# UNPRECEDENTED !
## NZS3910, RISK ALLOCATION AND COVID-19

**By Lydia Sharpe**

On 25 March 2020, New Zealand entered our first lockdown to try to contain the spread of COVID-19 (**Covid**). Workplaces closed and those who could began working from home. Essential workers, in a range of industries from supermarkets to medicine to cross-country transportation, continued physically attending work. Construction sites, previously filled with booming activity, fell silent as construction workers went home, unable to work remotely. Meanwhile, engineers argued over whether they should suspend contract works, and construction lawyers in both the public and private sector considered how to handle the legal effects of the lockdown.

A year has now passed since the first lockdown, and the legal effects of the lockdowns on construction projects has become clearer. In light of the upcoming review of NZS3910 by a committee of the Society of Construction Law, it is now a good time to consider how NZS3910 handled the legal issues arising from the lockdowns. How does NZS3910 allocate risk? How did the government's guidelines for the public sector construction industry on the contractual implications of the lockdown, and on variations, affect risk allocation under NZS3910? Did the lockdown expose flaws in NZS3910? And, finally, should the upcoming review recommend that risk allocation under NZS3910 be changed, and if so, how?

Ultimately, this essay recommends that the risk allocation regime under NZS3910 should be amended in three ways. A force majeure clause should be inserted to cover pandemics and legislation or regulation passed in response to pandemics. A new schedule should be included to list all the risks covered under the contract, to enable contractors to accurately price those risks. And finally, the theory of risk allocation under NZS3910 should be changed from a fault-based regime to one which allocates risk to the party best placed to bear it. Concurrently, this essay also recommends changes to tendering practices in the construction industry to ensure that risk is carefully considered and accurately priced.

### 1 Risk allocation under NZS3910

*A How does NZS3910 allocate risk?*

Risk allocation under NZS3910 is not found in one single part of the contract; instead, it is spread over a number of different clauses, primarily in clauses 5, 6, 9 and 10.

Clause 10.3.1 provides that the engineer shall grant an extension of time (**EOT**) for completion of the contract works for a number of reasons. Among these are the net effect of any variation; weather which interferes with the works' progress; strikes or other industrial action; flood, volcanic, or seismic events; circumstances not reasonably foreseeable by an experienced contractor at the time of tender and not due to the fault of the contractor, or the principal's default. Clause 10.3.7 provides that the contractor is entitled to time-related costs only where an EOT is granted as a result of the net effect of a variation or the principal's default. The contractor will not be entitled to time-related costs where an EOT is granted on any other ground.

For the purpose of considering the effect of the Level 4 lockdown on construction works, the relevant grounds on which the engineer may grant an EOT were the net effect of any variation (clause 10.3.1(a)), or circumstances not reasonably foreseeable by an experienced contractor at the time of tender and not due to the fault of the contractor (clause 10.3.1(f)). Both grounds, however, have limits. The ability to claim an EOT under the first ground requires the engineer to have already ordered a variation to the works, likely on the basis that there has been a change of law. Likewise, claiming an EOT under the second ground requires that the tender process for the construction project occurred before the pandemic began. If

tendering occurred in the early days of the pandemic (for example late 2019[1]), there is likely scope to argue that a lockdown was not reasonably foreseeable; however, it would be more difficult to claim an extension of time for works in which the tendering process occurred in February 2020. Although that is before the lockdown in March, New Zealand had its first case of Covid in February 2020 and it was clear that New Zealand would experience more cases sooner or later.

Clause 6.7 provides for suspension of the contract works. It notes that if suspension is necessary, the engineer shall instruct the contractor to suspend the progress of the contract works. Unless the suspension occurs because of the contractor's default, it is treated as a variation.

Clause 5.6 sets out how the risk of general loss or damage is allocated. In the majority of circumstances under this clause, risks are allocated to the contractor. For example, under clause 5.6.4, contractors are responsible for loss or damage to the construction site which arises out of the execution of the contractors' obligations under the contract.

Clause 9 discusses variations. Variations are intended to compensate the contractor for delays or additional work which increase the contractor's costs beyond those contemplated in the original contract. The contractor is required to carry out any variation so ordered by the engineer, and the value of the variation is added to or deducted from the contract price.

Clause 9.3 sets out the process by which variations are valued and enumerates the types of costs a Contractor can claim. As far as possible, the value of each variation should be determined by agreement between the contractor and the engineer. But, failing agreement, it will be determined by the engineer.

