#	Topic	Question	Panellists' views	Bell Gully comment
			POLICY INITIATIVES	
1.	**Construction Sector Accord** A partnership between government and industry which aims to be a "catalyst to transform the construction sector for the benefit of all New Zealand". The Accord promotes principles-based behavioural change across all industry participants. It targets improving leadership, business performance, workforce capability, regulation and risk. The Accord Steering Group is currently preparing a Transformation Plan which will set out a range of practical and measurable initiatives to give effect to the Accord Principles.	**Do you consider that policy initiatives such as the Accord or, in the NSW context, the NSW Government Action Plan: A Ten Point Commitment, have the capability to achieve fundamental industry reform?**	**David Jewell:** Yes, but "it requires commitment from all parties, especially the procurer of construction services… it will require dedicated leadership and resources to meet the challenges identified and make the changes desired". **Glen Heath:** No (in response to the Accord only). **Krista Payne:** Potentially, but change will require "ALL industry participants to consider changes in the way they approach procurements, negotiations and contract administration". **Craig Wheatley:** Yes. "I agree that the creation of the Construction Accord in New Zealand is a positive step – it represents an official commitment to amend what are generally perceived to be serious flaws in the industry. The potential to achieve fundamental reform over time is definitely there. Like many, though, I am reserving judgment on the impact of the Accord until it has been in play for a year or two. I do have some niggling concerns that it could be a case of lots of talk but not much action – although I hope I'm wrong on that."	Bell Gully is a supporter of the Accord and considers that the development and implementation of a workable plan which builds on the principles of the Accord to be a valuable and necessary initiative. We believe a fundamental change in certain industry behaviours will produce better results in procurement, contracting and delivery of projects. We do, however, share the hesitations of some of our panellists. Whether or not the Accord achieves its goals will be dependent on the Accord receiving maximum industry buy-in. Much also now depends on the critical Transformation Plan stage and how the principles are given practical effect. In some ways, the challenge facing the Accord is perhaps greater than that facing the NSW equivalent. The former is intended to apply across the industry and will require buy-in from a wide-range of stakeholders in order to be successful. The latter is focussed on infrastructure projects procured by the NSW government, with a view to achieving healthy competition throughout the industry supply chain.
2.	**A certification scheme to set minimum finance, governance and skill standards** The Registered Master Builders Association and others are looking at the introduction of a certification scheme that	**Do you think that the introduction of a certification scheme that sets minimum finance, governance and skill standards for contractors working on jobs above a certain value would**	**David Jewell:** No. "The procurement processes used by the client organisations should ensure that the tenderers for their projects are capable of the delivery – this includes assessment of these. I'd prefer to see improved procurement practices from clients – pre-qualification of tenderers, and evaluation on value for money, not just price."	As we noted in the second article in this series, many contracting businesses are being run on a low-equity model. When profits exist they are largely being taken out of the company. With margins tight, the popular strategy appears to be to win as much work as possible in an attempt to create greater revenue and spread out risk – the notion being that a loss on one project can be absorbed by the profit on another. Of course, this means multiple projects can be taken

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	would set minimum financial and competency standards for companies to meet if they want to win jobs above a certain value. A similar regime already exists in Queensland (as discussed in our second article).	**improve the industry and lessen the occurrence of contractor insolvency?**	**Glen Heath:** No. **Krista Payne:** Depends. "As with any minimum standard, setting the goal posts in the wrong spot is a real risk and could undermine the effectiveness of the scheme and actually create new problems." **Craig Wheatley:** Yes. "I agree that the introduction of these sorts of procurement rules should reduce the occurrence of contractor insolvency – it will mean that companies delivering large-scale projects are well-run and well-resourced. I expect that this will yield positive results for contractors in tiers 1 and 2. The reverse argument is that the rules will make it harder for smaller players to grow in the market as they may never be in a position to meet the standards required to deliver projects over a certain value. It should however provide those smaller contractors with an incentive to improve their processes."	