

### NEW OBLIGATIONS ON BUILDING SUPERINTENDENTS

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As with AS4000, AS4902 introduces some changes which favour the contractor. One of those changes is an overriding general obligation on superintendents to act in good faith regardless of what role they are performing under the contract.

Another is the inclusion of several new and much tighter time limits for superintendents. For example, if the superintendent doesn't determine an extension of time claim within 28 days, the claim will be deemed to have been granted. This will have a major impact in terms of contract administration and means that if a superintendent is not up to the task, the proprietor will be heavily penalised.

#### THE SUPERINTENDENT'S ROLE

AS4902 substantially widens the duties of superintendents, particularly with respect to the range of items they must certify under the terms of the contract. These additional requirements are likely to be quite onerous. For example, they are obliged to certify amounts which were previously debts due and payable (e.g. as a result of failure by one party to obtain insurance).

#### GOOD FAITH

There is now a far reaching obligation for the superintendent to 'fulfil all aspects of the role and

functions reasonably and in good faith'. This introduces a term into the contract that is difficult to define, resulting in a 'case by case' standard for each individual contractual arrangement rather than a prescribed standard by which to judge all scenarios.

The superintendent has a dual role under the contract:

- to act as the principal's agent in performing various administrative tasks under the contract
- to act (in a quasi-judicial role) as certifier under the contract.

When wearing the certifier's hat, the superintendent must act 'honestly and fairly'. In fulfilling these functions, he must act impartially and without bias to either party. He must also consider the respective rights and interests of the principal and the contractor while holding a balance between what may be disputing parties.

Under AS4300, in his role as agent for the principal, the superintendent owes a duty to the principal because he is required to act with the principal's best interests in mind. One of his functions as agent for the principal is to issue directions as permitted by the contract.

In contrast, AS4902 requires the superintendent to act in good faith in both situations. Although it is not easy to define good faith, it seems that the concept is aligned closely with the notions of fairness, honesty and reasonableness.

Recent case law suggests that acting in good faith does not require parties to sacrifice their self interests but it may require them to act in ways which do not necessarily maximise their own positions.

This may have a significant impact on how superintendents carry out their functions under a contract.

They will be required to treat both parties equally and not deprive either of the benefit of the contract. Before directing a variation or a suspension of work, for example, the superintendent will have to take into account whatever impact the variation or suspension will have on the contractor.

While this new 'good faith' obligation will undoubtedly appeal to contractors, it will not sit comfortably with principals or superintendents.