

## DOES AUSTRALIA NEED NEC 4?

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There have been more and more calls for sweeping changes in the Australian construction industry. Focused particularly at addressing concerns with capabilities, skills, culture and sustainability as well as commercial frameworks, approaches to procurement and risk allocation. This is despite Australia experiencing an infrastructure boom over the last few years and both Federal and State Government's reliance on the industry as a key player in helping to put the Australian economy back on track following the initial impact of the Covid-19 pandemic.



In March 2020, Mr Barr, John Holland CEO, said:

*"...as an industry, we are teetering on the brink of collapse."*<sup>i</sup>

In the same interview Mr Barr also stated John Holland will no longer bid for projects it believes carry an unacceptable risk profile.

John Holland is a major player in the Australian construction

industry and their opinion on the state of the industry is shared by others. Last year key contracting organisations<sup>ii</sup> joined forces to call for collaborative structures and reforms to help boost productivity, industry sustainability and long-term value for money. Critical in achieving these goals are equitable and aligned commercial frameworks that seek to achieve a 'best for project' outcome rather than transferring most of the risk down the supply chain and promoting more adversarial relationships<sup>iii</sup>.

i The Australian Financial Review 18 March 2020

ii The Australian Constructors Association members include Acciona, Bouygues Construction Australia, Clough, CPB, Downer, Fulton Hogan, John Holland, Laing O'Rourke, Lendlease, McConnell Dowell, Multiplex, UGL and Webuild

iii Australian Constructors Association: Constructing the Future A framework for a more sustainable construction industry (published in October 2020)

Back in 2013 the Melbourne Law School and the Society of Construction Law Australia undertook a research project to, amongst other things, assess the current use of and effectiveness of standard forms of contract in Australia<sup>iv</sup>. A key focus of this research project was to look at whether standard forms provided for an appropriately balanced risk allocation and efficient project administration.

Some of the findings of this research will come as no surprise to those who have worked in the Australian construction industry, including:

- Australian Standard (AS) forms<sup>v</sup> of contract (such as AS2124, AS4300, AS4000 and AS4902) are by far the most commonly used forms of contract within the industry
- A large proportion of respondents considered there was no standard form in Australia capable of use without substantial amendment
- AS forms of contract have been around for years and most companies / principal organisations have amended versions of these forms which they commonly use on all their projects
- Overall, the primary reason for amendments to standard forms was to shift risk to another party

and from my experience in the seven years since this research was undertaken, little has changed.

Coincidentally also in 2013, Standards Australia commenced work on the AS11000 General Conditions of Contract with the aim of:

- addressing some well documented shortcomings in both AS2124-1992 and AS4000-1997 forms of contract
- making the contract more applicable to construction, engineering and infrastructure sectors
- improving contract administration processes
- better defining early warning procedures
- supporting an appropriate balance of risk

however, by 2017 work on AS11000 was stopped due to a lack of support.

It is time client organisations, including Government, work with the construction industry to reform the tendering and contracting processes particularly addressing the attitude and approach adopted by contracting parties to project risk.

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iv Standard Forms of Contract in the Australian Construction Industry Research Report (June 2014)

v Australian Standard forms of contract have been developed by Standards Australia, the peak non-government standards development body in Australia

Should the vast majority of construction projects in Australia still be relying on standard forms of contract that were drafted (in some cases) nearly 30 years ago? Attitudes, philosophies, legislation and project complexities have changed significantly since the 1990's but can we honestly say the amendments currently being made to the standard forms are aimed at addressing this shift? In my opinion we need a better option that addresses key concerns, provides a framework that acknowledges and manages project risks appropriately and assists parties to strive for 'best for project' outcomes.

Internationally there are several forms of contract that promote a more collaborative approach, one of these is the New Engineering Contract (NEC).

The NEC is a family of contracts that have been around for almost as long as the AS forms of contract still used in Australia. The NEC suite of contracts have however evolved over that period with the current revision, NEC4 released in 2017, widely adopted internationally. The fundamental aim of the NEC is to promote best practice, focusing on collaborative and relationship contracting principles. The suite includes a range of contract options which allows the contract to be easily adopted to a wide range of project types and sizes without the need of amendment.

Critically the NEC is known for promoting:

- collaboration
- communication
- good project management
- good contract administration
- proactive approaches to managing risk

Main Roads in Western Australia and Sydney Water have both championed the use of NEC4 in Australia with Sydney Waters Head of Delivery Management stating:

*"The contract will help simplify our supply chain and deliver significant benefits to Sydney Water as an organisation, to our customers and to our partners, through increased efficiency, cost savings, continuity of work, resource availability and partner capability by incentivising high performance and increasing productivity.*

*By doing this, we'll give our partners more certainty, and drive better decision making across the whole lifecycle of our assets, improving our productivity and delivering value for our customers."*<sup>vi</sup>

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vi <https://utilitymagazine.com.au/sydney-waters-new-procurement-strategy-looks-to-partner-for-success/>



The Australian Constructors Association (ACA) CEO, Jon Davies, is of the opinion the industry is supportive of the use of NEC contracts in Australia because of the way they promote more collaborative relationships and improve industry culture. Other positives Mr Davies notes include:

- NEC contracts are written in plain English so easier to follow and administer
- They contain deeming provisions that deal with obligations of the Client and / or Contract Administrator so ensuring timely administration of the contract
- NEC contracts contain robust mechanisms for dealing with disputes that help to avoid disputes festering and impacting on project relationships
- The contracts contain standard clause numbering so helping to breed familiarity
- There is a framework to deal with amendments

However, despite the positive steps to promote the NEC taken by such organisations as the ACA and Sydney Water, uptake of this alternative form of contract has been slow. It is true the NEC4 will require a level of amendment to make it applicable in the Australian market, for example GST<sup>vii</sup>, SOPA<sup>viii</sup> and WHS<sup>ix</sup> legislation, but it is important to note that the AS forms of contract currently being used in Australia also require these amendments as they generally do not reflect the current legislation either.

