

CLAIMS AND DISPUTES - FURTHER DEVELOPMENTS

The National Public Works Conference and the National Building And Construction Council Joint Working Party's has prepared a report entitled "NO DISPUTE: Strategies For Improvement In The Australian Construction Industry", which will be released at seminars to be held in the major capital cities in July 1990.

1989 Australian Construction Law Newsletter Issue #3 contained a summary of the industry report entitled "Strategies For The Reduction Of Claims And Disputes In The Construction Industry".

In response to this report, the National Public Works Conference and the National Building And Construction Council established a Joint Working Party to examine the recommendations in the Strategies Report and related issues. The terms of reference for the Joint Working Party were set out in 1989 Australian Construction Law Newsletter Issue #7 at page 8.

The Joint Working Party has now prepared a report entitled "NO DISPUTE: Strategies For Improvement In The Australian Construction Industry", which was presented to a joint meeting of the National Public Works Conference and the National Building and Construction Council in May 1990. NPWC and NBCC have agreed to publish this report and will release it at seminars to be conducted in the capital cities in July 1990.

ANOTHER COMFORTING LETTER

- Dr Chris Gilbert, Consultant, Henderson Trout, Solicitors, Brisbane.

A recent decision by the Supreme Court of NSW shows that Australian courts may be more prepared to attach legal consequences to so called "letters of comfort" than are their English counterparts.

In *Bank of Brussels Lambert SAS v Australian National Industries Limited*, Rogers J. Chief Justice, Commercial Division, New South Wales Supreme Court, 12 December 1989, ANI provided a letter of comfort to the plaintiff, a Belgian Bank. In reliance on this, the bank made available a credit facility of US\$5 million to Spedley Securities Limited which was wholly owned by Spedley Holdings Limited. ANI had a 45% shareholding in the latter company.

In its letter to the bank, ANI said:

"it would not be our intention to reduce our shareholding in Spedley Holdings Limited from the current level of 45% during the currency of this facility. We would ... provide your bank with 90 days notice of any ... decisions taken by us to dispose of this shareholding, and ... we acknowledge that, should any such notice be served on (you), you reserve the right to call for the repayment of (the loan) within 30 days".

"We ... confirm that it is our practice to ensure that ... Spedley Securities Limited will at all times be in a position to meet its financial obligations as they fall due ... (including) repayment of all loans made by (you) ... (as) mentioned in this letter".

This letter was issued in 1982. After the stock market crash of October 1987, ANI decided to sell all its shareholdings in Spedley Holdings Limited. No notice of this decision was given to the bank. Shortly after this, Spedley Securities Limited went into liquidation, and the bank (which had loaned substantial sums to Spedley Securities Limited pursuant to the loan facility) incurred large losses as a result. ANI declined to make good the bank's losses. The bank sued ANI for breaching its letter of comfort relying on breach of contract, breach of the Trade Practices Act, unconscionable conduct and unjust enrichment.

Mr Justice Rogers held the defendants liable for breach of contract and unconscionable conduct. He dismissed the claims based on the Trade Practices Act and unjust enrichment. The court held that ANI's promises in the letter of comfort to give 90 days notice of any impending share sales and to ensure that Spedley Securities Limited would at all times be in a position to meet its financial obligations, were contractual in nature in the particular circumstance of this case.

The Court criticised much of the reasoning in the well-known English Court of Appeal decision on letters of comfort, *Kleinwort Benson Limited v Malaysia Mining Corporation* (see 1989 Australian Construction Law