



Contract reform must go to the cutting edge

Doug Jones, a construction partner at Clayton Utz, argues that current common contracts are 'cloaked in the rhetoric of consensus'.

Of all the obstacles to a more efficient and innovative Australian construction industry, one of the greatest 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 — AS21241992, JCC and AS43001995 — all have fundamental weaknesses that hamstring the industry's ability to reform and meet the challenges of the late 1990s.

Since 1990 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 that its continued pursuit will entrench mediocrity and stifle reform.

The three major standard forms in use today simply cannot cater successfully for innovative project structuring and a host of other emerging industry trends.

The absence of suitable standard forms has almost certainly discouraged many in the industry from seriously considering potentially more productive ways of working.

Further, attempts to amend the standard contracts to address these deficiencies have produced a plethora of one-off contracts.

The number and variety of these ad hoc amendments not only defeat the original objective of familiarity with the contracts but have frequently led to inap-

propriate risk allocations, such as attempts to transfer every conceivable risk to contractors and consultants.

Most owners recognise it is preferable to manage and control the risks that fall within their competence and expertise, rather than impose them on others and pay for the privilege in more ways than one.

The deficiencies of the industry's current standard forms of contract are not limited to their inability to support and promote innovative project structures and cooperative, dispute-reducing arrangements.

All three fail to tackle most of the hard contracting issues that have dogged the industry for the past 10 years.

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

When it comes to reaching workable agreements on a project, consensus between the contracting parties is, of course, at the very core of achieving successful outcomes, especially when partnering and other innovative approaches are to be used.

But instead of focusing on how to achieve this real, project-oriented consensus, the AS2124, JCC and AS4300 contracts are lowest common denominator contracts, even though they are cloaked in the rhetoric of consensus.

All three were developed through agonising committee-



Doug Jones ... the strongest hope for the future is owner-focused.

based processes of compromise, notwithstanding the vastly different agendas of owners, professionals and contractors in the industry, each group having its own sectional interests and preferred allocation of risk and obligations.

While compromise and consensus on how to structure any particular project and share its risks can lead to highly productive working relationships, the false assumption behind the development of AS2124, JCC and AS4300 was that the same process could be applied to develop a contract that would truly represent the consensus views of all the parties in all the projects to which the contracts might be applied.

In short, the processes used in developing these standard forms have made the results unfavourable, and therefore unacceptable, to many industry participants.

They have also actively inhibited the flexibility and innova-

tion the industry so desperately needs in its contract structures.

And perhaps worst of all, the false consensus process still shows no signs of developing this flexibility or being able to deal unambiguously — or indeed at all — with the hard issues facing construction projects in Australia.

The strongest hope for the future lies in developing 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.

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

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.

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

For projects costing less

than \$250,000, the contract is an eight-page user-friendly flow chart, instead of the traditional lawyers' texts. The contracts 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.

Because of the public sector's probity and process constraints, the private sector's new standard forms will probably be closest to the cutting edge.

As these owner-focused standard forms proliferate, areas of commonality will develop, as has already happened with aspects of the Defence Department's contracts.

Instead of the forced consensus compromises of the previous generation of standard forms, the market place 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.

All in all, it promises to be a much healthier and more productive way for the industry to develop.