TOPIC 10 – VARIATIONS

10.1 WHY DO WE NEED VARIATION CLASUES

- After latent conditions this is a leading cause of disputes on construction projects – important to know how you can avoid this being a problem on projects
- There is no common law right to vary, so without a variations clause, a contractor could insist on sticking to the original design.
    - Under common law if you have a contract stating that you will build a house then you have the obligation and the right to build the house exactly as designed
- Building contract requires the contractor to build *exactly* the scope of work described in the contract.
- Without a variation clause, the owner is not entitled to instruct the contractor to perform any work which is different to the scope of work described in the contract documents.
    - For example, owner cannot halfway through state that they wish to have granite benchtops instead of marble unless there is a variation clause in the contract that allows them to do this
    - Hence, no right to vary the works the contractor is required/has the right to build exactly what is described in the contract documents
- Because there is no common law right to vary the scope of works – need to have a variation clause so that you can accommodate changes that you might like/need to make during the course of the construction project

10.2 DEFINITIONS

- **AS4000 defines a variation (cl.36) as:**
    - An increase, decrease or omission of any part of the works;
    - A change to the character or quality of the works;
    - A change to the levels, lines, position or dimensions of the works;
    - Any additional work; or
    - The removal of any work no longer required by the owner.
- Seems very broad, and as though it would allow you to make whatever changes you would like
- **BUT** the variation must always be within the character and extent contemplated by the contract.
    - That is, when the contract was entered into, would the parties have contemplated this sort of a change?
- **Key points to note in Definition of a Variation:**
    - Must be within the character/scope contemplated by the original contract.
    - So,if a contract is to construct a single storey timber framed dwelling, couldn't use the variation clause to change this to a steel framed duplex.
        - Because this would not be within the character and extent contemplated by the parties
        - Changing the benchtops from laminate to granite is likely something that you could expect
    - Similarly, if contract is to install 100 km of broadband cable, arguably a variation to increase this to 1,000km of cable would not be within the original scope contemplated by the parties.
    - May have priced completely differently for 1000km – which may be over mountains rather than nice flat land
    - In such a case, contractor could refuse to do the additional work, or do the work, but charge for it on a quantum meruit basis.
- The issue is that you will not know if something is within the character and extent contemplated by the parties at the time that the contract was entered into until a judge tells you
    - Hence, this is why we have so many disputes about variations because the principal of course believes that the sort of changes could have been contemplated, and the contractor does not
- Contractor is in a very difficult position when they get issued with a variation that they don't think is a valid variation – very risky to refuse to do the work on the basis that it is not a valid variation because the consequence of this could be repudiation if you refuse to do work that turns out to have been a valid instruction
    - Better to do the work and dispute how much you get paid for it rather than risk repudiation

10.3 LIMITATION ON POWER TO VARY

- Variation clause cannot be used to delete work so as to give it to others. In *Carr v J A Berriman P/L* (1953) 89 CLR 327

CARR V J A BERRIMAN

Facts	Contract to construct a factory on Berriman's property. Contract had a variation clause that allowed omission of works (as AS4000 does) and stated that: no variation shall vitiate the contract. Principal deleted steelwork from contract and engaged a 3rd party to fabricate and supply the steel. Principal argued that this was a valid variation because the contract says that they can omit work and they have just omitted the steelwork that was going to be done.
Decision	High Court held, that this clause entitled the principal to delete work that it no longer wanted to have constructed, but **NOT** to delete work, just so it could be given to another contractor to do. Such conduct was unreasonable and amounted to repudiation by the principal. Hence, the power in AS4000 to delete/omit work in only when you no linger want that work performed – can not be used to effectively carve out some of the contractor scope of work because they are too slow/you are not happy with their quality and give this work to someone else. Once you have entered into a contract for that scope of work then the contractor has the right to complete that scope of works

