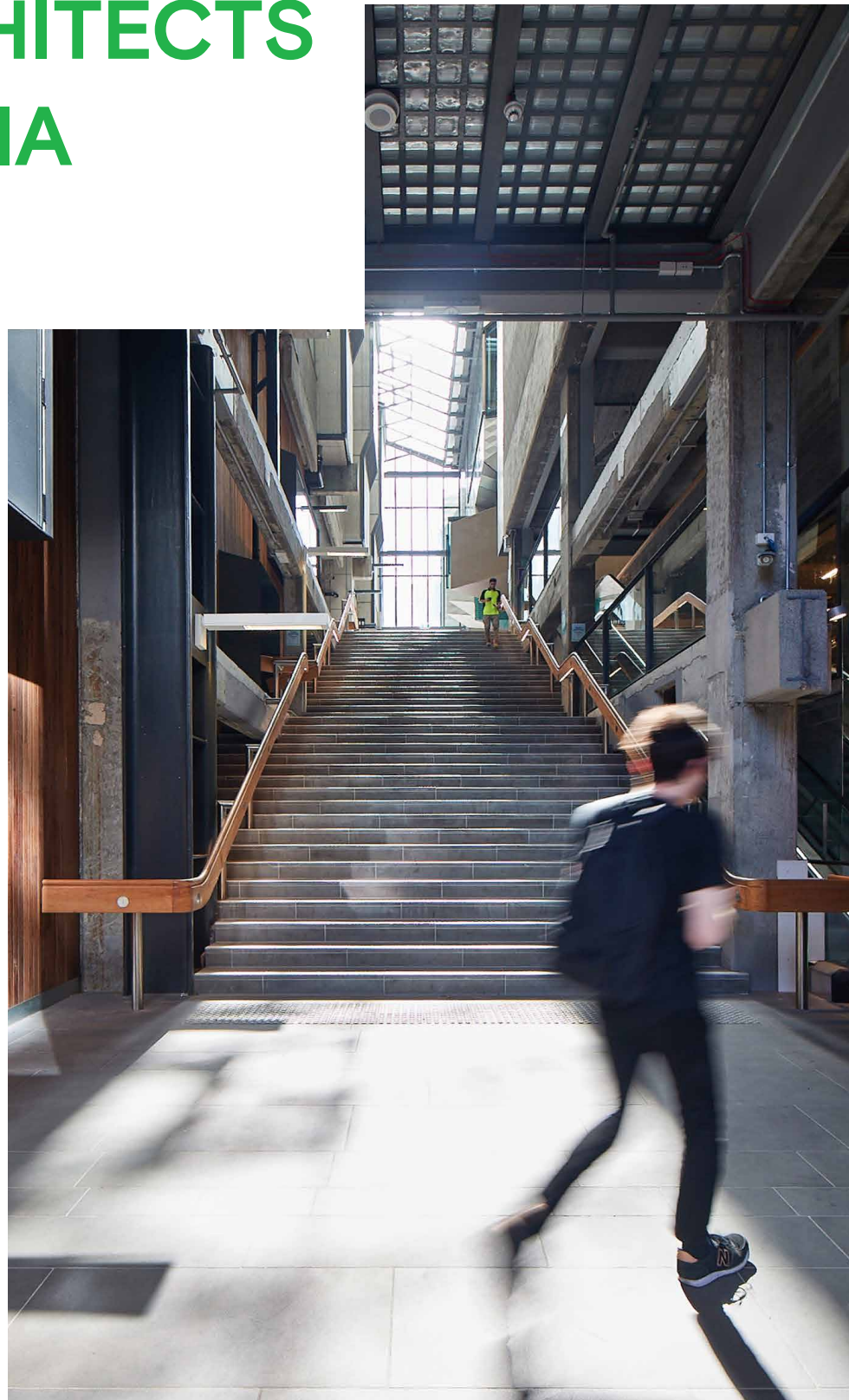




Australian  
Institute of  
Architects

# THE BENEFITS AND CHALLENGES OF NOVATION FOR ARCHITECTS - VICTORIA

August 2019



Prepared by the Australian  
Institute of Architects 2019



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Cover: 2018 Victorian Architecture Medal | New Academic Street, RMIT University | Lyons with NMBW Architecture Studio, Harrison and White, MvS Architects and Maddison Architects | Photo: Peter bennetts  
This image: 2018 William Wardell Award | Bunjil place | fjmt | photo: John Gollings

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# EXECUTIVE SUMMARY

**A range of issues face the construction industry regarding safety, transparency and quality. It is a critical time to engage in improving the procurement process to improve outcomes.**

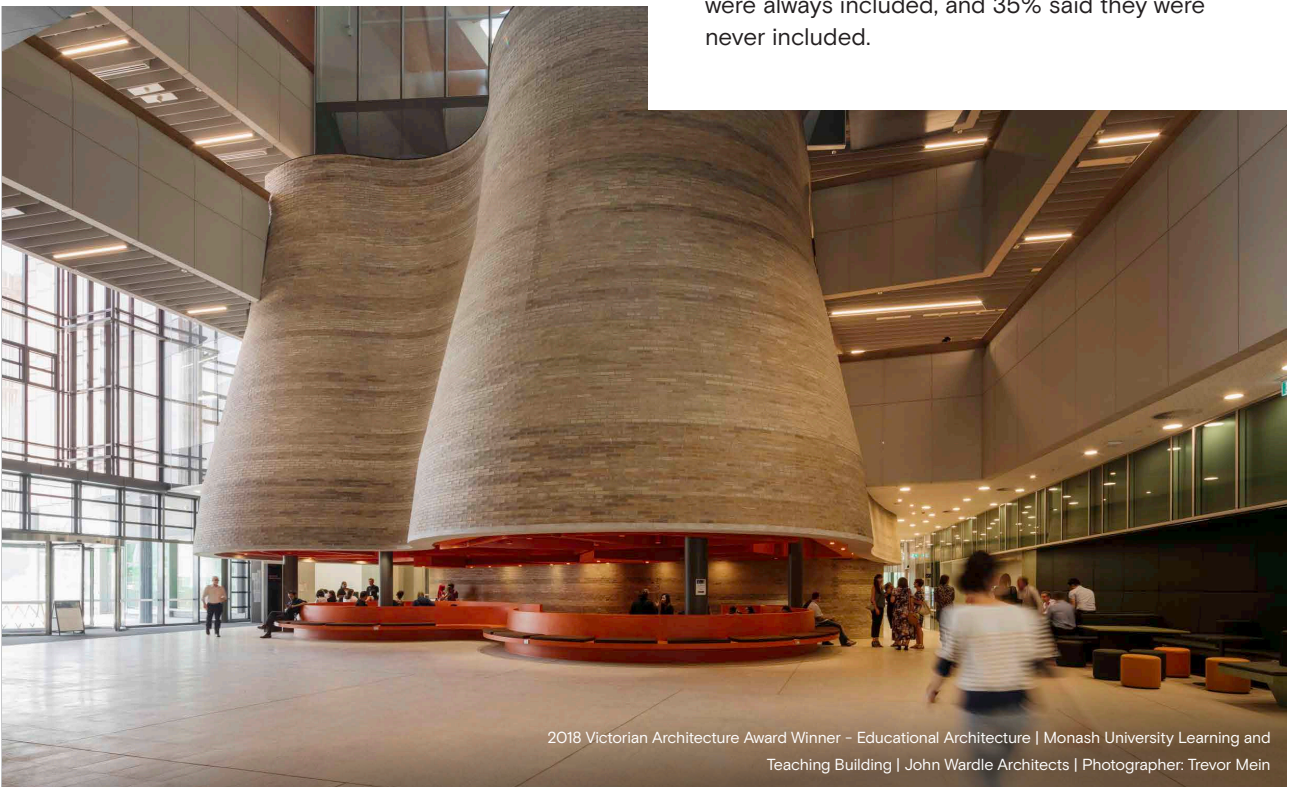
One of the most prominent procurement models being adopted is novation. Novation occurs when the contract between the architect and the principal is extinguished and is replaced by a contract with a new client (the building contractor) usually on the same terms, bringing about a transfer of contractual rights and obligations.

The Australian Institute of Architects has undertaken a national survey of its members to provide an initial indication as to what the pitfalls and positive outcomes of this procurement method are. The Institute is interested in an approach where we are actively engaging with industry research to understand how we can make holistic improvements to ensure that we are providing safe and quality built outcomes for our communities and consumers.

The intent of this initial survey is to assess where further research should be undertaken. This research would engage directly with industry partners including clients, contractors and consultants to achieve a broader understanding.

Novation can create a positive outcome and is supported by the architectural profession. Many benefits can be delivered around buildability, time and costs. However, the results of the survey, conducted in April 2019, identify some issues. For Victoria the survey covered 71 architectural practices and 158 projects delivered between 2009 and 2019. The following is a summary of the survey results:

1. Substitution of specified materials was more likely under a novated contract. 71% reported a negative impact on finish and durability of projects and 63% on the use of locally sourced materials. This is supported by reports that finishes and fixtures changed from the original tender after novation between 26% to 50%. Safety for end users depends on products that are adequately researched and crossed checked by other consultants.
2. In the value management process under a design and construct contract, there is a much lower commitment to the principles of ecologically sustainable design (ESD).
3. Better outcomes for the project and for risk management are achieved if architects are involved in strategic decision-making processes at project control group meetings. Before novation, only 23% of respondents reported they were always included. After novation, 10% of respondents reporting they were always included, and 35% said they were never included.



2018 Victorian Architecture Award Winner – Educational Architecture | Monash University Learning and Teaching Building | John Wardle Architects | Photographer: Trevor Mein

## EXECUTIVE SUMMARY (CONTINUED)

4. Architects reported being denied access to the site to undertake inspections at certain stages of the building process. Building contractors taking shortcuts in procurement and certification of building components affects safety for end-users of buildings.
5. The responsibilities of the architect changes under novated contracts, where architects have increasing responsibilities for all aspects of construction yet have diminishing power to influence good design and constructability outcomes.
6. The point of novation in the design and documentation phase is critical, and there is no consistent practice. The point where novation procures better outcomes for the general public and end user will depend on the scale of project, project type, time constraints, and principal's expectations. The optimal point is at either 100% Design Development or after more than 51% of the Construction Documentation had been completed.
7. There was serious concern about the need to undertake significant re-negotiation of client contract conditions at novation. Clients are increasingly choosing to require novation, but let contractors propose their own contract. 67% of architects believed that contract negotiations impacted negatively on their ability to deliver quality outcomes for the general public and end user.
8. Providing information to architects at the beginning and through the project process can have enormous benefits, particularly on overall project program or timeline to completion of construction. Realistic fees can be set, and resources allocated to reflect the true scope of the project requirements. If not provided, architects may be forced to reduce their scope of work, thereby affecting project outcomes.
9. After being novated to the contractor, only 21% felt they were able to effectively protect the original principal's interests. It is noted that 45% of architects did not know if the monthly reports prepared for the clients were being passed onto the clients during novation.
10. Very often, the total construction cost at tender is higher than the original total construction cost. 59% reported that they were unable to increase their fees to suit the increased workload expected as a result of the increase. The inability to provide adequate resources to the project leads to adverse health and well-being outcomes for staff engaged on the project.
11. The creation of an industry-wide code of novation was favoured by 83% of respondents, who believed that would be beneficial in improving the quality of projects delivered through novation.



