



*Talking Law*

## Episode 129 - What's Next for Construction? – a post-pandemic look at what construction businesses & suppliers should have in their contracts Part 1

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### Transcript

**Joanna:**

Hi, it's Joanna Oakey here and welcome back to talking law, a podcast proudly brought to you by our commercial legal practice aspect legal now we have another fabulous two part series for you our listeners. And in this two part series, we are talking with aspect legal's very own Jelena Milanovich, about construction contracts, and the general impacts of COVID-19 on the construction industry. Now, in this first half, which is part one of our two part series, Jelena and I drill into supply chain shortages and pricing pressures, the further likely impacts caused by flooding in Queensland and New South Wales. And finally, we touch on how businesses in this industry can protect themselves from all of these upcoming uncertainties. This episode is a must listen episode, if you're involved in any way in the building and construction industry. So buckle in, here we go.

**Jelena:**

Thanks so much, Jo. It's so good to be part of it.

**Joanna:**

Well, I'm excited to have you on here, because we're talking about what I think is such an important topic in the construction industry at the moment. COVID-19. And we're going to, we're going to get into some really topical issues, flooding uncertain times. And you know, and now's the right time to be talking about this, because there is just so much uncertainty around for construction businesses, building construction businesses at the moment, isn't it?

**Jelena:**

There really is in hindsight, I suppose at the moment, we've sort of seen what's happened in the last two years, and the effects that the industry has seen. But there's also all these other things that are happening at the moment and you know, kind of feels like it's one thing after another, and with all the flooding that's been experienced at the moment in Queensland and New South Wales, I think it's a really good time to start to think about, you know, some of these uncertainties in the industry, and maybe what we can do in our contracts to protect ourselves.

**Joanna:**

Really timely, because we've just had the collapse of the pro build. And I think that has brought a lot of concern into the market. You know, obviously, those issues have been there for the past couple of years. But a really, you know, the collapse of a really big player certainly magnifies the issues and creates a lot of concern within the industry.

**Jelena:**

It really does. And I mean, if you look at some of the statements that were issued by pro build, they talked about COVID and how it's been handled by the government to an extent and some of the measures that have been put in place and the extent of the lockdowns as part of the reason for the collapse. So definitely, yes, I mean, I think COVID It's really interesting. COVID had an interesting impact on the construction industry that perhaps no one would have really foreseen at the beginning of the pandemic and kind of created what people have termed as this perfect storm. Because we had people at home, in lockdown, they couldn't travel, they couldn't spend money on restaurants. And you know, they were starting to save up all this additional money, that perhaps they would have otherwise spent another thing. And they were at home all the time. They were focusing on the home and the government was issuing out all these incentives, especially for new buildings. So there was all of this demand on the construction industry, not just in Australia, but generally for materials worldwide. And then, in addition to that, we had, you know, the supply chain shortages that were caused by COVID-19. We had, you know, we had labour shortages, because of all the border closures that were happening both domestically and internationally. So it really saw this sort of perfect storm where there was an increase in demand, but not necessarily in supply.

**Joanna:**

And I guess what we're talking about today is, you know, reflecting on what some of those issues are, but also saying, there are some legal avenues that you can take to

businesses & suppliers should have in their contracts Part 1 help protect your business if you're in the building and construction industry during this time. And we'll definitely get stuck into some of those protections in a moment. So we've talked about the general impacts of COVID-19, and the construction industry Jelena, you've talked about that supply chain shortage, and you've talked about, you know, those pricing pressures, maybe you can talk a little bit more about what this pricing pressure environment looks like at the moment and how it's playing out for businesses in the building and construction industry in a damaging way.

**Jelena:**

Yeah, I mean, you have at the moment, you know, people have entered into this contract, right, and a lot of the time they've fixed-price contracts. So they're obliged to offer, they're obliged to provide the service or the project for a particular price. But on the other end, you know, they've been charged much more for the material and the labour needed than they initially expected. So, you know, I was reading this the other day somewhere that, you know, that the price of steel, for example, went up by, by something like 33% last year. And, you know, no one could have predicted that or forecast any of that index contracts. Another really topical thing that everyone seems to be talking about is timber, you know, the shortages of timber, and the price increases associated with that. One of our clients is a builder, who owns a fairly well-known franchise. And they were telling us that at one point they were waiting for six months for a frame for a house. And, you know, that's, that's really difficult when you've potentially got, you know, liquidated damages hanging over your head and another sort of pricing pressure. So it's just a story that we've heard over and over, but not you know, not only pricing. Sometimes you're lucky enough to even be able to get some of these trades to do your job and to turn up on time, so good luck at the moment getting a roofer or scaffolder or, you know, a bricky, for example. So that's the sort of thing we're hearing throughout.

**Joanna:**

Okay, so and, look, we don't, we don't want to dwell too much on the negatives, because we are really focusing I guess, today on well, how is it that would that businesses can protect themselves in these times, but I think it's really important that we, we tease out what these issues are. And of course, we've talked about COVID-19 but the other big one out there at the moment, in very recent times, is flooding in Queensland and New South Wales and of course, we've had some very, very recent floods, but we also had floods last year as well. You know, there's been quite a bit of pressure in the last couple of years, not just from COVID-19. But these repeated flooding events. What are you hearing in the industry about this, Jelena? And the impact of these sorts of events in the building and construction industry,

