BuildLaw *in Brief:*

Recent key developments in the construction industry

Some relief after weather devastation

Following the destructive floods, landslides, and cyclone throughout the North Island in January and February of this year, the New Zealand Government has provided some measures to help those impacted.

Temporary change to the CCCFA

Part of the relief effort saw the Government make a temporary exemption to the Credit Contracts and Consumer Finance Act (the **CCCFA**) to assist temporary lending for consumers impacted by the dual disasters. The exemptions removed the requirement under the CCCFA for affordability assessments for temporary overdrafts as well as home loan top-ups of up to $10,000, provided to existing customers.

The exemptions applied to lending arrangements entered into before 31 March 2023. Under the exception, banks and non-bank deposit takers, in addition to finance companies, were able to offer finance to existing customers.

It is important to note that this exemption does not change the responsible lending principles contained in the CCCFA. For example, lenders must still comply with the Responsible Lending Code. Borrowers can pursue statutory damages or compensation if a condition to the exemptions is breached by a lender.

For detailed information, see the full amendments and their regulations.

Flood remediation guidance

The MBIE has published information to help support homeowners, council staff, and building practitioners. The guidance covers four main areas:

- Flood damaged buildings
- Damage to wall linings (plasterboard) caused by flooding
- Building consent exemptions
- Slope stability

Flood damaged buildings

This guide seeks to guide homeowners and occupiers of damaged buildings, by looking at the steps to take immediately after the flood, or future flooding, through to repairs and mitigating future damage.

Damage to wall linings (plasterboard)

This guide assists with identifying plasterboard wall linings that have been damaged by flooding, and the steps necessary to remove and replace these.

Building consent exemptions

This guide provides councils, building practitioners, and homeowners with information on what building work may not require a building consent when repairing damage.

Slope stability guide

This guide provides homeowners and occupiers of buildings with direction on remediating damage related to slope and ground stability.

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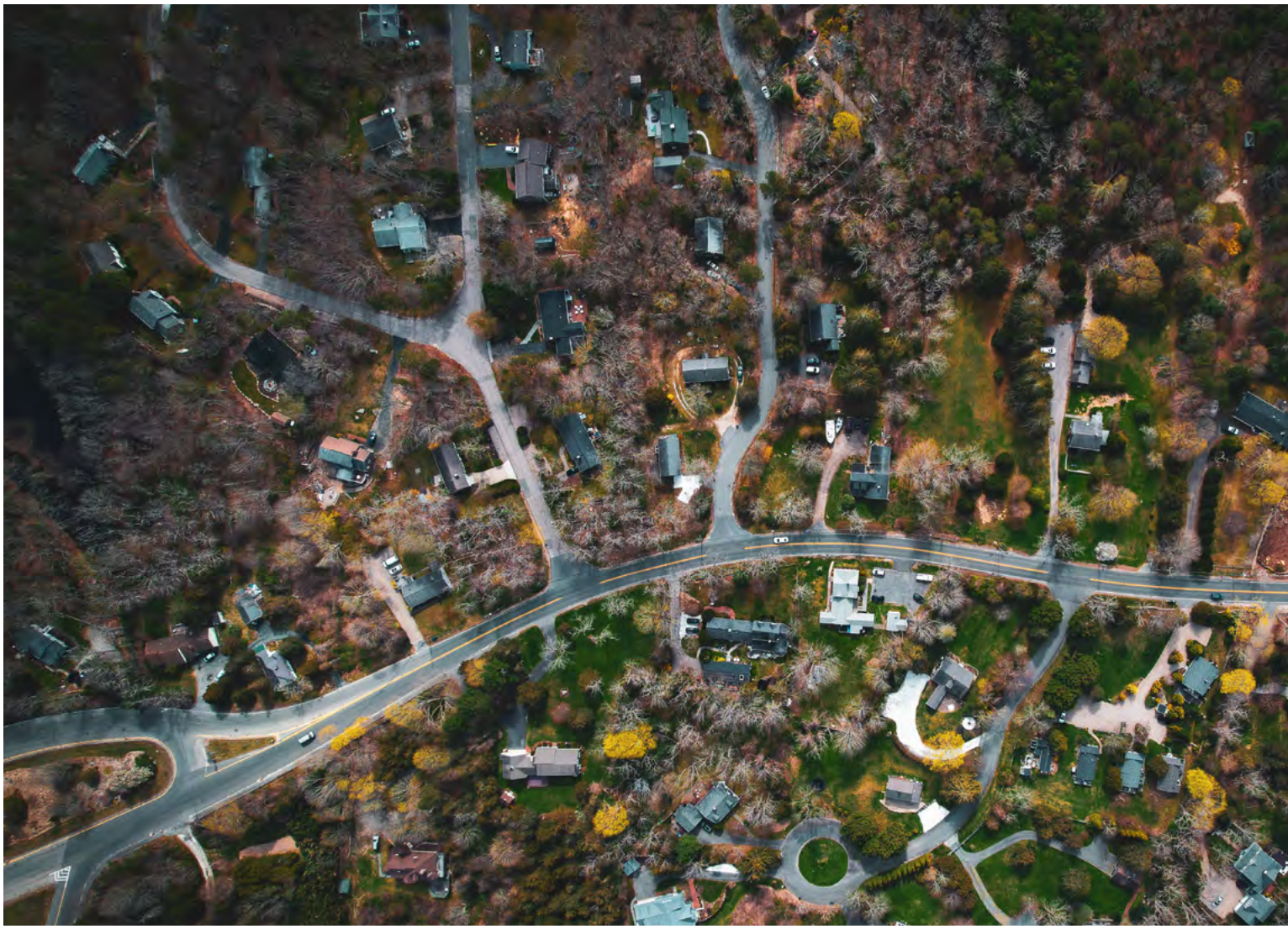