2018 Victorian Architecture Awards | 18 Innovation Walk Revitalisation Project | Kosloff Architecture, Callum Morton and MAP (Monash Art Projects) | Photo: Glenn Hester

# INTRODUCTION

**Throughout history, there have been various ways of delivering a building while balancing the principles of structural integrity, functional utility, and visual beauty through concept to construction.**

Currently one of the favoured forms of procurement is novation. It was originally seen as a method in allowing the design of a project to be developed with the best possible outcome bringing design innovation together with construction innovation. A client, working alongside an architect could refine their brief, which in turn would develop into a bespoke design solution tailored to their site and needs. As the project took shape a contractor would be consulted to incorporate construction innovation into the design, so that construction would be tailored to industry capability. Novation came from merging two different procurement strategies into one, it was aspiring to bring the best of both into one. However, in recent times, its lack of definition of roles and expectations has led to some unsatisfactory outcomes.

Current practice is for the novation of an architect's contract to a contractor who is engaged under a design and construct contract (D&C contract). Under this process, the architect is engaged initially for the design phases by the principal (original client) and is then novated to the contractor to complete the documentation and construction phases. Novation extinguishes the original contract and essentially transfers contractual rights and obligations from one party to another.

It is broadly recognised by the Australian Institute of Architects (the Institute) that novation has significant merit and is a procurement method that should be retained and continued to be utilised by clients. However, there has been a number of concerns from all parties (clients, contractors, sub-contractors, consultants, sub-consultants) that novation is no longer working optimally. With a range of issues facing the construction industry regarding safety, transparency and quality, it is a critical time to engage in how we can improve the process.

To understand initially from an architectural perspective what were the benefits and issues we were facing with novation, the Institute conducted a national survey of members between 31 March 2019 and 28 April 2019. Through understanding our own perspective, we could then engage with the broader construction industry regarding their own experience, with the aim to readdress novation to make it better for all.



The survey was in two parts – the first relating to practice information and overall views of novation to D&C contracts; the second relating to members' experiences in specific projects.

Australia wide, we had 263 responses, with 71 firms responding in Victoria. We asked participants, where possible, to give us information on two – three projects. The survey results set out below cover 158 projects delivered between 2009 and 2019 in Victoria.

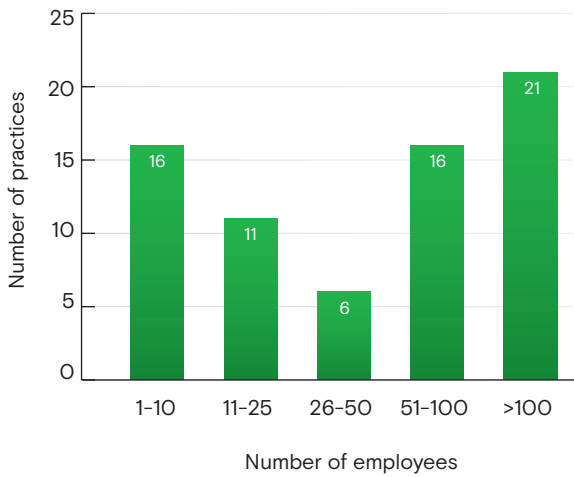
This survey has identified a number of issues of concern to the architectural profession. The Institute will be investigating these issues in more depth with other industry participants to gain an in-depth understanding of potential problems and solutions for all parties.

# SUMMARY OF FINDINGS

## 1. PRACTICE INFORMATION

There was a mix of small, medium and large practices, but respondents predominantly came from large practices who engaged over 51 employees.

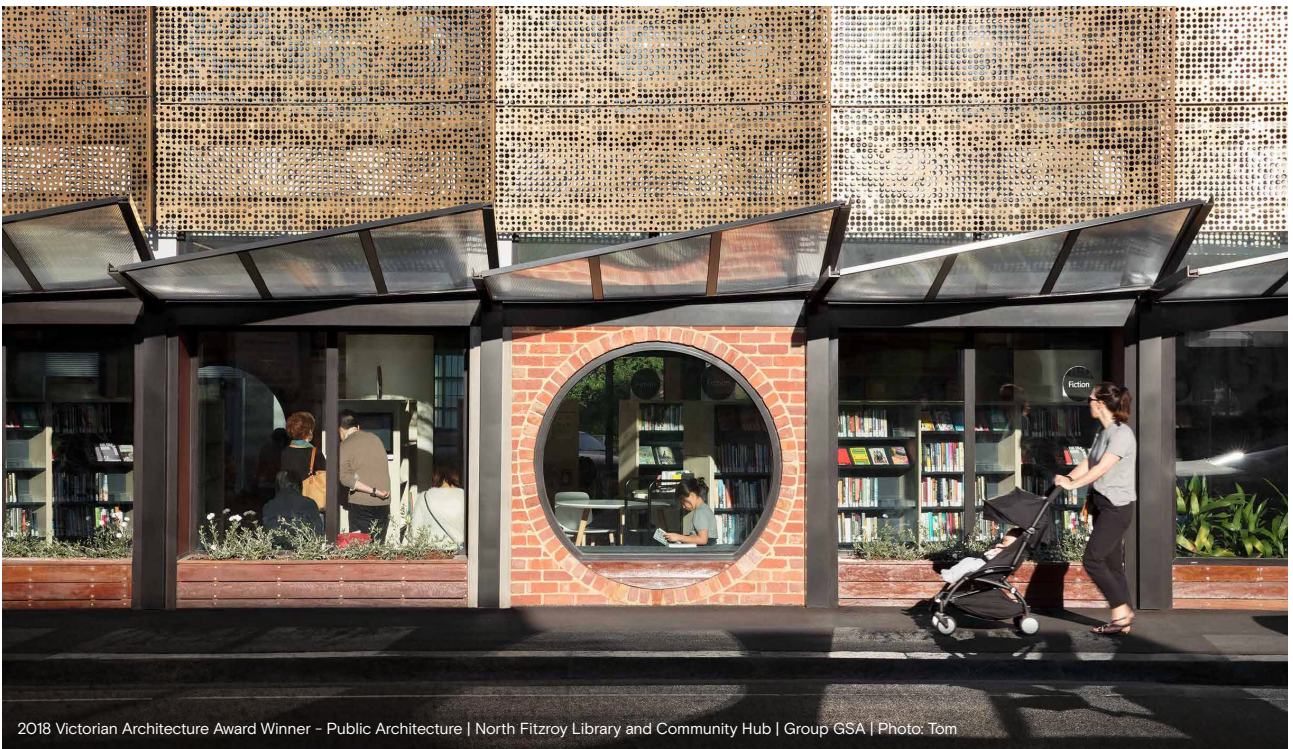
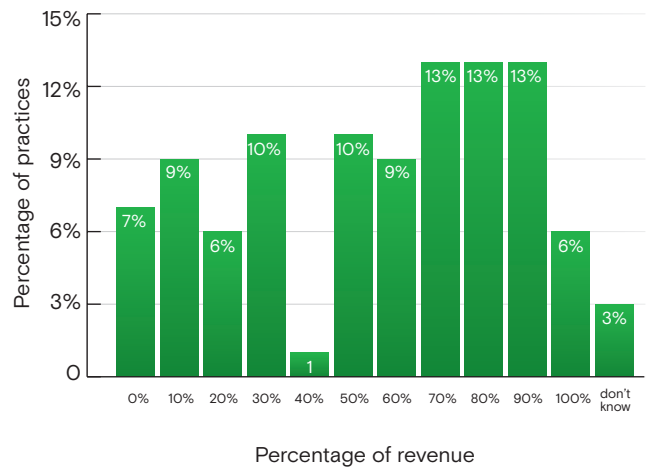
Figure 1. Practice size



## 2. REVENUE

In the last ten years (2009–2019), over 64% of practices derived over 50% of their revenue through a D&C contract that has been novated. 6% of respondents derived 100% of their revenue from this form of service delivery.

Figure 2. Revenue from novated contract

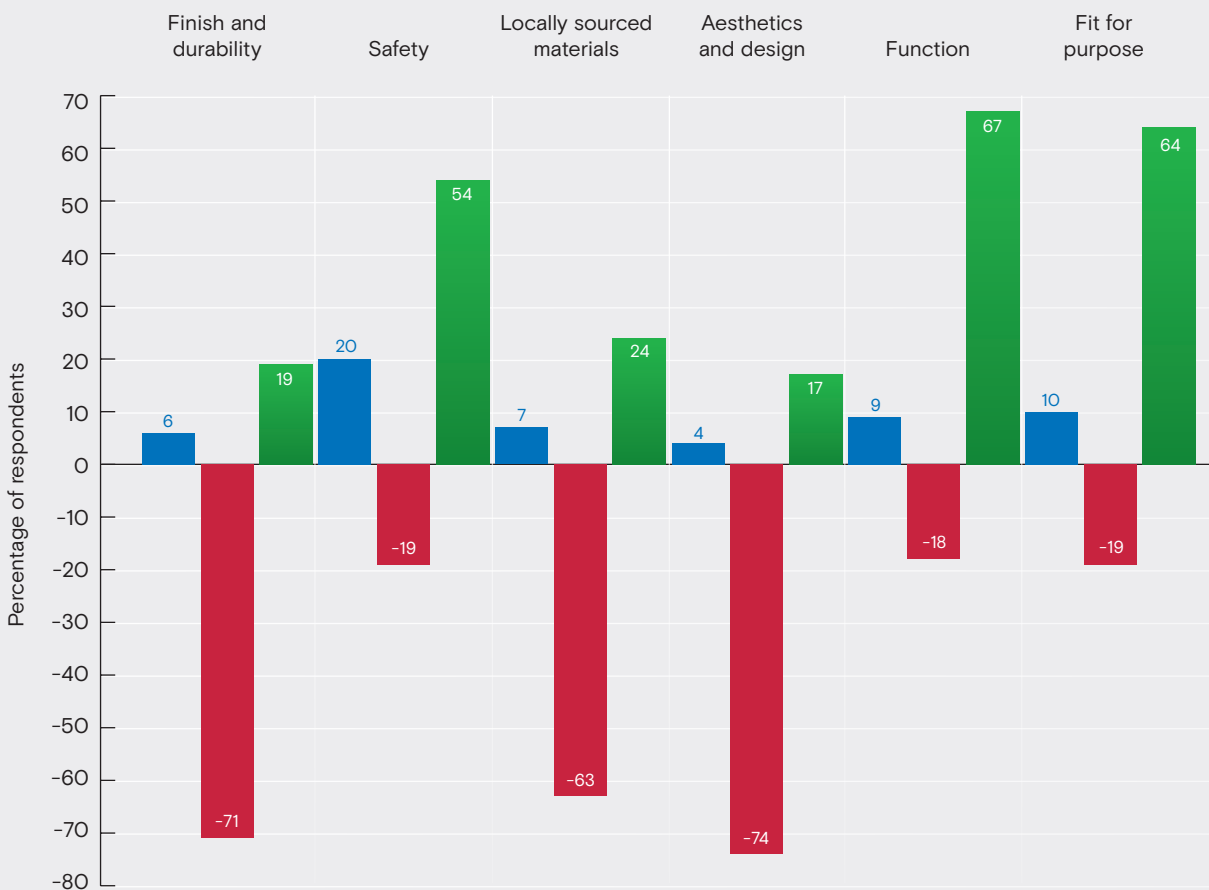


### 3. IMPACT OF NOVATION ON PROJECT QUALITY

Respondents were asked about the impact of novation on the final quality of the following:

