

# BUILDING AND CONSTRUCTION LAW JOURNAL

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## EDITORIAL

**The Jewel in the Crown of the Common Law** ..... 69

## ARTICLES

**An Insolvency Scourge That Must Be Addressed Now** – *Simon Bellas, Ken Hickman and Ben Holloway*

For decades, building and construction companies of all shapes and sizes have faced the risk of insolvency. Measures introduced by federal and State governments over the last 20 years to protect contractor cash flow (and reduce the incidence of insolvency) have failed to have the desired impact, and a perfect storm has again brought the industry to the precipice. We must confront the failures of the past to enact real reform and cultural change that will protect and future-proof the construction industry, which is a major contributor to the economy. .... 70

**Managing Design Risk** – *Dr Donald E Charrett*

Design is the first activity that has to be carried out in a construction project before construction can commence. Getting the design right requires managing the design risks to minimise the chance that the constructed facility will not fulfil its anticipated time, cost and quality requirements. There are two categories of design risks – the design management risks and the technical risks. The design management risks are those that relate to the designer’s performance in preparing the design and ensuring the design is constructed correctly. The technical risks are those that impact other stakeholders because of the content of the design. The tasks of appropriately “controlling” design management risks are both internal and external to the designer. Internal “control” of the risks requires the designer to have robust procedures in place to manage the design and construction inspection process. The external design management risks are those under the “control” of the designer’s employer. Managing the technical risks involves detailed review to check that the required outcomes for construction and the completed facility are achieved. The thesis of the article is that both design management risk and technical risks can generally be managed successfully by using an appropriate design contract to engage a qualified designer who applies established risk management procedures and complies with the design contract. .... 77

**Avoiding Construction Contract Risk in a COVID-19 Environment** – *Phil Evans, Chinelle van der Westhuizen and Jacques Duvenhage*

This article considers a number of suggested contractual provisions in construction contracts in order to mitigate the effect of the COVID-19 pandemic issues in the construction industry. It considers issues such as: (1) the industry awareness of the existence of COVID-19 at the time of entering into agreements; (2) the relevance and application of force majeure clauses; (3) the legal doctrine of frustration; (4) termination for convenience

clauses; and, (5) changes in law clauses or the contractual right to claim an extension of time in order to avoid liquidated damages or other liabilities for delay. .... 88

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