

Reform in the UK - The Latham Report, Constructing The Team, HMSO 1994. Available in Australia from Construction Publications Pty Ltd.

- Review by John Tyrill

The United Kingdom report by Sir Michael Latham entitled "Constructing The Team: Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry" will interest all those concerned with reforming, and improving the efficiency of, the Australian construction industry. Latham is a comparative benchmark for Australian reform efforts. It also contains some lessons for Australia.

The interest that many Australian public and private sector clients are taking in Latham Constructing The Team makes it essential reading for consultants, contractors, subcontractors, suppliers and construction lawyers.

Interestingly, when conducting the world-wide research which resulted in the 1988 Australian report "Strategies For The Reduction of Claims and Disputes In The Construction Industry", several organisations and individuals in the UK commented that the Australian claims/disputes situation did not pertain in the UK and that there were no particular untoward problems which needed addressing in the UK. Comments by other interviewees and the incidence of English case law suggested otherwise. The very existence of the British Property Federation's novel contracts and the then early development of the New Engineering Contract also indicated that, at least, some perceived the need for reform of, and greater efficiency in, the UK construction industry.

The establishment of the Joint Government/Industry Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry announced to the House of Commons in July 1993 evidenced that all was not well with the industry in the UK. Furthermore, that reform of the industry was as important an issue in the UK as it is in Australia. The Latham report has resulted from that Joint Government/Industry Review.

The Latham report's recommendations are intended to benefit clients by improving the industry's performance and teamwork and thereby achieve better value for money.

The report notes that clients' (whether informed or feeling their way) wishes normally include:

- (i) value for money;
- (ii) aesthetics;
- (iii) that the project will be free from defects on completion;
- (iv) that the project will be delivered on time;

- (v) fitness for purpose;
- (vi) the support of worthwhile guarantees;
- (vii) reasonable running costs;
- (viii) satisfactory durability.

The Latham report contains a significant number of recommendations including:

- a guide for clients on Briefing;
- a Construction Strategy Code of Practice to assist clients meet their objectives, obtain value for money and improve the long term performance of the industry by harnessing clients' purchasing power;
- the development of a check list for designers;
- the use of co-ordinated project information, to improve design and documentation;
- use of alternatives to nomination of specialist contractors, where the client does not wish them to be ordinary subcontractors, such as separate contracts, joint ventures and construction management;
- selection of consultants on the basis of quality and price;
- a national system for pre-qualification of contractors and subcontractors wishing to carry out public sector work on the basis of quality assessment and value for money, to avoid the need for construction agencies, local authorities etc to prepare their own pre-qualification lists. Main contractors should be required contractually to use registered subcontractors;
- tendering reform by:
 - limiting the numbers of tenderers to contain

- tendering costs;
- pooling of tenderers' resources on matters such as carrying out ground investigations;
- for large and expensive schemes, payment to unsuccessful tenderers of a reasonable proportion of expenses incurred; and
- a requirement that contractors engage their own consultants on the basis of quality and price;
- a Code of Practice for the Selection of Subcontractors, which includes limited subcontractor tender lists, selection on the basis of quality and price, a prohibition on Dutch auctioning, and an undertaking by subcontractors to coordinate their activities effectively with the other subcontractors in a spirit of teamwork to assist achieve the contractor's programme;
- public sector experimentation with partnering, where long term relationships can be established;
- accreditation of operatives, such as scaffolders;
- promotion of equal opportunities within the industry;
- increased spending on research and development;
- continued encouragement of quality assurance certification. However, the report notes that more evidence of the benefits of quality assurance is required before it is made a pre-qualification criteria for public sector work;
- the establishment of a target of 30% reduction in real costs by the year 2000;
- legislation (a Construction Contracts Bill) to require compulsory latent defects insurance for 10 years from practical completion, with liability to be limited to this period and to be apportioned on the basis of blame rather than joint and several liability. The insurance policy should require the premium cost to be shared amongst the principal participants in the project and exclude subrogation;
- an implementation strategy, including (as one possibility) the establishment of an Agency similar to Australia's Construction Industry Development Agency.

A Modern Contract

Briefly expressed, the Latham report's recommendations for a "modern contract" are:

1. duty for all parties to deal fairly with each other, and with their subcontractors, suppliers etc, in an atmosphere of mutual cooperation;
2. duties of teamwork and shared financial motivation to achieve "win-win" solutions to problems;
3. an inter-related contract documentation package, which clearly defines the roles and duties of all involved and which is suitable for all types of projects and for any procurement method. This family of documents should include a total matrix of interlocking consultants' agreements and contracts, including subcontracts and any additional relevant documentation such as bonds and warranties;

4. easily comprehensible language, with guidance notes for users;
5. separation of roles of the contract administrator, project manager and adjudicator. The project manager to act as the client's agent (rather than in an independent, certifying role);
6. a choice of risk allocation to be decided on the basis of what is appropriate for particular projects, but allocated to the party best able to manage, estimate and carry the risk;
7. strategies to reduce variations. Where variations do occur, pre-agreement on price, with independent adjudication if agreement cannot be reached;
8. payment on other than monthly basis by:
 - milestones; or
 - activity schedules; or
 - payment schedules;
9. interest on late payment;
10. secure trust fund routes of payment;
11. taking all reasonable steps to avoid conflict on site. If dispute does arise, provision for speedy dispute resolution by a pre-determined impartial adjudicator;
12. incentives for exceptional performance;
13. provision for advance payments for mobilisation, off-site prefabrication etc.

