

## WEEK 7: VARIATIONS (CHAPTER 8)

### INTRODUCTION

- Lump Sum Construction Contract - Agreement for the Contractor to perform an **agreed scope of work** within an **agreed timeframe** in return for the payment of an **agreed amount of money** from the Principal.
- Principal make changes / variations to - originally agreed contract scope of works - unpredictable nature of design and construction processes
- **REASONS FOR VARIATIONS TO SCOPE OF WORK**
  - **CLIENT CHANGE ORDERS** - Principal require + direct **design changes** during construction (via Superintendent)
    - Upgrade floor finishes / increase floor area
  - **POST-CONTRACT DESIGN DEVELOPMENT** - Continued development of design by consultant designers (Architect/Engineer) after the date of contract formation
    - Maybe like a D&C Contract
  - **Inaccuracies / Inadequacies** in the contract design - require updating after the date of contract formation
  - **Unavailability of materials / equipment** specified in contract documents
- **IMPORTANCE OF EXPRESS TERMS**
  - No express terms providing for variations to be made to interact scope of works → Contractor only bound to perform original scope of work
  - Variations unilaterally directed by the Principal → Contractor don't have to carry out
    - Each variation requires separate agreement between Principal and Contractor
    - Impractical and undesirable because:
      - ➔ Having to **separately agree each and every variation** (of which there could be hundreds) and the details of such variations during a construction project would be **administratively onerous** (require great effort / difficult).
      - ➔ It would give the contractor, by virtue of their prior appointment on the project, an **effective monopoly market position** with respect to any variation work thus giving the contractor a **strong bargaining position** from which to negotiate **high prices and/or generous time allowances** for carrying out variation work.
      - ➔ The contractor may, if they want, **simply refuse to perform any variations** requested by the principal as they are only contractually bound to perform the originally agreed contract scope of works.
      - ➔ If the principal were to **instruct a variation** to the contract scope of works **without the contractor's consent**, there is a risk that this instruction would **amount to a repudiation** of the original contract thus giving the contractor the right to terminate the contract
  - Therefore, commercially suitable for Principal to ensure that expression variation clause is included within construction contract that:
    - ➔ Gives the superintendent (as the principal's agent) the unilateral power to direct variations
    - ➔ Obligates the contractor to perform the variations directed
    - ➔ Provides for appropriate adjustments to be made to the contract sum and date for practical completion to compensate for variations
- **RELEVANT CLAUSES**
  - **CLAUSE 36.1** Directing Variations
  - **CLAUSE 36.2** Proposed Variations
  - **CLAUSE 36.3** Variations for the convenience of the Contractor
  - **CLAUSE 36.4** Valuation of Variations

### DEFINITION OF A VARIATION

- Works which are not contemplated by the parties at the time of the execution of the contract.
- When work is directed by the Superintendent - which is not included in the scope of works defined in the contract document
  - ➔ **AS 4000 CLAUSE 32:** did not mention that changes to timing and sequencing of work = subject of a direction to vary
  - ➔ But Contractor is entitled to any extra cost incurred due to direction to change the timing or sequence of WUC
- Hard to determine the subject of a direction from the Superintendent fall within the originally agreed contract scope of works
  - Require careful review of particular contract
  - Make sure clear and details scope of work is identifiable in the contract
    - Include appropriately detailed drawings, schedules, specifications, reports and other documents (clearly marked as contract documents)
    - show what is (or is not) included in the agreed scope of works

### CAN A CONTRACTOR CLAIM BE ENTITLED TO VARIATION FOR ESSENTIAL ELEMENT OF BUILDING THAT WAS NOT ADEQUATELY DEFINED?

- No, essential elements of building may be deemed to be included in the contract scope of work at law
- Even if it is now shown in the contract documents
- Court held that Contractor contracted to construct a building or project must perform all work that is indispensably necessary for the completion
- Williams v Fitzmaurice (1858): floor was not specified in contract specification - but a house without a floor is an incomplete house

### TYPES OF VARIATIONS - AS 4000 CLAUSE 36.1

- Increases, decreases or omissions;
- Changes to the character or quality;
- Changes to dimensions, positions, levels or lines;
- Execute additional work; and
- Demolish or remove material or work.

