Article Information

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Inflation: When is it the consultant's fault?

Last year, the Consumer Price Index rose 7.8%[1] with the Producer Price Index rising 5.8%[2]. Construction costs rose 14.2%, on top of the historical highs experienced during 2021[3].

The rapid cost increases sustained on construction projects over this period have typically been carried by:

- the developer, either through:
  - a cost plus (or similar) construction contract; or
  - *ex gratia* payments made to ensure projects are completed.
- the contractor, having made – and then honoured – fixed price contracts.

Can architects, engineers and other construction industry professionals also find themselves exposed to liability for cost blowouts?

Some certainly can: especially consultants who:

- co-ordinate tenders for construction work;
- prepare contracts, including specifications and contract drawings;
- provide superintendent / contract administration services during the construction phase, including monitoring construction progress, ensuring construction is progressing as required by the schedule and assessing and certifying claims for payment.

The consultant's potential liability arises:

- as damages for breach of the Consultancy Agreement;
- as damages in negligence; or
- under statute law (such as the *Australian Consumer Law*).

Consultants might also find themselves exposed to disciplinary sanctions from their professional bodies.

Breach of Consultancy Agreement

The Consultancy Agreement usually identifies the particular functions and tasks the consultant must carry out, when those functions must be performed, and the standard against which sufficient or adequate performance will be measured.

Most consultancy agreements require that consultants perform services to the standard of skill, care and diligence expected of a skilled and competent professional practising in the relevant field, or any higher standard the consultant might have represented would be achieved.[4]

Failure to comply with these terms in a Consultancy Agreement will expose a consultant to claims for damages for breach of contract.

Negligence

Construction industry professionals must also exercise the level of skill and care expected from an ordinary competent and

skilled professional when providing their professional services. Failure to do so will expose consultants to claims for damages for negligence: including claims from people with whom the consultant has no contractual relationship.[5]

If a principal requires a cost estimate in order to decide whether a project is commercially viable, the consultant will owe the principal a duty to exercise appropriate skill and care when preparing the cost estimate.[6]

Providing a cost estimate without appropriate warnings about the impact of inflation on the estimate can be a breach of that duty,[7] and a consultant's failure to advise a principal within a reasonable time that costs are likely to vary significantly from an approved budget can also be a breach of duty.[8]

Consultants engaged by a developer might face claims in negligence from a contractor who made a fixed price contract with reference to the consultant's cost estimate.

Also, consultants engaged by a contractor (ie: under a design and construct contract) might face claims from a developer who made a cost plus contract (ultimately exceeding the construction budget), or from a developer who made a fixed price contract (if the contractor becomes insolvent before a project is complete).

Australian Consumer Law

Consultants might also face claims from people with whom they did not contract if the consultant makes a misleading statement.

This liability arises under section 18 of the *Australian Consumer Law* (**ACL**), which provides that

> *"A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."*

If a consultant, say, overestimates the price for which a completed project might ultimately be sold, or under estimates the cost of constructing a project, the consultant may be liable for the loss and damage ultimately associated with the project.[9]

Unprofessional Conduct

Consultants who fail to appropriately warn clients about cost implications may also behave in a way that constitutes unsatisfactory professional conduct,[10] exposing themselves to disciplinary sanctions from their professional body.

What can consultants do to limit their exposure?

Consultants don't need to be scare mongers. Simple, sensible steps can manage exposure:

- Peer review cost estimates, cost assessments and claim certification. Ensure your staff are appropriately supervised and supported.
- Include appropriate warnings in cost estimates about the impact of inflation.
- Alert clients if costs vary significantly from the budget.
- Don't promise more than you can deliver. If you don't have a crystal ball, don't kid yourself – or your clients – that you do.

[1] https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/consumer-price-index-australia/dec-quarter-2022

[2] https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/producer-price-indexes-australia/latest-release

[3] https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/producer-price-indexes-australia/latest-release#construction

[4] For example, see clause 4 of AS 4122 (General Conditions of Contract for Consultants)

[5] Provided that the person is within a class of people to whom the consultant owes a duty of care

[6] *Nye Saunders & Partners (A Firm) v Alan E. Bristow* (1987) 37 BLR 92

[7] ibid

[8] *McKenzie & Anor v Miller* [2006] NSWCA 377

[9] See section 236 of the ACL and *Henville v Walker* (2001) 206 CLR 459. See also *McKenzie & Anor v Miller* [2006] NSWCA 377, where a misleading representation was a breach of section 42(1) of the *Fair Trading Act* (NSW)

[10] For example, see *Chapman v NSW Consultants Registration Board* [2013] NSWADT 120. See also s 36 of *Architects Act 2002* and s36 of the *Professional Engineers Act 2002*