Another basis for a variation is the change of law provision under clause 5.11.10. This provides as follows:

> If after the date of closing of tenders the making of any statute, regulation, or bylaw, or the imposition by Government or by a local authority of any royalty, fee, or toll increases or decreases the Cost to the Contractor of performing the Contract, such increase or decrease not being otherwise provided for in the Contract, the effect shall be treated as a Variation.

Essentially, if a change of law (which has generally been interpreted widely so as to include regulations and bylaws in addition to central government legislation) affects the cost to the contractor of performing the contract, if the contract does not provide for such an increase/decrease in cost then it shall be treated as a variation. The contractor is therefore entitled to recover that cost as an increase in the contract price as a variation.

An assessment of the value of the variation is done on a project-by-project basis, and requires the contractor to notify the proposed value of the variation and to provide full details to support its claim.[2] As far as possible, the value should be determined by agreement between the engineer and the contractor.[3] Generally, the value will comprise a combination of direct costs (including costs associated with demobilisation, remobilisation, materials, plant and equipment, etc)[4] and time-related costs (calculated based on the extension of time and an allowance for profit).[5]

If the parties cannot agree to an EOT, the contractor will be required to pay liquidated damages to the principal at the previously agreed contractual rate, for the period between the due date and practical completion.[6]

Overall, the theory underpinning risk allocation in NZS3910 is that risk should be allocated on the basis of fault. For example, if a variation is granted because the contractor causes delay as a result of its default, the contractor will not be entitled to recoup time-related costs. However, if a variation is granted in relation to the principal's default, the contractor will be entitled to recover time-related costs against the principal. Not all parties within the construction industry agree with this approach; some contractors and sub-contractors, for example, consider that it is overly punitive on parties with less bargaining power, and argue that risk should be allocated to the party best placed to bear it.

*B Recent problems with risk allocation in the construction industry*

The construction industry has experienced a wave of insolvencies in recent years, both high-profile and not, and has undergone what has been described as a "profitless boom".[7] Although the construction industry has grown over the last decade, and contributes a sizable percentage of New Zealand's GDP, it has experienced a number of problems as a result of its prevailing attitude to risk and cost. There are three issues which contribute to this, in varying and intertwined ways: risk

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1 Kate Kelland "New coronavirus spread swiftly around world from late 2019, study finds" (6 May 2020) Reuters <www.reuters.com>.
2 Clause 9.3.2 NZS3910.
3 Clause 9.3.4 NZS3910.
4 Clause 9.3.9 NZS3910.
5 Clause 9.3.11 NZS3910.
6 Clause 10.5.1 NZS3910.
7 Nikki Mandow "Seeking solutions for construction's 'profitless boom'" Newsroom (online ed, New Zealand, 7 November 2019).

pricing, common problems with contractual drafting, and a pervasive lowest-cost mentality. Generally, principals have a tendency to prefer the lowest-cost tender, although this often results in contractors and others failing to price risk accurately.

The Construction Sector Transformation Plan notes that: [8]

> Many companies operate on low margins in order to secure contracts and when things change or go wrong, there is no built-in resilience… Risk is particularly poorly understood and this leads to inadequate risk pricing, allocation and management.

For various reasons discussed later in this essay, parties may have a difficult time understanding risk allocation under NZS3910, and this difficulty can negatively affect other areas of a project. New Zealand Government Procurement demonstrates this through the example of a principal which did not carry out detailed site investigation, as that risk was to be transferred to the contractor.[9] During tender phase, the principal received two tender bids: one from a bidder which priced its construction method in between the best and worst case scenarios; and one from a bidder which priced a low-cost construction method based on an optimistic assessment of the project. A third potential bidder refused to bid as it had lost money on a previous project which did not allow sufficient tender time to assess and price the risk of ground conditions. Unsurprisingly, the project descended into chaos: although the low-cost bidder's tender bid was accepted, it took twice as long to construct as planned, and additional costs were incurred. The contractor fell behind schedule and all parties retrenched, communicating only when necessary and attempting to protect themselves by referring to strict contractual positions only.

The multiple insolvencies that have affected the construction industry in recent years have often arisen out of circumstances such as these, although from this vignette it is clear that planning ahead at the pre-tender stage and clear, transparent risk allocation in the contract has the potential to reduce later legal fallout.

