



MinterEllisonRuddWatts

Construction Review 2020

Insights and trends
for New Zealand's
construction industry

We are one of the largest construction practices in New Zealand. With six partners, our expertise spans the life cycle of any construction project, from procurement to the end of the latent defect period.

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Introduction

After an extraordinary year, where are we now as an industry?

It has been more than 12 months since our last thought leadership event in 2019, when the industry was facing a significant pipeline of work across both public and private sectors and serious skills and capacity constraints. Back then, topics of interest included new procurement rules, risk allocation, the role of the Engineer, and the success or otherwise of the adjudication regime under the Construction Contracts Act 2002. But after an extraordinary year, where are we now as an industry? With the best will in the world, we could not have predicted the challenges the construction industry would face in 2020.

In this publication we reflect on these challenges and look ahead to what the future holds for 2021 and beyond.

What did we expect in the face of the unexpected?

Like many, we went into the first lockdown without any clear idea about what COVID-19 and a lockdown would mean in the immediate and longer term for the construction industry, our clients, our firm, and our team.

We could see industry bodies quickly taking the lead on key issues arising under construction contracts (as is covered later in this publication) and a real push for relational and solutions focused approaches. We saw industry bodies motivated to address issues arising in the face of the pandemic, including the remobilisation of construction sites and associated health and safety measures.

The work of the Construction Sector Accord Group certainly highlighted the importance of the construction sector to both Government and the wider public. There was also a major shift, moving from an Accord that last year was looking for additional resourcing and talking to Government about the phasing of work to mitigate a boom, to

now looking for help from Government to mitigate the bust.

As we become accustomed to pandemic life (and we say this deliberately because it would be foolish to suggest we are out the other side of COVID-19) and infrastructure and construction work continues, what does the pipeline look like?

The Government's budget promised major investment in infrastructure and housing with around \$18 billion committed in its New Zealand upgrade plan, COVID-19 Response and Recovery Plan and through its Provincial Growth Fund. The residential and retirement sectors are also optimistic but battle the willingness of funders to back new developments, while commercial construction projects face very real challenges.

What next?

We are currently working with representatives from a key sector group with a pipeline of billions of dollars of work, preparing a suite of documents for their future projects. The group



As we look to the future for the construction sector, culture and people remain at the core of successful projects.

and the suite acknowledge that there is more than just a contract document required for a successful project. The group references and supports, a range of prerequisites (including a requirement for complete design documents for pricing, to the governance and management structures for the project for both Principal and Contractor, and an independent administrator for the contract). We look forward to its use on the first projects next year.

As we look to the future for the construction sector, culture and people remain at the core of successful projects. He tāngata, he tāngata, he tāngata (it is the people, it is the people, it is the people) has never been more relevant as our principal side clients look to key individuals to lead their projects.

There is a shift towards using relational approaches over the commercial arrangements to support project delivery – with both parties promoting best practice, solutions-finding (rather than problems-finding), and seeking ‘best for project’ outcomes. While aspirational, it is a worthy goal in these increasing dispute-ridden times.

Turning to disputes, this is certainly a growth area in the sector. No doubt arising from some of the commercial stresses encountered in the project. Many have their genesis at the beginning of the project with misaligned understandings, intentional or inadvertent mis-pricing, and/or

optimistic time scheduling. Others arise through personal circumstances, and asymmetric views.

The amounts involved in larger projects, or relative to the financial position of a party, almost necessitate formal dispute processes where an outcome can’t be negotiated between the parties, or as part of the journey towards such an outcome. Increasingly adjudication (under the Construction Contract Act) is being used in support of an initial cashflow outcome.

A dispute focus can be debilitating for the progress of projects, taking much needed management resource and focus away from project delivery. For this reason, we are now working with our clients on strategies to keep disputes distanced (but running concurrently) from the project delivery team. Sensible dispute strategies can provide meaningful outcomes depending on context, and it is important that project and dispute teams are aligned on this front.

We explore many of these issues in this publication, our Construction Review 2020.

We look forward to working alongside you as we move into 2021.

Janine Stewart
Partner and Division Leader
Construction



Transforming a sector

COVID-19 fundamentally changed the size and structure of the construction sector. It has influenced the industry in a way never anticipated and the pipeline itself has been dramatically impacted. Prior to and through this turbulent time, there were several industry bodies addressing sector issues. Those bodies continue to operate and straddle different functions. But what are they doing?

We sat down with Dean Kimpton, Chair of the Construction Sector Accord and Managing Director of infrastructure advisory business, Tūhura Consulting, to discuss the future for the Accord, Building Advisory Panel and where the construction and infrastructure industries should remain focused.

How would you describe your pathway to becoming a leading consultant in New Zealand's infrastructure industry?

I originally trained as a civil engineer and started my career at AECOM. I worked my way up to become the Managing Director for a number of years, before I was attracted to the Chief Operating Officer role at Auckland Council in 2013. This role provided me a broad overview of the varied functions of the country's largest city, and what is needed to develop sustainable infrastructure.

Last year I made the decision to start my own infrastructure advisory business, Tūhura Consulting. Tūhura is te reo for 'discovering, exploring and bringing to light' – I love the meaning. It was going to be a hobby but as usual there are too many interesting things to be involved in!

How would you describe your experience chairing the Accord during New Zealand's first significant response to COVID-19?

It was a night and day experience – it was a 'zoom' experience!