The report notes that the New Engineering Contract (see separate review in this Issue) contains virtually all of these assumptions of best practice, set out in its Core Clauses and in its main and secondary options, and that it is "extremely attractive". However, Latham suggests that its name should be altered to the "New Construction Contract" and that some modifications should be made to it, such as the establishment of a secure trust fund to secure payments and to provide contractors and subcontractors with greater confidence.

Whilst noting the extensive use which has now been made of the NEC contract around the world, Latham recommends that Government Departments should undertake contracts under the NEC contract as soon as possible to gain experience in its use. Furthermore, that the NEC contract's use should be promoted to other public sector agencies and for use in the private sector.

With due respect to our own Construction Industry Development Agency ("CIDA"), unfortunately, its great successes lie in areas other than contractual reform. Apart from contractually related reforms such as pre-qualification criteria and tendering codes, CIDA's contractual achievements seem limited to the publication of a users' guide to the main contracts currently in use in this country. Arguably, our historical, industry consensual approach to contract preparation, and also the vested interests in the existing contracts, defeated any potential for real breakthrough in this area. Perhaps, the only method by which contractual reform could have been achieved was by a client-driven reform agenda based on best practices and efficiency, rather than the sectional interests of the

industry participants. At the conclusion of CIDA's programme, perhaps the contractual reform challenge will rest with Australia's public and private sector repeat clients.

Following Latham, reform in the UK may make greater ground in contractual reform.

Unfair Contracts

The Latham report states that the use of the NEC contract it recommends would address many of the concerns expressed by clients, main contractors and subcontractors about unfair contracts. Latham recommends that the NEC contract be used unamended and suggests that the Latham recommendations, including use of the NEC, should be underpinned by extending the proposed Construction Contracts Bill to deal with unfair contracts.

Latham recommends the proposed Construction Contracts Bill should state that the following actions would be regarded as unfair and invalid:

1. any attempt to amend or delete the sections relating to times and conditions of payment;
2. to seek to deny or frustrate the right of immediate adjudication;
3. to refuse to implement the adjudicator's decision;
4. to seek to exercise any right of set-off or contra charge without:
 - (a) giving advance notice;
 - (b) specifying the reasons;
 - (c) being prepared to submit immediately to adjudication and accepting the result;
5. to seek to set-off in respect of any other contract.

The report also recommends that 2. to 5. above should also be declared unfair and invalid in relation to "bespoke" contracts. Additionally, any attempt in a "bespoke" form to introducing "pay-when-paid" clauses should be specifically declared unfair and invalid.

The report also recommends the proposed legislation should also require clients to set up a secure trust fund.

Dispute Resolution

Whilst noting Alternative Dispute Resolution methods such as mediation and conciliation and the use of multi-tiered dispute resolution systems on projects such as the Hong Kong airport, Latham concludes that most disputes on site are "better resolved by speedy decision - i.e. adjudication - rather than by a mediation process in which the parties reach their own settlement".

The Latham report recommends:

1. there should be no restrictions on the issues capable of being referred to the adjudicator, conciliator or mediator, either in the main contract or subcontract documentation;
2. the adjudicator's award should be implemented immediately;
3. any appeals to arbitration or the courts should be after practical completion, and should not be allowed to delay the implementation of the award, except in exceptional circumstances;
4. immediate resort should be available, if a party

5. refuses to implement the adjudicator's award; adjudicators should be trained and a Code of Practice developed for adjudication.

Conclusion

The Latham report, Constructing The Team, is a significant contribution to, or (at least) starting point for, construction industry reform. Its UK only content, such as references to VAT and the European community, is limited and does not detract from its importance to those interested in construction industry reform in Australia.

Of particular interest to those (particularly professionals) concerned about the duration and extent of design and construction liability and the problem of joint and several liability will be the proposals for legislation dealing (amongst other things) with the period of liability, project insurance for that period and liability apportioned on the basis of blame rather than joint and several liability.

The interest in the Latham report by both public and private sector clients in Australia makes it necessary reading for all construction industry participants (consultants, contractors, specialist contractors, suppliers and construction lawyers) - whether they are interested or not in Australia's reform efforts.

The Latham Report is available at \$75, plus \$5 handling and postage from:

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