



**CONTRACT ADMINISTRATION PRINCIPLES:  
GUIDE TO CONSTRUCTION CONTRACT PROFESSIONALS**

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## 1. PRE-CONTRACT PREPARATION

### 1.1 STANDARD FORM CONTRACTS

There are many standard form General Conditions of Contract available for use on construction projects in Australia.

AS2124-1992 is the widely-used Standards Association of Australia produced General Conditions of Contract for construction projects. (In fact, Standards Association of Australia regard this form, and its hybrid variants, as “superseded”. Standards Association of Australia recommend the later documents, AS4000-1997, and its hybrid variants. In my view, those later forms still have not achieved wide acceptance. For that reason, this guide refers, throughout, by way of example, to the AS2124-1992 and the AS4000-1997 forms.)

This standard form was first published in 1952 (originally known as CA24). Since that time it has been reproduced in several editions, changing its designation in 1978 to AS2124. AS2124 was revised in 1978, 1981, 1986 and 1992.

The Standards Association of Australia has, over several editions, hoped to encourage universal use of AS2124 on engineering projects. In particular, in the 1986 revision, and again in the 1992 revision, SAA hoped to discourage the use of the alternative NPWC3-1981 General Conditions of Contract by the public sector in favour of AS2124. (In the 1986 revision, therefore, many of the features of NPWC3-1981 were incorporated.)

AS2124-1992 is the genesis of several hybrid versions of General Conditions of Contract, in particular:

|             |                                   |
|-------------|-----------------------------------|
| AS2124-1992 | Construction Works                |
| AS2545-1987 | Sub-Contract                      |
| AS2987-1987 | Equipment Supply and Installation |
| AS3556-1987 | Supply                            |
| AS4300-1995 | Design & Construct                |
| AS4305-1996 | Minor Works                       |

AS4000-1997 is the current version of the Standards Association of Australia General Conditions of Contract for Construction. AS4000-1997 has (theoretically) superseded AS2124-1992 as the Standards Association of Australia produced General Conditions of Contract for construction projects. AS4000-1997 (like its predecessor) has spawned hybrid versions, in particular:

|             |                                      |
|-------------|--------------------------------------|
| AS4000-1997 | Construction Works                   |
| AS4902-2000 | Design & Construct                   |
| AS4905-1996 | Minor Works (Principal administered) |
| AS4906-1996 | Minor Works (Supt administered)      |

There are, however, a number of unfortunate drafting errors in the AS2124-1992 General Conditions of Contract, attributable no doubt to the committee process of revision, which would need to be remedied before the document is suitable for use on major engineering projects. In brief, those drafting flaws include:

1. The document, in its treatment of Bills of Quantities, places the risk of pricing the works with the Principal rather than the Contractor (contrary to the recommendations contained in "No Dispute" which recommended the reverse).
2. uncertain risk allocation in a number of important areas (e.g. default of selected Sub-contractors);

3. inadequate security/retention provisions, which disentitle the Principal from access to security or retention in the event of defective work removing the commercial equivalence of bank guarantees to cash;
4. no provision of collateral contracts within the document (perhaps this is a reflection of the failure of the committee to follow the commercial trends);
5. complex logical difficulties relating to the conflicting roles of the Superintendent (as between his role as agent for the Principal and as an independent certifier);
6. the document does not include an acceleration clause;
7. the latent conditions clause is expressed as a subjective test likely to favour inexperienced Contractors;
8. the extension of time clause has a number of logical and commercial difficulties;
9. the certificate of progress payments by the Superintendent requires the Superintendent to certify for claims, which may involve a legal judgment, and for claims, which may arise out of his own error, which are likely to result in challenges to the certificate by the Contractor;
10. the dispute resolution clause does not constitute a binding arbitration agreement.

Many of these (but not all) drafting flaws did not appear in the AS4000-1997 series. That series, however, includes other potential drafting issues (for example, AS4000-1997 does not include a time bar, unlikely to be preferred by principals in selecting a form of contract).