- Finish and durability - 71% of respondents believed there was a negative impact
- Safety - 54% of respondents believed there was a neutral impact, and 20% thought there was a positive impact
- Locally sourced materials - 63% of respondents believed there was a negative impact
- Aesthetics and design - 74% of respondents believed there was a negative impact
- Function - 67% of respondents believed there was a neutral impact
- Fit for purpose - 64% of respondents believed there was a neutral impact

Figure 3 - Impact of novation on outcomes

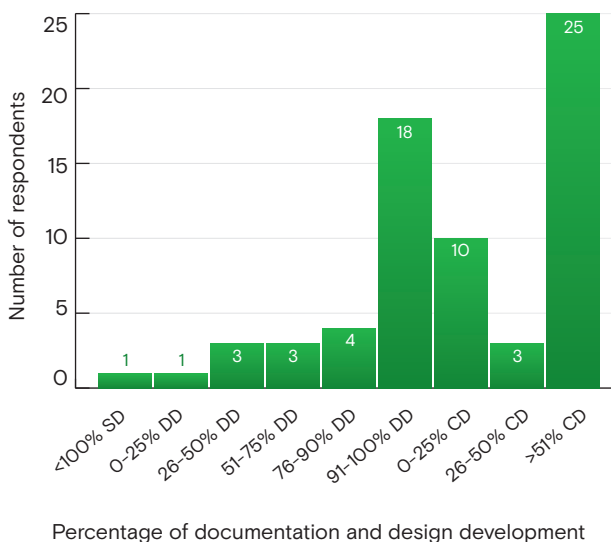


SUMMARY OF FINDINGS (CONTINUED)

**4. POINT OF NOVATION**

The point in the documentation phase where novation procures better outcomes for the general public and end user was considered by 37% of respondents to be when novation occurred after more than 51% of the construction documentation (CD) had been completed. 26% of respondents believed the better outcome was achieved at the point that 91-100% of the design development (DD) was completed. Least favoured was at the 100% schematic design (SD) completion, and at the early stages of DD (5%). These results identify an optimal level of document completeness at the point of novation. By contrast, section 8 below reports a major trend toward novation earlier and earlier in the design process, with less complete documentation, leaving a greater proportion of design choice in the hands of the contractor and missing the opportunity to effectively lock in design quality for the benefit of the principal.

**Figure 4. Preferred point of design development and documentation for novation**



**5. CODE OF NOVATION**

The creation of an industry-wide code of novation was favoured by 83% of respondents, who believed that would be beneficial in improving the quality of projects delivered through novation.

**6. BENEFITS AND CHALLENGES OF NOVATION**

Respondents identified many benefits and challenges. Because of the novation occurring at different stages in the design phase for respondents, and in considering matters from the client’s perspective in terms of risk and cost, there appears to be some conflict between comments, ie. risk and cost were seen as both a benefit and a challenge. By far, the most comments around benefits were made regarding better relationships with builders, although this is also mentioned as a challenge. Buildability was a stand out in terms of respondents seeing a benefit, as was time and efficiency. The challenges identified by a majority of respondents relate to design control, fractured relationships with the original client, and increased risks due to lack of control and engagement in decision making.

The challenges and benefits are grouped into the following themes, with more detailed comments regarding each theme is listed below.

Challenges	Benefits
Design control and compliance	Relationships
Communications with original client	Buildability
Value management	Time and efficiency
Defining responsibilities	Risk
Risk	Cost
Cost	Fee payments
	Safety





2018 Victorian Architecture Awards | Sorrento Visitors Centre | Workshop Architecture |  
Photo: John Gollings

## 6.1 Challenges

### *Risk*

Risk was the main challenge mentioned by respondents. Respondents reported that builders believed they were solely responsible for risk and liability of the project and therefore were making risky decisions that the consultant would not approve. There was a major concern that an architect has certain responsibilities but is hampered in managing these because of limited access to information in order to fulfil their duties. There was mention of unfair and onerous consultant agreements that place too much responsibility on architects, but do not bestow any authority to advise or instruct. Another issue was instructions by the builder to change documentation or draw up details that the architect does not recommend.

The rising incidence of requirements for collateral warranties was identified, and a particular concern was raised around the need to take on more risk/responsibility for sub-consultants, even where they are appointed by the contractor.

Risk to architects such as set-off clauses and indemnification of aspects that architects have no ability to control or manage was a challenge. It was reported that despite efforts to negotiate these clauses, it is usually only clauses that affect professional indemnity insurance that are successfully resolved.

Some respondents reported that contractors were taking extremely serious shortcuts in procurement and certification of building components that affect the safety of users and public and reported that there were instances where builders were unwilling to allow inspections to specific areas, claiming that works are underway, and access is prohibited due to safety reasons.

## SUMMARY OF FINDINGS (CONTINUED)

### *Design control and compliance*

Respondents believed that maintaining the integrity of the design intent was a challenge when the contract was novated. There was concern about delivering design quality and regulatory compliance, contractor commitment to ecological sustainable design, maintaining quality control over finishes and construction methodology so that substandard finishes are not applied. There was also significant concern about material substitution in a bid to reduce costs. Respondents reported that a key challenge is the different perspectives on project priorities between the builder and architect, leading to less than optimal design outcomes.

### *Communications with original client*

There was concern that the lines of communication with the original client are lost under a novated contract and architects have limited engagement with the client group and stakeholders during the documentation and construction services phase. There is also concern about a lack of end user involvement and a loss of transparent process and communication between builder, consultants and client.

### *Value management*

It was reported that value management (or value engineering) places constant pressure on design quality to maximise the builder's margin. Important elements are value managed out by the builder and the rationale is not made clear to the architect. This occurs while other less important elements are left in. Respondents reported that during this process, they were not given proper information on proposed substitutions of materials.

### *Defining responsibilities*

Respondents reported a lack of clarity around roles and accountability. They reported that the oversight roles that independent consultants bring to projects are greatly diminished.

There is concern about the liability of compliance statements resting with the architect, but there is no independence for the architect to enforce compliance. Concerns were raised about the skills and abilities of superintendents, who are often a project manager unqualified to make the decisions that need to be made during construction.

## SUMMARY OF FINDINGS (CONTINUED)

### *Costs to architects*

Extra unbudgeted costs were reported as a significant challenge under novated contracts. For instance, the cost of re-designing to the main contractor's preferred construction requirements creates extra risk and costs to architects. As well, construction services are often limited by hours or specific scope, yet consultant certificates are often worded strongly by default to cover thorough site inspections and comprehensive understanding that fees often don't accommodate. It was also reported that when contractors go into liquidation soon after the completion of the project and this results in an incomplete defect liability phase that become difficult to remedy, this will require additional services that have no allocated fee.



2019 Victorian Architecture Awards | Moot Court Learning Precinct for the Monash Faculty of Law | Jackson Clements Burrows Architects | Photo: Derek Swalwell

## 6.2 Benefits

### *Relationships*

Architects reported increased engagement with builders as a benefit of novation and believed there was more constructive collaboration with the builder when novated, with useful and meaningful dialogue between architect and builder during construction services. Some respondents reported that novation can reduce the adversarial nature of the contract. There were reports of novation providing a more vigorous process to understand the builder's proposed construction methodology and active participation from the builder in structural, civil, and building services decisions.

### *Buildability*

Improved buildability and detailing with early contractor involvement were seen as a significant benefit, with a better buildability approach to design as an outcome. Respondents reported becoming more aware of buildability and fit for purpose issues and the ability to tackle construction issues during design.

### *Time and efficiency*

Respondents reported that D&C allows a shorter overall program and that novation, in some instances, can avoid material re-selection or value management. It also allows the design/documentation process to be compressed and provides an opportunity to start a project on site earlier.

### *Risk*

While risk was seen as a challenge, it was also seen as a benefit. The benefit of risk shifting from the developer to the builder was mentioned as well as clients and financiers being satisfied by shifting risk to another party. Greater financial security for banks and other financial institutions was also seen as a benefit.

### *Costs*

While increased costs to architects were seen as a challenge, costs were also seen as a benefit, but in the context of reduced costs for the client through reduced contract administration fees and the contractor having greater responsibility for construction cost.

### *Safety*

Respondent reported that safety in design was increased with contractor input.

SUMMARY OF FINDINGS (CONTINUED)

### 7. TRENDS IN CONTRACTING

Respondents were asked to identify current trends in contracting. Many of the issues raised were also listed in the benefits and challenges section above, particularly around inappropriate risk transfer, and clearly defining roles and responsibilities.

Respondents were concerned with the need to undertake significant re-negotiation of client contract conditions at novation. Respondents identified a trend where clients do not choose to require novation of an existing contract, but let contractors propose their own.

Reports were made of commercially aggressive tactics by builder at novation, including withholding payment of accrued fees in order to change contract terms and transfer risk. As well, respondents reported that they feel bullied into signing agreements under threat that

“other Architects will sign if we won’t and we will lose the job”.

Respondents are seeing shorter times to turn documents around and more aggressive value management.