The Construction Sector Accord had only just been signed by all parties – but the brilliant thing was we had deep relationships with ministers, with government agencies, with industry and the wider construction sector. Our strategy and my total focus was to leverage that as best we could into a three phase response – maintain, restart, transform – to build a coalition of the willing and committed to create a resilient construction sector.

This also meant fast-tracking some of our transformation agenda in areas like rapid procurement models, payment terms, and dealing with significant issues of the moment like resolution of contract terms triggered by the pandemic, the dramatic shift down of existing and future work, redundancy and lay-offs. Looking back, I believe we achieved to a large extent our 'maintain and restart' objectives.

Now we get to focus on delivering against the transformation agenda,

and we have 2 years left to deliver it. But the agenda has changed, now with a greater focus on environmental leadership (a new workstream) and innovation (being further embedded in all workstreams).

With a new Government, we will need to adjust again but we have an awesome platform to work from and great ministerial support. The Construction Sector Accord will continue to provide that unique partnership interface between Government and the sector, between supplier and procurer.

How does your work with the Accord compare to your current role chairing the Building Advisory Panel (BAP)?

BAP is a group of leaders from across the building sector appointed to provide the Ministry of Business, Innovation and Employment (MBIE) free and frank advice and review of its building policy work programme. This ultimately shapes up the regulatory programme and advice to the Government of the day.

There is a helpful overlap between the panel and the Construction Sector Accord, as both aim to create a more sustainable and resilient construction and infrastructure sector here in New Zealand.

What is the focus of these industry bodies moving forward, do they share a common purpose?

They absolutely share a common purpose – building regulatory frameworks have long term, high impacts on our built environment, for the betterment of all New Zealanders. The construction sector needs to be high performing for the same reason.

In your opinion, what is the one thing the construction industry can do to seize opportunities from the disruption caused by COVID-19?

COVID-19 was a true 'black swan' event. My view at the outset was very simple from a Construction Sector Accord perspective – rapid focus on resilience (the 'maintain' and 'reset' phases), then accelerate the transformation agenda.

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COVID-19 was a true 'black swan' event.



For individual organisations, this is really interesting but simple in my view: people matter, and that is the big opportunity. Great people innovate, create, deliver excellent services, are your businesses agility, will be high performing and can be trusted. Hard choices still need to be made, but those companies that get it – that is that people matter – will be the ones transform and thrive.

If I had time to talk about a second – it would be technology innovation. There has never been a better time to think about how technology can both support and constructively disrupt business and New Zealand's wider economy.

If you could deliver one message to the construction and infrastructure industries what would it be?

People matter.

Industry bodies

Construction Health and Safety New Zealand (CHASNZ)

CHASNZ is an accredited charitable trust that focuses on delivering a unified voice to raise the health and safety standards across the whole construction industry. CHASNZ allowed the construction sector to continue working throughout the COVID-19 crisis by addressing work safety as well as public health and safety. It did so by implementing education, health and safety protocols through the alert levels.

Infrastructure Commission

The Infrastructure Commission is an autonomous Crown entity whose purpose is to lift infrastructure planning in New Zealand. A key focus is the publication of an Infrastructure Pipeline, which will give the market greater certainty about future infrastructure projects. This pipeline will be visible to the market and will work to rationalise the investment pipeline.

Another goal of the Commission is to develop a 30-year infrastructure strategy for New Zealand, which depoliticises project investments through quality planning for infrastructure.

Infrastructure New Zealand (INZ)

INZ is an advocacy body representing the infrastructure sector seeking to build a world-class infrastructure for the benefit of New Zealand. The body advocated strongly for the creation of the Infrastructure Commission.

Vertical Construction Leaders Group (VCLG)

The VCLG is an industry group that collaborates to improve the New Zealand's vertical construction sector. It is a forum for contractors to come together and for Accord and CHASNZ information to be shared.

VCLG has defined what good business performance looks like and the metrics for measurement. This is particularly important, considering that the vertical sector has experienced the most failures (e.g. it is where both Fletcher and Mainzeal have had issues). This group is also interested in how the industry can develop sustainable business practices.

Building Advisory Panel (BAP)

BAP provides the Ministry of Business, Innovation and Employment (MBIE) with independent, specialist and evidence-based advice on strategic issues facing the building and construction sector. The BAP is a challenge and review panel, as part of a regulatory review process that MBIE seeks to advance.

This panel is particularly important when considering the issues that the construction industry is facing now and into the future. These include building for climate change as well as managing risk and liability in the building sector.

Construction Sector Accord (Accord)

The Accord is a shared commitment between the Government and industry to create a high performing construction sector. It has created a platform for the industry and Government to work together to address the key challenges facing the construction sector. If the primary motive of the Accord is to lift business performance of the construction sector, this means that clients, procurers and suppliers must work together.

The Accord has four focus areas through which it aims to lift business performance. These are to:

- enhance productivity;
- raise capability;
- improve resilience (e.g. through fairer risk allocation); and
- restore confidence, pride and reputation of the industry.

A core example of an area in which the Accord may lift business performance is fair risk allocation. If procurers and suppliers can agree who is best to manage risk and allocate that risk fairly, they will be better able to manage their own risk and performance.

COVID-19 was a real test for the Accord, with the pandemic occurring during its establishment. However, the Accord stepped into the leadership role expected and worked equally with Government and the sector to support both the immediate response and recovery phases.

The focus for the Accord now is transformation of the sector and New Zealand's economy.

The construction pipeline led by the Infrastructure Commission is also integral to sustained business performance.