For the reasons set out above, the AS2124-1992 and AS4000-1997 series of General Conditions of Contract are always substantially amended by private sector principals prior to use on major projects, or not used at all.

## 1.2 TYPES OF CONTRACT

There are a range of contract types which may be attractive on a particular project.

The choice of a particular style of project delivery system will depend on many factors, for example:

- ease of design (buildings vs complex engineering projects);
- desire for design flexibility during construction;
- availability of suitable contractors/project managers, and balance sheets of such contractors;
- political considerations;
- budget constraints vs performance of completed project.

On major public sector projects, the use of standard form fixed-price contracts would be more prevalent than on similar scale private sector projects (though, in contrast, BOT projects are essentially public sector projects delivered by the private sector).

There are multiple different types of project delivery systems as follows:

### 1. Fixed Price Contracts

The traditional form of construction contract has been a fixed price contract.

The general operation of this type of contract requires the Contractor to tender on, and then take the risk in relation to, the price of the works. The Contractor, irrespective of the actual cost of the works, will be entitled to be paid no more than and no less than the Contract Sum, as agreed between the parties prior to commencing the works.

In fact, for a number of reasons which are discussed elsewhere in this and related topics, a fixed price contract is rarely performed for exactly the amount of the

originally agreed Contract Sum. For example, if the Principal delays the Contractor in obtaining the site, the contract would usually provide for an increase in the Contract Sum.

The critical characteristic, however, of a fixed price contract, is that the Contractor takes the risk as to the ultimate price, and that the parties agree to pay the Contract Sum (as adjusted pursuant to the provisions of the Contract).

## **2. Cost Plus**

The critical characteristic of the cost plus contract is that there is no risk, as to cost, borne by the Contractor.

The Contractor and the Principal agree, at the time entering into the Contract, that the Contractor will perform the works, and that the Principal will pay for those works, on the basis of the actual cost of the Works to the Contractor, plus an agreed fee, usually an agreed percentage of that sum (or some other agreed incentive over and above the actual cost of the works).

A cost plus contract is, therefore, risk-free, as to cost, for the Contractor.

This does not mean, however, that the Contractor is entitled to charge whatever he likes. The Contract will usually provide that the Contractor has to verify and/or justify the cost of the works to be charged under the Contract. Further, one could envisage circumstances where, through negligence by the Contractor or some other reason, the Contractor would not be entitled to recover the full cost of those works.

There are flexibility reasons why such an arrangement may be attractive from time to time for a Principal.

For example, the Principal might have a strict budget to comply with, and may be in a position of being able to increase or reduce the Works as they are performed (for example, by deleting or adding parts of the Works, or by increasing or decreasing the quality of the selected materials) to ensure that the final cost of the Works remains within that strict budget. (In theory, this should be equally possible under a fixed-price contract. For the reasons referred to above, however, in certain instances the Contract Sum being able to be adjusted, a Cost Plus Contract, where the Works themselves are able to be changed during construction, might, conceivably, provide a more convenient method of ensuring that the cost stays within particular limits, albeit that the Works to be performed may change from that which was originally proposed.)

The nature of cost-plus contracting, therefore, is that the Contractor agrees to perform the works but that the risk as to the final cost of those works is borne by the Principal, not the Contractor (the reverse of the position under the fixed price contract).

## **3. Design & Construct Contract**

A design & construct contract requires the Contractor to tender on the works described in the Design Brief (prepared by the Principal), and tender not only for the construction of the works described in that Design Brief, but also for the completion of the detailed design, consistent with that Design Brief.

There are a number of construction reasons which suggest that the design & construct method of contracting has the potential to reduce the overall cost of construction to the Principal.

The nature of this type of contract is such that the Principal is able to enjoy the advantages of design efficiencies which Contractors, through their contracting experience, may be able to incorporate into the design of the works, which may have the effect of reducing construction cost (this is discussed further below).