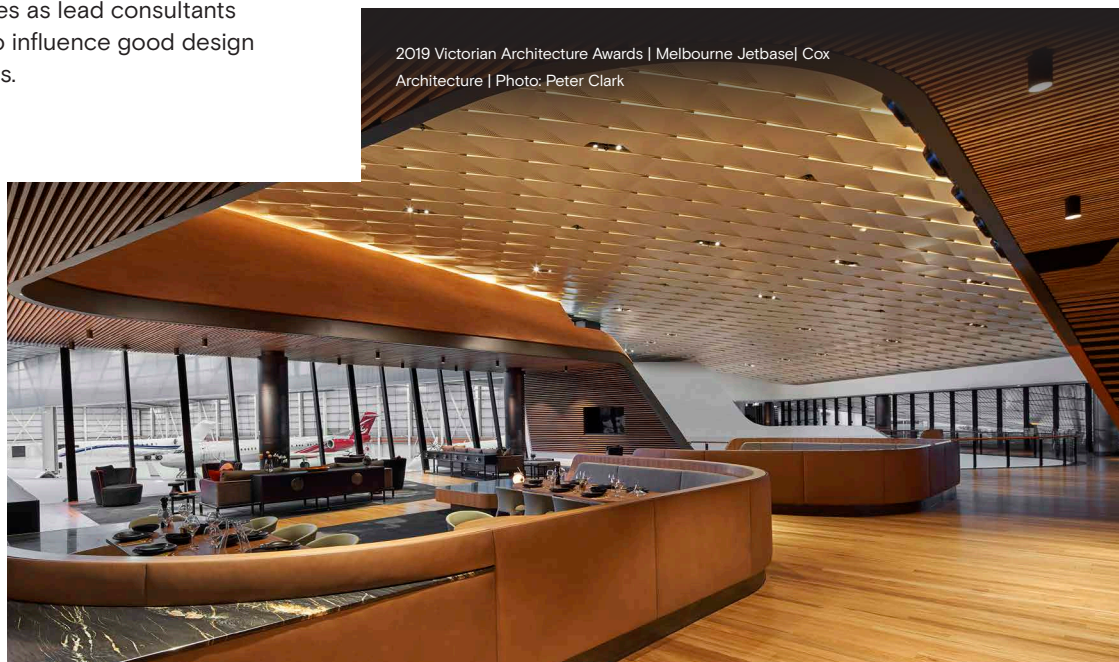
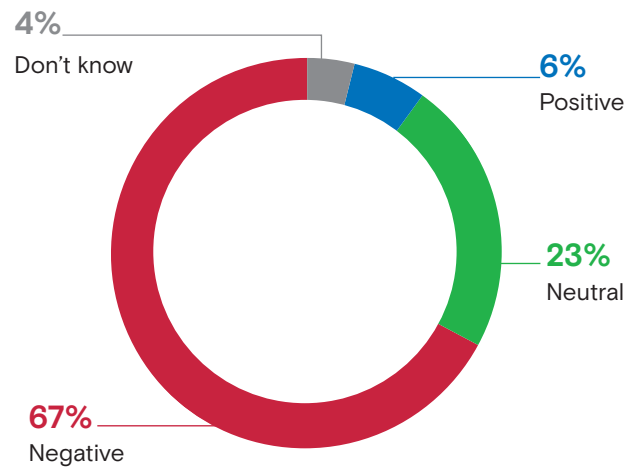
Novation earlier and earlier in the design process was a major trend, including novation at 100% schematic design.

A strong trend reported by many respondents is the changing role of the architect, where architects have increasing responsibilities as lead consultants yet have diminishing power to influence good design and constructability outcomes.

### 8. IMPACT OF CONTRACT NEGOTIATION ON OUTCOME FOR END USER

67% of respondents believed that contract negotiations impacted negatively on their ability to deliver quality outcomes for the general public and end user. Only 6% believed contract negotiations produced a positive outcome.

Figure 5. Impact of contracting to deliver quality outcomes



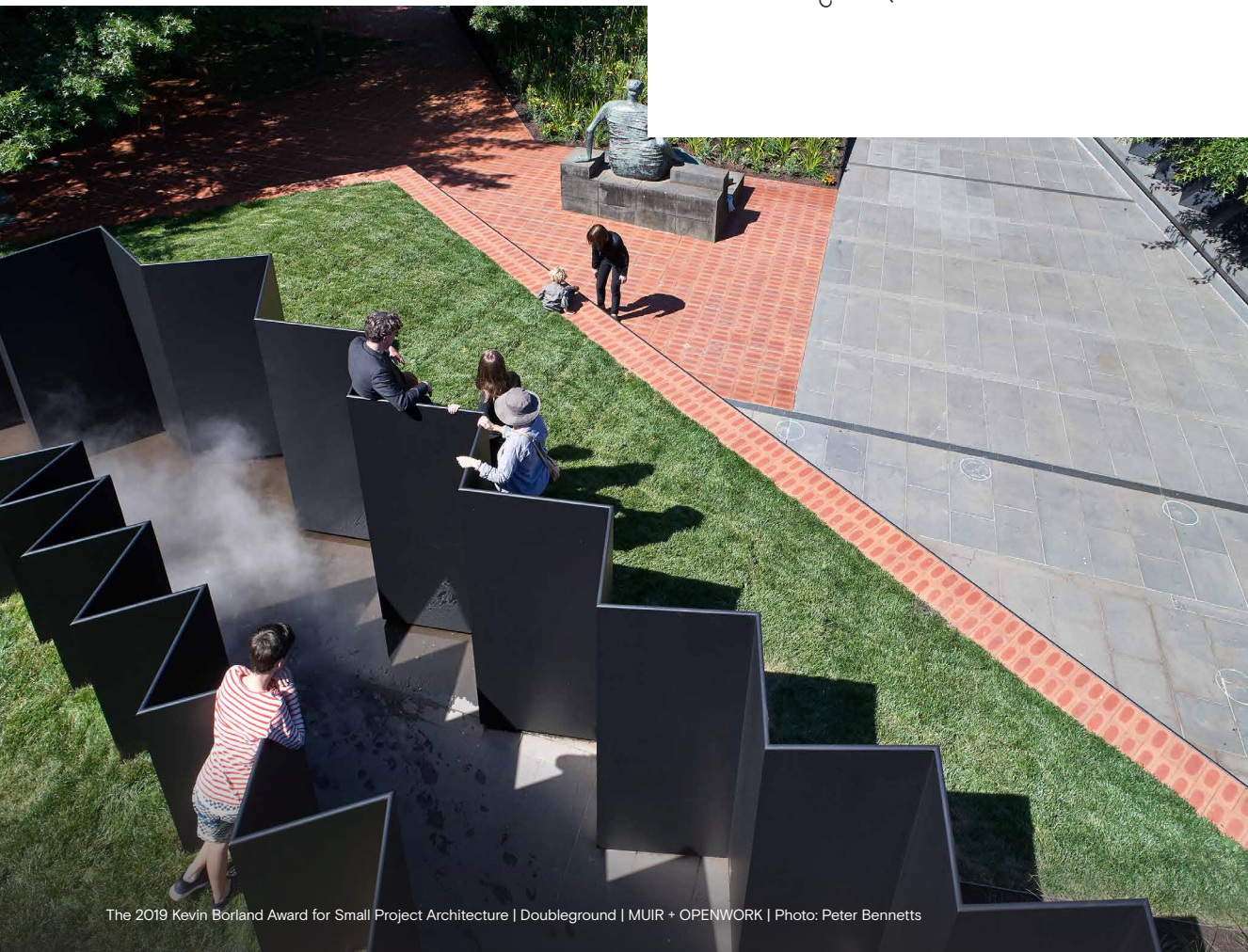
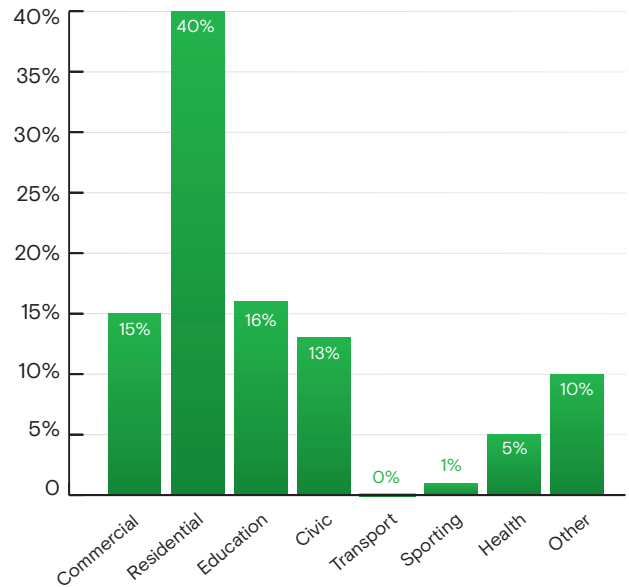
### 9. PROJECT INFORMATION

The majority of projects were residential, followed by education and commercial buildings. Civic buildings were well represented. Health buildings are only 5% of the building typology, but these are infrequently offered. Other building types included business events, public, student accommodation, mixed residential, retail, commercial, aged care, and an administration and media centre.

### 10. SECTOR

Projects were predominantly from the private sector (57%), followed by government (24%) and institutional clients (19%).

Figure 6. Typology



### 11. INFORMATION PROVIDED BY CLIENT AND INPUT BY ARCHITECT IN DECISION MAKING

Respondents were asked whether they were aware that the contract would be novated when they submitted their tender. 61% of respondents were aware, and 18% assumed that it would be novated. 18% were not aware that the contract would be novated and 5% didn't know.

In terms of the original client advising at what stage of design/documentation the contract would be novated at the time of the architect submitting their tender, 60% were informed, whereas 32% were not.

Clients provided an overall project program or timeline to completion of construction on which architects could base their fees 54% of the time. 38% of respondents were not informed.

59% of respondents reported that on submission of a fee proposal, the client, provided a total construction cost budget in association with a brief. 37% reported that this was not provided.

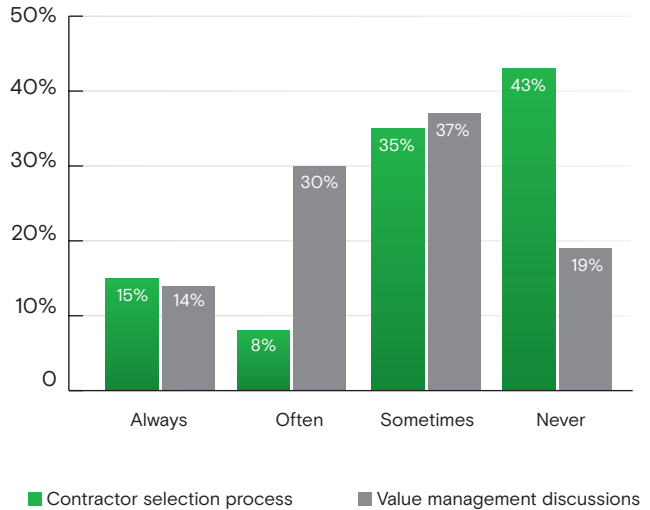
Nearly half of the respondents (49%) reported that they were provided access and ability to provide strategic advice on the cost plan in developing the design. 44% of respondents were not given this opportunity.

