BuildLaw in Brief

Regulatory updates

NZ consultation on changes to the Building Code now open for submissions

MBIE has published this year's proposed updates to the Building Code and is currently accepting feedback.

The three consultation areas are:

Plumbing and drainage

- Reduction of lead content of plumbing products. Products that were compliant when installed will not need replacing. A transition period will allow manufacturers and suppliers to adjust their products.
- Maximum hot water temperature will be reduced from 55°C to 50°C to prevent scalds. In Early Childhood Centres it will be reduced to 40°C. The changes will only apply to new plumbing fixtures used for personal hygiene (washbasins, showers, baths etc).
- New backflow prevention requirements to protect drinking water from contamination.

Hollow core flooring

- The current standard design of hollow core flooring will no longer be deemed to comply with the Code due to earthquake structural safety concerns.

Protection from fire

- New standards for fire detection, escape and spread control systems for low-rise multi-level residential housing.
- New fire protection products standards (smoke alarms, fire alarms and sprinklers).

You can have your say on the proposals by completing and submitting the consultation submission form to buildingfeedback@mbie.govt.nz. The deadline for submissions is 1 July 2022.

England – The Building Safety Act comes into force

The new Building Safety Act 2022 (**Act**) is now in force and is the most significant change to England's building regulation regime in 40 years. The Act introduces important changes for residential building developers, owners, landlords and tenants. Many of its provisions still require secondary legislation to be developed over the next 12 to 18 months, with the Act fully operational by October 2023.

The Act's focus is on higher risk buildings (over 18m but in some cases 11m) and is the Government's key legislative response to the London Grenfell Tower tragedy.

Some of the key changes include:

- **Building Safety Regulator**
  The Health and Safety Executive will take over as the new Building Safety Regulator overseeing building control and inspection, replacing the current system of approved inspectors and local authorities.

- **Gateway system**
  Gateways of compliance permissions at each major stage of development (planning, construction and completion). Any proposed variations to approved plans will need to re-submitted to the Building Safety Regulator for approval.

- **Higher risk building register**
  Higher risk buildings cannot be occupied until they have been certified and registered with the Building Safety Regulator.

- **Statutory time limit extensions**
  Retroactive extension of statutory time limits for claims for existing defective building work has been extended from 6 to 30 years. Claims can be brought for defective building work undertaken as far back as 1992.

- **Section 38 Building Act 1984 activated**
  The dormant section 38 of the Building Act

1984 has been brought into force, allowing anyone who has suffered damage from a failure to comply with building regulations to bring a claim.

- **Golden thread record keeping**
  Dutyholders under the Act will be required to keep and maintain a digital 'golden thread' of key construction information for the lifecycle of the building.

- **New Home Ombudsman**
  A New Home Ombudsman scheme will be introduced UK-wide to resolve disputes between new build home buyers and developers.

New Zealand Unit Titles Amendment Bill receives Royal assent

The Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill has received Royal assent and will come into force within the next two years. The amendments strengthen and expand the regulatory framework for unit title governance as apartment living becomes increasingly popular in New Zealand.

- **Utility interest**
  Developers and body corporates will have additional flexibility when apportioning running costs among unit owners. Rather than ascribing a fixed percentage to an owner based on the value of their unit, they will be able to determine separate utility interests for different services and amenities expenses. The policy aim is to increase fairness for owners. However, there are concerns it will lead to reduced certainty and expand the scope for disagreement and dispute between neighbours.

- **Disclosure to buyers**
  Prospective unit owners will benefit from increased disclosure requirements at the pre-contract stage. Body corporates will be required to disclose financial statements, audit reports, insurance details, minutes of general meetings over the previous three years, any known remediation issues, court or tribunal proceedings, maintenance plans and proposed works under a long term maintenance plan. Buyers may delay or cancel settlement if the disclosure requirements are not met.

- **Body corporate management**
  Body corporate managers will be regulated with a mandatory Code of Conduct and conflict of interest provisions. Committee processes are clarified, including conduct of meetings and decision making, virtual meetings, electronic voting and document retention.

- **Large developments**
  Developments with 10 or more principal units must have a body corporate manager and a long term maintenance plan which needs to be reviewed by a building professional.

- **Dispute resolution**
  Tenancy Tribunal fees will be reduced; jurisdiction is extended to claims up to $100,000, and the Tribunal may order improvement notices and penalties where body corporates breach their obligations.

NZ Introduces 'Straight-to-Residence' visas for some construction occupations

With the New Zealand borders opening up, the Government has announced a new 'Green List' of skilled occupations, which will fast-track eligible migrants to resident status. This straight-to-residence pathway is designed to help address the skills shortage and high demand for these occupations in New Zealand.