down with one bad contract, as there is no equity in the structure to absorb the loss. We consider this to be a fundamental problem in the industry, but it is not accurate to say that it is the contractor's problem alone. For contractors to be expected to retain equity in their businesses, realisable margins need to improve. This entails a shift to holistic procurement, rather than just lowest price, coupled with better understanding and acceptance of risk transfer on both sides. David Jewell notes that the recently revised Government Procurement Rules are "a positive move in this direction". The fourth edition of the Government Procurement Rules came into force on 1 October 2019. At their core, the Rules seek to achieve 'public value', being the best available result for New Zealand for the money spent and not necessarily the option with the lowest cost. Given the Rules do not apply equally to all public sector procurers, or across all types of procurements, the extent to which they will improve procurement practice remains to be seen. Another step towards giving contractors the confidence they need to invest equity into their businesses is the introduction of an infrastructure pipeline by the Infrastructure Transactions Unit. The pipeline is in its infancy, but is intended to give greater visibility and certainty over future infrastructure projects. As with the Rules, questions remain over the ability of the pipeline to overcome political change, notably the three year electoral cycle. Our view is that for the introduction of an appropriately tailored accreditation regime to improve industry resilience, it must be contingent on these other fundamental industry changes being properly effected. Tailoring the regime so that it applies differentially to different value procurements would be critical so as to avoid adversely impacting on market capability, a point noted by Krista. A similar concern is shared by

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				David, who said: "I think that a certification scheme would introduce elitism that is not beneficial to the evolution and growth of contractors".
			CONTRACTING	
3.	**'Alternative' contracting models** In recent times there has been a noticeable shift towards what might be termed 'alternative' contracting models. These include the use of early contractor involvement (ECI) arrangements, alliancing contracts and target cost contracts. The recently announced 'Enterprise Model' between Watercare, Fletcher Construction and Fulton Hogan is notable for its long-term commitment (10 years) to a programme of works rather than an individual project.	**Do you agree that more prevalent use of alternative contracting models would improve the current state of the industry (examples include ECI, alliancing, target cost, the Enterprise Model or programme delivery contracts)?**	**Panellists all agree:** Possibly (if used for the right project in the right context – not a silver bullet).	As a general observation, a growing number of principals (public and private sector) are adopting a more thoughtful and, on occasion, sophisticated approach when deciding on a procurement structure. In part this would seem to be a response to current market conditions and, in particular, growing reluctance on the part of contractors to take on certain risks. If a principal still wishes to allocate a certain risk to a contractor, they will have a better chance of doing so if the contractor has been given an opportunity to properly scope, assess and price that risk (for instance, through ECI), or an opportunity to realise some upside in the event so the risk does not materialise or they mitigate it sufficiently (through target cost, for example). A recent uptick in the use of alliancing, especially at a local government level, can similarly be traced back to market conditions and the government-policy response to those market conditions. It is possible that this could lead to alliancing being adopted for projects which easily lend themselves to more traditional contracting models, such as where the risk profile of the project is already known.
4.	**The suitability of NZS3910:2013 as an industry standard** It is well known and, to an extent accepted, that in the current market modifications will inevitably be made to any contract based on NZS3910:2013. The same	**Do you consider NZS3910:2013 to be fit for purpose as an industry standard build-only contract?**	**David Jewell:** Yes. "In the infrastructure sector, NZS 3910 is accepted as a fair and balanced contract. I'm a strong advocate of its use in NZ as a well-understood document that has been developed collaboratively by all industry participants. However, it is disappointing to see many client advisors advocating for extensive change to the standard wording."	As noted in the first article of the series, we consider that any desire to throw the NZS3910 'baby out with the bathwater' needs to be tempered by the reality that a standard form contract can't be everything to everyone. A universally applicable standard form contract isn't realistic. Rather, we need a contract which is up-to-date, user-friendly, and principles-based so as to enable flexible application or additional prescription, where required, through the use of special conditions.