Government Procurement's vignette also highlights a concomitant problem: the pervasive lowest-cost mentality in the industry. In New Zealand, principals often choose the lowest-cost tender bid.[10] This facilitates a race to the bottom and encourages tenderers to omit risks and costs which should be included. This, however, is not the only tendering model available. In Norway, for example, from a financial perspective, principals tend to give greater weight to the middle priced option in a range of tenders.[11] This encourages tenderers to adequately price their risk and tends to narrow the financial differences between the lowest and highest bidder, meaning that other factors such as competence, environmental responsibility, innovation and the like can have a greater influence on outcomes.

## 2 The Government guidelines

There were two major pieces of advice issued by the government for construction projects in response to the Level 4 lockdown. The first, released on 7 April 2020, dealt with the contractual implications of the Level 4 lockdown (the **contractual guidelines**),[12] while the second, released on 11 May, dealt with variation claims due to the lockdown (the **variation guidelines**).[13] This section provides an overview of both. These guidelines were primarily intended for public sector/government projects. However, the Construction Sector Accord, which oversaw the construction sector's response to Covid, noted that the guidelines placed "expectations on the private sector to also take a supportive and collaborative approach to the recovery."[14] While not strictly compulsory, it is unlikely that a private sector entity would act in contradiction to these guidelines. However, it is important to note that these guidelines did not purport to permanently modify the provisions of NZS3910. The guidelines apply only in the context of the lockdown period.[15]

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8 Construction Sector Accord "Transformation Plan: Business Performance" (22 October 2020) <www.constructionaccord.nz>.

99 New Zealand Government Procurement "Risk Management: Construction Procurement Guidelines" (October 2019) <www.procurement.govt.nz> at 7 and 8.

10 Hon Phil Twyford and Hon Jenny Salesa "New rules to help construction companies" (press release, 29 September 2019).

11 "Best Value approach: lessons learned & success factors from Norway" (31 August 2017) <www.consultancy.uk>.

12 Construction Sector Accord "Guidance for public sector agencies dealing with the contractual implications for construction projects of the COVID-19 lockdown period" (7 April 2020) <www.constructionaccord.nz> (**Contractual guidelines**).

13 Construction Sector Accord "Guidance for public sector agencies dealing with variation claims due to the COVID-19 lockdown period" (11 May 2020) <www.constructionaccord.nz> (**Variation guidelines**).

14 "Construction Sector COVID-19 Response Plan" (last updated 24 September 2020) <www.constructionaccord.nz>.

15 On a related note, this guidance is phrased as applying to "the COVID-19 lockdown period". It is unclear whether it relates only to the Level 4 lockdown in March 2020, or to all Level 4 lockdowns, or to all lockdowns where closure of construction sites is required. This is not directly relevant to this essay, but is something which contractors and principals will need to consider.

*A Guidelines on the contractual implications*

These guidelines clarified a number of the questions and theories which the legal fraternity had been considering since it became clear that a lockdown might be imposed in the future. The guidelines noted that in many cases contractors were entitled to recover time and costs resulting from the lockdown period, although establishing the value of the claim would be a complex process which would need to be approached on a case-by-case basis. It noted that, as the Level 4 lockdown had commenced, many engineers had issued instructions for works to be suspended in accordance with clause 6.7.1 NZS3910. In these circumstances, because the suspension was not due to the contractor's default, the contractor would be entitled to a variation.[16]

However, where an engineer had not issued instructions for suspension, the guidelines noted that the principal and contractor were still required to stop non-essential works to comply with the "government's Alert Level 4 directive".[17] The guidelines relied on clause 5.11.10, the change of law provision, to provide that whether or not the engineer has issued a suspension, the contractor will be entitled to a variation as a result of the new laws and regulations relating to Covid. Any increase in costs arising under clause 5.11.10 was therefore to be treated as a variation.

*B Guidelines on dealing with variation claims*

The second set of guidelines set out how government agencies should deal with variation claims under NZS3910. As set out in the contractual guidelines, the variation guidelines first set out the contractual principles entitling contractors to a variation as a result of the lockdown. They noted that the full cost consequences of the lockdown, "including any wage subsidies or other government support that will benefit contractors or the supply chain",[18] must be taken into account when agreeing the value of the variation.

