

Contracts Claims And Disputes - The Contract Superintendent

- John Tyrnil

In November 1991, the New South Wales Royal Commission into Productivity in the Building Industry released for comment a research paper entitled "Contracts, Claims And Disputes - The Contract Superintendent" by Peter Hocker, who is employed by the Royal Commission. This paper reflects the views of the author and not necessarily those of the Royal Commissioner.

This research paper comments that the traditional lump sum or schedule of rates contracts contemplate the Superintendent acting as:

- (a) Principal's Agent;
- (b) Certifier, valuer and assessor; and
- (c) In some cases, first instance arbitrator (sic) of disputes between Principal and Contractor".

The research paper comments that the objections to these three functions of the Superintendent are:

- (a) That there is a conflict between the roles of the Principal's Agent and Certifier;
- (b) That where the Superintendent is responsible for design and documentation, there is a conflict between his own interests and his duties as a Certifier;
- (c) That there are conflicts between the functions of Certifier and arbitrator (sic) of first instance".

This research paper makes the following recommendations:

"On medium-sized projects or larger projects at least, the assessing, valuing, and certifying functions should not be performed by the design architect or by the project manager but should be carried out by a properly qualified independent person jointly appointed and remunerated by the Principal and the Contractor (the 'Certifier'). This will:

- (a) Avoid conflict of interest and conflict of roles;
- (b) Promote confidence in the Certifier's decisions;
- (c) Provide both Principal and Contractor with a remedy against the Certifier for negligent or other improper performance of these functions;
- (d) Encourage timely compliance by all parties (including the Certifier) with the procedural and evidentiary requirements of the building contract for making and acceding to claims.

On smaller projects the project architect or the project manager may be left with assessing, valuing and certifying functions, but an independent Adjudicator should be retained to resolve disputes arising from their exercise.

Relatively minor projects may be adequately served by improved dispute resolution provisions in the contract, which would provide for quick and cheap resolution of disputes arising out of the assessing, valuing and certifying functions, or by the establishment of a panel of Adjudicators who could be called upon on an ad hoc basis."

It is probably fair to say that these recommendations are likely to be controversial; at least, with the design professionals.

The recommendations in the 1988 report *Strategies For The Reduction Of Claims And Disputes In The Construction Industry* for a separation of the role of contract administrator from the designer and the establishment of a contract adjudicator independent from both designer and contract administrator were not supported by the design professionals (architects and engineers) when it came to an examination of these issues by the NPWC/NBCC Joint Working Party, which prepared the report *No Dispute: Strategies For Improvement In The Australian Building And Construction Industry*.

To reiterate, the research paper does not have the status of the views of the Royal Commissioner. However, it should be useful in provoking debate on these issues. The research paper and comments and submissions to the Royal Commission on its content and recommendations will doubtless be considered by the Royal Commissioner when finalising his report. □