Resource Management Review

In July the Government received the Resource Management Review Panel's report on *New Directions for Resource Management in New Zealand*. The Review Panel, (led by retired Court of Appeal Judge Tony Randerson QC), undertook consultation and submissions were received.

The Review Panel's recommendation was to replace the existing Resource

Management Act (RMA) with two separate pieces of legislation: a Natural and Built Environments Act and a Strategic Planning Act.

The proposed Natural and Built Environments Act (NBEA) would take a substantially different approach from the RMA. It would focus on enhancing the quality of the environment and housing, as well as achieving positive outcomes to support the wellbeing of present and future generations.

The proposed Strategic Planning Act would embed integrated spatial planning across all regions of New Zealand. It would set long term

strategic goals and help integrate legislative functions across the resource management system including the proposed NBEA, the Local Government Act, the Land Transport Management Act and the Climate Change Response Act. This would allow a broad range of matters to be reconciled to ensure better future planning, including for infrastructure and housing.

The Review Panel also recommended greater use of national direction by the Environment Minister, a more streamlined process for council planning and a more efficient resource consent process.



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New Zealand's Infrastructure sector:

Key to rebuilding the country's economy?

The COVID-19 pandemic has had wide-ranging impacts on New Zealand's economy, and the construction and infrastructure sectors have not been immune to these challenges. Infrastructure expenditure has long been seen as an effective tool to reinvigorate an economy and generate growth, and New Zealand's Infrastructure sector is a key beneficiary of the Government's economic stimulus package post COVID-19.



In January this year, the Government announced \$12 billion of additional infrastructure funding as part of the New Zealand Upgrade Programme and subsequently announced an additional \$3 billion as part of its COVID-19 Response and Recovery Plan. There is another \$3 billion from the Provincial Growth Fund. The Government is clearly looking to address decades of underinvestment in infrastructure and generate economic growth. Considered in the context of previously committed infrastructure funding, there are plenty of positives for the sector to look forward to.

Stepping back, there are several observations and trends within the infrastructure sector, and where it is heading over the coming months and well into the new year. These include:

- a focus on broader outcomes for infrastructure projects;
- legislative reform to facilitate further infrastructure development;
- a broader system approach to the infrastructure sector;
- a healthier pipeline of projects; and
- a shift towards more collaborative contracting models.

Broader outcomes

In 2019, Government released the fourth edition of the Government Procurement Rules, which introduced the new concept of “Broader Outcomes” for public sector procurement. Agencies subject to the Rules are now required to consider the cultural, environmental, social and economic outcomes from their procurement activities.

Fast-forward to present day and the consideration of broader outcomes have become more prevalent in large and complex infrastructure projects, with a renewed focus on how such projects can enable and unlock broader outcomes for the community. For example, the Auckland Light Rail project, which started life as a mass transit project connecting Auckland’s city centre to the airport, has evolved into a project with a strong urban development focus. This is reflected in its four key outcomes: access and integration, environment, urban and community and customer experience.

The Government is also looking to address decades of underinvestment in water infrastructure through the three water reform programme currently being spearheaded by the Department for Internal Affairs. Amongst other outcomes, this reform programme is intended to address affordability issues, facilitate improvements in freshwater outcomes, increase resilience to climate change and natural hazards, and enhance community wellbeing.

Legislative reform

Legislative reform is expected to play a key role in facilitating the development of a number of current and future infrastructure projects and initiatives.

Legislative reform on the horizon includes:

- the three waters reform programme, which represents a step-change in local government water services delivery arrangements;
- a review of the Resource Management Act to unlock development opportunities across the country. With what appeared to be cross-party political consensus in the lead up to the General Election, it will be interesting to see how this review unfolds and the extent of reform that is ultimately proposed; and
- potential legislation to enable the delivery of mass transit projects.

Broader system thinking

Another market trend worth watching is broader system thinking across the Infrastructure sector, both in terms of joined up approaches between sectors and a potential shift in the framework for the delivery of infrastructure projects generally.

Many current projects traverse various sectors (e.g. Auckland Light Rail’s focus on both land transport and urban development) and there are considerations being given to broader system thinking more generally.

This approach will be supported by the Infrastructure Commission which is tasked with developing a 30-year infrastructure strategy to be tabled in Parliament in late 2021. To develop the strategy, the Commission is working with stakeholders across the sector with the aim of reaching a consensus view as to a long-term vision for infrastructure and the outcomes it enables for New Zealand.

Project pipeline

In a down cycle, infrastructure is always a leading beneficiary of economic stimulus, and after a period of uncertainty recent funding announcements have strengthened the project pipeline. This is a clear positive for the sector, as it allows the industry to plan ahead and resource effectively.

Building on a key challenge identified by the Construction Sector Accord, the Infrastructure Commission continues to maintain and update the Infrastructure Pipeline for projects in New Zealand’s infrastructure market.

