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# COMMUNIQUÉ

Newsletter of the  
New Zealand Architects Co-operative Society Ltd

July 2005

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## Barry Dacombe Standing Down as Chairman

By Alan Purdie – Editor

**A**t the Annual General Meeting of **NZACS** held in Hamilton on 17 June 2005, Barry Dacombe advised it was his intention to stand down as Chairman from the next Board meeting which will be held in early September. At that meeting he will hand over the Chairmanship to Hamish Wixon of Dunedin.

Barry has been a Director for 26 years and Chairman for the past 20 of those years. His commitment and drive to advance the services of the Society, in its role supporting the profession, and to promote improved methods of managing risk in the practice of architecture, has been his mission. He has willingly shared his knowledge and experience with the membership and fellow directors. In these roles Barry has made an outstanding contribution to the advancement of profession in this country.

Barry's experience, however, will not be lost as he will continue to serve as a Director and be there to assist Hamish as he takes up the position as Chairman.

## Risk Management Seminar in Hamilton

**C**ombined with the AGM in Hamilton in June Graham Strez gave a further presentation of his current Risk Management seminar which has now been held in several centres and will continue to be presented around the country as opportunities arise.

The Directors wish to record their appreciation for the support of the 55 members from within the Waikato – Bay of Plenty region who attended, a number travelling in from Tauranga and Rotorua. It was gratifying to see such support.

## Preparing for Construction Disputes

**C**olin Orchiston presented this paper to the Building and Construction Law, Disputes and Contract Management Conference in Auckland held in February this year.

As well as being one of our Claims Directors he holds recognised qualifications in Architecture, Valuation and Dispute Resolution so is well qualified and experienced to write on all aspects relating to construction disputes.

Colin has generously made his paper available to the Society for publication to members via Communiqué, an offer which has been most gratefully accepted.

More recently Colin has been appointed as one of the six members of the new Licensed Building Practitioners Registration Board, on the nomination of NZIA. He is the only architect member on the Board. We wish him well in this new challenge.

Colin paper reads.....

### **Preparation for disputes starts before a contract is entered, and continues until all disputes are settled.**

- Before a contract commences, the preparation is directed at reducing the risks of, and the potential for disputes.

- During the contract, the preparation is directed at anticipating emerging difficulties, and minimising their impact.
- If a dispute arises, the preparation is focussed on generating and organising the knowledge required to navigate through the resolution process.
- During the resolution process, the preparation is cumulatively developed with a view to reaching an acceptable outcome.

This paper is a checklist of questions and issues to guide such preparation. Whilst the sections are arranged in chronological order, no priority is intended by the order of items within each section, and more or fewer issues may be relevant to a particular dispute.

The final section is a summary of key words: an aide-memoire reviewing the intentions of the more detailed information.

## 1. Pre-Dispute Actions

- |                                    |                                  |
|------------------------------------|----------------------------------|
| ● Agree dispute resolution process | ● Uninformed                     |
| ● Negotiation                      | ● Personal                       |
| ● Mediation                        | ● Corporate                      |
| ● Adjudication                     | ● Committee                      |
| ● Arbitration                      | ● Government                     |
| ● Partnering/Alliancing            | ● Timeframes                     |
| ● /DRB <sup>1</sup>                | ● Realistic                      |
| ● Assess the risks                 | ● Deadlined                      |
| ● Project type                     | ● Liquidated Damages             |
| ● Technically challenging          | ● Quality expectations           |
| ● Routine                          | ● Contract type                  |
| ● Large                            | ● Lump sum                       |
| ● Complex                          | ● Cost up                        |
| ● Budget                           | ● GMP <sup>2</sup>               |
| ● Adequate                         | ● Consequences of failure        |
| ● Tight                            | ● Legal environment              |
| ● Inflexible                       | ● Physical environment           |
| ● Ill-defined                      | ● Check Contract Docs            |
| ● Consultants                      | ● Maintain ongoing documentation |
| ● Client type                      | ● Know thine enemy!              |
| ● Informed                         |                                  |

## 2. Sources Of Dispute

- |                            |                             |
|----------------------------|-----------------------------|
| ● Cost over-runs           | ● Overlaps                  |
| ● Time over-runs           | ● Materials                 |
| ● Poor quality             | ● Trades                    |
| ● Poor communication       | ● Documentation             |
| ● Poor documentation       | ● Unclear responsibilities  |
| ● Mismatch of expectations | ● Client/Consultant         |
| ● Difficult personalities  | ● Consultant/Contractor     |
| ● Unforseeables            | ● Contractor/Sub-contractor |
| ● Misjudged risks          | ● Supplier/installer        |
| ● Botches                  |                             |

<sup>1</sup> DRB: A Disputes Review Board is a standing committee or appointed individual who monitors the contract for emerging disputes and advises on how to minimise or solve them.