### DIRECTIONS TO VARY WORK UNDER THE CONTRACT

- **AS 4000 CLAUSE 36.1:** Superintendent is provided with the power to vary the work under the contract
- **AS 4000 CLAUSE 36.1:** Superintendent is provided with the power to make assessment of the value of the variation works to be added to / deducted from the contract sum
- **AS 4000 CLAUSE 20:** Contractor is bound to comply with direction to vary given by Superintendent

- **AS 4000 CLAUSE 36.1:** Variations are to be directed in **WRITING** by the Superintendent
  - **REASON:** Avoid situation where Superintendent remind the Contractor of an obligation under the existing scope of work, Contractor thought a variation was directed.
  - Should not commence variation work unless receives written direction duly given by the Superintendent in accordance with the relevant contractual procedure
  - Should not carry out pursuant to oral direction to vary (request written confirmation of oral direction), or else:
    - Difficult to claim any entitlement under the contract to be paid for additional work carried out

### LIMITATIONS ON POWER TO DIRECT VARIATIONS

- The variation must be within the general scope of the contract.
- Works cannot be omitted from the originally agreed contract scope and awarded to a third party (unless the contract expressly states otherwise).
- Variations may not be directed after the date of practical completion.

### LIMITATIONS ON THE SCOPE OF VARIATIONS

- Limited to the extent that the change to the size and nature of the works must be reasonable when considered in context of the particular contract
- Must not cause size and nature of the remainder of the work to be carried out under the contract - to differ from that contemplated by the parties
- **AS 4000 CLAUSE 36.1:** A direction to vary the work under the contract must be of a character and extent contemplated by, and capable of being carried out under, the provisions of the contract.
- Wegan Constructions v Wodonga Sewerage Authority [1978]:
  - Shall not increase or decrease the moneys otherwise payable under the contract to the contractor by more than a reasonable amount.
  - Shall not be large in proportion (about xx per cent) to the expected contract price and the increase represented a proportionately large increase in the work to be done.

### WHAT IF THIS LIMITATION DOES NOT EXIST?

- Works could be varied to such a degree that the constructed project bears little, or no, resemblance (in nature and/ or scale) to that originally contracted for - shopping centre change to airport terminal / 500m2 to 5000m2 development

### WHAT IF DON'T ADHERE TO THE RESTRICTION?

- Issuance of such direction may amount to repudiation by the Principal → Contractor have the option to terminate & sue for damages
- ➔ But Contractor must make sure that the scope of variation is beyond reasonable limit → Contractor's purported termination would itself be repudiation
  - Principal now have options to terminate & sue for damages

### PASSING ON VARIATION TO SUBCONTRACTOR

- If a subject variations beyond reasonable bounds in the context of the subcontract scope but within reasonable bounds in the context of the head contract scope → passing on a variation to the Subcontractor = risk of repudiating the subcontract

### RECOMMEND THAT HEAD CONTRACTORS INCLUDE SUCH EXPRESS PROVISION IN SUBCONTRACT

- Allow the head contractor to:
  - Direct their subcontractors to carry out any variations which the superintendent has directed under the head contract; and/or
  - Direct variations up to a certain size or amount (for example, 50% of the contract sum).
- Chadmax Plastics Pty Ltd v Hansen and Yuncken (SA) Pty Ltd (1984): Wallflex supplied by Chadmax failed test so HY cancel 98% of Wallflex as per architect's instruction.
  - Such variation to the subcontract amounted to a virtual cancellation of the subcontract, which was not authorised by the express variation provisions in the subcontract, because it was not 'within the general scope of this agreement'.

### LIMITATIONS ON OMITTING WORK TO AWARD TO ANOTHER SUBCONTRACTOR

- **Negative variation** (variation which omits work from original contract scope) is allowed
- But they are not permitted where they are **directed for the purpose of awarding the omitted work to another contractor**
  - Unless there is an express provision in the contract authorising and clearly empowering them to do so
  - *The Principal may instruct a variation which decreases or omits any part of the Works for the purpose of having that part of the Works executed by another person.*
- Commissioner for Main Roads v Reed & Stuart Pty Ltd (1974): The successful tenderer, should have the opportunity of performing the whole of the contract work.

### LIMITATIONS ON DIRECTING VARIATIONS AFTER PRACTICAL COMPLETION

- **AS 4000 CLAUSE 36.1:** variations may only be directed before practical completion

### PROPOSED VARIATIONS

- Superintendent give notice of proposed variation → Contractor to advise if it can be effected → if can, then provide estimates of
  - The effect on the construction program including the date for practical completion; and
  - The cost of the proposed variation including any delay costs/damages.
- **WHY DIRECT A PROPOSED VARIATION (INSTEAD OF JUST DIRECT)**
  - Superintendent can assess viability of the potential variation to the work under the contract in light of the information provided by the contractor before deciding whether to go ahead and direct the variation.
  - Superintendent can discover if Contractor have any objections to carry out the propose variation works before directing it
    - When Superintendent is not sure if proposed variation is within the general scope of the contract
    - Don't want to risk repudiating contract on behalf of Principal