

BuildLaw in Brief

Final report on competition in residential building supplies market released

In our [47th Issue of BuildLaw](#), we wrote about the Commerce Commission's [draft report](#) on competition within the residential building supplies industry in New Zealand. The Commission has since released its [final report](#), finding that competition for the supply and acquisition of key building supplies is not working as well as it could.

The report points to two key factors affecting competition in the residential building supplies market. The building regulatory system has been found to incentivise the use of familiar building products, making it difficult for smaller brands and lesser-known products to compete. Quantity-forcing rebates paid by established suppliers to merchants have made it difficult for new and competing products to gain entry into the market.

The final report has identified the need for a lot more to be done in order to improve competition. It suggests that improving conditions for entry and expansion, making entry easier for building products and expansion easier for suppliers without compromising the key objectives of the building regulatory system will lead to increased and more effective competition.

The report has provided the following recommendations to improve competition within the residential building supplies market:

1. Introducing competition as an objective to be promoted in the building regulatory system.
2. Better serving Māori through the building regulatory system.
3. Creating more clear compliance pathways for a broader range of key building supplies.
4. Exploring ways to remove impediments to product substitution and variations.
5. Establishing a national system to share information about building products and consenting.
6. Establishing an education and mentoring function for building consent authorities.
7. Developing and implementing an all-of-government strategy to coordinate and boost



- offsite manufacturing.
- 8. Promoting compliance with the Commerce Act, including by discouraging the use of quantity-forcing rebates that may harm competition.
- 9. Considering the economy-wide use of land covenants, exclusive leases and contractual provisions with similar effect.

The government, which had directed the Commerce Commission to carry out the study on the residential building supplies market, has welcomed the Commission's findings.

It will consider the recommendations made in the report to understand the changes that need to be made to improve competition and lower costs for consumers. A government response is expected in March 2023.

New Zealand Infrastructure Commission releases Infrastructure Strategy 2022–2052

The New Zealand Infrastructure Commission has released its first ever long-term infrastructure strategy, [Infrastructure Strategy 2022-2052](#) (the **Strategy**), setting out actions required in the next 30 years to meet the infrastructure challenges and opportunities that lie ahead.

The Strategy envisages a thriving New Zealand with a world-class infrastructure system and identifies the key challenges as:

- Increasing rates of road congestion
- Increasing and ageing population
- Increasing demand for housing
- Historical under-investment in infrastructure
- Ageing infrastructure and substantial investment required to fix this
- Rising costs of construction
- Shortage of construction workers
- Need to adapt to climate change demands
- Need to promote economic engagement and growth across the country.

There are five strategic objectives to achieve the vision of a thriving New Zealand:

1. Enable net zero carbon emissions
2. Support towns and regions to flourish
3. Build attractive and inclusive cities
4. Strengthen resilience to shocks and stresses
5. Move to a circular economy.

There are a total of 68 recommendations, including:

- Strengthen partnerships with Māori across the infrastructure system
- Achieve net-zero carbon emissions at minimum cost
- Reduce barriers and costs for infrastructure services
- Reduce congestion and improve urban mobility
- Increase housing development opportunities in areas with good access to infrastructure
- Prepare infrastructure for the impacts of climate change
- Increase infrastructure funding to meet infrastructure challenges
- Better decision making, project evaluation and selection
- Develop the talent required to deliver New Zealand's future infrastructure
- Standardise planning policies across the country and ensure cities plan for significantly more growth
- Streamline consenting processes.

The Government's response to the Infrastructure Strategy can be found [here](#).

Construction Sector Accord publishes Construction Sector Transformational Plan 2022–2025

The Construction Sector Accord (the **Accord**) has published the [Construction Sector Transformational Plan 2022-2025](#). This is a three-year action plan to tackle the construction sector's systemic challenges and build resilience across the industry.

The Transformational Plan identifies systematic challenges holding the construction sector back. Some are common throughout the world, while others are New Zealand-specific. These challenges include:

- Fragmentation and minimal collaboration across the sector
- Ageing workforce and scarcity of skilled labour
- Poor health and safety performance, including mental health
- Low profitability and high-risk practices
- Cyclical boom-bust performance
- Poor procurement and risk management practices
- Low productivity

- High environmental impact
- Supply chain disruption.

The Transformational Plan sets out a framework to address these challenges and realise the vision of a “thriving, fair and sustainable construction sector for a better New Zealand”.

There are six mid-term goals:

1. Increase capabilities of leaders to drive change
2. A more skilled, diverse and future-ready workforce
3. More thriving people and organisations
4. Greater Māori construction economy success
5. Reduced waste and embodied and operational carbon
6. Increased productivity through innovation, technology, and an enabling regulatory environment.

There are two enablers to support these mid-term goals – Knowledge and Networks.