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	applies to the other standard form contracts in the NZS suite. Why is this happening? In its recent report on the use of NZS conditions of contract, the Infrastructure Transaction Unit cited a variety of "key challenges" which account for the way in which NZS3910 is being used. We have discussed many of these challenges in our previous two articles. In our view, the real issue is whether there is something fundamentally wrong with NZS3910, or whether its use is being distorted by market conditions and behaviours.		**Glen Heath:** No. **Craig Wheatley:** Yes. "I certainly wouldn't say that NZS3910:2013 is not fit for purpose – it deals with many issues in a generally fair manner (for example unforeseen physical conditions, valuation of variations and others). In my experience, problems have arisen when principals have made substantial changes to the general conditions of contract. Despite this, I do feel that there are improvements to be made to NZS3910 to bring it further into line with other international contracts such as FIDIC – for example the introduction of a liability cap for the contractor. I would like to see those sorts of issues addressed in any future 'refresh' of NZS3910."	As noted in the first article of the series, we consider that any desire to throw the NZS3910 'baby out with the bathwater' needs to be tempered by the reality that a standard form contract can't be everything to everyone. A universally applicable standard form contract isn't realistic. Rather, we need a contract which is up-to-date, user-friendly and principles-based, so as to enable flexible application or additional prescription where required, through the use of special conditions. What would this look like? The answer may be a standard form contract that looks quite similar to the current NZS3910, with adjustments to: • rectify some of the known glitches and shortcomings (for example, certain definitions, time of entry into the contract, rules of assignment, preparation and review of documents); • introduce some additional optionality (such as liability caps for contracts, standard exclusion of consequential and economic loss wording, for instance); and • reflect current law (such as the Health and Safety at Work Act 2015). Such an update would not completely 'do away' with the need for special conditions. Certain principals will, for example, always want a degree of prescription in the drafting of contract terms that a standard from contract cannot provide – but an update should result in the consistent treatment of some fairly core issues without the need for bespoke drafting. Finally, we cannot stress enough the need for NZS3910 and the rest of the NZS suite to be licensed in such a way that amendments can be marked up in track changes rather than described in a separate document. It is possible to do this with the Australian equivalent to NZS3910:2013, AS4000:19997, and with

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				other standard form contracts such as FIDIC. It is high time NZS provided this simple efficiency.
5.	**Other standard form contracts (such as FIDIC or NEC4)** In the wake of the discussion surrounding NZS3910 and its suitability to the current NZ construction market, there has been a steady call for a different form of standard form contract to be adopted, such as FIDIC or NEC.	**Do you think other types of standard form construction contracts, such as FIDIC and NEC, need to be more widely used in the NZ construction industry as alternatives to the NZS?**	**David Jewell:** No. "There is no reason in my opinion to introduce these forms of contract. NZS 3910 has been modified in its latest version to reflect the importance of the programme to the contract (as it is in NEC), and as long as NZS 3910 continues its evolution, then it should remain as the preferred form of contract for infrastructure works. It is accepted that large, complex projects may warrant a bespoke contract form, but this should not be the case for smaller projects". **Krista Payne:** "Not necessarily. FIDIC and NEC work well in the UK and part of this is because they are very tried and tested – the market knows these contracts. That is not the case in Australia / New Zealand, so the value may not be realised. Further, those standard form contracts are not without their own issues. Sometimes changes are made to contract form for change sake, which isn't always helpful – the point is probably more about consistency than about picking up a standard form used elsewhere in the world." **Craig Wheatley:** No. "Not necessarily. While I would like to see these contracts used more in the NZ market (particularly on large projects), I wouldn't say that they absolutely have to be used. I would, however, like to see the NZS suite amended to include certain aspects of the international standard forms, for example the early warning provisions of NEC and the liability cap provisions of both NEC and FIDIC."	Although both FIDIC and NEC contracts have been used in projects in New Zealand, the simple reality is that neither suite is well known or understood in the market outside of specific industries (such as plant-intensive sectors (such as dairy processing) or large scale infrastructure projects). FIDIC's use in NZ is limited primarily to those involved in the design, construction and installation of plant (FIDIC Yellow Book) or for large projects which are to be delivered on a turnkey basis, such as a powerplant (FIDIC Silver Book). Sometimes a FIDIC contract will also adopted for a large scale infrastructure projects – for example, Watercare used FIDIC Red Book for the $NZ1.2bn Central Interceptor project. NEC3 has similarly been used on a relatively limited basis in NZ. The perceived benefits of NEC are that it encourages collaboration between the parties and has a multitude of options which can be selected to reflect the specific requirements of the project. We're not aware of NEC4 having been adopted for any significant projects to date. NEC3 has been used by local authorities in New Zealand, although some in the industry have queried whether collaboration can truly be achieved through NEC's prescriptive notice requirements and communication protocols. The NZ contracting industry considers that it knows and understands the NZS suite-well: written by New Zealanders for New Zealand conditions. The obvious example is that (once it has another update) the NZS suite is reflective of current NZ law, unlike FIDIC or NEC. It is difficult to change the degree of incumbency that the NZS suite enjoys, irrespective of the merits.