Only 34% of respondents reported that they were provided the total construction cost for the successful tenderer when the project was tendered to contractor.

40% of respondents reported that total construction cost at tender were higher than the original total construction cost, whereas 22% said it was not higher and 36% did not know. Where the total construction cost was higher than the original, only 27% of respondents were able to fully (7%) or partially (18%) increase their fees to suit prior to novation of the contract. 59% were unable to increase their fees.

Respondents were in the main only sometimes (35%) or never (43%) included in discussions regarding contractor selection during tender and contractor award. Discussions on value management during tender and contract award saw inclusion in discussions rise with 14% stating they were always included an 30% reporting they were often included.

Figure 7. Inclusion in discussions



56% of respondents either knew (31%) or partially knew (25%) the other consultants' scope of works in order to determine what was assumed in their own scope of works. 40% were not aware of the other consultants' scope of works.

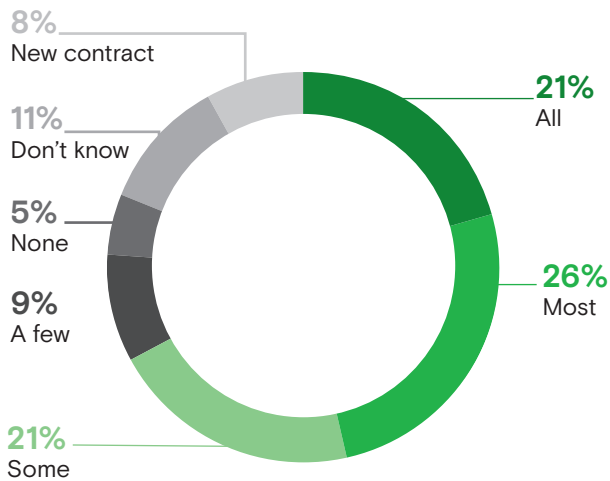
63% of respondents had full (44%) or partial (19%) access to the principal's project requirements (PPR) prior to novation. 29% did not, and 8% did not know.

50% of respondents had either full (33%) or partial (17%) access to the design and construct contract documents and/or were aware of what specifically constituted the contract documents by which the contractor was engaged. 44% of respondents did not have access and 6% of respondents did not know.

## 12. CONTRACTS AND CONDITIONS

When asked whether key terms and conditions, including exclusions, were carried over into the novated contract when the original contract was novated. There was a very low number of respondents that reported that all (21%) or most (26%) of the key terms and conditions were carried over into the new contract.

**Figure 8. Contract conditions**

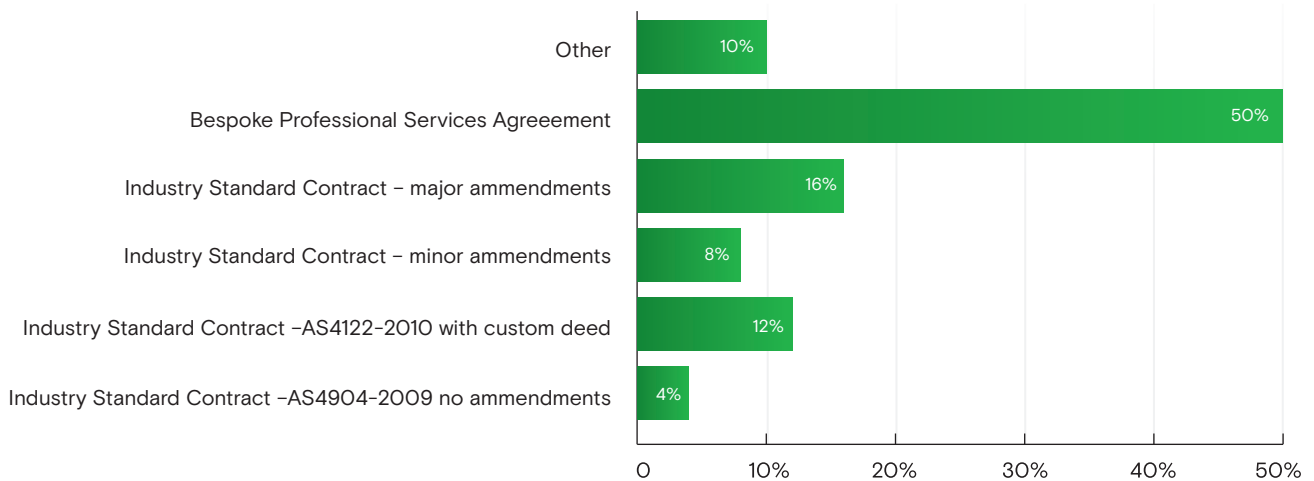


Respondents were asked if they were able to negotiate key design variations into the overall consultant scope and fees at the time of novation, such as to include value management, purchaser variations, tenancy fit out co-ordination, substitution analysis, number of redesign options, and/or other potential anticipated changes. Only 22% said they were able to negotiate key variations in full. 45% of respondents were able to partially negotiate design variations, and 30% were unable.

Overwhelmingly, respondents reported that a bespoke professional services agreement was used in the novation process when compared to other contract types.

43% of respondents reported that the novation deed had a clause which allowed the architect to contact the Principal or Principal's representative if there was a significant departure from the brief. 36% of respondents did not have this clause and 21% of respondents did not know what was in the deed of novation.

**Figure 9. Types of contract**

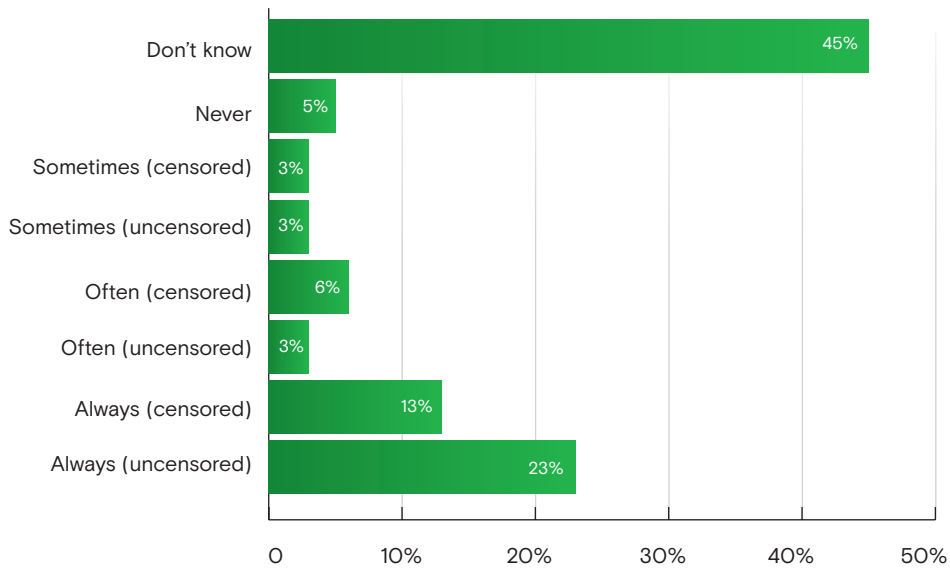


### 13. CLIENT RELATIONSHIPS AFTER NOVATION

After being novated to the contractor, only 21% of respondents felt they were able to effectively fully protect the original principal's interests. 56% of respondents felt they were able to only partially protect the original principal's interests and 21% said they felt they could not protect the original principal's interests.

45% of respondents did not know whether monthly reports issued to the contractor during novation were passed on to the original client. 23% of respondents stated that they were always passed on to the client in an uncensored state, but 13% reported that while they were always passed on, they were censored by the contractor.

Figure 10. Monthly reports

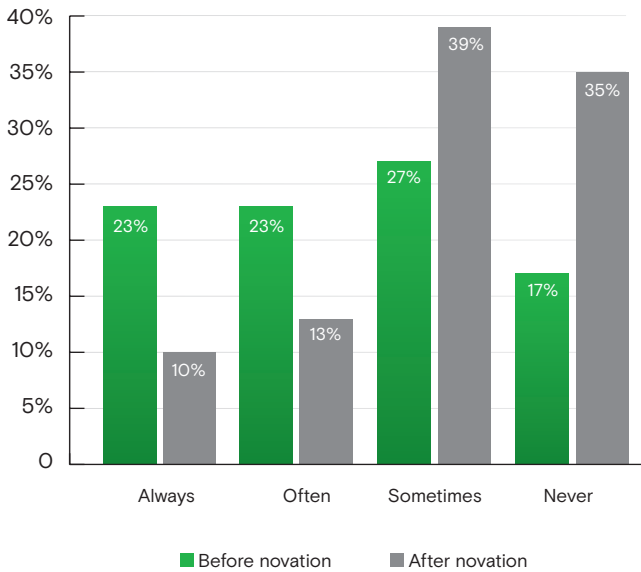


### 14. INVOLVEMENT IN DECISION MAKING BEFORE AND AFTER NOVATION

Only 46% of respondents reported they were always (23%) or often (23%) included in strategic decision-making processes at project control group meetings before novation. 27% said they were sometimes included and 17% were never included.

After novation, the percentages change quite substantially to 10% of respondents reporting they were always included, 13% said they were often included, and 39% said they were sometimes included. 35% said they were never included.

Figure 11. Inclusion in strategic discussions



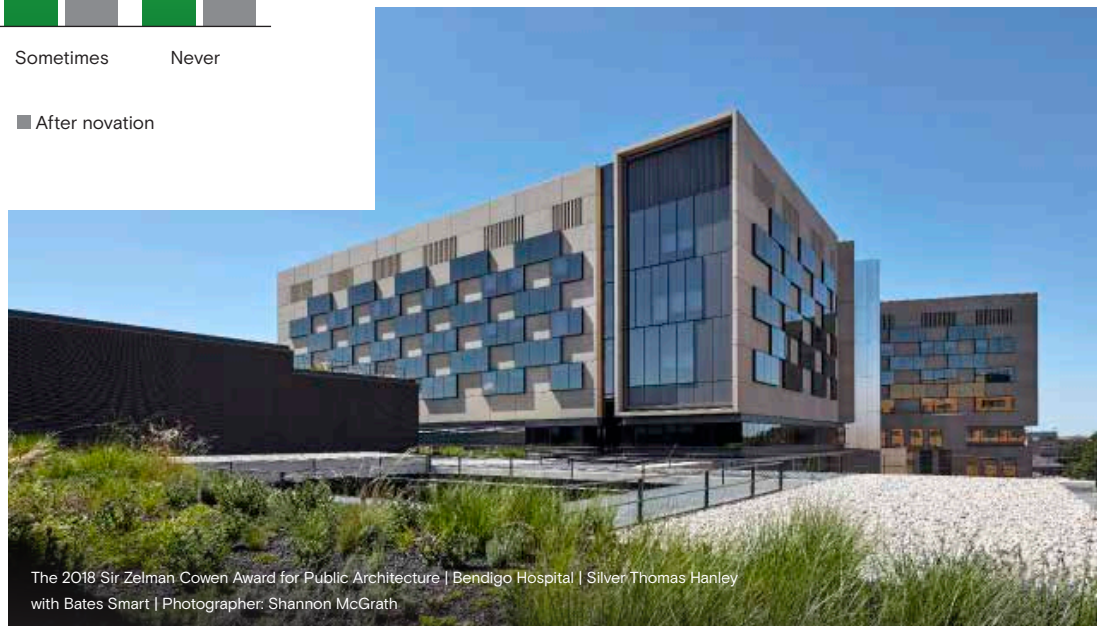
### 15. CONSULTANTS AND SUB-CONSULTANTS

Only 40% of respondents were responsible for engaging major engineering consultants. 57% reported that they did not, aligning with reports of trends for builders to commission engineering and other consultants.