The Principal is still required to adequately specify (in the Design Brief) the works to be completed for the Contract Sum. The degree to which that work is specified, however, is less than that which would occur under a construction only contract. The accuracy of the Design Brief (which, again, is discussed further below), is critical to the Principal being able to rely on the design & construct contract.

#### **4. Project Management Agreement**

A project management agreement is one in which the Principal contracts, not with a Contractor who would perform the construction (or the design and construction) works, but with a person who would manage the project on behalf of the Principal, whether by performing the works in part or wholly himself, or by contracting out part or all of the works on behalf of the Principal, or a combination of all of the above.

There is an infinite variety of possible project management contract types (these are discussed further below).

The nature of a project management agreement, however, is that the Principal engages a person to manage the project on its behalf, rather than engaging a Contractor to construct the Works. The functions typically performed by a Project Manager, therefore, are usually more extensive than those which might be performed by a Contractor. Further, the risks borne by a project manager, under a project management agreement, are typically less than, or at least different to, those borne by a Contractor.

The types of functions performed by a project manager, pursuant to a project management agreement, typically include the design, or procurement of the design on behalf of the Principal, the construction or procurement of the construction on behalf of the Principal, and, in particular instances, other activities including, for example, site selection, site acquisition, permit approvals, advertising of the project, leasing or pre-leasing of the project, and/or other activities which might otherwise need to be performed by the Principal.

The essential feature of the project management agreement is that the works to be performed pursuant to the agreement are the necessary management services rather than the contract construction works.

#### **5. Construction Management Agreement**

A construction management agreement is similar in most respects to a project management agreement, except that, typically, the services to be provided by the Construction Manager are restricted to construction activities only (rather than, for example, design activities, site acquisition, leasing activities...).

Accordingly, construction management agreements are, typically, similar in structure to project management agreements.

The substantive functions to be performed by construction management, typically, include engaging trade contractors on behalf of the Principal, and potentially, the

provision of preliminaries for those trade contractors.

## 6. **Managing Contractor Contract**

The Managing Contractor might be characterised as a hybrid of a project management/cost-plus/fixed price contract.

Typically the features of such a contract would include:

- the Managing Contractor contracts with the Principal to manage the construction of the works on behalf of the Principal
- the Managing Contractor contracts with the Principal to provide, at a fixed price, or alternatively at a percentage of the total contract price, certain aspects of the works (for example, the preliminaries, including crane hire, site sheds, supervision services...)
- the Managing Contractor may perform all or part of the design services for the Principal
- the Managing Contractor will arrange the trade packages, tender and enter into the trade contracts on behalf of the Principal and, potentially, itself perform some of the trade contract works
- the Managing Contractor will perform the usual supervision, reporting activities required on the project to keep the Principal informed of the progress of the works.

The attraction of the Managing Contractor type of contract is its flexibility and the skills which the Managing Contractor may be able to bring to the project, to assist the Principal.

## 7. **Warranted Maximum Price Contract**

A Warranted Maximum Price Contract is, in substance, a cost-plus contract between the Principal and the Contractor, which, in turn, is subject to an upper limit (the Warranted Maximum Price), above which, subject to certain conditions, some of which are discussed below, the Contractor will bear the risk as to costs.

Under a Warranted Maximum Price contract, the Contractor is to be paid on a cost-plus basis up to a certain limit. Over and above that limit, the Contractor is not entitled to any further payment. That limit, however, as in the case of the Contract Sum under a Fixed Price Contract, is subject to adjustment in certain circumstances (for example, where the Principal varies the works, or where the Principal causes delay and/or additional cost to the Contractor).

The benefit of the Warranted Maximum Price contract is in giving some upper limit degree of comfort as to the total cost of works, provided those works are adequately described as to scope, yet allow the parties to enter into the contract on a cost-plus basis where that is an appropriate vehicle for them (this is discussed further below).