Approximately 20 construction and engineering professions are on the list, accounting for half of all available occupations.

These roles include Construction Project Manager, Quantity Surveyor, Surveyor, Civil Engineer, Electrical Engineer, Geotechnical Engineer, Mechanical Engineer and Structural Engineer, among others.

Employers looking to use the Green List scheme will need to ensure that the roles they offer meet the salary and job description requirements, not just the job title. Applicants will need to ensure that they meet all of the qualifications, including experience and registration equivalence requirements.

The full list of occupations and details of the eligibility criteria are available on the NZ immigration website.

NZ consultation on Licensed Building Practitioners scheme

In April last year, MBIE sought feedback on some current areas of concern in the Licensed Building Practitioners (**LBP**) scheme. MBIE has now published a summary of the submissions received.

The key concerns among those who made submissions included:

- Substandard supervision by LBPs, particularly where the LBP is recently licensed and inexperienced, LBPs supervise remotely, or where the LBP is supervising the work of unlicensed builders in specialised practice areas beyond the LBP's own expertise.
- Additional license classes should be introduced for specialised practice areas such as stonemasonry and plaster boarding.
- Some LBPs are working outside their competencies, since they are not required to be competent in all areas within the license class.
- Site licenses would be better utilized by restricting supervision of restricted building work to site license holders.
- Site licenses should be modified to be more in line with the former clerk of works role.
- A tiered license structure should be introduced to recognise those LBPs with more experience and ability.
- There should be mandatory qualification requirements for LBP applicants.

MBIE will publish its proposals for improvements to the LBP scheme later this year.

First Stage of Western Australia's new Security of Payment legislation now in force

Last year Western Australia became the latest state to enact security of payment legislation for construction contracts with the passing of the Building and Construction Industry (Security of Payment) Act 2021 (**SOP Act**).

The first stage of the Act's introduction will take effect on 1 August 2022. Any construction contracts entered into after this date will be subject to the security of payments and adjudication regime set out in the new Act.

The key features coming into force on 1 August include:

- Principals must pay a contractor's invoice within 20 days or deliver a payment schedule in response (25 days for subcontractor payment claims).
- If the principal does not deliver a payment schedule in response to an invoice, the principal must pay the full amount claimed and cannot later seek to dispute the amount at adjudication.
- The payment schedule must set out all of the reasons the principal relies on for withholding the full amount. The ability to respond at adjudication will be limited to these reasons.

Other key provisions which will be introduced later during stages 2 and 3 will include:

- A party intending to demand performance security must provide five days' notice to allow the contractor to rectify any default.
- Retention money payable to a contractor must be held in a dedicated trust account.

Legal updates

UK Court of Appeal interprets "total cost of works" clause in interior design contract

A recent English Court of Appeal case *Alebrahim v BM Design London Ltd* [2022] EWCA Civ 183 considered the interpretation of a "cost of works" clause in a contract between the owner of a luxury Marylebone mansion apartment and her interior designer. The owner claimed that she was overcharged for the furniture, fittings and the designer's fee.

Under the contract terms, the design fee was calculated at 20% of the total cost of the works. The issue was whether the "cost of works" referred to the cost incurred by the designer or to the cost estimates the designer had provided to the owner at each stage and which the owner had accepted.

The owner relied on "cost of works"clauses in building contracts usually referring to the actual cost to the contractor. She had assumed that savings from trade discounts with suppliers would be passed on to her.

The Court of Appeal agreed with the lower court's interpretation that the "cost of works" in this case meant the cost estimates provided to, and accepted by, the owner at each stage, and that the actual cost to the designer (including trade

discounts) was irrelevant.

In applying the general principles of construction, the Court found that it could not add words into the contract to refer to actual cost to the designer, as this would cause problems with the rest of the contract. There was no suggestion from the contract terms or the practice adopted by the parties for the owner to assume that trade discounts would be passed on to her.

Auckland remains most expensive city in ANZ for construction

Arcadis has published its yearly Construction Costs Index profiling construction costs in 100 global locations.

London overtook Geneva as the most expensive city to build, with many other UK cities in the top 25, including Bristol, Manchester, Liverpool, Edinburgh, Cardiff, Glasgow, Birmingham and Belfast.

Auckland came in at 28th place on the list and Christchurch at 35th, further down the list compared to last year when both cities ranked within the top 20 most expensive locations.