When asked whether the appropriate consultants and sub-contractors available at the time needed for construction documentation, 61% said they were always (29%) or often (32%) available. 36% reported that they were sometimes available and 15% reported they were rarely (11%) or never (4%) available.

### 16. TIME PRESSURES AND OTHER DEMANDS AFTER NOVATION

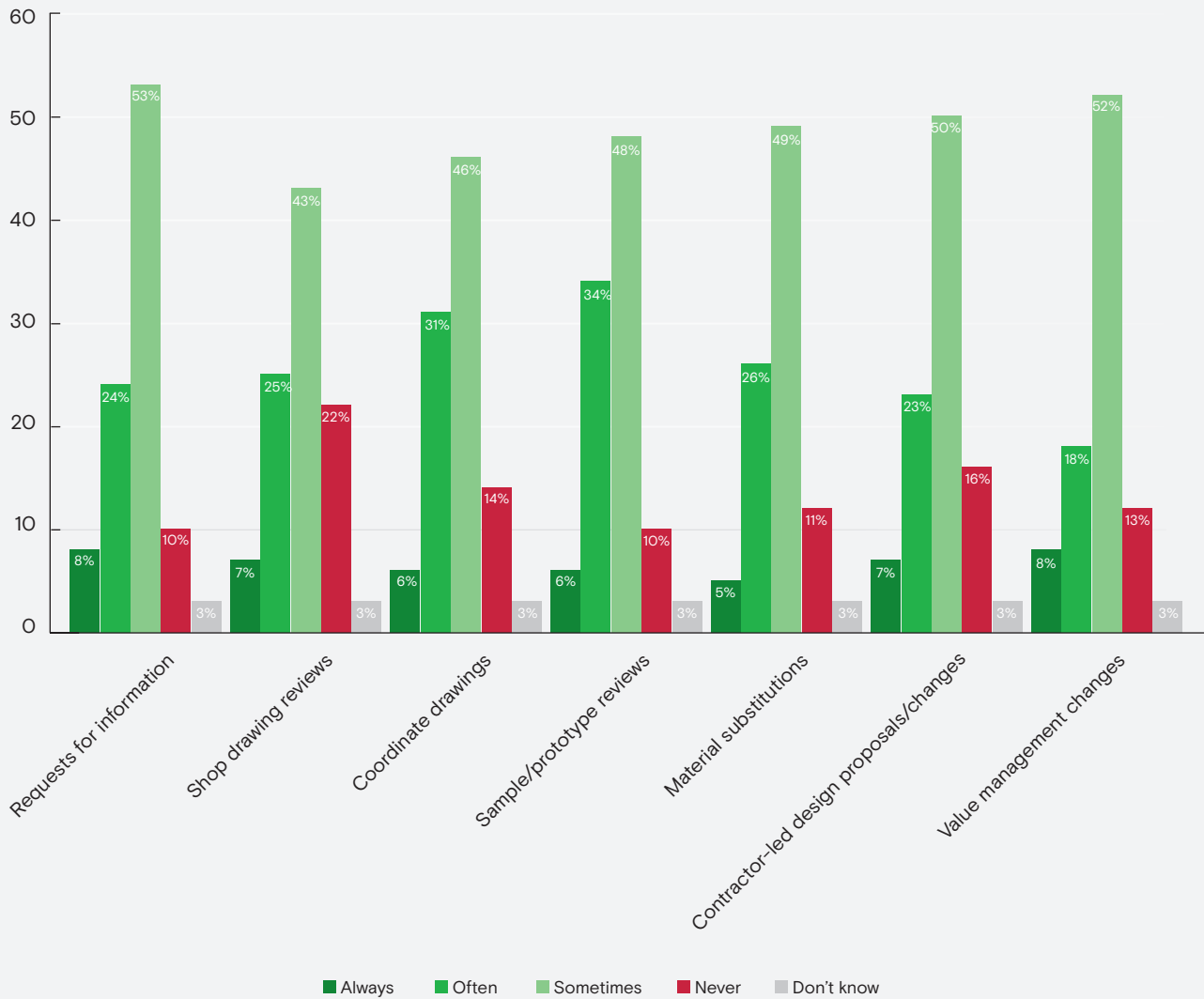
Respondents reported that overall, they were only sometimes allowed sufficient time for research, co-ordination and assessment of requests for information; shop drawing reviews; coordinate drawings; sample/prototype reviews; material substitutions; contractor led design proposals/changes; and value management changes





SUMMARY OF FINDINGS (CONTINUED)

Figure 12. Time allowed for research, coordination and assessment

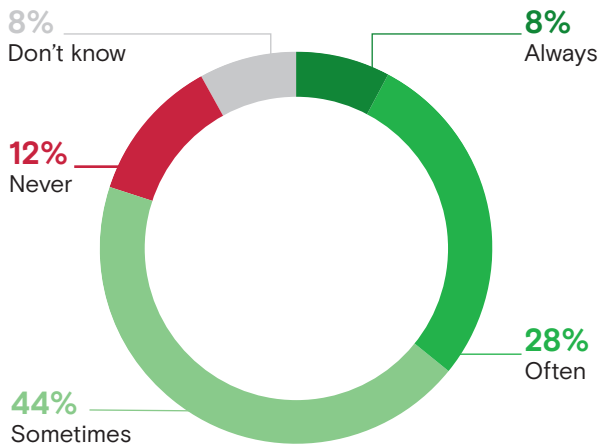


	Always	Often	Sometimes	Never	Don't know
Requests for information	8%	24%	53%	10%	3%
Shop drawing reviews	7%	25%	43%	22%	3%
Coordinate drawings	6%	31%	46%	14%	3%
Sample/prototype reviews	6%	34%	48%	10%	3%
Material substitutions	5%	26%	49%	11%	3%
Contractor-led design proposals/changes	7%	23%	50%	16%	3%
Value management changes	8%	18%	52%	12%	3%

## SUMMARY OF FINDINGS (CONTINUED)

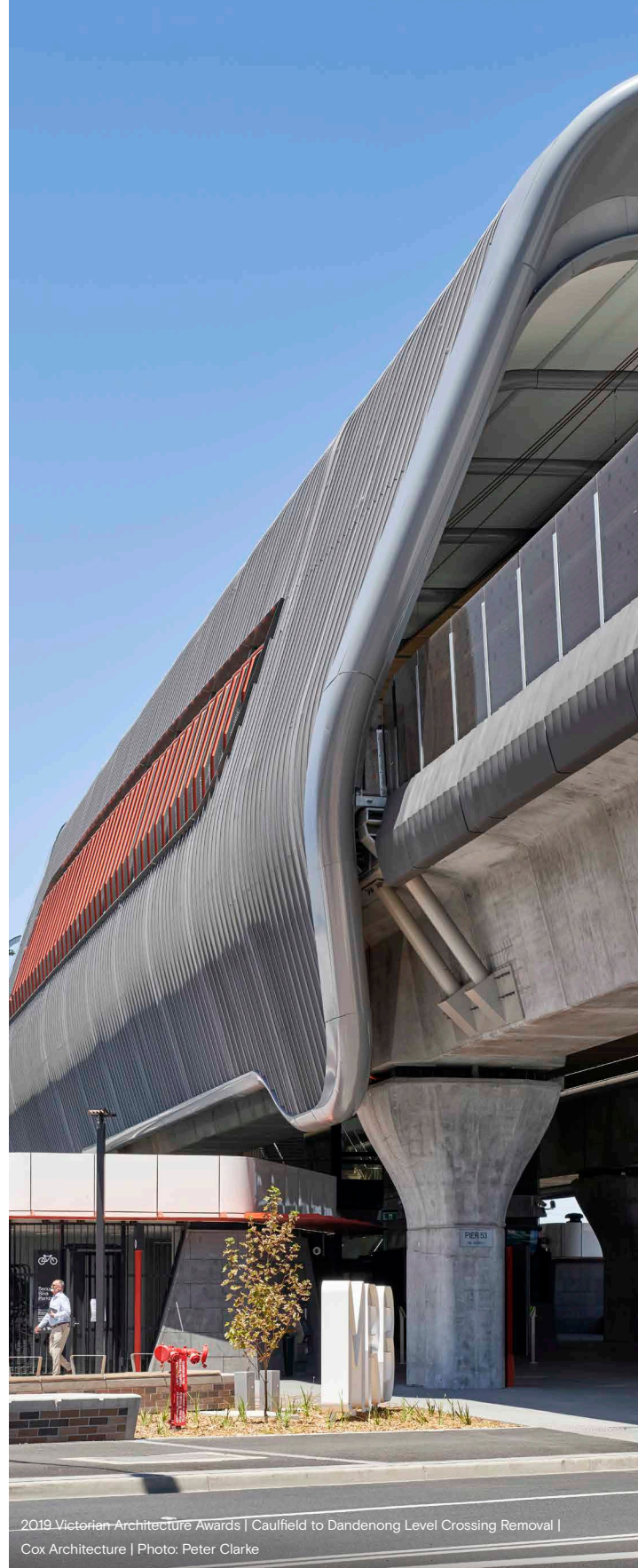
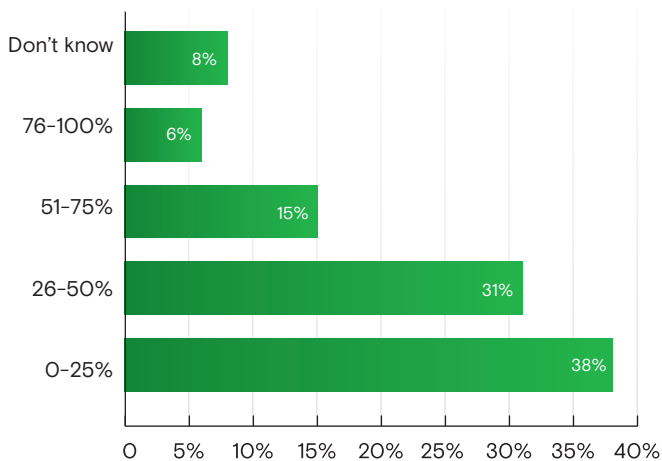
Respondents reported that they were often (28%) or sometimes (44%) asked to re-document or make significant changes to drawings that should have been a variation but were not granted by the contractor.

