
 Contracts

Construction Industry Contract (CIC-1) 1997: A Response to John Pilley

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The RAIA wishes to make some comments generally about CIC-1 1997 in reply to Mr Pilley's article which appeared in Issue #57 of the Australian Construction Law Newsletter.¹

A comprehensive review of all comments which have been made in relation to the contract is due to be undertaken shortly by the RAIA's Contracts Committee and Phillips Fox as authors of the document. If it is felt that Mr Pilley has raised any issues which require comment, a more detailed response will be published in the next edition of the Australian Construction Law Newsletter.

Mr Pilley, as a representative of sub-contractors, has provided an important and comprehensive critique of CIC-1 1997 from both a philosophical and analytical perspective. The RAIA is grateful for his interest and effort. Such analysis and indeed, commentaries by other interested parties in the construction industry have recognised the importance of the contract and have provided a basis upon which the RAIA can assess the level of acceptance, the areas which may have been misunderstood and sections where legitimate criticism has been made. There is no doubt that when a contract of this magnitude is produced, fine tuning is required over time. This, however, does not mean that there will be a reversion to traditional legal language. The contract has been written in plain English, which in itself, requires a shift from traditional thinking. Mr Pilley appears to have viewed CIC-1 1997 in a manner one would normally reserve for a construction contract couched in traditional legal terminology. The contract has been dissected section by section and various operative clauses have been analysed and compared with those contained in other contracts. CIC-1 1997 must be viewed in a much broader perspective.

The significance of CIC-1 1997 and its position in the market place has also been recognised by others in various commentaries which have been published since the contract was first released. In his article "Construction 2000", Dr David Doyle has stated:

"Construction contracts are the backbone and the bane of the industry. Three new contracts in 1997

*will be influential in distributing profits and awarding losses into the next century: C21, AS4000 and CIC-1."*²

The article by Dr Doyle primarily deals with three issues namely, superintendence, payment approval mechanisms and contractor's risks. Dr Doyle has not specifically criticised any of the contracts referred to.

Whether or not CIC-1 1997 is seen as a replacement for JCC as Mr Pilley suggests is the intention, will simply depend upon the objectives and preferences of the user. Where the document sits with respect to other similar contracts will ultimately be determined by market demand.

Mr Pilley has expressed concern at the existence of a "*plethora of documents in the industry at a time when contractors and subcontractors are suffering enough stress due to extremely tight margins and low prices*". This factor itself would seem to be a fundamental reason for assessing the existing contracts and identifying what positive steps could be taken to alleviate this cause of stress. To this end, the production of a plain English document which is easy to read and understand is seen to be of primary importance.

Prior to embarking upon the considerable task of producing a plain English construction contract, the RAIA undertook extensive market research. This research provided ample evidence to support the view that the market was not satisfied with the available construction contracts, which encouraged the RAIA to develop CIC-1 1997. Not surprisingly, the research also revealed that parties in the construction process tended to use a contract which they were familiar with even if it was not appropriate for the project. Furthermore, the existence of a large number of construction contracts was seen as evidence in itself of the market's dissatisfaction with what was available. The Institute did not set about to produce yet another traditionally worded construction contract, instead, it has produced a clear and concise document which is, as a result, fundamentally different to the "*plethora of documents in the industry*".

Mr Pilley has also made reference to the stance taken by the Master Builders Australia ("MBA") and with

reference to the RAIA, he has stated that *“they received a frosty blast from the MBA especially in the Australian Financial Review”*. However, when the comments contained in this article³ are reviewed, they refer to the way in which the contract was produced and not the substance of the document itself. Mr John Murray, National Executive Director of the MBA is quoted as saying *“It smacks of elitism, I am surprised and disappointed that we weren’t consulted.”*⁴ Mr Peter Barda, Executive Director of the MBA (NSW) said *“Architects are not Gods”*⁵. He also referred to architects as *“romantics”*⁶. These comments appear to be emotive rather than analytical and contribute little to an assessment of the new contract.

It is apparent from Mr Pilley’s article, that one important area which requires clarification, is the role of the architect. Mr Pilley has expressed concern at the contract’s failure to adequately deal with the situation where the architect is terminated. CIC-1 1997 is not intended to operate in the absence of an architect. Therefore, if the architect’s engagement is terminated, a replacement must be made promptly.

Finally, it should be noted that the Institute sought to obtain the views of a range of people in the construction industry before finalising the contract. The comments which were received were carefully considered and where appropriate, were incorporated in the contract. Furthermore, Sir Laurence Street was not prepared to commit to launching the contract until he had had the opportunity of reading it and reaching his own views as to the nature of the contract and the allocation of risk. Had he felt that the document was biased or inequitable, it is unlikely that he would have lent his support to assisting the RAIA in its launch. At the launch of the contract on 14 October 1997, Sir Laurence stated:

*“I wholeheartedly endorse the RAIA’s belief that it is in the interests of both contractors and proprietors that construction contracts are fair, easily understood, practical to administer and provide for the allocation of risks associated with construction in an acceptable and manageable way.”*⁷

The fact that the contract has elicited a variety of responses regarding the manner in which risks have been allocated seems to demonstrate that fairness (like beauty) is in the eye of the beholder.

The RAIA will be realistic in responding to the market and has always maintained that CIC-1 1997 is a *“living”* document. In time, issues in practice with the contract may emerge and accordingly, they will be considered and addressed in the appropriate manner.

The RAIA believes that in producing CIC-1 1997, it has adopted a forward thinking approach and attitude to the evolving and ever changing nature of the construction industry. Once parties have taken the initiative to use CIC-1 1997, a much better perspective of its value will be gained.

Footnotes

1. “Construction Industry Contract (CIC-1) 1997” by John Pilley, Issue #57, ACLN.
2. “Contracts 2000” by Dr David Doyle, Architecture Bulletin NSW, December 1997 issue.
3. “Builders demolish ‘elitist’ RAIA move” Australian Financial Review, 15 October 1997.
4. *ibid.*
5. *ibid.*
6. *ibid.*
7. *ibid.*