code system update scheduled for June 2019.

View the full proposal and information on how to provide feedback on the MBIE Corporate website.



Adjudicator's reasons: a nuanced approach? (Clayton Utz - Major projects & construction 5 Minute Fix 17)

A recent decision of the Victorian Supreme Court, *Nuance Group (Australia) Pty Ltd v Shape Australia Pty Ltd* [2018] VSC 362, emphasises the need for adjudicators to work out how much is actually payable to the contractor.

Justice Digby held that the adjudicator effectively worked backwards, starting with the claimed amount and then deducting amounts he thought were not properly claimable

(including those falling within Victoria's "excluded amounts" regime). Section 23 of the Victorian SOP Act "at a minimum requires a determination as to whether the construction work the subject of the claim has been performed and its value". Even though Justice Digby recognised that "bare reasons which render the Adjudicator's determination comprehensible will suffice", not even this relatively low standard was reached. The adjudicator had failed to undertake the determinative task required, and the determination did not contain comprehensible reasons explaining the quantification of the adjudicated amount. Therefore, the determination was void.

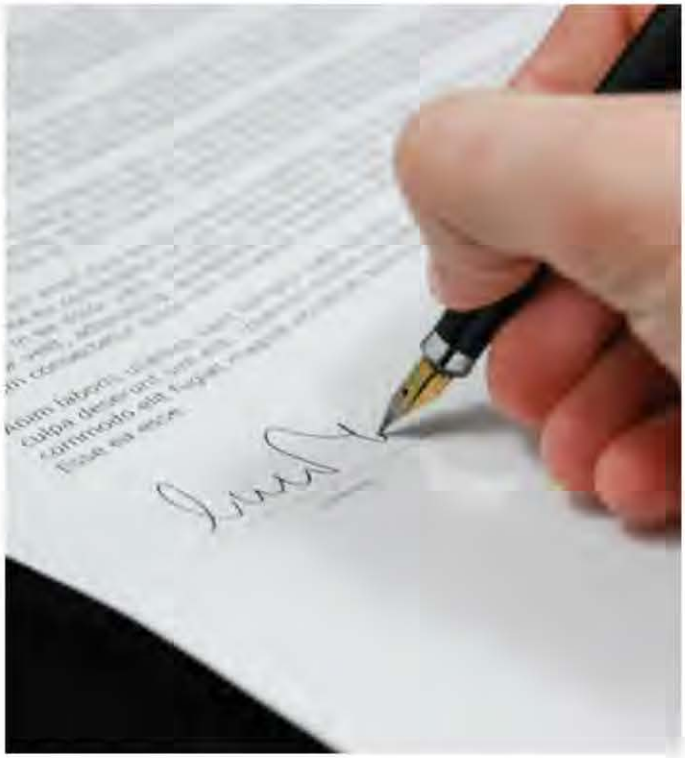
Battle of the forms: lump sum or cost plus construction contract? (Clayton Utz – Major projects & construction 5 Minute Fix 17)

A recent NSW Supreme Court decision has highlighted the need for contracting parties to be wary of how their objective intentions could be assessed after modifying or replacing previous legal agreements.

Stepanoski v Aslan [2018] NSWSC 1160 considered a battle of the forms for a construction contract. The parties had initially signed a Cost Plus Contract, but later signed a Lump Sum Contract which was backdated to the date of the Cost Plus Contract. The issue arose as to the extent to which the Lump Sum Contract was intended to replace the Cost Plus Contract.

Justice Emmett had regard to the defendant's monthly progress claims. These sometimes attached tax invoices headed "Cost Plus Building Contract Value ..." , however they also:

- referred to the exact amounts specified in the Lump Sum Contract under the schedule of progress payments;
- mentioned the amount of the lump sum as the contract value; and



- did not particularise the defendant's expenditure incurred in performing the works.

Further evidence also indicated that certain payments were made to the defendant over and above the amount actually expended by him at that time.

Despite the "minor inconsistencies" in the material, overall the evidence was inconsistent with there being a Cost Plus Contract on foot. Justice Emmett held that irrespective of when the Lump Sum Contract was signed, the act of signing clearly indicated the parties' intention to be bound by the Lump Sum Contract with effect from the date that it bore.

Retentions under the spotlight

Since 31 March 2017, all new and renewed non-residential construction contracts have been subject to a retentions trust regime following amendments to the Construction Contracts Act 2002 (the Act). In essence, retention moneys are deemed to be held on trust, meaning they are not available to the general pool of creditors provided they can be traced.

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On 31 July 2018 Ebert Construction Ltd (Ebert) was placed into receivership. Ebert owes trade and unsecured creditors approximately $24.5m, plus another $9.3m in retention money. Upon receivership, it had less than $10,000 in its other bank accounts, which were set off against a credit card debit balance in excess of that amount.

Ebert's receivers have indicated that approximately $3.7m of the $4.6m that is captured by the new retention regime is held in a separate retentions trust account (the Fund). No amounts are expected to be paid relating to subcontractor claims in the receivership or liquidation, save for those claims to the Fund.

The challenge for Ebert's receivers (and affected principals/subcontractors) will be establishing entitlement to retentions as they fall due, which may be legally and administratively complex.

Ebert's receivers have applied to the High Court for directions on whether the receivers should be appointed by the Court as receivers to manage and distribute the Fund, which subcontractors have a claim to the Fund and on what basis and, how to distribute the Fund if, as expected, there is shortfall.

Receiver Richard Longman of PWC said "The act itself is not clear, it's the first time act has actually had to be used so there are many different permutations as to whose money has been held," he said. "We want to see that money paid out as soon as we possibly can, and that's why we've taken the action."

This is the first high profile insolvency event where the new regime will operate in an attempt to protect retentions. The matter is set down to be heard in the High Court in Wellington on 8 November 2018.