## 8. **Build Own Operate Transfer (BOOT) / PPP Project**

Since 1989, in Australia, there have been a substantial number of major construction projects which have been performed using the BOOT, or BOT vehicle. This type of project is more usually called, now, a PPP or Public/Private participation project.

The basic structure of a BOOT project is that the Contractor agrees with the Principal not only to build the project but to arrange finance for the project, and then, using that finance, to build the project, to own the project for a limited period, to operate the project throughout that period, and then, at the end of that period, to transfer the project

to the Principal.

Typically, this style of structure is employed on public infrastructure projects where, but for the intervention of private sector financing, the project might not proceed.

### **Choice of Project Delivery System**

The choice of any particular project delivery system is made at the commencement of the project. Historically, however, little, or inadequate, consideration is given to the many types of possible contract structures available for any particular project.

In fact, there is an unlimited number of potential project delivery systems based on the above, or a combination of any or all of the above, which might be suitable to any particular project.

The choice will usually depend on factors such as:

- the need for strict cost control;
- the need for flexibility in what is to be constructed throughout the construction period;
- the complexity of what is to be constructed;
- the inhouse resources of the Principal;
- the expertise of the likely tenderers;
- particular budget constraints;
- financing considerations.

## **1.3 FIXED-PRICE vs COST-PLUS CONTRACTING**

### ***Fixed Price?***

In theory, a Fixed Price Contract is one in which the Principal contracts with the Contractor to perform agreed works for a fixed price.

Accordingly, irrespective of whether the works actually cost more or less than the agreed Contract Sum, the Contractor is entitled to receive no more than and no less than the Contract Sum at the end of the works.

In practice, however, there are a number of ways in which the Contract Sum can (and usually does) alter during the period of construction on the works, including, for example:

1. the Principal failing to deliver the site to the Contractor on time;
2. the Principal failing to deliver exclusive access of the site to the Contractor at the agreed time;
3. the Principal failing to provide the detailed contract drawings and/or specifications required of the Principal under the Contractor by the agreed time;
4. the drawings and/or specifications provided by the Principal having errors or omissions or being incomplete;
5. the site having characteristics different from that which was described in the tender documents;
6. material to be dealt with on the site being different from that which was anticipated under the tender documents;
7. other reasons pursuant to which the Contractor would reasonably be entitled to claim more or less than the Contract Sum on the basis that the works as ultimately performed were different to those works which were described in the tender documents.

In fact, as a matter of practice, a Fixed Price Contract is rarely performed for the exact amount of the **original** Contract Sum. This is not surprising when one considers the nature of a construction contract (in comparison, for example, with a Contract of Sale for land). The nature of a construction contract is such that works as **generally** described in detailed and complex contract documents are to be performed over an extended period of time, subject to a large number of variable conditions, which the parties need to anticipate and which may bear on the actual cost of construction.

### *Turnkey Contracts*

The Fixed Price Contract is different to a true “turnkey” contract.

(Unhappily, the word “turnkey” is often used interchangeably with “fixed price contract”, or what are in fact fixed price contracts are wrongly called “turnkey” contracts on particular projects, thereby giving rise to the confusion.)

A turnkey contract is one in which the Principal and the Contractor agree on a **fixed** Contract Sum to be paid upon completion of the works to a particular standard and/or performance criteria, and in relation to which the Principal does not participate in any way in the actual performance of the works but, at the end of the works, is invited to inspect the works and, subject to the works being adequately constructed and performing to the requisite criteria, the Principal then paying the full amount of the Contract Sum and taking over the works. (The Principal is said to simply hand over the cheque, turn the key and commence operation.) In a fixed price contract, by comparison, the Contract Sum is **adjusted** throughout the contract period, (for the reasons set out above). A true turnkey contract, in practice, is more akin to a purchase contract than to a construction contract.

### *Cost Control of Cost-Plus Contracts*

The Principal may impose a number of cost controls in a cost-plus contract.