New Zealand consultation on changes to occupational regulation regime now open for submissions

MBIE has proposed changes to four occupational regulatory regimes and is now seeking submissions. This is part of its reform of occupational regulation in the building and construction sector. These reforms are part of the broader series of changes to the Building System Reforms.

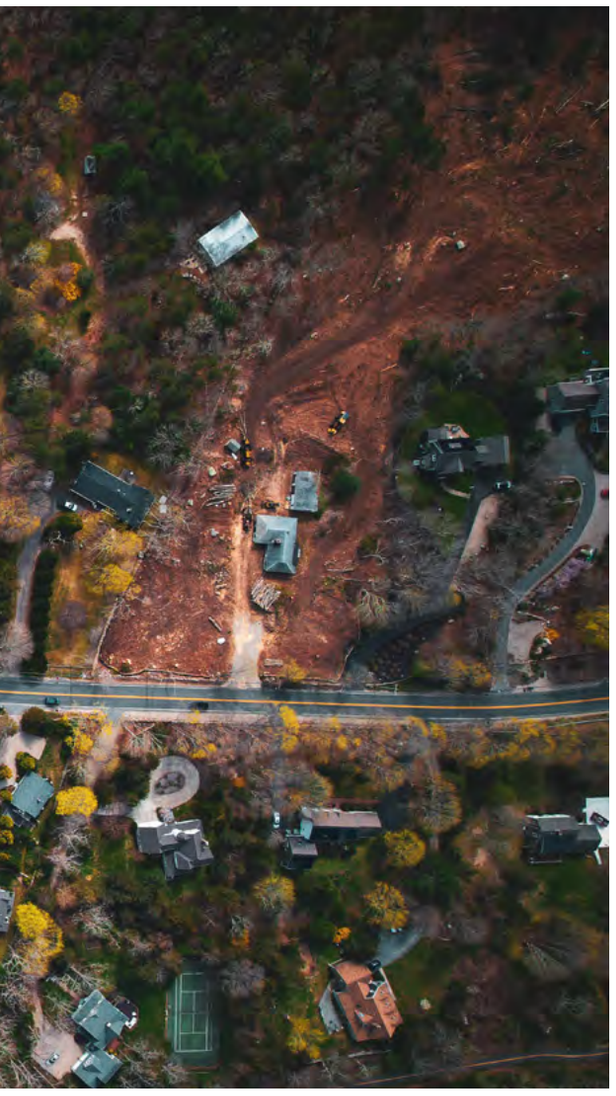
Consultation is open for these four occupational regulation regimes:

- **Licensed Building Practitioners**, which includes proposals for reform concerning supervision and licensing, as well as inviting comment on issues with competencies. Previously, consultation periods have indicated that the regime still has areas to improve on, despite feedback suggesting it largely works as intended.
- **Registered architects**, which includes seeking feedback on a number of issues to establish whether the regime still fits its purpose. The consultation is necessary as the Registered Architects Act has not been reviewed since its 2006 introduction. One of the discussion points is whether the government should continue to have a role in regulating architects.
- **Plumbers, Gasfitters and Drainlayers, and Electrical Workers**, which includes consulting on the reach of a code of ethics to improve the quality of the service and ensure public confidence. Currently, no code of ethics system exists, limiting the ability of regulators to address poor conduct.