The variation guidelines then listed the principles which must guide agencies' approach to valuing variations:

- agencies and contractors must engage in discussions and problem-solving, in parallel with the contractual claims valuation processes;
- agencies should treat all claims equitably, by adopting a fair and reasonable approach to the valuation of costs;
- submissions and responses must be undertaken in a transparent, open and collaborative manner;
- agencies need to work cooperatively with contractors to seek solutions that maximise the likelihood of achieving good project outcomes for all.

Likewise, contractors had various obligations to ensure a good outcome. They must:

- understand that the efficient resolution of the variation is reliant on the contractor substantiating, with evidence and justification, any increase in costs as a result of the lockdown;
- fully disclose any decrease in costs;
- mitigate delay and costs, demonstrate flexibility in doing so, and promptly provide relevant information;
- seek agency flexibility and cooperation only for matters related to the lockdown (not pre-existing or unrelated issues or delays);
- protect and utilize insurance arrangements which could mitigate impacts;
- act cooperatively with other contractors; and
- treat subcontractors, consultants and suppliers in a manner consistent with these principles.

Under clause 9.3.2 of NZS3910, the onus is on the contractor to notify the proposed value of the variation and to provide full details to support its claim.[19] Under clause 9.3.4, as far as possible, the value should be determined by agreement between the contractor and the engineer. If they fail to agree, it should be determined by the engineer.

Generally, determining the value of the valuation will involve calculating direct costs and time-related costs. Direct costs involve costs associated with demobilisation, remobilisation and materials, as well as the costs of making the site safe and other temporary works required as a result of the lockdown. However, because the contractor remained responsible for the care of the contract works and plant during the lockdown, it would have been unable to recover the costs of rectifying damage due to, for example, adverse weather, vandalism and graffiti. It may, however, have been able to claim the cost of repairing damage under its insurance policies.

At the time the valuation guidance was published, there were divergent legal views among the industry on the extent to which costs related to trade labour were directly compensable as part of the value of a variation entitlement. The guidance noted that the government's interpretation was that the principal was not required to effectively indemnify the contractor for

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16 See clause 6.7.3 NZS3910, for variations due to suspension.
17 Contractual guidelines.
18 Variation guidelines.
19 Variations guidelines at 2.

all costs associated with the lockdown. What was compensable was the increase in costs in performing the contract beyond what was contemplated in the contract.

Meanwhile, the guidance noted that the government's directive to treat the lockdown as a variation would trigger an entitlement to an extension of time under clause 10.3.1(a) and an entitlement to time-related costs. It noted that under clause 9.3.11, the contractor is entitled to compensation for time-related costs incurred as a result of an extension of time. However, it argued that, "given the unique nature of the lockdown period, and the unprecedented change to the way in which all work has had to be carried out, it is highly unlikely that any [working day rate] in the contract will reflect the actual increase or decrease in time-related costs associated with any delay".[20] Instead, it encouraged parties to try to agree on a reasonable and equitable approach.

## 3 The effect of the guidelines on risk allocation

The Guidance Note issued to the Master Builders' Association by Hazleton Law around 8 April 2020 notes that if contractors were to take on the risk of a Covid event, they would face significant cost issues, which could lead to solvency concerns and project risk. This is particularly so in the context of the multiple insolvency events experienced by the construction industry over the last few years, as discussed above. As a consequence of this, banks and insurers could be unwilling to issue performance bonds where a contractor is asked to take on the risk of a Covid event. This would mean that principals would face increased financial exposure. In general, principals may have greater financial resources to weather a Covid event and could therefore be the entities best placed to carry that risk.

Under the guidelines, risk related to variations is transferred to the principal because the effect of the guidelines is that a contractor is entitled to a variation because of the effects of the Covid pandemic, no questions asked. Contractually, if the contractor had to prove that Covid had affected the work, causing a delay which would result in a variation, then the Contractor would carry the risk. By basing the right to a variation on the change in law provision under clause 5.11.10, and linking this to the government's directives regarding the implementation of Alert Level 4, the contractor was no longer required to wait until the engineer had issued a suspension notice under clause 6.7.1, and was therefore entitled to a variation as of right.