#### *Capping*

For example, there may be an overall cap on the Maximum Price (usually referred to as a Warranted Maximum Price Contract), subject to the following:

- the Warranted Maximum Price is subject to the scope of the Works being adequately described;
- the Warranted Maximum Price as adjustable, just as the Contract Sum is adjustable under a fixed price contract.

#### *Trade Contracts*

Alternatively, the Contractor, though himself on a cost-plus basis, may be required to procure all or an agreed part of the works through fixed price trade contracts, each of which is to be vetted and approved by the Principal.

The Principal would, with the assistance of the Project Manager, negotiate and enter into prime contracts with the proposed trade contractors, the technology providers, and other major contractors as are identified at the time of allocating work/supply contracts between the prime contractors.

This structure has been successfully used on a number of major projects around Australia..

Wherever this project structure has been successful, however, the Principal has been protected from the possibility of unlimited cost overruns by incorporating all of the work (say, 85% plus of the work) in fixed price trade contracts. The Principal enters into a cost-plus contract with the prime contractor, the work is then contracted out by the prime contractor on a fixed price basis, the prime contractor being entitled to cost-plus reimbursement by the Principal for those trade contract prices. Effectively, therefore, the Principal has the benefit of fixed price contracting.

### ***Features of the Trade Contracts***

The Contractor would be required to perform the works within a number of trade contracts.

There are a number of contractual protections (for the Principal) which should be incorporated into those trade contracts to ensure the time/cost targets are ultimately met on the project:

1. the trade contracts should be fixed price;
2. the terms of the trade contracts, generally, should be agreed between the Principal and the Contractor;
3. the trade contracts should be put out to open tender;
4. there should be an approval process whereby the Principal may review the proposed tender process, and shall have final approval of any particular trade contract (subject to, if necessary, such trade contracts having a value above a minimum trade contract value);
5. the trade contracts should provide adequate security for the performance of the contract, and provisions for liquidated damages (in respect of both, late completion and underperformance) sufficient to compensate the Principal for its losses if necessary.

Subject to these protections, the Principal would have effective contractual remedies in respect of the works, should there be a failure to perform in accordance with the targets ultimately developed between the Principal and the Contractor.

### ***Incentive Provisions***

Finally, the cost-plus contract would preferably include a regime of bonuses and penalties, and potentially a cap on the total cost, all of which would be subject to the Program. The bonus/penalty targets would be developed by the Principal, assisted in some instances by the Contractor, and incorporated into the cost-plus contract.

## **1.4 TENDERS**

There have been cases in Australia where the courts have decided that a tender process, depending upon the language used, constituted a contract between the Principal and the respective tenderers. In substance, the Principal was, in the right circumstances, promising the tenderers that the tender process and evaluation would be performed in accordance with the tender evaluation criteria described in the tender documents.

In *Ipex ITG Pty Ltd (in liq) v State of Victoria* [2010] VSC 480, the Supreme Court (Sifiris J) was considering a claim by an unsuccessful tenderer that the Victorian government had breached its contractual duty in relation to the evaluation of tenders for the ParleyNet project in 2003. His Honour reviewed the authorities and concluded:

1. Each tender must be considered on its own facts, including the tender and/or related documents, and the relevant context and circumstances, to determine whether there is any intention to create an immediately binding contract as to process.

2. The courts have been more inclined towards finding a contract had been made in relation to the “tender process” where a timeline and detailed process, including evaluation criteria, are set out in the tender documents in a way consistent with such a promissory obligation to follow that timeline and process.
3. In this instance, the RFT was intended to be a legally binding contract as to process, including detailed evaluation criteria, rather than simply a document that provided relevant information. The RFT contained detailed evaluation criteria that Parliament said “will” or “must” be applied, suggesting a “commitment, promissory in nature, to abide by a process particularly in relation to the evaluation of tenders”.

His Honour ultimately concluded, in that case, that there had been no breach of that tender process contract.