For those wishing to add their voice to the development of the regime, this can be done at building@mbie.govt.nz using the consultation submission sheet provided by MBIE. The deadline for submissions is Thursday, 6 April 2023.

NZ Building code review: Results of public consultation on issues for review

In July 2022, the New Zealand Government commenced an initial public consultation on its review of the building consent system, with the publication of an Issues Discussion Document. The initial public consultation on the proposed issues and outcomes for review closed in



Reviewing the building consents system

Public consultation having closed, MBIE has published a summary of submissions, identifying four critical outcomes.

September 2022. In December 2022, MBIE published a summary of the submissions received from across the industry.

MBIE identified four critical outcomes that the building consent system should have:

- **Efficiency**: The consent system should be efficient in providing assurance to building owners and users. It should be risk based, have proportionate compliance costs, and allow for innovation.

89% of submissions rated current efficiency performance as poor or fair.

- **Roles and responsibilities**: The roles and responsibilities within the consent system should be clear and based on ability to identify and manage risks. System participants should have a good understanding of their own responsibilities and the extent they can rely on others for assurance.

78% of submissions rated the current roles and responsibilities as poor or fair.

- **Continuous improvement**: The consent system should be responsive, flexible and agile. It should seek to continually improve through performance and system monitoring, good information flows and feedback loops.

85% of submissions rated current continuous improvement as poor or fair.

- **Regulatory requirements and decisions**: Regulatory requirements should be clear. Decisions should be robust, predictable, transparent and broadly understood.

72% of submissions rated current regulatory requirements and decisions as poor or fair.

In the next stage of the review, MBIE will incorporate the results of the submissions, confirm the key issues for review and propose the options for improvement. A revised issues and proposals document is expected to be published later this year. You can follow the progress of the building consent review here.

NZ BuiltReady scheme: Guidance published for new modular component certification scheme

The use and installation of prefabricated and offsite manufactured modular components (**MCM**s) is becoming increasingly common in the New Zealand construction industry, improving on-site efficiency and reducing building costs.

In order to expedite and streamline the building consent process, amendments to the Building Act 2004 took effect last year, allowing the introduction of a certification scheme for MCMs. Regulations for the new scheme, known as BuiltReady, were passed in June 2022, followed by publication of the scheme Rules in August 2022.

The BuiltReady scheme will apply to three types of MCMs, including prefabricated frames and panels (such as roof, floor and wall panels), prefabricated volumetric structures (such as bathroom pods) and prefabricated whole buildings.

Manufacturers of MCMs in NZ or overseas can apply to BuiltReady to become a certified manufacturer. Manufacturers who become certified will be allowed to issue compliance certificates with their MCMs that

building consent authorities must accept as evidence of deemed compliance with the NZ Building Code.

The scheme opened to applications from certification bodies last year, and opens to MCM manufacturers this year. The most recent development is the publication of BuildReady's Guidance Document in December 2022, which sets out guidance for building consent authorities, manufacturers and practitioners on how the scheme will work and information on the compliance pathways.

You can find more information and keep up to date with the rollout of the scheme on the BuiltReady website.

Supreme Court of New South Wales asks how many payment claims can be served

In *BCFK Holdings Pty Ltd v Rork Projects Pty Ltd* [2022] NSWSC 1706, a builder served a payment claim on its principal. The payment dispute went to adjudication, but the award given was challenged by the principal in the Court on the basis that one of the payment claims was invalid. In determining the matter, the Court considered the interpretation of section 13(c) of the Building and Construction Industry Security of Payment Act 1999 (the **SOP Act**).

BCFK Holdings Pty Ltd (the **principal**) and Rork Projects Pty Ltd (the **builder**) had entered into a construction contract which was terminated in May 2022. That July, the builder served a payment claim on the superintendent of the project. Under the contract, the superintendent was unable to accept service of documents; accordingly, they notified the principal of the claim. The corresponding payment schedule was then served on the builder. In express terms, the payment schedule stated that the payment claim to which it was responding was invalid.

Due to confusion as to whether that payment claim had been effectively served, the builder decided not to proceed with adjudication. Instead, a second payment claim was served on the principal, this time straight to the principal with confidence as to its validity. The principal responded with a payment schedule.

At the adjudication stage, a determination was made in favour of the builder. This determination was challenged on the basis that the first payment claim, was in fact served validly, and thus the second could not be.

