

Standard contracts need to be owner focused

Contract reform is essential for the construction industry. **Doug Jones** argues for more focus on the consumer but without a mindless attempt to shift risks.

OF ALL the obstacles to a more efficient and innovative Australian construction industry, one of the biggest can be blamed on the industry's own efforts to become more efficient: its standard forms of construction contract.

The three most commonly used standard forms of contract, AS2124-1992, JCC and AS4300-1995, all have fundamental weaknesses that hamstring the industry's ability to meet the challenges of the late 1990s.

Since the 1990 No Dispute report by the National Public Works Conference and the National Building and Construction Council, many in the industry have pursued the holy grail of a single standard form for all sectors of the industry and all types of construction work.

But it is increasingly clear this goal is inconsistent with developing "best practice" in the industry, and its continued pursuit will entrench mediocrity and stifle reform.

The three major standard forms in use today, all developed since 1990, simply cannot cater successfully for innovative project structuring or "partnering" or longer-term strategic alliances or the project "co-operatives" used in off-shore oil and gas developments.

Nor do they tackle most of the "hard" contracting issues such as the liabilities of head contractors for the actions of owner-nominated sub-contractors, or the inability of owners to readily access securities.

At the heart of these problems with Australia's major standard forms of contract lies an inability to rise above the shibboleths of industry "consensus" in establishing new forms of contractual relationships.

All three contracts were developed through committee-based processes of consensus and compromise — notwithstanding the vastly different agendas, and preferred allocation of risks and obligations, of owners, professionals and contractors in the industry.

Flexibility and innovation have been actively inhibited.

The strongest hope for the future lies in the development of new standard forms of contract that focus very strongly on the needs of the end consumer of construction services — the owner — rather than the sectional interests of the participants in the process.

The philosophy behind this is simple.

The closer the industry identifies with the end users of its products, the more focused it will be on finding processes that meet real commercial objectives, instead of uncertain policy objectives such as uniformity for its own sake and "fairness".

An "owner focus" should not be misunderstood as meaning a mindless shifting of risks away from owners on to contractors and consultants.

As discussed earlier, this narrow "lawyers' approach" would fly in the face of commercial reality and owners' practical interests — and would be quite inconsistent with achieving the mutual benefits offered by "partnering" and similar innovations in the industry.

The first serious move in this "owner focused" direction in recent years was made by the Department of Defence in 1993, with a suite of standard form contracts tailored to its full range of construction projects, which total more than \$500 million a year.

These contracts were developed through extensive consultations with the industry, but were not shackled by a requirement for consensus on each and every point.

The innovative results — for projects costing less than \$250,000, the contract is an eight-page, user-friendly flow chart, instead of the traditional lawyers' text — have increasingly found their way into more general use in the industry.

The Building Owners' and Managers' Association and the NSW Department of Public Works and Services are now developing their own owner-focused standard form contracts. The latter, "Century 21", will be used for all Public Works construction projects from mid-1997.

The pressure for regular consumers of construction services to use familiar, standard forms of contract, rather than one-off contracts, is likely to accelerate this trend, with many organisations being likely to

develop suites of contracts to be used for their most common types of projects.

Instead of the forced consensus compromises of the previous generation of standard forms, the marketplace will recognise and adopt best practice — and in this way the new standard forms will continually evolve with the changing demands of consumers and the industry.

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Drawbacks seen with construction industry standard contracts.

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