## 1.5 PRE-CONTRACT DISCUSSIONS/MISLEADING AND DECEPTIVE CONDUCT

### The Legislation

The *Trade Practices Act 1974 (Cth)* (“TPA”) was passed by the Commonwealth Parliament in 1974. At the time it was a fairly novel piece of legislation aimed at restrictive trade practices, and, in addition, attempting to regulate dealings between corporations and consumers. Constitutional limitations of the Federal Parliament generally limited the application of the Act to corporations under the Federal corporations power.

From 1 January 2011, the name of the *Trade Practices Act 1974 (Cth)* changed to the *Competition and Consumer Act 2010 (Cth)*, and certain other State Acts have been repealed, resulting in the new Australian Consumer Law (“ACL”). From 1 January 2011, the ACL applies nationally and in all States and Territories, and to all Australian businesses. For transactions that occurred up to 31 December 2010, the previous national, State and Territory consumer laws apply. Schedule 2 Section 18 of the *Competition and Consumer Act 2010 (Cth)* provides, so far as relevant, as follows:

*18 Misleading or deceptive conduct*

*(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive*

(This Section repeats the previous Section 52 of the *Trade Practices Act 1974 (Cth)*.)

The ACL gives a person who suffers loss or damage as a result of a breach of the Act a civil action for damages.

### *Bond Corporation Pty. Limited v. Thiess Contractors Pty Ltd.*

In an early case, *Bond Corporation Pty. Limited v. Thiess Contractors Pty. Ltd. & Ors.* (1987) 71 ALR 615, Bond Corporation engaged a firm to act as consulting and supervising engineers for road, earth and drainage works. Following the calling of tenders, and acting on the advice of the consulting engineers, Bond engaged a contractor to carry out the works. Bond brought an action against the consulting engineer, alleging that the firm misrepresented its experience and expertise in the design and supervision of the works, and its ability to provide competent engineers with sufficient experience and to provide accurate estimates of work and subdivisional costs. Bond claimed that as a result of it relying on the consulting engineer's advice it would have to pay more than \$5.4 million in excess of the estimated total cost of the development. The Court concluded that section 52 of the *Trade Practices Act* was applicable to the giving of professional advice by a consulting engineer.

The provision of professional advice for reward fell within the class of conduct as it was engaged in "trade or commerce". The consulting engineer was found to have misrepresented its experience and expertise. (Ultimately, however, Bond failed to establish a causal link between the misleading conduct and the damage complained of.)

*Unisys Australia Ltd v RACV Insurance Pty Ltd*

In *Unisys Australia Ltd v RACV Insurance Pty Ltd & Anor* [2004] VSCA 81 (14 May 2004), the Victorian Court of Appeal was considering a claim for damages by RACV Insurance Pty Ltd against Unisys Australia Pty Ltd in relation to a computer supply contract. In March 1995, 2 years after contracting, Unisys delivered a system that did not meet RACV's expectations. RACV gave Unisys an opportunity to remedy the project, however, the system was still not to RACV's specifications. In June 1996, RACV terminated the contract and sought damages from Unisys. RACV claimed that Unisys had breached section 52 of the *Trade Practices Act*. The key claims related to statements as to the adequacy of the proposed system for RACV's purposes, contained in Unisys' response to the Request for Proposal.

The trial judge had held Unisys liable, concluding that Unisys had represented it would be able (then failed) to deliver a system which met RACV's requirements, and that had Unisys represented otherwise, RACV would most likely not have given Unisys the contract. In the Victorian Court of Appeal, (rejecting the appeal, and allowing a cross appeal by RACV for wasted labor), Phillip JA said, in relation to the representations upon which the action was based, at paragraphs 48-49:

*It is surely significant that, as found below, Unisys was anxious to obtain the contract with RACV; Unisys was representing that it could deliver a system to meet the needs of RACV which were articulated plainly enough in the RFP; and if Unisys later found it more difficult to honour the representations than it had at first expected, that does not absolve it from liability once the representations were acted upon. ....*

