

To be, or not to NEC: that is the question

Part 1 – Use of the NEC Contract in Australia

It is understood that in 2018, Main Roads WA elected to use the 3rd edition of the NEC New Engineering and Construction Contract for the ‘Pithara’ package of its Great Northern Highway upgrade project. Seemingly, this is the first time the NEC has been used in Western Australia.

The NEC is not a new concept. It was first issued in its consultative form in 1991, and the first edition was published two years later in 1993. In July 1994, Sir Michael Latham’s renowned report ‘Constructing the Team’ that was commissioned by the UK Government in collaboration with the construction industry and its professions recommended, amongst other things, that the NEC should become a national standard contract across the whole of the construction and engineering industry in general.

In this three-part series, we discuss the use of the NEC on construction and engineering projects in Australia and globally, looking at the following:

Part 1 – Use of the NEC in Australia

Part 2 – Arrangement of the NEC

Part 3 – The core clauses of the NEC

Background

In 2014, the Australian and Western Australian Governments announced that detailed planning was underway for a \$345 million upgrade of the 218 km section of Great Northern Highway between Muchea and Wubin (“**Project**”). The Project is a planning, design and construction program being delivered collaboratively by an integrated project team, comprised of Main Roads WA and industry partner, the Arup Jacobs Joint Venture.¹

The Pithara package, one of nine packages being progressed under the \$345 million scheme, includes upgrading a 16-kilometre section of the Great Northern highway from Gatti Road to north of Pithara to enhance road safety and efficiency.² The Australian Government is providing \$275 million towards the Project, with the WA Government providing the remaining \$69 million.²

The Pithara section is being delivered by the Highway Construction/ALBEM Joint Venture.

¹ <https://annualreports.mainroads.wa.gov.au/AR-2017/assets/appendices-downloads/Great-Northern-Highway-Muchea-to-Wubin-Stage2-Upgrade-16-17-MRWA.pdf>

² <https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/04/Joint-media-statement-Work-underway-on-two-key-Great-Northern-Highway-upgrades.aspx>

Whilst it is not wholly clear why Main Roads WA decided not to use its long-standing alliance model form of contract on the Pithara section of the project, it is thought industry partners ARUP and Jacobs encouraged use of the 3rd edition of the NEC (“NEC3”), because of previous experience with the form of contract elsewhere in the world.

Given the recent groundswell of support for the WA Government to mandate the use of a standard fair contract on all taxpayer-funded construction work to address the, “*unfair transfer of risk through onerous contracts*” and the alleged, “*unfair treatment and non-payment [of sub-contractors] on Main Roads projects*”,³ perhaps the WA Government decided it too has a vested interest in establishing whether the NEC really is capable of doing what it says it does, which is to primarily:

- a. minimise the incidence of disputes;
- b. ensure foresighted, co-operative management of the interactions between the parties to reduce the risks inherent in construction and engineering work; and
- c. enable a clear division of function and responsibility to help accountability and motivate people to play their part.

Indeed, when coupled with other, well-publicised cost blow-outs on various major State projects over the last few years and in light of John Murray’s recent Review of Security of Payment Laws, “*Building Trust and Harmony*” in May 2018, then perhaps the WA Government really is starting to consider alternative, more collaborative forms of contract to ensure the construction industry delivers better value, whilst:

- a. protecting the financial health of the entire supply chain on State funded projects; and
- b. minimising the use of “*cost-prohibitive*” adjudication to resolve payment disputes under the West Coast Model.⁴

Irrespective of the reasons, whilst very little has been publicised about the use of the NEC on the Project, Main Roads certainly appears to be invested in its decision. Indeed, in the Annual Project Sustainability Report 2017, it is evident that training has been provided to employees engaged on the Project (who are part of the larger organisations of Main Roads, Jacobs or Arup) for specific project requirements, which includes NEC3 contract training.⁵

Overview of the NEC Contract

The language of the NEC contracts is clear and simple, and the procedures set out are all designed to facilitate and encourage good management of the projects on which they are used. According to Dr Martin Barnes (originator of the NEC contracts):⁶

“The NEC contracts are also the first to deal specifically and effectively with management of the inevitable risks and uncertainties which are encountered to some extent on all projects. Management of the expected is easy, effective management of the unexpected draws fully on the collaborative approach inherent in the NEC contracts.”

Fast forward 24 years and the NEC suite of contracts has been endorsed by governments and industry and used successfully in over 20 countries, on high-value, technically complex construction and engineering projects. In fact, the NEC3’s CV is rather impressive, given it includes projects such as:⁷

- the London 2012 Olympic games venues;
- Terminal 2 at Heathrow airport (design and construct);
- Tin Shui Wai Hospital in Hong Kong (the largest NEC contract let so far by the Hong Kong Government); and
- procurement of the airside civil works, part of Christchurch International Airport’s \$95 million, six-year redevelopment.



In 2017, the contract suite’s next evolution NEC4 was launched, although the NEC3 is still being widely used.

Notwithstanding its success elsewhere in the world, it would appear that the NEC3 has only ever been used once before in Australia on the \$260 million Mt Mercer wind farm project in Victoria, even though the project was successfully completed on time and budget at the end of 2014.⁸

In the next part of our series, we look at the arrangement of the NEC3 and how it differs from more traditional forms of contract.

³ Article titled ‘Mandate fair contracts: CCF’ by Helen Shield; published in the West Australian (Property Section) on 24 October 2018

⁴ Article titled ‘Bigger players object to fairer play’ by Helen Shield; published in the West Australian (Property Section) on 31 October 2018

⁵ <https://annualreports.mainroads.wa.gov.au/AR-2017/assets/appendices-downloads/Great-Northern-Highway-Mucheato-Wubin-Stage2-Upgrade-16-17-MRWA.pdf> (page 12 of 14 refers)

⁶ Preface to the NEC3 engineering and construction contract April 2013 guidance notes refers

⁷ Which includes the NEC3 suite launched in 2005 and the NEC4 suite launched in 2017

⁸ <https://www.neccontract.com/About-NEC/News-Media/The-first-NEC-project-undertaken-in-Australia>

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