There are 11 priorities:

1. Leadership for change
2. Workforce development
3. Strong Māori construction economy
4. Wellbeing, health and safety for all people
5. Procurement and contracting
6. Environmental and climate action
7. Advanced construction ecosystem
8. Response to emerging issues and opportunities
9. Beacons
10. Data, information and insights to assist decision-making
11. Creating and leading networks.

According to the Accord, the Transformation Plan will help the construction industry take bolder steps forward.

New Zealand’s Construction Contracts Act (Retention of Money) Amendment Bill progresses to third reading in Parliament

Earlier this year the [Construction Contracts Act \(Retention of Money\) Amendment Bill](#) (the **Bill**) passed the select committee stage and second

reading, and is currently awaiting its third and final reading before Parliament. If passed, it will come into effect six months after receiving Royal Assent.

The Bill amends the current retention money provisions the [Construction Contracts Act 2002 \(Subpart 2A- Retention Money\)](#). Currently, retention money withheld under a construction contract as security for fixing defective work can be at risk where the party withholding the money becomes insolvent or co-mingles it with its other funds.

The proposed amendments aim to address these risks and strengthen protections and transparency for parties awaiting payment of retention money (usually subcontractors). Some notable amendments include:

Automatic creation of a trust – Retention money will automatically be held on trust by the party withholding it – the creation of a trust will be triggered at the time when the money becomes retention money under the terms of the contract. It will only cease to be retention money when paid to the subcontractor, the subcontractor gives up its claim, or the funds are used to remedy defects. If the party withholding the retention money intends to use it to remedy defects, it must give the subcontractor 10 days’ advance notice.

Accounting, record keeping and reporting – Retention money must be kept separate from other funds, either in a separate bank account or by way of a financial instrument such as insurance or a guarantee/ bond. Clear accounting ledgers must be maintained and the party withholding the money must report to the subcontractor as soon as reasonably practicable after the money becomes retention money, and at least every three months thereafter.

Offences and penalties for non-compliance – There will be cumulative penalties for each breach of the rules, including fines for failure to keep retention money as required (up to \$200,000), failure to keep accounting records as required (up to \$50,000), and failure to provide regular reports (up to \$50,000). Company directors can also be held personally liable and fined up to \$50,000 each.

You can find more information on the Bill and keep track of its progress on the [NZ Parliament website](#).

Standards NZ announces decisions on proposed changes to the Building Code

Earlier this year, MBIE held a public consultation on its [proposed updates to the Building Code](#) in relation to plumbing and drainage, hollow core floors and protection from fire. On 15 November 2022, MBIE published the outcome of the consultation and its decisions on [plumbing and drainage](#) and [hollow core floors](#).

Plumbing and drainage decisions

Acceptable solution G12/ AS1 will be amended in relation to use of copper alloy plumbing products. The revisions will be published in November 2023. There will be a transition period to allow manufacturers and suppliers to adjust their products.

Lead content

The lead content of plumbing products for use with drinking water will be reduced to 0.25%. Lead content must be verified by a test report from an accredited laboratory. The transition period will end on 1 September 2025.

Dezincification resistance

All copper alloy water supply system components must be dezincification resistant to minimise corrosion, and comply with testing standard AS 2345. The transition period will end at least one year from publication of the amended acceptable solution.

Hollow core flooring decision

The current standard design of the supports for hollow-core flooring systems will no longer be deemed to comply with the Code due to earthquake structural safety concerns. The amended verification method will be published in November 2023. The change will have immediate

effect from the date of publication, with no transition period.

Protection from fire proposals

MBIE will not announce its decisions on the [fire protection proposals](#) at this stage. The proposals included new standards for fire detection, escape and spread control systems for low-rise multi-level residential housing, and new standards for fire protection products (such as smoke alarms, fire alarms and sprinklers). An announcement on the outcome and decisions for these proposals is expected prior to publication of the new acceptable solutions and verification methods in November 2023.

Standards NZ publishes interim Special Conditions for NZS 3910:2013 construction contract and postpones full draft revision and public consultation

In July 2020, Standards New Zealand (Standards NZ) initiated a comprehensive review and revision of the [NZS 3910: 2013 Conditions of contract for building and civil engineering](#) (the **Standard**). The Standard is a widely used model contract for construction and civil engineering projects in New Zealand. The review aims to incorporate the legislative changes since 2013 and address widespread industry dissatisfaction with the Standard's current conditions on risk allocation between principal and contractor.

On 4 October 2022, the review committee published a set of [Special Conditions](#) for use with the current Standard. The Special Conditions include updates to clauses to align with legislative changes (Health and Safety at Work Act 2015 and repeal of the Forest and Rural Fires Act 1977), an updated cost variation clause dealing with pandemic-related legislative changes, an updated advance notification clause and a new



limitation of liability clause.

The release of the full draft revised Standard and a public consultation were scheduled for February to May 2023, with final publication in July 2023. However, on 3 December 2022, the Committee announced it will push this timetable back by several months. The draft revision release and consultation will now take place between May to July 2023, and the final revised Standard is expected to be published in October 2023.