**Figure 13. Re-documentation without reward**



The percentage of finishes and fixtures changed from the original tender after novation were reported by 38% of respondents as between 0 and 25%, followed by 31% of respondents reporting 26 to 50% of changes being made.

**Figure 14. Changes to fittings and finishes**





2019 Victorian Architecture Awards | Caulfield to Dandenong Level Crossing Removal | Cox Architecture | Photo: Peter Clarke

## 17. CONTRACTOR RELATIONSHIPS

41% of respondents reported that the contractor applied undue pressure for approval during sample reviews/substitutions always (14%) or often (27%). 41% of respondents reported undue pressure being applied sometimes. Only 13% of respondents reported never having experienced undue pressure.

When asked whether the contractor provide robust and high-quality design management throughout novation, only 27% of respondents reported always (3%) and often (24%). 40% of respondents felt quality design management was provided sometimes, with 26% reporting that it was never provided, or they are unsure.

Contractor’s design management affected the quality of the project for the end user in a negative way according to 48% of respondents. 12% thought there was a positive impact and 34% thought the impact was neutral.

37% of respondents believed that novation allowed for improved construction methodology for the project, however 42% disagreed. 21% of respondents did not know.

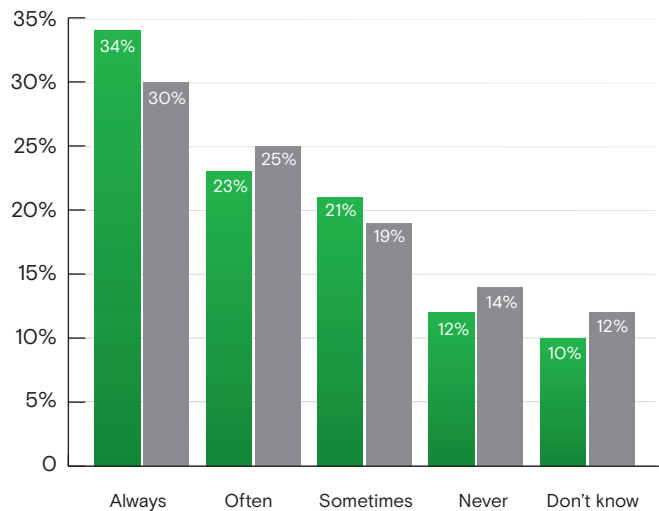
Respondents were asked if novation reduced the level of detailing (i.e. quality) in the project. 57% reported that there was a reduction, and 34% believed there was no reduction.

When unforeseen co-ordination issues occurred on site that required architectural input, 45% of respondents reported that they were always (11%) or often (34%) given the opportunity to document and co-ordinate the solution with other consultants. 45% of respondents said this occurred some of the time, and 10% responded never/don’t know.

When asked whether respondents were allowed free access to all relevant parts of the site to carry out their duties, 68% reported that they were either always (47%) or often (21%) allowed free access, while 21% were given free access only some of the time. 10% responded never/don’t know.

Respondents reported that they were able to accurately report around 55% always or often on what was occurring during construction without undue pressure or influence by the contractor in preparing and issuing monthly reports and monthly certificates.

Figure 15. Reporting



## 18. PROJECT COMPLETION

The project was reported as completed on time by 44% of respondents. 37% reported that it did not finish on time and 21% of respondents did not know. The project was reported as completed on budget by 44% of respondents. 26% reported that it did not finish on budget and 30% of respondents did not know.

# CONCLUSIONS

The major issues of concern are identified below. These will provide a basis for the Institute to further work and consult widely with industry.

## 19. RELATIONSHIP BETWEEN ARCHITECT AND BUILDING CONTRACTOR

It was clear from the commentary offered in the survey responses that successful novation is possible and supported by the architectural profession. Many benefits were described, particularly around better buildability because of early involvement with the building contractor.

However, the success of the project appeared to rest on the relationship between the building contractor and the architect and the way in which the novation is managed with regard to fees, terms and at what point the architect is novated. Architects have reported that the process of novation and change in relationship has produced some negative results for project outcomes. 67% of respondents believed that contract negotiations impacted negatively on their ability to deliver quality outcomes for the general public and end user.

Other issues arise when the relationship is transferred to the building contractor. For instance, respondents reported that overall, they were only sometimes allowed sufficient time for research, co-ordination and assessment of requests for information; shop drawing reviews; coordinate drawings; sample/prototype reviews; material substitutions; contractor led design proposals/changes; and value management changes. This adds time pressure to the process and can result in negative project outcomes because adequate time has not been allowed to address these issues.

## 20. UNDERSTANDING NOVATION

The incidence of novation of an architect's contract to a builder under a design and construct contract is increasing. Most architectural practices in the survey derive over 50% of their income from this contracting method. However, the survey results clearly show that there is a misunderstanding of "novation" by all players in the industry, particularly around roles and responsibilities under a novated contract in a design and construct building process.

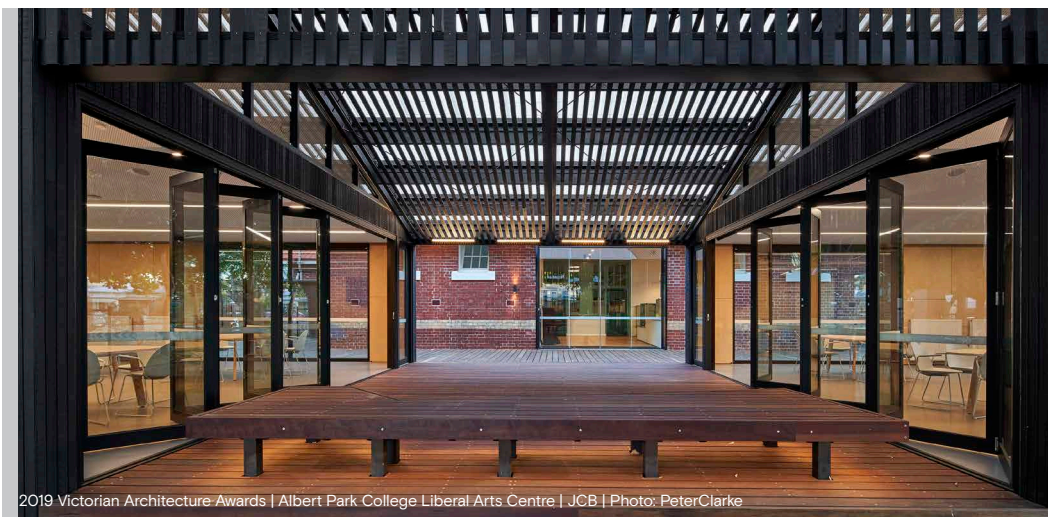
Novation occurs when the contract between the architect and the principal is extinguished and is replaced by a contract with a new client (the building contractor) usually on the same terms, bringing about a transfer of contractual rights and obligations.

There was a very low number of respondents that reported that all (21%) or most (26%) of the key terms and conditions were carried over into the new contract. This indicates a need for a code of novation.

Respondents were asked whether they were aware that the contract would be novated when they submitted their tender. 61% of respondents were aware, and 18% assumed that it would be novated.

In terms of the original client advising at what stage of design/documentation the contract would be novated at the time of the architect submitting their tender, 60% were informed, whereas 32% were not.

The survey results show that in this novation process, building contractors are renegotiating contract conditions with the architect at the time of novation, at times, to the detriment of the architect.



2019 Victorian Architecture Awards | Albert Park College Liberal Arts Centre | JCB | Photo: PeterClarke

## CONCLUSIONS (CONTINUED)

Architects have reported that there are substantial benefits outside of pure novation to the project and outcome that is passed on to the principal, end user and public. They would like to remain in a relationship with the original client, albeit in a different type of relationship, on the basis that they see themselves as representing the principal's interests. After being novated to the contractor, only 21% of respondents felt they were able to effectively fully protect the original client's interests. In terms of protecting their client's interest, respondents felt that it was important that their reports were passed on to the client, however, 45% of respondents did not know whether monthly reports issued to the contractor during novation were passed on to the original client.

There is scope for further research, education and engagement with the architectural profession to both clarify their understanding of novation and provide some stronger safeguards in their contracts and novation deeds. These aspects could be refined during the process of establishing a code of novation.



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JCB | Photo: PeterClarke

## 21. VARIATIONS TO ORIGINAL INTENT/ PROJECT OUTCOMES

In terms of quality outcomes, architects work through the desired outcomes with the principal prior to novation. They achieve an understanding of what is required within certain budget restraints. When novated, the building contractor is often more focused on reducing costs, which is not always achieved.

For instance, the percentage of finishes and fixtures changed from the original tender after novation were reported by 38% of respondents as between 0 and 25%, followed by 31% of respondents reporting 26 to 50% of changes being made. The project was reported as completed on time by 44% of respondents. 37% reported that it did not finish on time. The project was reported as completed on budget by only 44% of respondents.

Respondents believed that they could maintain the integrity of the design intent if they had greater control over quality control. Different perspectives between the building contractor and the architect were believed to lead to less than optimal outcomes. Material substitution was seen as a big issue.

Architects believe that better outcomes would be achieved if they were involved in strategic decision-making processes at project control group meetings before novation. Only 23% of respondents reported they were always included. After novation, the percentages change quite substantially to 10% of respondents reporting they were always included, and 35% said they were never included. This dramatic drop off in an architect's involvement in strategic decision making through the project control group meetings points to a missed opportunity for architects to add value to these strategic conversations. The architect is the lead consultant with legal responsibilities for the outcome of the project, and therefore requires access to the information necessary to execute these responsibilities.

Providing information to architects at the beginning and through the project process can have enormous benefits, particularly on overall project program or timeline to completion of construction. Realistic fees can be set, and resources allocated to reflect the true scope of the project requirements. If not provided, architects may be forced to reduce their scope of work, thereby affecting project outcomes.

## CONCLUSIONS (CONTINUED)

Very often, the total construction cost at tender is higher than the original total construction cost. 59% reported that they were unable to increase their fees to suit the increased workload expected as a result of the increase. The regular inability to adjust the fee to suit the actual construction cost and therefore scale of the project often results in less revenue which directly relates to insufficient staff numbers being allocated to the project. The inability to provide adequate resources to the project leads to adverse health and well-being outcomes for staff engaged on the project. For instance, if a project was estimated at \$100m and increases to \$150m, this could result in a requirement for 1 extra registered architect full time during the entire construction documentation and construction services phase.