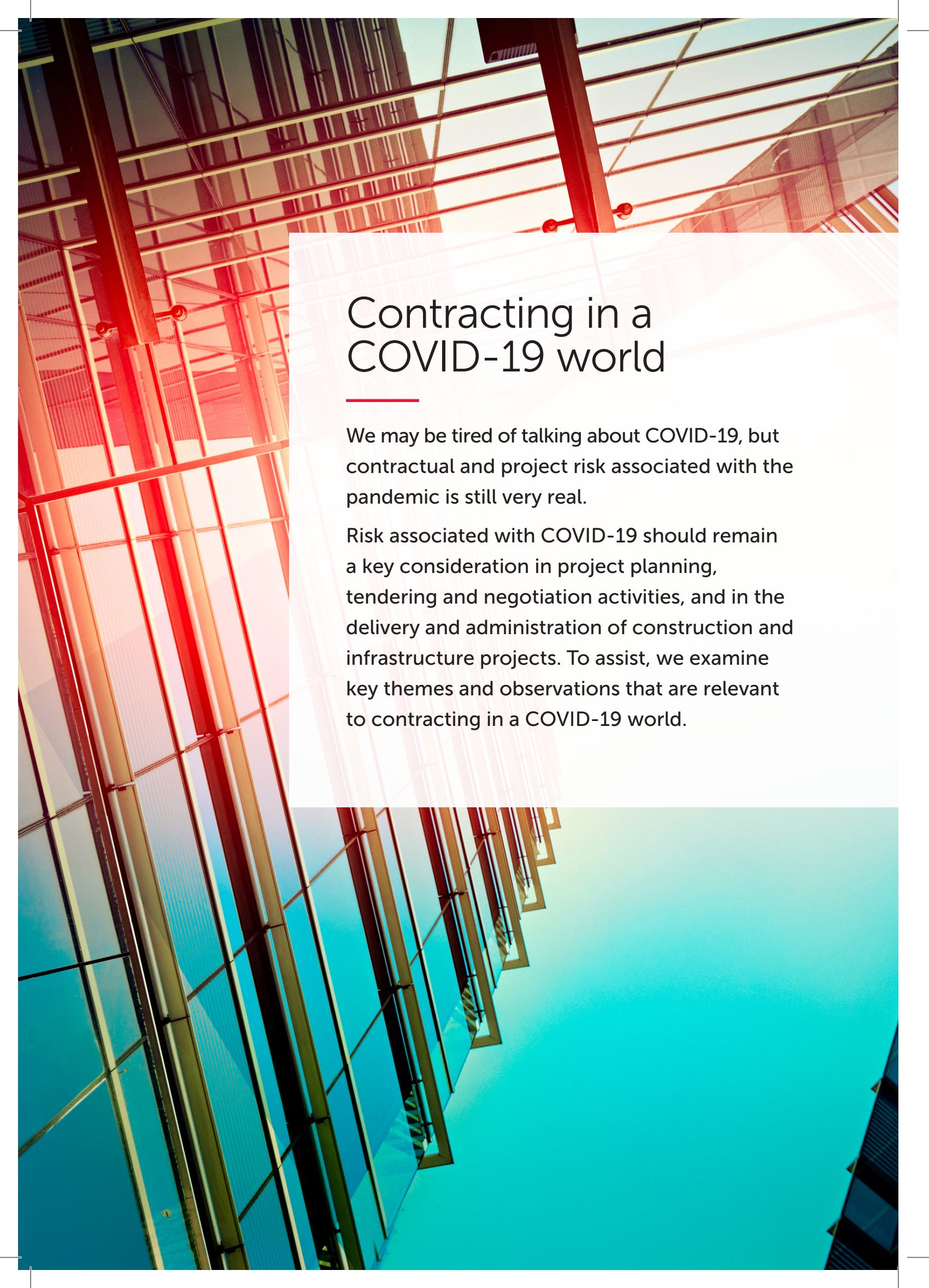
Alternative contracting models

When markets are facing a period of uncertainty it is not uncommon for a shift towards alternative contracting models with a greater focus on alliances and collaboration, and this is a trend that is worth watching going forward.

The Infrastructure Commission is currently reviewing the country’s Public Private Partnership (PPP) model, and this is expected to highlight a broader range of contracting models available to the public and private sector beyond the PPP model previously used in New Zealand.



In a down cycle, infrastructure is always a leading beneficiary of economic stimulus.



Contracting in a COVID-19 world

We may be tired of talking about COVID-19, but contractual and project risk associated with the pandemic is still very real.

Risk associated with COVID-19 should remain a key consideration in project planning, tendering and negotiation activities, and in the delivery and administration of construction and infrastructure projects. To assist, we examine key themes and observations that are relevant to contracting in a COVID-19 world.

Collaboration

COVID-19 has highlighted the need for collaboration – we are all in this together. While New Zealand’s construction industry has not responded through large-scale shifts to collaborative risk sharing contracts (e.g. alliances) as the norm, a focus on collaboration is finding its way into pre-tender and tendering activities, pre-contractual processes (in the form of a renewed trend toward ECI/Preconstruction contracts and co-design) and collaborative contracting principles (see “Plan B contracting” over the page).

Thoughtful tendering

Principals need to know that prospective suppliers are thinking about COVID-19. We are designing notices of procurement that ask tenderers to explain how they have planned to deal with the impacts of COVID-19 in a manner that provides best-for-project outcomes. These responses are increasingly becoming part of a principal’s evaluation criteria.

Emergence of “COVID clauses”

One of the main contractual trends is the emergence of clauses specifically addressing and allocating risk for the impacts of COVID-19. Project-specific “COVID clauses” have become particularly important because many traditional relief regimes, such as “change of law” provisions or Force Majeure/extension of time clauses, are unlikely to be sufficiently effective. For example, Force Majeure and other relief clauses generally require unexpected events, but COVID-19 is well-known as are many of the consequences of the

pandemic such as the Government’s lockdown responses.

A COVID clause provides (as far as possible) certainty of risk allocation – parties are able to enter into contracts with the understanding of where risk lies, which allows them to plan for that risk including to price and programme for it from the outset.