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6.	**Problematic special conditions of contract** There has been a lot of commentary in the market over the last 18 months or so about the use of special conditions of contract and how they affect and/or depart from the 'commonly understood' general conditions of contract. The debate is perhaps at its peak right now.	**How often do you see examples of special conditions in construction contracts which you consider to be problematic and contributing to the poor state of the industry?**	**David Jewell**: Often. "This is a real issue for construction contracts with local authorities. I have seen 60 pages of Special Conditions to 3910 from a local authority, and at the same time seen a half page of Special Conditions on a $100 million-plus contract from NZTA. Unfortunately, I have to say that this appears to be driven by legal advisors to the local authorities who are seeking to minimise their risk exposure. In my view, that risk exposure is often better managed through adopting the standard 3910 without all the amendments. **Glen Heath:** Not often (not really applicable to Mansons). **Krista Payne**: Not applicable – the issue is not the use special conditions per se, but a lack of industry understanding about the suitability of special conditions. **Craig Wheatley:** Often. "In my experience, examples of such special conditions include: • Broadening of the standard indemnity provisions to require indemnities for matters such as breach of contract. • Clauses allowing principals to discuss payment issues directly with the contractor's subcontractors, and make direct payments to those subcontractors at their discretion. • No entitlement for contractor to rely on documents provided by the principal, when the contractor has had no involvement in preparation of those documents and often little time to review them in the tender period	The argument from the other side is that, for certain types of principals, or for certain types of projects, special conditions are necessary. The simple fact that special conditions are included in a contract should not, and does not, mean that the contract is unfair or constitutes poor contracting practice. This resonates particularly loudly in the private sector, where absent initiatives such as the Accord, considerations of public policy do not carry much weight in terms of procurement selection or contracting terms. In our view, legitimate grounds to include special conditions include: • to fix a deficiency in the general conditions; • to reflect the particular requirements of the project; or • to reflect the particular requirements of a party. The second and third categories are often where the trouble starts, as it is unclear what a genuine requirement is, what is 'a nice to have' and what is simply an attempt to 'screw the scrum'. In our view, it is in this space that lawyers and other consultants have the opportunity to offer real value to all project participants by providing guidance on the practical and legal consequences of requiring a particular special condition (both in terms of the specific project as well as for future procurements). It is critical that all parties seek and obtain appropriate legal and other advice in any contractual negotiation. Too often we encounter situations where, based on an apparent understanding of the general conditions of a contract, a party will advocate for, accept or reject a special condition, even though it is clear that the party does not understand the meaning or effect of that condition. As we stressed in our earlier articles, in commercial contracting there has to be an emphasis

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			• Narrowing of the circumstances for which variations and EOTs may be claimed (for example, unforeseen physical conditions)."	on self-accountability, regardless of the rights or wrongs of using special conditions. Finally, in our view, any debate around the legitimacy or otherwise of public sector procurers using extensive special conditions needs to be holistic and take into account the drivers for those special conditions, including often the terms of upstream contracts such as development agreements or agreements to lease. Such upstream contracts often require the principal to pass through onerous conditions of the upstream contract to the contractor under the construction contract (including direct deeds of warranty). If the public sector is to be subject to rules around procurement and risk allocation, those rules must apply both directly and indirectly.