<sup>2</sup> GMP: Guaranteed Maximum Price contract

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### 3. Signals Of Impending Dispute

- Anger
- Frustration
- Criticism
- Threats
- Damaged Pride
- Longer lead times
- Reduced productivity
- Lax management
- Slow payment
- Inflated progress claims
- Increased formality
- Reduced communications
- Increased communications
- Outside "experts"

### 4. Responses To Dispute

- Gather information
- Can the problem be defined
- Confirm what happened
- Why did it happen
- Who was involved
- What did they do
- What did they not do
- What were the contract requirements
- Confirm intentions of the contract
- Confirm instructions and context<sup>3</sup>
- Assess the information
- Is it a dispute, or a contract issue
- What are the direct consequences
- To you
- For the performance of the contract
- To others
- What are the flow-on consequences?
- Is the information reliable
- Measurement of quantities
- Quality benchmarks
- Realistic costings
- Biased reporting
- What further information is required
- Tests
- Site examinations
- Opening up
- Solvency investigations
- Expert input<sup>4</sup>
- Technical
- Legal
- Accounting
- Dispute Resolution
- Personal observations/accounts
- Willing sources
- Unwilling sources
- What is the likely attitude of the other parties
- Objective
- Possessive
- Submissive
- Devious
- Confrontational
- Co-operative
- What is the competency of the other parties
- Expert
- Technical
- Legal
- Widely experienced
- Narrowly focussed
- Ignorant
- Not familiar with the industry
- Not attuned to logical argument
- Will personalities get in the way of the problem

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<sup>3</sup> Context: Issues external to the contract which may affect it; e.g. government or corporate policies and objectives, highly geared or speculative project, client living on/near the site

<sup>4</sup> Experts: Recent Court decisions have reinforced the concept that experts should match the point being addressed. For example a WHRS assessor would not be acceptable as an expert about an architect's performance – that would require another architect as an expert.

### 5. Moving To Resolution

- Solve at the lowest level
- Who can solve it
- Who needs to solve it
- When can it be solved
- Who else is involved
- How/Why
- Do they know
- Should they know
- When
- Will they co-operate
- Shared interests
- Shared positions
- Shared information
- Other relationships
- Can they contribute
- Time
- Money
- Expertise
- Materials
- Labour
- Might they contribute
- Are they solvent
- Willing to come back to the job
- As the lesser of other evils
- Act as soon as preparation permits
- Can a simple fix be effected
- Could changed circumstances reduce the impact
- Positions taken by the parties
- Offset against other matters
- Alteration to contract requirements
- Timing issues
- Budget issues
- What are the consequences of
- Delaying resolution
- Failure of resolution

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## 6. Situation Analysis

- What are your POSITIONS<sup>5</sup>
- Dollars
- Principles
- Contract interpretation
- BATNA<sup>6</sup>
- WATNA<sup>7</sup>
- Are your POSITIONS
- Flexible
- What would change them
- Prioritised
- What would change the priority
- What are your INTERESTS<sup>8</sup>
- Honour
- Goodwill
- Marketing advantage
- Relationships
- Client'
- Consultants
- Subcontractors
- Suppliers
- Expediency
- Money
- Time
- Quality
- Are your INTERESTS
- Flexible
- What would change them
- Prioritised
- What would change the priority

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<sup>5</sup> Interests and Positions: For example, your position might be that your child must be in bed by 9pm; your interest is that they succeed at school they next day.....

<sup>6</sup> BATNA: Your best alternative to a negotiated settlement

<sup>7</sup> WATNA: Your worst alternative to a negotiated settlement!

<sup>8</sup> Interests and Positions – see below

## 7. Agents Of Change

- Who else has INTERESTS
- Who else has POSITIONS
- Do you know those interests and positions
- How can you find out
- What are they
- How do they differ from yours
- Why
- How can they be brought closer to yours
- If you were them
- How would they see your positions
- How would they see your interests
- Do they need you
- Does a resolution establish a precedence
- How would that affect your future Interests
- What are the power issues How can you influence them
- The Golden Rule (\$) <sup>9</sup>
- Authority by position
- Authority by knowledge
- Authority by size/muscle
- Existing and future relationships
- Resolution process options
- Ignore the problem
- Negotiation
- Set by the contract terms
- Formal opinion
- Mediation
- Arbitration
- Adjudication under the CCA<sup>10</sup>
- Parallel processes
- Should you initiate the process

## 8. Organising Information

- Create a recognisable structure
- Lay the "ground bait"
- Bring out the facts
- Explain the involvement of others
- Provide proof, validation, and references
- Establish the relevance of the information
- Repeat the key issues
- Summary and conclusion
- Or (put another way) – the Journey
- Where we are going
- How we get there
- These are the markers along the way
- Almost there – how far it is to go
- We are there (you can tell because.....)
- Deal with the easy stuff first
- Use objective tests and benchmarks
- Compare with understood criteria
- Apply logical extensions
- If this..... then.....
- Because of..... then.....
- What if..... then.....
- Don't personalise
- Problems
- Attitudes
- Arguments
- Criticism
- This is not MY problem
- It's OUR problem
- Lets face it together
- Lets solve it together

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<sup>9</sup> The Golden Rule: "Them wot got th' gold make th' rules"

<sup>10</sup> CCA: The Construction Contracts Act imposes a mandatory regime of adjudication on construction contracts