The Supreme Court of New South Wales (the **Court**) found in favour of the principal. This was done by considering two related matters:

- Which of the two payment claims was valid?
- Can a party serve more than one payment claim?

On the first issue, the Court cited the recent decision of *Piety Constructions Pty Ltd v Hville FCP Pty Ltd* [2022] NSWSC 1318, to find that a payment claim is not invalid simply because

the correspondence was undertaken improperly. The wrong person had been contacted, but ultimately it had been received by the correct person. This had made effective the serving of the first payment claim.

Section 13(1C) of the SOP Act was assessed to reach a conclusion on the second matter. The provision directs that

[i]n the case of a construction contract that has been terminated, a payment claim may be served on and from the date of termination. The Court read this section to mean that at the contract's termination, only one payment claim can be made.

As the Court had held that the first payment claim was validly served, it followed that the second payment claim was invalid. Consequently, the adjudicator could not have had jurisdiction to adjudicate on the second payment claim. The adjudicator's determination therefore had to be quashed.

Supreme Court of Queensland considers correspondence complexities in payment schedule dispute

In *Demex Pty Ltd v John Holland Pty Ltd* [2022] QSC 259, a subcontractor claimed a payment schedule sent to them by the principal was invalid because it had been sent after the date contractually agreed upon. In considering the application, the Supreme Court of Queensland looked at what circumstances are necessary for a claim to be properly served.

The construction contract between John Holland Pty Ltd (the **principal**) and Demex Pty Ltd (the **subcontractor**) contained a clause under which a payment schedule would have to be delivered to the subcontractor by the principal within 10 working days of the principal having received the payment claim. Compliance with this correspondence timetable was to occur if the principal believed the sum requested by the subcontractor was too high.

On Saturday, 25 September 2021, the subcontractor sent a payment claim to the principal. The corresponding payment schedule was sent to the subcontractor on Tuesday, 12 October 2021, establishing they believed the cost to be substantially lower. Having noticed the schedule had not been given 10 working days after the claim had been sent, the subcontractor claimed the schedule was invalid. The subcontractor subsequently filed an application for the full cost.

The principal contended that the payment schedule had indeed been issued within the agreed upon period. It argued that although the claim had been sent on Saturday it could not be said that this was the day on which it was received. Saturday was outside the working hours specified in the contract.

The Court centred its decision on the fact that the service period is not

effected until the party receives the payment claim. Looking at whether the claim was received on that Saturday or that Monday, the Court took note of the enormity of the consequences for non-compliance. Where the stakes are so high, the party looking to serve the payment claim must have firm evidence that the claim was received on the day they are asserting. The subcontractor did not have this; and so the Court found in favour of the principal. The subcontractor was not entitled to the full cost it had originally claimed.

Western Australia's retention money trust scheme now in force

Last year, Western Australia implemented its new security of payments and adjudication regime for construction contracts (the Building and Construction Industry (Security of Payment) Act 2021). Stage 1 of the reforms came into effect in August 2022, implementing the new rules governing withholding of payments due under a contractor's invoice and the requirements for the service of payment schedules.

Stage 2 of implementation has now also come into force, introducing a new retention trust scheme to protect subcontractors awaiting payment of retention money. The rules apply to money withheld from payments under a construction contract as performance security, as well as money paid upfront to be retained as performance security.

From 1 February 2023, the retention money trust rules apply to all new contracts over $1 million (including GST). The rules do not apply to small scale residential contracts, contracts with individual homeowners or direct contracts with state government or commonwealth departments and agencies.

Retention money must be held on trust in a dedicated trust account for the benefit of the contractor it is payable to. The account must be established within strict deadlines and labelled as a 'trust account'. It must be administered in accordance with prescribed requirements for notification, withdrawal of funds, and account record keeping and inspection.

Retention money for multiple contractors or projects may be kept in the same trust account, but the records must identify the relevant contract for each payment. The moneys must not be mingled with the trustee's other funds, be invested or used to pay any debts or business expenses. The trustee is entitled to any interest earned, but may only withdraw it from the trust account once every six months. Penalties for non-compliance with the rules include conviction and fines of up to $50,000 for individuals and $250,000 for companies. Parties cannot contract out of the rules.

The department for Building and Energy has published a factsheet and guidelines on the new rules, available on its website.

The retention money trust scheme will be extended next year to include contracts over $20,000 (from 1 February 2024), as part of Stage 3 of implementation.