There is no standard COVID clause. Some provisions are thorough and prescriptive, while others are simple and generalised. Whatever the approach, we recommend a careful balance between achieving certainty for the parties, and enabling the parties to be flexible and incentivised to be responsive and adaptive.

What should COVID clauses cover?

The challenge with agreeing effective COVID clauses is their scope and coverage – the impacts of COVID-19 can be far-reaching and their time and cost implications uncertain. Suppliers will understandably wish to have as much protection against the impacts of COVID-19 as possible. Conversely, principals and their stakeholders and financiers necessarily desire certainty, and are therefore reluctant to accept generalised and unabated risk.

Parties should turn their minds to the potential impacts of COVID-19 against the realities of their contract, particularly the contract term and the importance of time, relevant project risks (such as any international procurement or specialist foreign labour supply, or where the project involves a large site-based workforce working in close proximity). A COVID clause prepared with careful

consideration of these types of eventualities is a good starting point.

What are appropriate remedies for COVID-19 impacts?

A range of traditional contractual remedies can be made available for COVID-19 impacts, such as entitlements to more costs (variations) and relief (extensions of time), and a right to suspend or terminate.

Relief from performance should be uncontroversial, but the question of cost is more contentious. While the impacts of COVID-19 may be felt differently by the parties, both parties carry risk – the starting point should be allocating risk to the party best placed to manage it. This may mean that some cost is available to suppliers, but it should not be an invitation for an open cheque book.

If compensation is included as a form of relief, it is important that the compensation regime is clear and fair. For example, a principal may be willing to pay for demobilisation and remobilisation costs associated with an escalating alert level, but is unlikely to agree to pay any profit on such costs. The extent of compensation available should be covered in clear and certain terms.

Plan B contracting

COVID clauses are one piece of the contractual puzzle. However, the availability of relief does not protect the parties or their project from risk arising. Any such clause only provides a time and cost remedy once that risk has arisen.

At law, parties are required to mitigate their loss. Contractually, parties may wish to be more prescriptive and agree mechanisms that describe what mitigation entails – or in other words, what “Plan B” looks like. Some examples of mitigation measures and mechanisms include:

- **proactive notification regimes as to impacts** – including through monthly project reporting and/or advanced notification regimes, and proactive updates to construction programmes.
- **rights to re-sequence and new ways of working** – investigating new ways of working that enable

progress of the works on site. This may involve more off-site fabrication or partial fabrication of materials, or different trades working in different parts of the site at different times, or re-sequencing works to enable compliance and/or efficiencies of operation to mitigate any loss of productivity.

- **alternate supply (materials and labour)** – collaborative discussions around alternate procurement opportunities (both materials and labour supply), and risk/cost sharing for those changes. Local supply options should be actively investigated.
- **staging of works or new separable portions** – where commercially beneficial and practical, staged handovers of parts of the works and/or the introduction of new separable portions provides the principal the benefit of early access or occupancy, and for the supplier to achieve an early release of retentions.
- **requiring acceleration** – acceleration options for the principal to off-set delays and/or losses in productivity. This could be facilitated by additional weekend and/or night shifts (subject to allowance in or amendment to consented hours of work).
- **prioritisation** – identifying project priorities and allocating resources to those priorities.
- **relaxing working constraints** – for those projects being delivered in operating environments (e.g. extension works to existing buildings), opportunities for principals to relax working constraints (e.g. site working hours), particularly in circumstances where those environments are themselves subject to lockdown constraints (e.g. shopping centres) or with reduced use (e.g. road works).

Long-lead procurement regimes

To mitigate supply chain delays, a contract could usefully enable or may even mandate long lead procurement activities. Suppliers will likely look to principals for partial or full advances for those materials (or letters of credit), which introduces security considerations for the principal such as advanced payment bonds. For materials in New Zealand, principals should be protecting their security position by registering security interests over the materials and being aware of the physical storage arrangements (including location and the identity and substance of the organisation storing those materials) and ensuring insurances are in place. Extended warranty periods may be needed to account for any delay between procurement and installation or use.

Pause provisions

Suspension regimes are an important tool for principals navigating unknown impacts of COVID-19.

Discretionary suspension rights provide principals the ability to “press pause” on their projects or specific contracts, enabling them to consider next steps (including with their key stakeholders and financiers). Suspension regimes need to be fair to suppliers – this involves appropriate notification requirements (in advance of the suspension if possible and in relation to lifting it), suitable compensation entitlements, and certainty of suspension periods such as longstops.

Termination for convenience rights

Termination for convenience or “termination at will” clauses allow a principal to unilaterally terminate or cancel a contract, without reason. In the current climate, these are receiving much attention as they provide a useful tool for principals to end a contract



that has become overly burdensome, financially unviable or commercially comprised due to COVID-19 – circumstances that the pandemic is presenting in many construction sectors including retail, hotel and tourism.

For suppliers, these clauses are harsh, not least because a supplier has planned its business to complete a contract and to receive a profit. If a principal is requiring a right to terminate at will, principals should also consider advanced notification periods and fair compensation regimes.

Cashflow considerations

COVID-19 is creating financial risk and uncertainty. Where commercially appropriate, principals may be able to agree to different payment regimes that generate quicker cashflow to its suppliers. This could include:

- advances for works and materials (with appropriate securities, e.g. advance payment bonds in place);
- flexible payment cycles, for example moving from monthly payment cycles to fortnightly or weekly payments to ensure that contractors/suppliers have a steady cashflow;
- payment milestones against achievement of works milestones to incentivise project centric approaches; and
- release of bonds and retentions.