This is a cleaner and simpler option than the alternative, which is that the engineer would issue instructions for works to be suspended in accordance with clause 6.7.1, on the basis that the suspension had "become necessary". Where that occurred, the contractor would be entitled to a variation under clause 6.7.3, as the suspension was not due to default by the contractor. However, this process would inevitably be longer and more complicated than the alternative promoted by the guidelines, which removes the need for the engineer to make a judgment call and entitles contractors to variations as of right. The guidelines' proposal also means that any increase in costs arising from a change of law under clause 5.11.10 is automatically treated as a variation, thereby removing another potential source of risk for contractors.

As a final note, at the time of the first lockdown there was considerable disagreement as to whether the guidelines accurately described the legal effect of the imposition of Alert Level 4. Lawyers did not take a unified view,[21] and some engineers considered that they were not required to order a suspension of works, arguing that the government's directives imposing Alert Level 4 were sufficient. Today, however, there is consensus among the construction industry that the guidelines did accurately describe the legal framework around Alert Level 4.

## 4 Covid and risk allocation under NZS3910

### *A Has Covid exposed flaws in the way NZS3910 handles risk?*

As discussed above, NZS3910 attempts to handle risk in a balanced, party-neutral manner by focusing on fault rather than on the actual circumstances of the parties. This is intended to balance the potential disparities in bargaining power between the parties, and thus to create a level playing field for all parties to the contract. In and of itself, this remains a laudable aim. However, while NZS3910 may be generally fit for purpose, the Covid lockdowns have demonstrated that it struggles to respond to these types of extraordinary events. In particular, the processes for obtaining EOTs and variations have several steps and require the parties to consider multiple factors. While this will usually not present problems, in a fast-moving emergency situation such as a pandemic, parties may experience difficulties.

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[20] Variations guidelines at 4.

[21] See one discussion of the Guidelines and their effects here: John G Walton "Government releases guidance on suspension of construction work during covid-19 outbreak" (8 April 2020) <www.johnwalton.co.nz>.

*B How should risk allocation under NZS3910 be modified?*

There are three major problems with NZS3910 in this respect.

NZS3910 entirely lacks a force majeure clause, which would otherwise be a useful tool in responding to a pandemic-type event. While clause 10.3.1 provides that an engineer will grant an EOT for delays caused by circumstances not reasonably foreseeable by an experienced contractor at the time of tender, this is not a true force majeure clause because it does not provide a way for one or other of the parties to cancel the contract if it is unable to be performed. All this clause does is grant an extension of time. While the lockdown in March did not last as long as some lockdowns have overseas,[22] and it is unlikely that construction contracts had to be cancelled as a result of it, a force majeure clause in NZS3910 would provide protection for all parties in circumstances in which the contract had to be cancelled. It would also provide protection for all parties in a much wider range of events, including war, natural disasters or emergencies, strikes or other industrial action, or pandemics, epidemics, or other outbreaks of a disease. Importantly, such a clause should also cover changes to legislation or regulations made as a result of a force majeure event. This would mean that the consequences of legislation/regulations passed in response to a pandemic (such as an ongoing lockdown) would form a possible basis for cancellation of the contract under the force majeure clause. While this clause will only apply to events which were not reasonably foreseeable at the time of the tender and which were beyond the parties' control, it is sufficiently broad that it will provide an additional layer of protection to the parties beyond that currently afforded by clause 10.3.1.

Next, because the clauses which affect risk are scattered in numerous places throughout NZS3910, it is difficult to obtain a coherent and complete understanding of the risks involved in the construction project, and the parties to which they are allocated. The clauses discussed in section 1, above, are separated from each other throughout the contract, and their wording is such that it is not immediately clear that they allocate risk. This requires a close analysis of the contract to ensure that parties have understood the consequences of these clauses. Instead, NZS3910 should be amended to include a schedule or a risk register which sets out all the various types of risk and clearly specifies which party bears each risk. This would not oversimplify the contract, as each section of the schedule would link back to the relevant clause in the contract which allocates that risk. This would enable parties to understand at a glance which risks they are responsible for. It would also make it easier for contractors to price the works. Risks are almost always able to be priced, but contractors must understand what they are pricing and principals must understand how contractors have priced risk so as to be able to adequately compare tenders. Otherwise, influenced by the need to submit the lowest-possible tender, there is a tendency to price too low, which may not adequately capture the full extent of the particular risk.