	RISK TRANSFER			
7.	**Understanding the contract** Synonymous with the debate around the use of special condition is the discussion around how risk is in fact transferred under the contract terms. There are many accounts in the market of principals allocating a specific risk to a contractor through the P&G specification or an annotation on a plan. There are similarly many instances where a contractor accepts a risk simply because it did not properly comprehend the effect of a condition of contract, or agreeing to a condition with full	**Which do you consider to generally be more culpable for poorly understood contractual positions around risk:** • **'risk transfer by stealth' (that is, where the transfer of a risk by the principal to the contractor is buried in the contract documents or obfuscated in some other way such that it is not easily discernible); or** • **a failure by the contractor to**	**David Jewell**: "I believe that both of these factors are in play, and they are closely linked. As discussed above, the extensive Special Conditions often transfer risk that is not easily identified by the contractor. While the standard 3910 clauses and risk allocation are well understood, the extensive Special Conditions are often a trap for the contractors who may not understand the implications and who then under-price their exposure." **Glen Heath**: Poor contractor practices. "Contractors know the risks they are taking, but due to market pressure feel obliged to accept them." **Krista Payne:** Poor contractor practices. "Obviously everyone will be able to point to an example of transfer by stealth, but most of the time it's about the parties understanding what is written on the page. This issue can be mitigated by mechanisms like ECI and reimbursing bid	We agree that there are two sides to this issue. The obvious solution is an improved and more transparent contracting process including, depending on the nature of the project and the risk allocation, sufficient time for pre-contractual due diligence and appropriate principal-contract engagement. The time and costs of such a process are always a consideration. There can, of course, never be any substitute for the words of the contract and so there is never any substitute for a party not reading and properly understanding the words of the contract. Equally, however, there should never be any reason to not present a contract for tender that is clear and transparent on its terms, and which is either consistent across its constituent parts or which has express rules for dealing with inconsistency. It should not be an unnecessarily difficult or burdensome task to properly understand the contract.

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	knowledge of the risk profile and likely consequences. Are these issues mutually exclusive? Or is improvement required on both sides?	**properly read and comprehend the contract documents?**	costs in appropriate scenarios and allowing suitable time for procurements." **Craig Wheatley:** Risk transfer by stealth. "It is not as black and white as this though - there is always a range of culpable factors. Contractors are not blameless."	
8.	**Disclosure of risk allocation** Understanding how a risk is allocated under a construction contract is (or at least should be) an obvious pre-requisite to accepting and then properly scoping and pricing that risk. While there can never be a substitute for the words of the contract, could disclosure be made more transparent and efficient?	**Do you think it would be useful tool for the industry if each construction contract were accompanied a by a one-page, tabular matrix indicating how certain risks had been allocated under the contract documents?**	**David Jewell:** "Useful, but with an important caveat. Risk often manifests as shades of grey rather than black and white, so it is debatable whether such a table would help. What would take precedence – the table or the words in the contract?" **Glen Heath:** Possibly useful. **Krista Payne:** Harmful – the parties need to properly understand and comprehend the contract terms in their entirety. "This creates a risk that the matrix is inconsistent with the contract due to summarising the terms, which creates more uncertainty. Further, it aids the approach of not reading the contract. Many organisations prepare these matrices in any event to assist with approvals processes but it is not clear what the benefit of including them in the contract would be." **Craig Wheatley:** Possibly useful. "I think this would be useful and I have seen it used to good effect on previous projects (although they are often longer than one page). If this practice were to be adopted, parties would need to be careful to avoid any conflict or confusion between the matrix and the terms of contract (which may be more detailed)."	Subject to the appropriate conditions being included in the contract to deal with the effect of the matrix on the written conditions and the issue of inconsistency between the two, we think this is a good idea. To indicate what such a matrix could look like, Bell Gully has prepared a draft, for-discussion version, for distribution at the panel event on 10 October 2019.

