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Australian Construction Law Newsletter

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CONTRIBUTIONS

Contributions to Australian Construction Law Newsletter are welcome. Articles may be submitted to Construction Publications for consideration by posting to PO Box 1341, Crows Nest, NSW, 2065 or by faxing to 02 918 7153. Please indicate that items are for consideration for Australian Construction Law Newsletter.

1. DEVELOPMENTS IN INDUSTRIAL RELATIONS

The following item on the recent Arbitration Commission Inquiry and the potential future directions of industrial relations in the industry has been included in the Newsletter for interest and also because of the importance of I.R. to the efficient delivery of projects and to contractual issues such as cost adjustment.

Industrial relations in the building and construction industry has been under intense scrutiny during 1988. An Arbitration Commission Inquiry has encouraged all the major players to review their philosophies. The outcome will affect owners and contractors alike.

The Australian Conciliation and Arbitration Commission announced in December 1987 that it was going to conduct an Inquiry into the Building and Construction Industry. The Inquiry had a strange history and was an unusual and perhaps unprecedented proceeding. It was to be conducted by a five-person Full Bench with

Commission President Maddern presiding; clearly the Commission did not treat its task lightly.

The Inquiry suffered, however, from a lack of direction. Some of the parties appearing before the Inquiry wanted it to concentrate on fairly narrow issues of particular concern to them. Others saw the Inquiry as a threat and did their best to play down the need for any interference by the Commission in the status quo.

Unlike a judicial inquiry, the Commission had no Counsel assisting. It had to rely entirely on the evidence and submissions put forward by the various employer groups, unions and governments. It was hardly surprising that the material put before the Inquiry covered a great deal of territory.

Most of this material was presented to two Commissioners who were part of the five-man bench. The Bench delegated to the two Commissioners the task of conducting a fact-finding investigation. They published their report on 9 September 1988. They drew few conclusions and made no recommendations; indeed, their report was little more than a summary of the evidence and submissions put by the various parties.

The Full Bench subsequently began hearings based on the report and will probably issue its findings early in 1989. It is already illuminating, however, to identify the extensive common ground which has emerged during the course of the Inquiry about the desirability of substantial change to the way wages and conditions of employment are fixed in the building and construction industry.

It is now obvious that major changes will occur. There is still a question mark over the extent to which the Commission will take the lead in imposing change, but this will only affect the pace at which change occurs. The direction of the change can be predicted with almost total certainty.

The key aspects of change will be as follows:

- consolidation of awards;
- rationalisation of conditions of employment;
- recognition of over-award payments.

The number of awards operating in the building and construction industry has been a source of irritation for many years. Even at its most benign, the existence of many awards causes inefficiency and unnecessary duplication of work. At worst, it can be the trigger for major industrial confrontation. It has been a major factor in some of the industry's worst demarcation disputes. It encourages competition amongst unions to see who can achieve the most benefits; it fosters a "sense of empire" in both unions and employer groups, leading them to protect their "territory" and extend it where possible.

A number of the major parties in the industry from both the employer and union side are committed to consolidating the existing awards. In part, this is a legacy of the deregistration of the BLF. That most militant union was also the most enthusiastic in its moves to extend its coverage. Other unions are more prepared to resolve their differences by discussion and negotiation. The reallocation of BLF work to other unions has also left a rather untidy award structure which is an obvious target for review.

It is therefore likely that in the near future there will be a single award covering carpenters, bricklayers, painters, plasterers, builder's labourers, plant operators and crane drivers. There is a substantial body of thought in favour of extending this award to cover everybody on non-residential building construction (e.g. plumbers, sheetmetal workers, sprinkler fitters, electricians and lift mechanics). Many people also support extending this award to cover everybody in all sectors, effectively covering the whole building and construction industry with a single award.

The difficulties of achieving a single award should not be under-estimated.

It is one thing to agree about the theoretical benefits of one award; it is quite a different proposition to have a large group of diverse unions and employer groups agree on what the contents of that award should be.

It is more likely that there will be gradual progress towards greater uniformity and consistency within awards, than a sudden move to a single award. There is no doubt that different employment conditions applicable to people working side by side on a construction project are a common and fruitful source of disputes. In most cases, these differences have no objective justification: they are merely the outcome of separate awards being dealt with over many years by different employers and unions (and often different members of the Commission).

Yet, here too, progress will not be easy. Employers will be keen to prevent an exercise aimed at achieving uniformity becoming a "levelling-up" process in which all workers receive the highest common denominator of currently applicable conditions. By the same token, unions will be reluctant to give up special benefits which, while anomalous viewed against the industry as a whole, may have been achieved after an intense struggle and over severe opposition. Once again, the pace of change is likely to be determined by the Commission itself. If it is prepared to act of its own motion to break deadlocks by arbitration, it can keep things moving. If, on the other hand, it decides only to act as a conciliator, the parties could well end up in inconclusive debate for eternity.

The area where change seems both inevitable and imminent is in wage fixation. For many years, all wages and allowances paid on a building site have theoretically been fixed by the Arbitration Commission. The reality has been vastly different to the theory. Over-award payments have become widespread. It is recognised that many so-called "site allowances" are nothing more than disguised over-award payments.