The final change to risk allocation under NZS3910 which could have a positive impact is to ensure that the party which bears the risk is the party best placed to bear it. The way in which NZS3910 currently allocates risk (i.e. on the basis of fault) is arguably not the best option, as it has the potential to lead to rigidity and a legalistic approach. There may be particular circumstances in projects which mean that one party is best suited to bear a particular risk as opposed to another party. One example of this is where there is a risk which needs to be allocated which could be mitigated or avoided by the way in which the work is programmed. The appropriate party to bear this risk will be the party which has control over programming the relevant part of the works, since that party will be able to program the works in a way which can avoid the risk, or, at the very least, mitigate it. This approach may still include an analysis of parties' fault, but parties would have ownership over the risks they are best placed to mitigate or avoid. Creating this type of approach could necessitate rewriting some clauses to be more customisable or responsive to parties' particular circumstances.

*C Other solutions to address the construction industry's treatment of risk*

There are a few other options which would address risk allocation under NZS3910. One major difficulty which hinders a culture change within the construction industry around risk allocation is current tendering practices. As discussed above, the construction industry tends to run on very low profit margins and has unusually high rates of insolvency events, even for large, seemingly-profitable companies. One reason for these low profit margins is the common tendering practice of accepting the lowest-price tender. This encourages tenderers to lower their price as much as possible, by, for example, forgoing detailed analysis of the proposed site (including, for example, ground conditions) and using the cheapest available materials and methods. Alternate tendering practices, such as those used in Norway and other Scandinavian countries where the principal tends to choose the middle of three tenders, could help to alleviate the pressure which current practices impose on tenderers. The Norwegian model encourages moderate bids, neither too low nor too high, and enables tenderers to properly price their risk because tenders which are too low are generally rejected.

[22] See for example France, which has experienced multiple lockdowns and "les couvre-feux" (curfews) multiple times over the last year. Le Gouvernement Français "Les actions du Gouvernement" (updated 27 March 2021) <www.gouvernement.fr>.

Alternatively, parties could use the alliancing model.[23] This model includes a "no blame, no disputes" philosophy which restricts legal claims between the parties to matters of insolvency or willful default only. It increases flexibility for all parties, and ensures that parties' commercial interests are aligned, providing incentives for parties to collaborate. However, this model is most appropriate for highly-complex or large infrastructure projects which are difficult to scope, price and deliver under a traditional model. Not every project will suit alliancing, and other options may be better for particular projects.

Another option is to retain the principles for valuing variations, set out in the government guidelines on variation claims. While these principles currently only apply to the process of valuing variations between government principals and contractors in the context of the Level 4 lockdown, they embed an equitable culture of transparency, discussion and cooperation. Promoting a cooperative and transparent culture could reduce the construction industry's tendency to negotiate as if braced for impact and could promote a collaborative approach to issues affecting variations and extensions of time.

## 5 Conclusions

It is clear that NZS3910 needs to be amended. In particular, it should include a force majeure clause which covers both pandemics/epidemics, and legislation or regulations introduced as a result of a force majeure event. NZS3910 should also include a new schedule which lists all the risks involved in the project, and clearly allocates them to a party. This could refer back to the current clauses which involve risk allocation, so as to avoid unnecessary repetition. This type of schedule could enable parties to accurately price their risk, and would help both principals and contractors gain a clearer understanding of what risks each carries. Finally, the committee convened to consider amendments to NZS3910 could consider changing the philosophy of risk allocation which underpins the contract from a fault-based approach to ensuring that the party which carries the risk is the party best suited to carry it. This theory would underpin the new schedule of risk allocation and would help parties ensure that risks are allocated to the party which is in the best position to mitigate it.

Beyond amending NZS3910, there are other options which would address risk allocation in the construction industry more broadly. These include modified tendering practices which do not reward poor risk pricing and 'race to the bottom' behaviour from tenderers. Finally, the principles in the government guidelines on variation claims should be retained and expanded. This would contribute to a culture of transparency and increased collaboration in the construction industry.

Ultimately, this essay recommends that the risk allocation regime under NZS3910 should be amended, to ensure that it is transparent, appropriate to each party's circumstances and easy to understand. Structural and cultural change within the construction industry remain necessary to ensure that poor risk allocation during the tendering process is not encouraged. Together, this has the potential to promote a culture of transparency, particularly during the tendering process, and to ensure that risks are appropriately allocated under NZS3910 contracts.

[23] New Zealand Government Procurement "Alliance Delivery model: Construction Procurement Guidelines" (October 2019) <www.procurement.govt.nz>.