It is important for mechanisms to be put in place to ensure that contractors pass on the benefit of alternative payment measures to their supply chain. This may be achieved through requiring contractor declarations with payment claims and audit rights to ensure that cash is flowing through the supply chain as intended. Contractors should also be open to providing accurate and timely cashflow schedules with each monthly project report or payment claim.

Health and Safety

Fundamentally, New Zealand's legislative framework for health and safety, including the Health and Safety at Work Act 2015, its regulations and approved codes of practice, has not changed. PCBU's duties remain. However, the prevalence of COVID-19 and the Government's directives for conducting business within alert level constraints require different approaches from construction organisations to achieve compliance. Construction Health and Safety New Zealand (CHASNZ) promulgated standards and protocols to assist the construction sector to operate safely under alert levels 2 and 3.

Health and safety management plans and organisation systems need to be fit for purpose and revisited in light of COVID-19. P&G Specifications should be updated and backed-up by organisational and site-based behaviours that align with those requirements.

Embracing new technologies

COVID-19 has emphasised the importance of investment in technology that allows for off-site project monitoring and management. In an increasingly digitised world, parties should look to embrace technology to increase productivity and reduce costs, (e.g. through digital workflow management, real-time progress tracking, 4D simulation and modular construction). Given global labour shortages, overseas companies have begun developing technical solutions to reduce the need for physical labour and mitigate rising labour costs in response to increased health and safety requirements. The construction sector is likely to see significant investment in technology over the next few years.



COVID-19 is creating financial risk and uncertainty.

COVID-19 in New Zealand

3 FEB 2020

Government places entry restrictions on foreign nationals travelling here from, or transiting through, mainland China

28 FEB 2020

First COVID-19 case reported in New Zealand

14 MAR 2020

Government announces anyone entering the country must self-isolate for 14 days, except those arriving from the Pacific

19 MAR 2020

All indoor gatherings of more than 100 people are to be cancelled. Borders close to all but New Zealand citizens and permanent residents

23 MAR 2020

Prime Minister announces country to move to Alert Level 3 and to Alert Level 4 at 11:59pm on 25 March 2020

25 MAR 2020

At 11:59pm, New Zealand moves to Alert Level 4, and the entire nation goes into self-isolation following issue of s 70(1)(m) Health Act order notice

A State of National Emergency is declared at 12:21pm

Epidemic Preparedness (COVID-19) Notice 2020 is issued

7 APR 2020

MBIE issues guidance note for public sector agencies dealing with contractual implications associated with Alert Level 4 lockdown

27 APR 2020
New Zealand moves to Alert Level 3 at 11:59pm

11 MAY 2020
CHASNZ COVID-19 Standards and Protocols released

13 MAY 2020
COVID-19 Public Health Response Act 2020 is invoked

13 MAY 2020
New Zealand moves to Alert Level 2 at 11:59pm

12 AUG 2020
At 12pm Auckland region moves to Alert Level 3. The rest of the country moves into Alert Level 2

21 SEP 2020
All regions, except Auckland, move to Alert Level 1 at 11:59pm. Auckland moves to Alert Level 2, without extra restrictions on travel and gatherings

7 OCT 2020
The Auckland region moves to Alert Level 1 at 11:59pm. All of New Zealand is now at Alert Level 1

Q&A

Construction law in an extraordinary year

Our leading construction team answers some of the big questions affecting New Zealand's construction and infrastructure sectors following an unprecedented year of activity and uncertainty.



Travis Tomlinson, Partner

Q | What are the key procurement trends arising from COVID-19 lockdowns and the pandemic's wider impacts?

A | To set the scene, the private and public sectors continue to present opportunities in the form of large construction projects and major works programs. Some parts of the industry – most noticeably in the retail, hotel and tourism sectors – are understandably less active, but in the large, Government, developers and other principals are advancing their planning and project initiation activities and putting opportunities to market. The construction pipeline looks positive, with many projects and programmes gathering momentum and looking to proceed at pace – often to overcome procurement delays and interruptions related to the pandemic.

While traditional procurement models remain the preference, there is greater emphasis on collaborative procurement processes and contracting structures.

Unique co-design frameworks are being formulated to integrate principal, advisor (including project management, cost and legal) and consultant expertise in collaborative working environments, and this is occurring early in project planning phases. There is also a resurgence of preconstruction or "ECI" processes, with current processes designed and structured around the interrogation of project risk – particularly risk presented by COVID-19. There is also a noticeable uptake of collaborative contracting principles in traditional procurement models.

In the private sector, there has been a mix of direct negotiation and competitive tendering – but on balance, developers and other principals are running competitive processes, particularly in light of some available market capacity and the resulting opportunities (e.g. commercial/pricing

and contract positions) that this is providing. Competitive single or two-stage procurement processes are and will continue in the public sector, but panel appointments will likely become more prevalent due to the need to accelerate procurements that have been impacted by the pandemic.

With the uncertainties being presented by COVID-19, principals are procuring with an eye on flexibility. While principals generally look to retain broad discretionary rights in their procurement activities – such as to change, delay and/or cancel their projects at will, there is a heightened focus on those discretionary rights and privileges being carried forward from tendering phases into project delivery contracts. Discretionary “pause” and termination for convenience rights are becoming the norm but principals are wanting to have sensible discussions with their counterparties to ensure that fair relief and compensation regimes are available should those privileges be exercised.