Further information on the progress of the revision is available on the [Standards NZ website](#).

Changes to unfair contract terms rules in New Zealand and Australia

Recent legislative reforms to Australia and New Zealand's unfair contract terms regimes may have consequences for businesses within the building and construction industry.

In New Zealand, the [Fair Trading Amendment Act 2021](#) (the **Amendment Act**) came into force on 16 August 2022, amending the [Fair Trading Act 1986](#) (the **FTA**). The FTA prohibits the use of unfair contract terms in standard form consumer contracts. The Amendment Act extends the FTA's prohibitions to include standard form small trade contracts between businesses. 'Small' trade contracts are those under \$250,000 annual value. The Amendment Act also introduces a general prohibition against 'unconscionable conduct' in all trade.

In Australia, the [Treasury Laws Amendment \(More Competition, Better Prices\) Act 2022](#) received Royal Assent on 9 November 2022, amending the [Australian Consumer Law](#). The changes will come into effect in November 2023. The amendments introduce penalties for using unfair contract terms in standard form contracts with small businesses and extend the current definition of 'small business contract' to contracts where at least one party is a business employing less than 100 persons and/ or with annual turnover of less than \$10million AUD.

Broadly speaking, under both the New Zealand and Australian regimes, a contract is 'standard form' if it has not been subject to effective negotiation between the parties, such as standard terms and conditions. A contract term may be 'unfair' if it would cause a significant imbalance between the parties, is not reasonably necessary to protect the legitimate interests of the

benefitting party and would cause detriment to a party.

Businesses in the construction and building sector should familiarise themselves with the new rules and review their standard form contracts to identify any terms that could be considered unfair. Common construction contract terms which may potentially fall foul include some automatic renewal, unilateral termination, unilateral price increases, unilateral variation of terms, liquidated damages, unilateral assignment, limitation of liability and indemnity clauses.

Public consultations close on New South Wales major building and construction reforms

The New South Wales Government has announced four draft pieces of legislation as part of its major reform proposals for the regulation of residential and commercial construction. The broad topic areas include home building, building product safety, prefabricated and manufactured homes, licensing building work, building compliance and enforcement, upskilling the construction industry, adjudication and security of payment rules.

Building Bill 2022 – this would replace and repeal the Home Building Act 1989 (NSW) and regulate all commercial and residential building work.

Building Compliance and Enforcement Bill 2022 – this would replace the Residential Apartment Building (Compliance and Enforcement Powers) Act 2020 (NSW).

Building and Construction Legislation Amendment Bill 2022 & Building and Construction Amendment Regulation 2022 – these would amend current legislation, including the Building Product (Safety Act 2017 (NSW), the Stata Schemes Management Act 2015, the Builders and Certifiers Development Act 2018 (NSW), the Environmental Planning and Assessment Act 1979 (NSW) and the Building and Construction Industry Security of Payment Act 1999 (NSW).

The public consultation on the draft legislation closed for submissions on 25 November 2022. The outcome of the consultation on the proposals will be published next year and the Bills introduced to Parliament. You can find out more and keep up to date with the progress of the reforms on the [NSW Government website](#).

Fire Safety (England) Regulations 2022 come into force on January 23 2023

New [Fire Safety \(England\) Regulations 2022](#) (the **Regulations**) will come into force in England on 23 January 2023. The Regulations follow the introduction of the Fire Safety Act 2021 earlier this year, implementing the recommendations of the inquiry into the Grenfell Tower tragedy.

Fire Safety Act 2021

The [Fire Safety Act 2021](#) extended the responsibilities of Responsible Persons by requiring regular fire risk assessments (by competent fire risk professionals) of external walls, structure, balconies, windows, cladding, and doors between common parts of multi-occupancy domestic premises.

Responsible Persons are defined in the Regulatory Reform (Fire Safety) Order 2005 and include employers (for work premises), or persons who own, control or manage premises.

The Regulations

Responsible Persons will also need to take action to comply with the Regulations when they come into force on 23 January 2023. There are different requirements depending on the height category of building. On 6 December 2022, the Government published a [guidance](#) document on the Regulations and actions required, as well as template documents.

All multi-occupation residential buildings:

Responsible Persons of all multi-occupied residential buildings must provide residents with information and instructions on fire safety, evacuation and fire doors.

Mid-rise buildings (11 metres): In addition to providing residents with the above information, Responsible Persons will need to perform checks of entrance doors and fire doors.

High-rise buildings (18 metres or seven storeys):

In addition to the above actions, Responsible Persons of high-rise blocks of flats also need to provide information to Fire and Rescue Services (building floor plans, information on the design, materials and risk levels of external walls systems), perform checks on lifts and fire-fighting equipment and report any faults, and install information boxes and wayfinding signage.

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