Similarly, within Australia, Sydney and Melbourne have also dropped 10 places down the list from last year, with Sydney currently ranked at 49th and Melbourne at 58th. The report identifies decreased demand compared to expectations, increased competition and cost absorption by the supply chain as likely factors.

The full Index report and analysis are available on the Arcadis website.

NSW court finds multiple breaches where directors used funds received under a disputed Security of Payment adjudication to declare a dividend

A recent determination of the NSW Supreme Court in *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd (in liq); Yazbek v Gleeson as Liquidator of Atlas Construction Group Pty Ltd (in liq); Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd (in liq)* [2021] NSWSC 1692 highlights the caution company directors must exercise when handling funds received under Security of Payments adjudication.

The case concerned a building contract between a developer and a builder. During the project, the builder was successful at adjudication for payment of approximately $11 million under the NSW Security of Payment legislation, and secured payment of the amount from the developer's bank. The developer notified the builder that they disputed the adjudication determination and applied to the Supreme Court to have it set aside and the adjudicated amount reimbursed.

While the developer was challenging the determination at the Supreme Court, the building company's directors urgently resolved to declare a dividend of almost all of the funds, wrote off shareholder loans, stopped trading and went into liquidation.

The Supreme Court found that the adjudicated amount should have been recorded in the builder's financial accounts as an asset with a corresponding liability, as the adjudication was not a final determination and the directors knew the developer intended to try to recover the funds. This meant that the builder's assets did not exceed its liabilities, therefore the dividend could not be paid.

The Court held that the directors had committed multiple breaches of legislation and their director duties and had deliberately alienated the funds to defraud creditors. It ordered the dividends to be restored and distributed by the company's liquidator.

English court clarifies fire safety claims still require proper pleadings

In the wake of the Grenfell Tower tragedy, defective cladding claims have come to the fore with an expectation that construction professionals will be held accountable for negligence in meeting fire safety standards.

Following a decision of the TCC last year, it was suggested that the courts may be willing to lower the standards of pleadings and particulars for claimants in defective cladding cases.

However, in a recent decision of the Technology and Construction Court (**TCC**) *Evolve Housing and Support v Bouygues (U.K.) Ltd & Ors* [2022] EWHC 906 (TCC) the Court has clarified that while it may be unwilling to strike out poorly pleaded or vague claims, it will make orders requiring claimants to properly plead their cases so that defendants may

know the case they have to answer, and prepare responses and evidence accordingly.

The case was brought by Evolve against the building contractor, employer agent and architect of a YMCA hostel. Evolve claimed that the cladding on the building was defective, the construction professionals acted negligently and the cladding must be replaced.

The defendant architect applied to the TCC for an order that Evolve provide further particulars of its claims for breach and causation and respond to the architect's requests for information. The TCC granted the architect's application in full and ordered Evolve to provide the information and particulars before the case may proceed.

Impacts of Brexit on UK construction industry

The UK left the EU on 31 January 2020, which unfortunately also coincided with the start of the COVID-19 pandemic.

A report recently published by construction insurance broker Marsh McLennan highlights some of the impacts of Brexit combined with the challenges brought by the pandemic on the UK construction industry, including:

- skills shortages
- price increases
- availability of materials
- project delays
- defaults by subcontractors
- overseas companies operating in the UK

You can download the full report from Marsh McLennan's website.

UK court finds hands-free phone call was a legally binding agreement to forgo £500,000 in liquidated damages

In *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2972 (TCC) the English Technology and Construction Court (**TCC**) held that an informal and undocumented conversation between the directors of each party was a legally binding contract.

The case concerned a construction contract for student accommodation in Nottingham between a property developer (**Mansion**) and a contractor (**Fox**).

There had been a series of delays to the project and the parties disagreed on who was responsible. After Fox made an application for interim payment, Mansion responded with a pay less notice and intention to deduct liquidated damages under the contract.

A subsequent conversation between the director of Fox and the director of Mansion occurred while both were driving. Fox claimed that during this call, Mansion's director agreed to abandon its right to liquidated damages (approximately £500,000) in exchange for Fox agreeing to forgo its claim for loss and expense of delay in an attempt to complete the project.

However, after the call took place, Mansion continued with liquidated damages and claimed it had not agreed to forgo them. At adjudication, it was determined that Mansion had agreed to abandon its entitlement to liquidated damages during the call and could not now recover them. Mansion challenged this determination and referred the matter to the TCC.

The TCC preferred the Fox director's evidence and recollection of what they discussed during the phone call, and considered the parties' documents and conduct afterwards. The TCC agreed with the adjudicator that Mansion had agreed to forgo liquidated damages during the call, and held that this was legally binding.