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## 9. The Resolution Process

- You have to give a little to gain a little
- Not often is there gain without pain
- What do
- You know that they know
- How does their view differ from yours
- You know that they don't know
- You think they think you know
- You think they might know, that you don't
- Prepare to move
- Signal ahead
- Create the room for movement
- Recognise common interests
- Emphasise the positives
- When to move
- If other side recognises the signals
- If they provide room for movement
- If they acknowledge commonalities
- If they acknowledge the positives
- Why move
- If they move
- If they can't move because you won't
- If there is a shift from POSITIONS to INTERESTS
- To deflect a potentially damaging blow
- New adverse facts
- Unwinnable argument
- The application of adverse power
- New directions you haven't prepared for
- Movement to
- issues you want to avoid
- How far to move
- Not too far too soon
- Are your interests still intact
- Consider your BATNA
- Consider your WATNA
- If they were you, but knowing what they know
- What is the best they could do now
- What is the worst they could do now
- How far would they move now
- How will they react to
- The worst you can do now
- The best you can do now
- Consider their BATNA
- Consider their WATNA
- Compare to what they think you could do
- Confirm and celebrate movement as objective progress
- What other openings are thus presented
- How has it affected the dynamics of the process
- Move from holding positions to meeting interests

### Summary: Key Concepts

- Before the contract
- Who
- What
- How
- Context
- What if
- During the contract
- People
- Tasks
- Information
- Performance
- Uncertainties
- Potential contract disputes
- Attitudes
- Information
- Interests
- Positions
- Conflicts
- Dispute resolution
- Differences
- Commonalities
- Consequences
- Options
- Satisfaction
- Commitment

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## The Challenge of Customising

By Deborah Cranko - NZACS Board Member

**I**n the August 2004 issue of *Communiqué* a Risk Alert was published advising care in the use of Master Specifications, emphasising the need to ensure that each specification produced did in fact relate to the specific job.

Don Bunting, Chief Executive of Construction Information Ltd producers of MasterSpec, has written the following in response on customising specifications.

"Whatever approach you take to preparing for and then writing your project specifications, it is essential that the final document is customised to reflect the project being documented. The "standard" specification is a myth. It does not exist.

And whether you maintain your own system, or use a system like MasterSpec® as a base, the task remains to remove irrelevant text, add any project-specific clauses or sections and complete any open or incomplete lists of selections.

**NZACS** recently commented to Construction Information that:

"Many users of MasterSpec® are not customising the text.." and that:

"...CIL should take more responsibility for ensuring that users know they need to customise for each job".

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Our response to them at the time was:

1. Last year's MasterSpec® seminar series finished by stating – “customise, customise, customise”.
2. We now provide training in Microsoft Word, with “Word Workshops” being held on demand throughout the country. These are proving to be very popular and provide those who attend with improved text management skills.
3. The new LINK technology – our internet-based file delivery and customising software - helps and encourages subscribers to customise by making the process easier.
4. We provide extensive guidance notes throughout the work section text to encourage and guide the customising process.
5. Our on-line “specifiers guide” makes extensive reference to the need for customising, as well as providing further guidance on “how to”.
6. The CIL December 2003 News Bulletin noted that:  
“We make no apologies for sounding like a broken record in repeating our call for greater attention to customising the MasterSpec specification text”.

Having said that, there is always more that we can do to make the specifying process as intuitive and straightforward as possible. We are increasing our encouragement and support of tertiary institutions, by providing better access to educational versions of MasterSpec® and by offering free teaching modules on specifications and specification writing.

Other current initiatives are:

- Grouping more project selection items under the single heading of SCHEDULES, to reduce the need to trawl through the text to find all the open default entries
- Providing more single file versions for non-LINK (Macintosh) users
- Additional telephone support for all MasterSpec® subscribers.

This still leaves the specifier with the task of removing inappropriate clauses and inserting any additional project-specific clauses.

Ultimately it is over to the person preparing the project specification to accept the need to customise the raw “standard” text and to include only those matters which relate to the project being specified.

Leaving things in “just in case”, or forgetting to either complete or remove all the prompts for project-specific selections (the little tilde symbols found throughout the MasterSpec® text) is at best dumb and at worst very, very dangerous.

Imagine having to justify to a court or to an arbitrator, that leaving in text on clay roof tiles when there were no clay roof tiles in the project was appropriate? Or justifying the fact that some parts of the specification contradicted other parts, or contradicted what was shown on the drawings?

There is no justification. To not customise the MasterSpec® work section text, or the text of your own specification system is unprofessional. And as we inexorably move into an era of self-certification, greatly increased accountability and a much more litigious public, it could well threaten an architectural practice's very survival.

As an “industry-good” company Construction Information Limited is available to provide advice and guidance on documentation practice to architects and other design professionals, whether or not they currently subscribe to MasterSpec®.

All it takes is a phone call or email, requesting information, or requesting a meeting to discuss your practice's specifying needs.”

## ***COMMUNIQUÉ***

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***We welcome contributions from readers, on how they manage risk.***