

BuildLaw *in Brief:*

MBIE briefs new Minister for Building and Construction

In February, the Ministry of Business, Innovation and Employment (**MBIE**) briefed the then-incoming Minister for Building and Construction on four priority areas for the construction sector:

- efficiency and productivity
- climate change mitigation
- managing seismic risk
- strengthening fire safety.

The recommendations respond to the stated goals of the Minister as Government was being formed in late 2023.

MBIE's recommendations on each of the points can be summed up as follows:

Efficiency and productivity

Creating a more efficient and productive building system will involve streamlining the consent process. This process will mainly

occur by fast tracking Code Compliance Certificates and strengthening competition.

Competition will be enhanced through the adoption of new technologies.

Climate change mitigation

The way buildings are constructed, and the materials they incorporate, can have a substantial impact on the amount of CO² emitted. Furthermore, the form in which the building is constructed can make homes warmer and drier, directly resulting in a reduction of energy consumed.

Managing seismic risk

MBIE is piloting the Earthquake-prone Building Support Service to assist owners of earthquake-prone buildings to undertake remediation work within set time frames. MBIE has also published a [framework](#) setting out how MBIE



will consider potential changes to the earthquake-prone building system.

Strengthening fire safety

MBIE officials are developing a work programme that may consider a range of potential interventions, including changes to the Building Code and how its supporting documents might be improved in respect of fire safety. MBIE has also identified boarding houses as being in need of fire safety strengthening.

Click [here](#) to see the full set of recommendations.

Updates to New Zealand's resource management regime

5 seconds of fame: NBA and SPA repealed

As we mentioned in [BuildLaw issue 51](#) (page 4), National and Act indicated during the 2023 election campaign that they would repeal the Natural and Built Environment Act (**NBA**) and Spatial Planning Act (**SPA**), if elected. This has eventuated with the creation of the Resource Management (Natural and Built Environment and Spatial Planning Repeal and Interim Fast-track Consenting) Bill (**Repeal Act**). However, this is just the start of the process. In the next two phases of reform, the Government will create new consent laws and create new resource management laws.

Fast-track consenting

The Government has also announced a pathway for creating a fast-track consenting regime.

So far, Cabinet has announced that:

- The new fast-track process will be contained in standalone legislation. That legislation will contain its own purpose statement.
- There will be priority given for regionally and nationally significant infrastructure and development projects.
- A process will be implemented wherein projects will be referred by Ministers into the fast-track process if they meet appropriate criteria.
- The regime will contain a list of projects that will be first to have their consents approved and conditions set by an expert panel.
- The process is intended to be a "one-stop shop". The process will also allow other relevant permits to be obtained in addition to resource consents.

Commerce Commission charges construction companies after probe into cartel conduct

The Commerce Commission has filed criminal charges in the Auckland District Court against two construction companies and their directors. The allegations concern bid rigging of publicly funded construction contracts.

The companies had been subject to an investigation over allegations that the directors had colluded to rig bids for infrastructure projects in Auckland. Bid rigging occurs when there is an agreement among some or all of the bidders over who should win a tender. In these situations, potential bidders often elect to not bid for a tender

in the hope that it will support another bidder. Alternatively, bidders sometimes discreetly agree on the price that each party will bid.

Bid rigging methods include "cover pricing". Cover pricing occurs where one or more parties submit tender bids at an inflated price. This will increase the prospects of another firm winning the tender.

The charges mark the first time in New Zealand that alleged cartel conduct has been met with criminal prosecution. In 2021, the Government introduced criminal provisions into the Commerce Act 1986, under [section 82B](#).

Unable vs unwilling: confusion over letter's content in construction dispute

In [ESR Investment Management 2 \(Australia\) Pty Limited v AllRoads Pty Ltd \[2023\] QSC 235](#), the Queensland Supreme Court considered whether a letter sent by a contractor, Allroads Pty Ltd (**AllRoads**) contractor, to the principal, ESR Investment Management 2 (Australia) Pty Limited (**ESR**) was an indication that the contractor was financially incapable of proceeding with a contract.

In August of 2023, 10 months after AllRoads and ESR entered into a contract for civil earthworks, AllRoads sent ESR a letter. The letter explained that AllRoads was facing *unprecedented challenges* and these were significantly impacting the timeline and costs of the project. The challenges included COVID-19 and the resulting

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lockdowns, the war in Ukraine, the Australian Government's stimulus project and extreme weather events in Queensland. The letter concluded with a list of options for solutions to the heightened costs, including project adjustments, revisiting contractual terms, releasing cash retentions in full, and exploring any alternative approaches. Two days later, the parties discussed the letter in a call.

The purpose of the letter was still not clear to ESR. At the end of August, ESR served a termination notice. The notice stated that AllRoads' costs letter was a declaration by AllRoads

that it was financially unable to proceed with the contract. This being the case, ESR was entitled to terminate the contract by way of one of its clauses, clause 44.11(a). AllRoads disagreed that their letter amounted to such a declaration.

AllRoads argued that a distinction exists between a company being incapable of continuing with a contract and a company which finds it financially unviable, on the basis it would result in a financial loss. AllRoads had been trying to communicate the latter in their letter: that the changing realities of the construction industry meant that

continuing with the project would make little commercial sense, not that it could not proceed with the contract.

Clause 44.11(A) concerned the financial position of the contractor. This, however, was not what AllRoads' letter was trying to speak to. AllRoads *could* proceed with the contract, but it would likely be at a loss for them. The Court agreed with this distinction and agreed that AllRoads' letter concerned a fear that the project was losing commercial sense. ESR therefore could not rely on the letter to serve a termination notice.