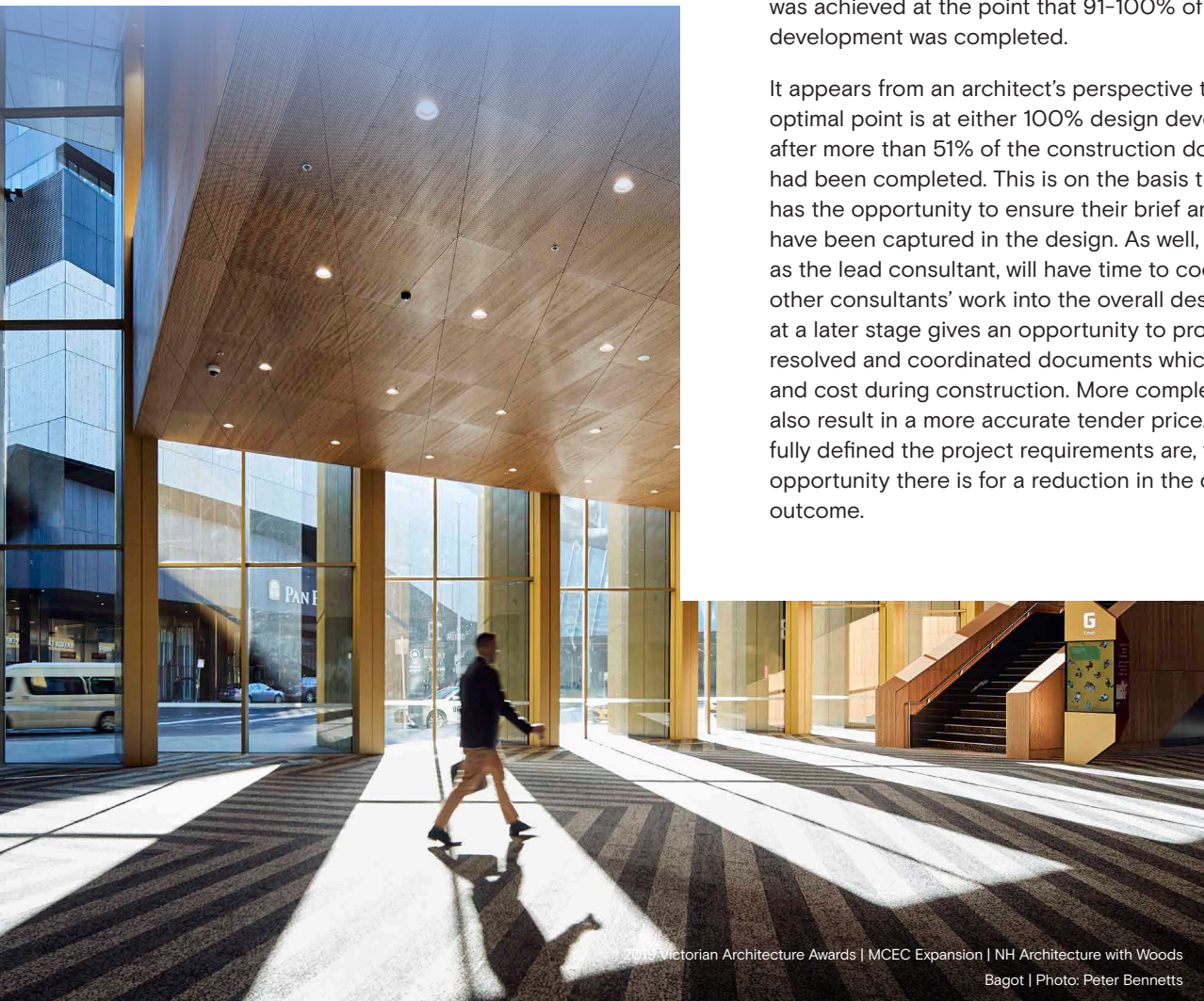
## 22. OPTIMUM POINT OF NOVATION

A major issue that needs to be further investigated is the optimum point during the design and documentation phases that novation should occur and to gain an agreed definition of each phase. There is no consistent practice. The point where novation procures better outcomes for the general public and end user will depend on the scale of project, project type, time constraints, and principal's expectations.

For instance, the survey described three phases, being schematic design, design development and contract documentation.

The point in the documentation phase where novation procures better outcomes for the general public and end user was considered by 37% of respondents to be when novation occurred after more than 51% of the construction documentation had been completed. 26% of respondents believed the better outcome was achieved at the point that 91-100% of the design development was completed.

It appears from an architect's perspective that the optimal point is at either 100% design development or after more than 51% of the construction documentation had been completed. This is on the basis that the client has the opportunity to ensure their brief and aspirations have been captured in the design. As well, architects, as the lead consultant, will have time to coordinate the other consultants' work into the overall design. Novation at a later stage gives an opportunity to provide a set of resolved and coordinated documents which saves time and cost during construction. More complete documents also result in a more accurate tender price. The more fully defined the project requirements are, the less opportunity there is for a reduction in the quality of the outcome.



2019 Victorian Architecture Awards | MCEC Expansion | NH Architecture with Woods Bagot | Photo: Peter Bennetts

## CONCLUSIONS (CONTINUED)

### 23. ROLES, RESPONSIBILITIES AND RISK

Risk was the main challenge mentioned by respondents under novated contracts. The principle of allocating the risk to the best person to manage it appears to be eroded.

The survey clearly shows that the responsibilities of the architect changes under novated contracts, where architects have responsibilities as lead consultant yet have diminishing power to influence good design and constructability outcomes.

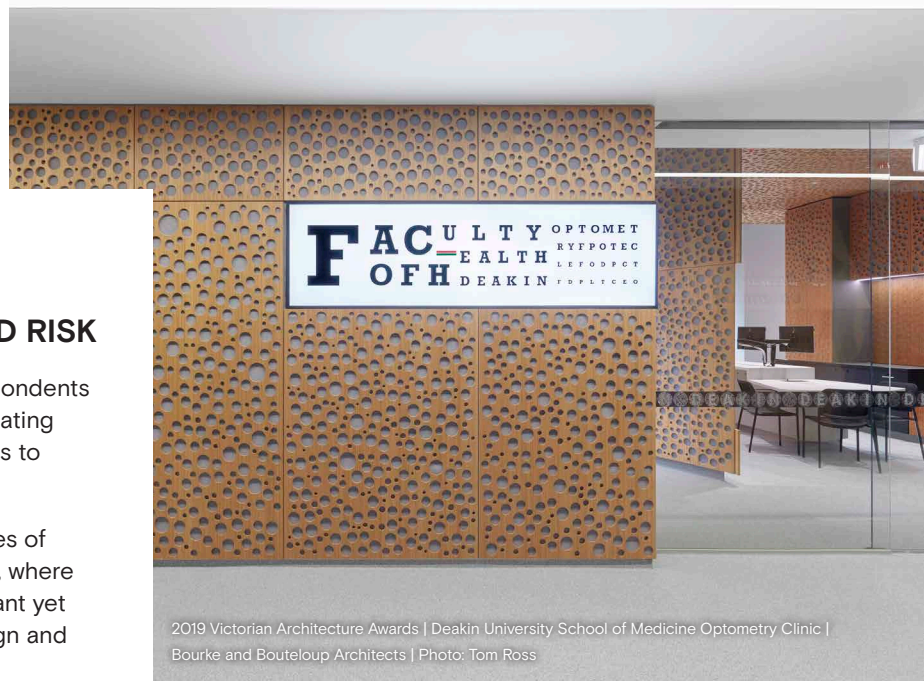
In the schematic design phase, it is not unusual for an architectural practice to be asked to provide all documentation for all required approvals, permits and licences from all regulatory authorities and organisations and to coordinate and administer the work of all consultants to produce an integrated coordinated and accurate design and documents package which are fit for efficient construction purposes within accepted industry practice and standards.

The need to take on more risk/responsibility for sub-consultants, even where they are appointed by the contractor, was highlighted in the survey as a major concern.

At the design development phase, architectural practices are often asked to undertake the detailed design of the project incorporating and coordinating the requirements of consultants and regulatory authorities and fully defining all building elements, finishes, materials, fixtures and finishes. They are required to make comment on and make recommendations on all aspects of design development and selection/substitution of materials and systems as appropriate, and to develop fully detailed specifications and detailed drawings of all architectural finishes within the approved budget.

Not being included in key decision making or lack of access to critical information to allow them to perform their role was a key finding of the survey. This places architectural practices in a high risk situation.

The survey results highlighted a lack of access to the cost plan, project control group meetings, the scope of work agreed to by consultants and the contractor's brief. The survey also highlighted that there was limited access to the site to enable oversight of quality, and limited opportunity to prevent substitutions of materials.



2019 Victorian Architecture Awards | Deakin University School of Medicine Optometry Clinic | Bourke and Bouteloup Architects | Photo: Tom Ross

There was mention of unfair and onerous consultant agreements that place too much responsibility on architects, but do not bestow any authority on architects to advise or instruct. Another issue was instructions by the builder to change documentation or draw up details that the architect does not recommend.

Risk to architects such as set-off clauses and indemnification of aspects that architects have no ability to control or manage was a challenge. It was reported that despite efforts to negotiate these clauses, it is usually only clauses that affect professional indemnity insurance that are successfully resolved.

### 24. CODE OF NOVATION

The issues outlined above are this experienced or observed by the architectural profession. The Institute is interested in an approach where we are actively engaging with industry research to understand how we can make holistic improvements to ensure that we are providing safe and quality built outcomes for our communities and consumers.

The intent of this initial survey is to assess where further research should be undertaken. This research would engage directly with industry partners including clients, contractors and consultants to achieve a broader understanding.

83% of respondents believe that a code of novation would be beneficial in improving the quality of projects delivered through a novated contract. It is in the interests of industry that this concept be investigated more fully.

# GLOSSARY

**Buildability:** Buildability is a pre-construction exercise that assesses designs from the perspective of those that will install components and carry out the construction work.

**Construction documentation:** During construction documentation the architect will prepare drawings and specifications that will be used in the construction process.

**Design Development:** During the design development phase the architect will develop the approved concept design and provide documentation to explain it to the client, coordinate the work of specialist consultants, provide a schedule of proposed finishes, review the developed design against the budget and coordinate, and prepare an updated estimate of the cost of the works.

**Novation:** Novation is the substitution of a new contract for the old one, usually with the same terms and conditions. The new agreement extinguishes the rights and obligations that were in effect under the old agreement. All parties must agree to the novation.

**Schematic Design:** The design concept is advanced to a level of legibility sufficient to gain client approval, receive consultant advice and provide the basis for the preparation of a reasonable estimate of cost. Client approval at the end of this phase leads to preparation of the detailed design (design development)

**Value management:** Value management at its most basic is generally understood to be identifying and removing unnecessary costs