We at DGA have seen the benefits of using NEC on UK major projects such as Hinkley Point C, The Channel Tunnel Rail Link, London Orbital Rail and Crossrail that have used Option C - Target Cost and in Hong Kong on the new airport terminal building being constructed also using Option C.

We are using our experience to deliver a series of practitioners NEC webinars looking at actual events on these Projects and how they were managed and resolved.

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vii Goods and Services Tax

viii Security of Payment Acts

ix Workplace Health and Safety

DGA GROUP Melbourne, has moved!

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## DGA TRAINING SERVICES

### WEBINARS

#### NEC3 & 4 ENGINEERING & CONSTRUCTION CONTRACT (AND SUBCONTRACT)

The NEC Engineering and Construction Contract (and Subcontract) is one of the most frequently used standard form contracts for building and civil engineering projects

This one-day course is presented by one of our experienced Directors who are frequently called to provide contractual advice, expert evidence with regards to quantum or to be party representative in Adjudication. The course considers the main pricing options, the frequently used secondary options, the parties duties, co-operation, communications, early warning, risk register, programme, providing the works/ Works Information, change control, compensation events (and an introduction to the approach to assessment for the purpose of quotations for a change to the Prices and/or key date or Completion), the schedule of cost components/ Defined Cost and payment with reference to Y(UK) 2 and the Housing Grants, Construction and Regeneration Act 1996, as amended.

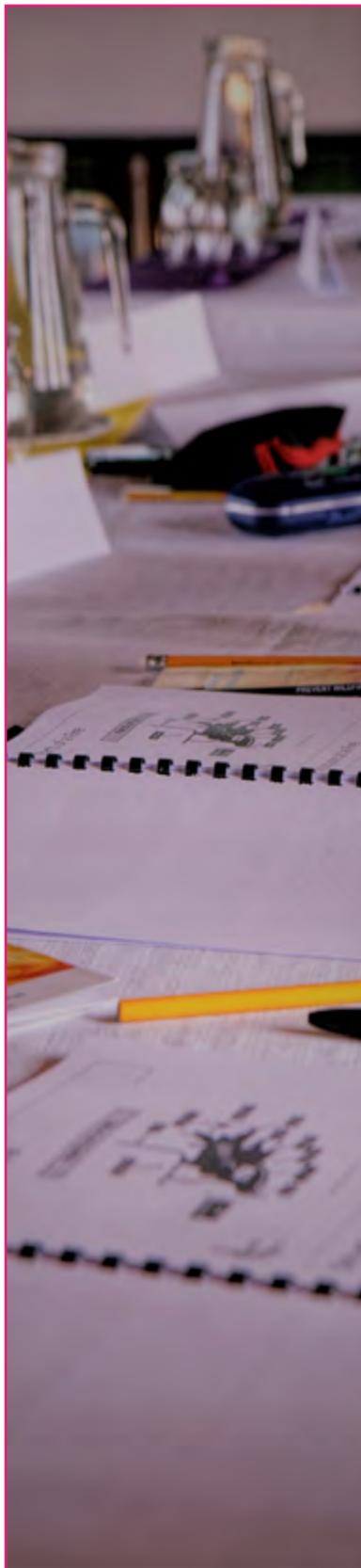
#### UNDERSTANDING AND USING THE JCT STANDARD BUILDING CONTRACT AND DESIGN & BUILD CONTRACT 2016

##### Overview

The JCT Standard Building Contract and Design and Build Contract remain the two most frequently used contracts in the United Kingdom. In 2016, a number of changes to the previous editions of the JCT were published by the Joint Contracts Tribunal.

This one-day seminar is presented by experienced and dual qualified professionals. It will provide the delegates with a comprehensive understanding of the key parts of both contracts in order that they can understand each party's liability and obligations. Reference is made to case law as part of explaining some of the provisions of the previous editions (and how this applies to the current editions) and operation of the contract.

#### COMING SOON: PROGRAMMING & DELAY ANALYSIS TRAINING



## ABOUT DGA TRAINING WEBINARS

### WHO SHOULD ATTEND?

The courses are suitable for:

- Quantity Surveyors
- Commercial Managers
- Planners or Contracts Managers of Contractors or Subcontractors
- Architects
- Designers
- Contract Administrators, of all levels that desire obtain a firmer understanding of the terms of the contract and their practical application.

Price of each course

Online £250 plus VAT per delegate

What's included in the Price

The presentation, slide handout, CPD certificate

Dates and times

To be published shortly

### WHAT TO DO NEXT?

If you are interested in hearing more about our forthcoming public courses, please email [dgagroup@dga-group.com](mailto:dgagroup@dga-group.com) . Further details will be sent once dates have been confirmed.

Terms & Conditions apply

## MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at [DGAGroup@dga-group.com](mailto:DGAGroup@dga-group.com)

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