Finally, it is worth highlighting that consultants, contractors and their suppliers have started to re-engage in certain proactive and forward-looking risk management activities – activities that were largely put on hold as resources (financial and personnel) were allocated and tied up earlier this year due to the pandemic. There has been a lot of activity from these parties recently, with them re-visiting their standard form agreements and subcontracts to see whether they remain fit for purpose in the COVID-19 era, interrogating and updating their corporate risk and tendering policies, and providing risk, tendering and contract management training programs for staff.

These forward-looking behaviours and trends are encouraging signs for the construction sector, particularly considering the significant impacts that the pandemic has created across the board.

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The construction pipeline looks positive, with many projects and programmes gathering momentum and looking to proceed at pace.

Travis Tomlinson



Mark Crosbie, Partner

Q | There was a lot of talk last year, and out of the Construction Sector Accord, on terms of construction contracts and a push or request from the sector for ‘fairer contract terms’. What are you seeing in the approach to construction contracts for larger commercial projects?

A | This protest had been coming through from main contractors for a while and was amplified through and embodied into the Accord, through reference to fairer risk allocation – which of course is primarily set at the outset in the construction contract.

No matter your view on that (whether that it takes two to sign, or that its rich for contractors to cry unfair when those same contractors use vastly more onerous terms with their subcontractors, or conversely that many Government key projects are run by consultants who advise risk transfer to contractor side and leverage the tender process to avoid meaningful rebalancing by contractors), there

is starting to be a move towards a rebalancing.

We are currently involved with representatives from a key sector group, preparing a suite of contract documents for their future projects. The group and the contract suite acknowledge that there is more than just a contract document required for a successful project and references project governance and management structures, project culture, as well as contract mechanisms.

Good governance and management in projects is something we’ve been banging on about for a while. Over the next few years this will be tested – both for the companies and for projects.

In the initial phase of development of the contract document, it contains a range of initiatives both in and around the contract itself (from an expectation of complete design documents for pricing, inclusion of a risk allocation matrix, inclusion of more fulsome project information and processes and protocols, to an independent administrator for the contract, among many other things).

I’m looking forward to using the suite on the first projects next year.



Janine Stewart, Partner

Q | Prospecting and disputes, managing the uncertain certainty of a litigation outcome?

A | One of the most challenging questions for a dispute lawyer is the strength of a client’s claim or defence. When I first started practicing, the senior lawyers often refused to answer it.

Parties were expected to take an extraordinary “punt” at significant cost without any clear prospect of success. Now days, and rightly so, clients are demanding clear indications of prospects of success. But even now, there is rarely, if ever, satisfactory certainty of return on investment in disputes.

Of course, a claim assessment is subjective to the lawyer, and trust me, if you have a prospect of better than 70% – you’re doing very well.

My expectation post lockdown was that disputes would dwindle and strength of claim assessments would come under even more scrutiny, as finances and resources came under strain. But not so.

We are seeing numbers of disputes climb, more disputes escalating and more parties prepared to take their disputes through the contractual process or adjudication under the

Construction Contracts Act 2002 with less scrutiny on actual prospects of success.

While this may be a helpful growth industry for lawyers, it is not necessarily the best alternative for parties. In some cases the stakes or matters of principle are high enough to justify the spend, but we would encourage parties to continue to challenge the merits of their position, and explore all options.



Stephen Price, Partner

Q | How has the disputes landscape changed in 2020?

A | COVID-19’s impact on the construction industry has led to increased disputes over delays and cancellation of contracts, including termination on the basis of frustration. We anticipate that these disputes will continue to rise in 2021 as the economic consequences of the pandemic manifest. The easing of manufacture and disruption to supply chains due to COVID-19 restrictions and lengthy border/port closures, culminating in higher costs, will fuel the number of construction disputes.

However, the increase in construction disputes may not be immediately reflected in the New Zealand courts. Apart from disputes involving urgent injunctive relief, it is unlikely that any substantive construction proceeding will be heard and determined by the courts in 2020/2021. Like the Construction industry, New Zealand’s alert level restrictions have had a major impact on the court roster, resulting in

adjournments of hearings and limited windows of time to re-allocate priority fixtures on civil/construction litigation matters.

The courts have signalled that they are committed to allocating fixtures in 2021 to criminal jury trials that were cancelled as a result of the alert levels. This means, for example, that the High Court at Auckland will be running seven jury trials every week during the first seven months of next year, as well as three jury trials in Hamilton and one trial each in Rotorua and Whangarei. It follows that the earliest date on which the courts will allocate a fixture (including priority fixtures) for civil/construction matters will be mid to late 2022. Due to this situation, adjudications and/or arbitrations may be preferred by those seeking immediate certainty, clarification and/or speedy resolution. Those seeking to slow a dispute or further frustrate the dispute process, may opt for court proceedings.



It is unlikely that any substantive construction proceeding will be heard and determined by the courts in 2020/2021.

Stephen Price



Scott Thompson, Partner

Q | Is collaboration key to resolving COVID-19 disputes?

A | From my perspective, the year has been one of contrast between parties in conflict on construction and infrastructure projects.

Many of the disputes have arisen, in part, from parties adopting rigid and uncompromising contractual positions to advance their own interests. In addition, a claims-focused mentality has prevailed across many work sites. Both trends typically lead to poorly articulated and substantiated claims which make compromise and dispute resolution protracted and expensive. It certainly detracts from best-for-project outcomes, and long-term relationship building.