Jolin, I'm begging of you please don't break my bank

In a recent case from the Supreme Court of Victoria, *Jolin Nominees Ltd v Daniel Investments (Aust) Pty Ltd* [2022] VSCA 209, a builder was permitted to recover payment for variations carried out despite non-compliance with statutory notice requirements, on the basis that it would suffer financial hardship if it were unable to recover payment.

Under section 38 of the Domestic Building Contracts Act 199 (Vic), a builder cannot carry out or recover the cost of variations, or be entitled to extensions of time, unless it has provided a notice to the owner stating the effect, costs and delays which will result, and until it has received written confirmation from the owner. There is a very narrow exception to this rule under section 38(6)(b), if it is found that non-recovery of payment would cause *'significant or exceptional hardship'* to the builder, and recovery would not be unfair to the owner.

In this case, the owner Jolin Nominees Pty Ltd (**Jolin**) had requested that the builder Daniel Investments (Aust) Pty Ltd (**Daniel**) carry out variations, but it was never put in writing. Daniel proceeded with the variations without sending a variation notice with the cost and delay estimates, or obtaining Jolin's written confirmation. A dispute over the final payment amount and delays subsequently arose. Jolin refused to pay for the cost of the variations, and refused an extension of time for completion, on the basis that Daniel had failed to comply with the section 38 variation notice requirements.

Daniel successfully applied to the Victorian Civil and Administrative Tribunal (**VCAT**) to request that it be allowed to recover payment under the exceptional hardship exemption, and that the time for completion also be extended. Jolin appealed, but the VCAT's decision was upheld by the Supreme Court.

The Supreme Court confirmed that the meaning of 'significant and exceptional hardship' is broad enough to encompass financial hardship as a result of not being paid for the variations. In respect of delays as a result of the variation, it further held that section 39(c) should be interpreted so that where an application for recovery of costs under the exceptional hardship exemption is successful, then the completion date is also adjusted to take account of the variation.

English High Court gives useful guidance on 'expert shopping'

The High Court of England and Wales has issued a decision on expert shopping which provides useful guidance and authorities around permission to change experts, and when disclosure conditions may be requested by a party or imposed by the Court.

University of Manchester v John McAslan & Partners Limited and Laing O'Rourke Construction Limited [2022] EWHC 2750 concerned proceedings brought by the University for breach of contract in relation to the design and construction of three of its buildings in Manchester.

Prior to the proceedings, the University had engaged expert witnesses to produce reports, but after the litigation got underway it applied for the Court's permission to allow it to change experts.

Laing O'Rourke argued that the University was changing experts because the original report was adverse to its case, and requested that any grant of permission be conditional on the University making disclosure of the original report plus extended disclosure of other documents, instructions and correspondence between its solicitors and the original expert.

While the Court accepted that disclosure of the original report was justified to ensure it had all relevant material before it, the University had already satisfied this by disclosing the original report.

The Court found that the University had acted in a transparent and open manner when requesting to change experts. It declined to make a grant of permission conditional on the disclosure of the additional information that Laing O'Rourke had requested because there was no evidence to suggest that the University was expert shopping or abusing the expert witness process. It noted that witness statements from both parties supporting their position on the accusation of expert shopping would have been useful in this case.

Key resource management bills referred to select committee

In the 48th issue of BuildLaw, we wrote about the proposed changes to New Zealand's resource management laws. The much-criticised Resource Management Act 1991 (the **RMA**) is being replaced by three new laws aimed at making it easier to get building consent whilst ensuring the protection of the environment.

Two of the proposed new laws, the Natural and Built Environment Bill (the **NBE Bill**) and the Spatial Planning Bill (**SP Bill**), have been introduced to Parliament, with the first reading taking place in late November 2022.

The NBE Bill is intended to be the main replacement for the RMA, governing land use and environmental regulation in New Zealand. The bill is more detailed than the exposure draft of the bill that was released for public consultation in 2021.

The SP Bill introduces mandatory spatial planning. This is aimed to be achieved by having up to 15 regional spatial strategies which are intended to provide long-term, high-level, strategic direction for integrated planning.

Both bills were referred to the Environment Select Committee, with submissions to the select committee now closed. The select committee's report to Parliament on the bills is due on 22 May this year.

The bills will then go through three further debates in the second reading, followed by a review by the Committee of the Whole House before the third reading.

The Climate Change Adaptation Bill, the third proposed law of the new resource management laws, is due to be introduced later in the year. This bill is expected to establish systems and mechanisms to protect communities against the effects of climate change and set out how the cost of this will be met. We will be providing further updates on the progress of the bills.