COMMISSION FOR MAIN ROADS V REED & STUART

Facts	Commissioner engaged Reed & Stuart to build part of an expressway in Sydney. Contract provided that Reed & Stuart were to take topsoil from the site and lay it around embankments. It was estimated that there would be sufficient top soil on the site to allow Reed & Stuart to layer the embankments, <u>but</u> the contract DID provide that if there was a shortage of topsoil, then the contractor would be paid a generous rate of X for each unit of topsoil that had to be brought to site. Commission realised that the estimate of available topsoil was vastly short & that it would incur extra expense if it exercised its contractual power to order Reed & Stuart to supply extra topsoil to the site. It therefore arranged for another contractor to supply the topsoil at a cheaper price.
Issue	Did the contract, which provided that the engineer could direct the contractor to supply additional topsoil give the engineer (engineer here means SI) the option to give that work to another party?
Decision	High Court Held: Commission could either direct Reed & Stuart to supply the topsoil at additional cost and complete the works as anticipated ***<u>OR</u>*** direct Reed and Stuart not to do the work requiring the topsoil. However, just like in Carr it could not direct a third party to supply the topsoil. The contract contemplated that there would be enough soil on site and it also contemplated that if there was not there would be a specific course of action followed. Principal cannot change its mind because it will cost them too much and carve out that part of the contract to give it to someone else. It could not direct a third party to supply the topsoil. Stephens J: *"Were he allegedly entitled to do so it would, I think, run counter to a concept basic to the contract, namely that the contractor, as successful tenderer, should have opportunity of performing the whole of the contract work. … Clause 18 is a common enough provision to be found in engineering contracts and permits the omission from time to time by the proprietor of portion of the contract works. <u>What it clearly enough does not permit is the taking away of portion of the contract work from the contractor so that the proprietor may have it performed by some other contractor."</u>* Really reiterating the Carr v Berriman scenario.

10.4 VARIATIONS IN D&C CONTRACTS

- This is a tricky area – in D&C contracts the principal provides a brief that dictates the scope of works
- Design brief dictates the scope of work, and contractor undertakes a design that satisfies the owner's design brief.
- If owner requests a change, is it a variation?
- **Three Scenarios:**

- (1) Requested change is to the Principal's design brief.
    - E.g. Changing the residence from 4 bedrooms to 5 bedrooms
- (2) Requested change is to contractor's design, which design is compliant with the Principal's design brief; or
    - E.g. the contractor has given the Principal the 4 bedrooms that they wanted but the Principal finds that the bedrooms are all on the small side and requests that they each be increased by 5 square meters
- (3) Change is requested because contractor's design does not satisfy requirements of the owner's design brief.
    - E.g. the design brief is for the garage to fit 2 cars and it can only fit 1
- **Which of these, if any, constitute a variation?**
- Scenario 1: Yes.
- Scenario 2: Yes, if contractor's design is compliant, and the owner wants to change it, it will be a variation.
- Scenario 3: Not a variation that comes with extra time and money. It is an instruction to correct defective work.
- A reminder of how important it is to get your design brief right in a D&C contract
    - Contractor will always try to maximise its profits so it will give you the cheapest design that complies with your design brief
    - If you want something other than this/something particular – you need to express and specify this

10.5 MAIN PROBLEM AREAS WITH VARIATIONS

- i. Is the work a variation, or was it part of the original scope of works?;
- ii. Valuing variations – agree that it is a variation but disagree about how much contractor is entitled to be paid for it; and
    - contractors love variations because when they are tendering for a job they need to put in the lowest possible tender in order to win the job – but when you are doing a variation you are not competing with anybody else so they try to maximize their profits on the variations
- iii. Whether procedural requirements have been followed.

MULTIPLEX CONSTRUCTION V EPWORTH – IS THE WORK A VARIATION

Facts	Multiplex contracted to do redevelopment of Epworth hospital. Lump sum contract, BUT design not fully documented at time contract entered into (generally the design is fully complete when lump sum contract are being used, or you wait for design completion, or utilize D&C). Contract specifically provided that any changes resulting from "the development of the design" where works not fully documented at time of tender was **NOT** a variation, i.e. no extra money or time for contractor. Unusual contract, but still a useful case on how courts interpret construction contract provisions.
Issue	**i. Is the work a variation, or was it part of the original scope of works?**
Decision	Multiplex claimed over $3.4 million from Epworth by way of more than 1,000 variation claims. Question for court was whether the changes were variations or design development. Variations come with time and money – design development does not Some changes were major e.g. converting nurses' accommodation into consulting rooms and operating theatres, while others were minor e.g. moving the position of pipes. CA held majority of claims were variations rather than design development.

- **ii. Valuing variations:**
- If contract is silent as to how to value a variation, then contractor entitled to be paid a reasonable sum.
- However, most standard form contracts contain detailed clauses regarding how a variation is to be valued.
- AS4000 clause 36.4 sets out a hierarchy of ways of valuing the variations. Dorter & Sharkey describe this clause as being of "commendable simplicity" and should resolve most pricing issues.
- Clause 36.4 – Pricing:
    - The SI shall, ASAP, price each variation using the following order of precedence
        - A) prior agreement
        - B) applicable rates or prices in the Contract
        - C) rates or price in a priced bill of quantities, schedule of rates or schedule of prices, even though not Contract documents, to the extent that it is reasonable to use them; and