However, when looking at the time and cost implications arising from COVID-19, project participants on the whole came together to address the issues in a pragmatic and solutions-focused manner. We expected to see many disputes in this area, and given the costs involved, anticipated these running through the formal contractual dispute resolution processes. What transpired on many work sites was the opposite. Parties provided costs on an open-book basis, worked together to mitigate time and cost implications, and contractual formalities were often forsaken in the spirit of commerciality. Of course, there were exceptions, and some of the larger infrastructure projects have been more adversarial (which is to be expected given the dollars at stake).

Looking ahead, restrictions to bringing in talent from overseas to provide necessary expertise is a concern for the sector from a project outcomes and disputes perspective. Historically, New Zealand has relied on overseas experience to assist in the design and construction of the more complex construction and infrastructure projects. Without the required depth of talent, projects can suffer from delays and performance issues such as design and construction errors. These issues inevitably lead to disputes. Parties need to be aware of these potential bottlenecks of personnel getting into New Zealand and ensure they have plans in place to protect themselves.



Sarah Sinclair, Partner

Q | Infrastructure development is being promoted as critical to New Zealand's recovery. What trends are you seeing in this sector?

A | Whilst building infrastructure was firmly on the national agenda prior to COVID-19, there is an even greater spotlight on investment and activity now with it being identified as a key driver of New Zealand's economic recovery.

Infrastructure investment has the opportunity to deliver social and economic outcomes and contribute to long term sustainable growth. And yet, like many sectors, the Infrastructure sector has faced several challenges in recent months given the economic and logistical disruptions brought about by the COVID-19 pandemic and, as we are all acutely aware, many challenges still lie ahead.

We anticipate that momentum in the sector will rise over the coming months in line with the Government's efforts to boost the economy through public sector stimulus packages, with a particular focus on new and previously unfunded infrastructure projects.

Our team is currently at the heart of a number of key public sector infrastructure initiatives and large, complex infrastructure projects (including water reform and mass transit projects). Through our involvement, we are seeing a clear trend towards projects that seek to drive both social and economic outcomes – and that are planned and procured with sustainability as a key criteria.

Added to this focus on outcomes, there is a move towards "joined-up" projects that traverse sectors that have traditionally been planned separately (e.g. land transport and urban development) as well as broader system thinking. Critically, some of the large scale initiatives rely on, or may need, legislative reform or will be impacted by the legislative reform programme expected to be on the Government's agenda.

So now, more than ever, is a time for constructive communication and collaboration between all players in the infrastructure and construction sectors – through central and local government, iwi, the private sector and all who support them.

Know your contract:

Case law highlights

New Zealand's construction industry and projects have weathered a turbulent year with a consistent flow of seminal judicial decisions addressing issues arising in the life cycle of a project.

The courts have considered elements giving rise to the very existence of a contract; the requirements for a valid payment schedule; the test for a penalty clause; the scope of an exclusion of liability clause; and what sets out the adjudicator's jurisdiction under the Construction Contracts Act 2002 (CCA). Here we summarise some of the key decisions and the legal principles they advance.

Electrix Ltd v Fletcher Construction Co Ltd (No.2) [2020] NZHC 918:

Confirmed the absolute pre-requisite to contract formation as (1) an intention to be immediately bound and (2) an agreement on essential terms.

Where work done by a contractor (at request of the principal) is not referable to any contract or an agreed price, the law imposes an obligation on the principal to pay a reasonable remuneration (non-contractual quantum meruit).

The absence of a contract will not deprive the contractor of reasonable remuneration for work performed.

127 Hobson Street Ltd v Honey Bees Preschool Ltd [2020] NZSC 53:

A clause stipulating a consequence for breach (i.e. a liquidated damage clause) will be a penalty if the consequence is out of all proportion to the legitimate interests of the innocent party in performance of the primary obligation.

A legitimate interest in performance includes an interest in enforcing performance or an appropriate alternative. It may extend beyond the harm caused by the breach as measured by a conventional assessment of contractual damages. Parties may agree to consequences for breach which recognise the broader impact of non-performance on the commercial interests the parties seek to achieve through the contract.

MSC Consulting Group Limited v Oyster Management Limited [2020] NZCA 417:

Consultants in producing work (i.e. a seismic report) may owe a duty of care beyond the original client.

Exclusion of liability provisions need to be drafted clearly and appropriately scoped to avoid unintended liabilities arising to third parties.

The Fletcher Construction Company Limited v Spotless Facility Services (NZ) Limited [2020] NZHC 1942:

A payment schedule issued under the CCA containing contra charges must indicate with clarity how these charges arose and how they were calculated.

When it is common practice between two parties to calculate payments as a percentage of work under each item, it is not required for a payment schedule to contain an explanation of how deductions were calculated.

A payment schedule must provide reasoning for deductions, when those deductions total a significant sum.

Alaska Construction + Interiors Auckland Limited v Lahatte [2020] NZHC 1056:

A controversial decision that found:

1. An adjudicator is not required to determine the rights and obligations of the parties under the contract if the dispute set out in the adjudication claim is separate from the question of the rights and obligations of the parties under the contract.
2. The role of the adjudication notice does not go beyond initiating the adjudication.

**This is a controversial decision that is not widely accepted as correct. We continue to recommend scoping the adjudication notice with care as other authorities provide that the notice is relevant to the setting of the adjudicator's jurisdiction.

Haskell Construction Ltd v Ashcroft [2020] NZHC 772:

Parties must ensure to put forward their full case to the adjudicator as they will be unable to re-adjudicate the same issue.

Confirmed that the courts are cautious in interfering with and overturning the adjudicator's decisions.



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