This breakdown in the system of wage regulation has reached the stage where all parties are concerned to do something about it. The unions are conscious that ever-inflating benefits on major projects minimise their ability to negotiate industry-wide increases for their total membership. Employers know that the more industry standards become subject to wholesale re-negotiation at site level, the more the industry is marked by instability and ultimately anarchy. And the Commission itself is showing every sign of wanting to disentangle itself from a discredited process which poses a constant threat to the continued viability of a centralised wage-fixing system.

Three basic reform options are available. The first is to try to re-jig the existing approach to make it work effectively, i.e. find a way to restore a total regulatory role to the Commission. The second is to accept that actual wages and conditions of employment will have to be negotiated at site level, and that the industry awards should consequently be trimmed back to providing bare minimum standards.

Nobody has put up a convincing proposition for restoring the Commission's pre-eminent role in regulating wages. The Commission itself shows no signs of devising its own new approach, although it is always possible that it will do so. It is therefore unlikely that the first option will be taken up.

The second is likewise unlikely as a deliberate choice. It would amount to deregulation of the industry. While pure economic theory might favour that approach, it would not appeal to either contractors or investors, because of the instability and unpre-

dictability of labour costs which would inevitably result. Nevertheless, it might be the only avenue left, if the union movement (and employers) prove themselves unable to regulate the industry effectively in a collective way.

Some form of collective self-regulation is the third option and it seems certain at least to be given a fair trial. Virtually all the major parties have supported the concept of a secondary wage or over-award payment to apply on major commercial and industrial building projects. It is also common ground that this payment should be the exclusive source of wages and allowances over and above those provided by the relevant awards. There are different views within the industry about exactly how this should be done and what role (if any) should be played by the Arbitration Commission. But these are essentially points of detail, not principle, and will ultimately be resolved by discussion or force of circumstance.

It is likely then that within 12 months there will be quite a new approach to wage-fixing on major building work. It is quite possible that site allowances and site agreements as they are known today will disappear for new projects. In their place may be a regional agreement covering much the same matters, but fixing payments for all sites for a period of perhaps two years at a time.

These changes will have major consequences. For the first time, it will be possible for specialist contractor organisations to have direct input in the negotiation of over-award agreements. It will also be possible for owners and investors to be advised and consulted about the level of labour cost increases.

These changes will pose questions for government. The codes of conduct currently imposed by the Federal and some State Governments require contractors not to pay any wage or allowance which has not been ratified by the Commission. This will obviously be an inappropriate prescription, if the Commission itself endorses the widespread negotiation of over-award payments.

Conditions of contract will also have to be reviewed, particularly rise and fall clauses. The industry will have to decide whether it wants to encompass over-award payments in its price escalation calculations, or exclude them. If a new system of fixing wages has its intended effect of improving stability and predictability of labour costs, then it may be practicable to rely far more on fixed price contracts, or to incorporate escalation provisions which rely on a single index of industry or community prices.

The momentum of reform is now so firmly established that it cannot be stopped completely. There will be significant changes in the way wages are regulated on major building work. The industry must now await the outcome of the Building Industry Inquiry to see whether change is going to be half-hearted and fragmented, or enthusiastic and thorough. Only the Commission can take a decisive lead. If it does not, the current moves to manage industrial relations in the major building sector in a totally different way to the rest of the industry can only gather pace.

- Ken Lovell, Director, Industrial Relations, AFCC

2. CLAIMS AND DISPUTES

The next issue of the Newsletter shall contain a detailed outline of the findings of the industry research project, convened by AFCC, into claims and disputes in the construction industry.

In the meantime, it may be interesting for readers to note the findings of one public sector client's internal survey into the causes of claims and disputes, which it has experienced during the 1980s. These findings are set out below:

Analysis Of Disputes Requiring Superintendent's Decision 1980 - 1987

Classification	%
• Errors In Bill Of Quantities And Conflicts Between Bill Of Quantities And Other Documents	22
• Extension Of Time Including Consequent Delay Costs	22
• Discrepancies Between Specification And Drawings	19
• Rejection Of Work And Materials	13
• Pricing Of Variation Orders	12
• Latent Conditions (Earthworks)	6
• Late Nomination Of Subcontractors	4
• Other	2

3. CONFERENCE OVERLOAD

In additions to the regular training courses offered by organisations such as The Institute of Arbitrators, Australia, the Australian Commercial Disputes Centre, AFCC etc. and sessions at conventions held by industry organisations, there would seem to be an abundance of opportunities presented to the industry to attend seminars and conferences on all manner of topics related to the industry.

To a large extent, these conferences reflect the problems and concerns of the industry, e.g. in relation to contract formation, contract administration, claims and disputes and dispute resolution. However, there is a significant extent of overlap and duplication in the courses offered, to the point where it is possible to question which industry is serving which.

Over the last twelve months, offers to attend seminars and conferences on the following subjects have come across just one desk:

- Acquisition, Divestment and Privatisation
- Administration of Contracts
- Advanced Arbitration Course
- Alternative Dispute Resolution
- Alternative Dispute Resolution In Construction Contracts
- AS2124-1986 General Conditions of Contract
- Competitive Tendering And Contracting Out
- Construction Claims
- Construction Claims Management (four courses)
- Design and Construct Contracts
- Engineering Contracts
- Financial Risk Management In Real Estate Construction And Development
- Fundamentals of Estimating
- General Arbitration Course
- Improved Project Management Through Computer Assisted Information Management
- Legal Aspects of Subcontracts In The Building Industry
- Local Government and Building Law
- Management of Construction Contracts
- National Cost Adjustment Provision Edition 2
- Negotiation Workshop