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			DESIGN RISK	
9.	**Consultant limits of liability**	**As a general proposition, are 'market standard' limits on a design consultant's liability (for example, three times the fee) disproportionate to the level of responsibility a design consultant has for the success or otherwise of a project?**	**David Jewell:** Unsure. "Possibly, but this is a complex issue, especially when it is linked to 'project success'. The designer has responsibility to deliver a design that meets the project's budget and programme. Management of designers to achieve these performance goals is an issue for the industry that needs addressing, but this is different to the designer's liability with respect to professional indemnity." **Glen Heath:** Yes. **Krista Payne:** Often, yes. **Craig Wheatley:** Yes. "Absolutely. I see this as one of the most imbalanced aspects of construction contracts in New Zealand. Under our standard head construction agreements, contractors currently have no entitlement to a cap on their liability (unless they negotiate one with the principal) while standard form design agreements contain liability caps at values far less than the size of loss that could arise due to defective design."	We agree that this issue is perhaps more nuanced than the binary nature of the question suggests. How the principal defines 'project success' and what requirements, objectives and constraints are subsequently imposed on the design team will invariably have an effect on the quality of the design. This naturally influences the extent to which the design team is prepared to accept liability for defective design. A contractor may argue that similar considerations inform its liability as those same barometers of 'project success' (cost, time and output) apply equally during the contracting phase. What is different, however, is that the contractor's methodologies and implementation of the contract works do not have the same extent of principal oversight and input as the preparation of design. Arguably, the contractor has greater autonomy and therefore responsibility and liability. It seems somewhat cursory and arbitrary to define a design consultant's limit of liability by reference to the fee, especially when the fee is often calculated using a variety of different means. It also seems slightly odd to define limits of liability by reference to the capacity of the domestic professional indemnity insurance market. As a point of contrast, many law firms have to look offshore to obtain sufficient levels of professional indemnity cover.

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10.	**Responsibility for buildability** As the interface between the design and the build, buildability involves assessing the design from a construction perspective to ensure that it is capable of being built within the programme and budget constraints. It involves consideration of a range of on-site and off-site activities and how they will be sequenced and interfaced in order to deliver against the requirements of the design.	**Is it fair to ask a build-only contractor to accept responsibility for 'buildability' of a design?**	**David Jewell:** Yes. "As long as the design is complete at the time the contractor tenders. And that any design change becomes a Variation after that". **Glen Heath:** No. **Krista Payne:** Yes. "Provided appropriate opportunity has been given during the procurement or the start of the contract to flag 'buildability' issues and the contractor not take risk on these flagged issues. The construct only contractor is the expert in this circumstance and is best placed to identify issues and find ways to deal with them." **Craig Wheatley:** No, "because "buildability" is subjective. An acceptable test is for a build-only contractor to take responsibility for building 'in accordance with the specification' (provided the specification is unambiguous) as that can be measured."	Provided that the design is complete and sufficient opportunity is given to the contractor to review that design and all other relevant information, including conducting site-visits, we agree that a build-only contractor is best placed to assess buildability. It is important that buildability responsibility is distinguished from design responsibility, the latter of which should rest with the design consultants in a build-only context. We note we concur with Craig's comments that any allocation of buildability responsibility needs to be pegged to the specifications or the design. An open-ended, immeasurable responsibility to ensure buildability is effectively a quasi-transfer of design risk as the line between responsibility for design and responsibility for construction is blurred.