**Jelena:**

They seem to have sort of a two-tiered effect, right, there's the effect that is immediate, that we're seeing at the moment, you know, and that's the obvious sort of thing, you know, inundation of, of businesses, inundation of sites, you know, difficulty in people being able to travel and move around. And you know, sometimes a week, a week or two weeks is a long time for a project to be delayed. But then, you know, after that, after that immediate impact has settled down, you know, what we're going to see is people are going to start rebuilding and repairing. And that's just, that's going to, I think, just add some more pressure on the environment we're already in because everyone will want to rebuild and repair as soon as they possibly can. And trying to get the materials and the labour on an already stretched industry, I think might be a little

**Joanna:**

Yeah. It's ironic, isn't it, that's what we're talking about, a lot of the things that we're talking about here relate to this extra demand. And that in itself is creating an issue, which is ironic, because, you know, for most businesses, demand is a really good thing. But in this instance, demand is that is actually causing all of this pressure, because of the supply chain pressures for all of this demand coming on all at once. So I guess this is the issue. But how is it that businesses can protect themselves in these sorts of uncertain times, you know, when we've had uncertain times, and we're right in the quagmire of them at the moment, but what's on the horizon? Who knows? You know, there could be there's more uncertainty into the future. So what is it that businesses within this industry can be thinking about from a legal perspective, to help shore themselves up to provide some sort of certainty and protection?

**Jelena:**

Well, now's the time, if you're entering into new projects, and a new contract, and you're pricing these projects, to really be mindful of these things. And to be mindful that, you know, uncertainty can be something that will continue for a little while longer. So I think the key thing that I'd like to focus on is pricing and how you're pricing your contracts and allowing for uncertainty in price when you are putting together your quotes.

**Joanna:**

And so what are those choices? Let's talk about what those choices are in pricing.

**Jelena:**

Yeah, well, the obvious is, you know, a fixed price contract versus a cost-plus contract. And you know, for your clients, they'd obviously probably prefer a fixed price contract because it provides them with some certainty, but for the builders and for the industry, you know, it might be preferable to try and negotiate a cost-plus contract when you can, but you know, something to be really mindful about is if you're in the residential space, if you're doing residential building work, you might not have that option because in a lot of states, in Australia, in a couple of states in Australia, that sort of pricing structure isn't allowed for residential building work.

**Joanna:**

I've actually seen in this sort of distinction between fixed price and cost-plus, I've actually also seen recently popping up around the place this concept of a fixed price, but with a variable allowing for large movements in raw material cost changes and you know, I often think that that's quite a good way to sit in the middle of the two. And of course, that doesn't help if you're dealing with costs that relate to delay, or if you're dealing with costs that relate to the fact that you're finding it hard to find labour, and you're having to pay more for the labour. Because, you know, it's hard to find. So that won't help you with a fixed price. But certainly, this issue in relation to your raw material costs increasing, you know, I thought this is a quite creative way of dealing with that sort of concern.

**Jelena:**

Yeah, definitely. And just because you're in a fixed-price contract, or you need to provide a fixed price contract to your customer doesn't mean that there can't be other

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things in your contract to try and protect you. You know, one thing we often try drafting is the rise and fall clause. So you know, a clause that tries and protects you if there is some significant movement, in the cost of particular materials, for example, in your contract. So, that's certainly something that's an option. But, you know, as always, those sorts of things you have to be a bit careful about, because it depends on who your customer is, again, there's some restrictions, if you're dealing with residential building work. And it also needs to be really clear in where you're allowed to claim and how you're allowed to claim and reasonable for it to be enforceable. So it's certainly an option. Just have to think about how it's put together and drafted. And separate to that, you know, people will be really familiar with some prime cost items, and provisional sums and in construction contracts. And they're being used more and more to protect against some of these uncertainties. So, prime cost items are, for example, if you know, your client doesn't know what sort of fixtures or fittings they want to use, exactly, they don't know what kind, if you're building a house, they don't know what kind of tiles or taps or something that they want. So you can provide an allowance for that in your contract. But ultimately, what you get to charge for it will be will depend on what's actually chosen, or on the actual cost to you later on, when you get to that stage of the project. The provisional sum is sort of a similar beast. But if there's a part of your contract, that you're having some difficulty pricing, because there's a lot of uncertainty in the cost of a particular material. For example, you know, steel or a particular trade, then you can make an allowance for that again, in your contract. But there would there's the option to later have some movement in that, depending on the actual cost to you. There are all sorts of ways we can prepare these clauses to try and address some particular points of concern when you're preparing your contract.

**Joanna:**

And I guess the point about this is at the moment, well, you may have in the past always priced in a particular way. But now's the time to step back and say well, the way I'm pricing, is the way I'm pricing appropriate for where we are in terms of certainty within the market at the moment and the industry? And you know, taking on board professional advice to help you work out what your alternatives are, and how you can build that in, in a way that sort of balances risk protection with simplicity as well because you don't want to go overboard, creating things that are going to be difficult for you to administer ultimately, at the end of the day as well.

**Jelena:**

Yeah, that's exactly right. I mean, what I'm hearing is the things that are that were never traditionally, for example, included as provisional sum items in the contract. You know, we had someone the other day asking if they could include a, you know, a roof as a provisional sum item because roofers were so hard to come by. So people are definitely thinking outside the box and trying to use some of these, you know, mechanisms in a different sort of way to try and protect themselves.

Well, that's it for this episode, which was part one of the two-part series with the fabulous Jelena from our very own aspect legal. Now, don't forget to catch our second and last part of this two-part episode, next time on talking law. And of course, if you're interested to talk to Jelena or any of our other lawyers, about anything relating to this topic, then just head over to our website at [www.aspectlegal.com.au](http://www.aspectlegal.com.au) To book a free 15-minute discussion with our Legal Eagles. Of course, you could also just click the link in your show notes because that will take you right there to that booking form as well. Well, that's it. I hope you enjoyed what you heard today. If you did, please consider



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