11.	**Liability for buildability** Refer above.	**If the answer to the preceding question is yes, to what extent should the contractor be liable for failing to properly discharge that responsibility?**	**David Jewell:** Partly liable (depending on the nature of the issue, the design consultant should bear some responsibility). "Unless there is a design change (because the design doesn't work or can't be physically built) or some unforeseeable component or event that affects the buildability. For example, if a third party is successful with an injunction against the contractor in respect of the standard-practice construction methodology proposed, requiring a fundamental change to the construction." **Krista Payne:** Partly liable. "Assuming an appropriate mechanism has been put in place to allow constructability issues to be identified and dealt with, the	The nature of buildability is such that, where it becomes an issue, there is often a degree of overlap between the responsibility of the design consultant and the build-only contractor. Where this responsibility turns to liability, it is logical and fair that, to the extent practicable, that liability should attributed on a proportional basis and any claims framed accordingly. We agree that there should also be exceptions to any liability, along the lines of those outlined by David. It is also important that design changes are properly and completely disclosed to the contractor, with the contractor then being given an appropriate opportunity to review any buildability issues arising out of that change.

#	Topic	Question	Panellists' views	Bell Gully comment
			contractor should be liable for any issues they fail to flag. The principal should be liable to arrange the design to be changed for issues flagged."	
			TIME BARS	
12.	A current 'hotspot' in construction contract negotiations is the inclusion of time bars which prevent the contractor from making a claim for a variation or extension of time if that claim is not made within a set number of days after the contractor becomes aware of the circumstances giving rise to the entitlement to a claim.	**As you are seeing them used in the market, do you consider time bars to be:** • **a legitimate contractual means of protecting the principal's interests (for example, by allowing the principal an opportunity to mitigate the relevant matter and by protecting the principal against the risk of claims made long after the fact); or** • **nothing more than an attempt to prevent the contractor from realising its genuine entitlement to time and/or cost relief in circumstances where it is not liable, under the contract, for relevant risk?**	**David Jewell:** Legitimate means of protecting the principal's interests, "provided always that the time allowed is reasonable. Regardless, I prefer the wording of NZS 3910 that states 'within 1 month or as soon as practicable thereafter'". **Glen Heath:** Legitimate means of protecting the principal's interests. **Krista Payne:** "These mechanisms definitely commonly exist in contracts. However, that doesn't mean they are often being used to actually bar claims. There is a balance to be struck between the contractor receiving the relief they are entitled to and the principal having the ability to mitigate the impacts of delay and achieving some certainty throughout construction as to the delays and costs its responsible for." **Craig Wheatley:** An attempt to prevent the contractor from realising its genuine entitlement. "My real answer here though is 'it depends'! Note though that my view only applies to substantially reduced time bars – which is a common practice at the moment in some of the contracts I have seen. I have no issue with the presence of time bars where they are fair. I acknowledge that an overly lengthy time bar increases the risk of claims being	When it comes to time bars, the devil is in the detail (specifically in the numbers). Allowing a contractor an unrealistically short period of time to give a notice of a claim or circumstances giving rise to a claim, sometimes together with full and complete particulars of the claim as a pre-requisite to bringing the claim, are clearly an attempt to prevent the contractor from realising its genuine entitlement. Increase the relevant period of time so that there is sufficient time, plus a reasonable contingency for the contractor to give a notice, and the regime already begins to look fairer. Other relevant considerations include whether the knowledge test is objective or subjective, whether it is a 'two-stage' notice process, the effect of any intervening or contributory conduct by the principal on the time period, and how the process interfaces with any 'early warning' provisions. We note that there are questions to be tried around the enforceability of time bars, as well as how any attempt to enforce a time bar might play out in the context of the contract's dispute resolution provisions. We have also heard anecdotal stories of engineers/superintendents seeking to devise ways to work around the strict requirements of the time bar provisions. While we understand the purpose and basis for time bars, we note that they can produce absurd results due to the contractor having to take additional steps, including hiring or dedicating personnel to deal solely with the making and administration of claims (mostly where the time periods are short). Even where the cost of this can be sheeted home to the principal, it is

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			raised long beyond the matter arising, which all principals will seek to avoid."	an undesirable outcome, and is the type of conduct that the Accord is seeking to eradicate.
			SECURITY FOR PERFORMANCE	
13.	**Retentions** The Construction Contracts Act 2002 requires retentions under a construction contract to be held on trust by the principal/ head contractor in favour of the contractor/ subcontractors downstream. The regime was introduced in response to the collapse of Mainzeal and first took effect on 31 March 2017.	**Do you agree that the new retentions regime under the Construction Contracts Act 2002 is working as it should be (that is, to protect the cash retentions of those in the contracting chain against insolvency and/or misuse of cash retentions)?**	**David Jewell:** No. "It seems that some contractors are not holding the retention funds 'in trust'. Consequently in the event of their failure, the money is still not available for the affected subcontractors. Could Directors be held personally liable for such retentions?" **Glen Heath:** Yes. **Craig Wheatley:** "Not enough information to say…we are complying with the rules and no issues have arisen since they were implemented - I have not been involved in any specific matters which would suggest that the regime is not doing what it was designed to. Media articles in the wake of the latest spate of contractor insolvencies however would suggest that the regime is perhaps not working as well as it could be."	Based on the situations where the regime has been tested to date, it would seem clear that it has not achieved its intended purpose. Although not all of Ebert's subcontractors were required to have the protection of a retentions regime, a substantial portion of those that did found themselves without its protection. This was largely due to Ebert's handling of the retentions Further, the Court found that the regime does not establish a deemed trust, but rather the usual requirements for establishing a trust at common law apply (that is, certainty of intention, subject matter and beneficiary). It appears that a similar shortfall will occur in the case of Stanley Group. Of course, as Craig points out, the regime has barely been tested, but the early signs are not great. Key issues which remain to be resolved include: • What are 'liquid funds'? • Perverse incentives for head contractors/ principals investing trust funds. • Co-mingling of trust and non-trust funds; • Entitlement to interest. • Non-compliance: does the regime have teeth? • How will contractors, principals and funds respond to this uncertainty and potential litigation risk?

#	Topic	Question	Panellists' views	Bell Gully comment
14.	**Bonding** As soon as the contract value of a project exceeds a certain de minimis amount (usually, in our experience, about $5 million), it is typical for a principal to require the contractor to provide a bond to secure the performance of the contractor's obligations. Many principals require these bonds to be 'on-demand', allowing the principal to claim under the bond without first satisfying any conditions to the drawdown.	**Do you consider a requirement for an on-demand performance bond to be reasonable?**	**David Jewell:** Depends on the project/context. "For certain projects, a performance bond to protect the principal against additional cost if the contractor fails or walks away is reasonable. Equally there are many projects where contractors need protection from failure of the principal, but it seems that principals bonds are infrequently used." **Glen Heath:** Depends on the project/context. **Craig Wheatley:** Depends on the project/context. "Only for the larger, more complex projects. Bonds are not always easy for contractors to procure and I am not convinced that they are necessary on smaller, low-risk contracts. They ultimately cost the principal money too of course. I also think that there is a tendency in NZ to assume that contractors should provide several forms of security on one contract (bonds, retentions, PCGs and others). This is unusual in some other jurisdictions where one form of security is often deemed sufficient. Performance bonds were incredibly rare when I worked in Scotland 15 years or so ago, but that may have changed now."	In a relatively recent case, Clark Road Developments, the Court found that a straightforward on-demand bond could be called upon by the principal, irrespective of any default by the contractor, termination of the construction contract or dispute between the parties to the construction contract. While there are constraints in the way in which bond proceeds can be dealt with, the case is a timely reminder of the potency of an on-demand bond and the risk it exposes the contractor to, especially where the principal can require a replacement bond to be tendered. In the current market, it can be difficult for certain contractors to meet the bonding requirements asked for by principals. These requirements are no doubt being partly informed by considerations as to the minimum levels of equity in the industry, and the credit-worthiness of SPV contractor entities. Those same constrained levels of equity, coupled with a need for multiple bonds across multiple projects, are in turn limiting the capacity of many contractors to obtain bonding. It is a difficult catch-22 for the contractor, but also a good example as to why fundamental reform and a rethink around terms of engagement between principals and contractors is required.