His Honour referred to the reliance by RACV upon the representations, in RACV deciding to award the contract to Unisys, based on the representations that had been made in the RFP and subsequent demonstrations by Unisys. His Honour concluded that the representations were not borne out, and then addressed the issue as to whether Unisys had, at the time it made the representations, reasonable grounds for making those representations. At paragraph 73:

*There remains the appellant's argument based on s.51A of the Trade Practices Act that, if the representations were made in 1993 and made as pleaded (as has been concluded) so that they related to the outcome of the system if implemented and were thus as to the future, Unisys had "reasonable grounds" for making the representations. I do not know that it was seriously in dispute that the existence of those reasonable grounds had to be determined as at the date of the making of the representations and not, for example, in June 1996, the "cut-off" date. But as to reasonable grounds, the onus of proof lay squarely on Unisys and the trial judge rejected its submission that reasonable grounds were shown...*

Ultimately, the court awarded RACV damages of approx \$4.3 million plus costs.

*Abigroup Contractors Pty Ltd v Sydney Catchment Authority*

In *Abigroup Contractors Pty Ltd v Sydney Catchment Authority* [2005] NSWSC 662 (11 July 2005), the NSW Supreme Court (Macdougall J) was considering a claim by Abigroup

in misleading and deceptive conduct in relation to an \$85.7 million lump sum contract with Sydney Water to design and construct a spillway on the Warragamba Dam. Under the contract, Abigroup bore the latent conditions risk. Ultimately, Abigroup was required to do substantially more excavation to solid rock and refilling with cement stabilised fill than expected. Abigroup argued that it had been induced to enter into the contract by misleading or deceptive conduct on the part of Sydney Water (namely, advice that there was a representation that there were no plans of an outlet pipe that drained water through the embankment, though ultimately there was such a plan, which would have given information as to the depth of the underlying rock). The Contract included express acknowledgments that the tender documents might be incomplete, contain errors, and must not be relied upon, Sydney Water argued that Abigroup was estopped from arguing the misleading and deceptive conduct point because of these acknowledgements. Though the Contract required tenderers to go on site and do their own investigations, in fact there was no effective opportunity for them to do so. Tenderers were, in fact discouraged from going onto the site during the short (7 week) tender period. The tender documents included a concept design report and specifications, a DPWS geotechnical report. The information in the geotechnical report later proved to be “wildly wrong”.

The court concluded, in brief:

1. Sydney Water, in issuing tender documents and entering into the Contract, containing statements which were wrong, while having in its possession the correct cross-section, had engaged in misleading and deceptive conduct.
2. Abigroup had relied on the misleading and deceptive conduct in submitting its tender and entering into the Contract.
3. The express acknowledgments in the tender documents that the documents might be incomplete, contain errors, and must not be relied upon, did not have the effect that Abigroup was estopped from arguing the misleading and deceptive conduct point.

In relation to the Sydney Water argument that Abigroup was estopped from arguing the misleading and deceptive conduct point because of the express acknowledgments in the tender documents that the documents might be incomplete, contain errors, and must not be relied upon, the court reasoned, at paragraphs 66-67, as follows:

*66 It is clear that, if one party (A) to a contract was induced to enter the contract by misleading or deceptive conduct (for example, a material misrepresentation of fact) on the part of the other (B), B cannot escape liability because the contract contains a term that purports to acknowledge that (for example) there was no anterior representation made to A, or on which A relied; or that purports to exclude liability for the consequences of any such representation . See the judgment of Burchett J in Oraka Pty Ltd v Leda Holdings Pty Ltd (1997) ATPR 41-558. Although his Honour’s decision was reversed on appeal, the relevant principle was affirmed by the majority in the Full Court: (1998) ATPR 41-601 at 40, 517-40-518 (Branson and Emmett JJ). ....*

*67 The same principle applies to any document, including de hors the contract, that would purport to exculpate B from the consequences of its misleading or deceptive conduct . See Waltip Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) ATPR 40-975; Keen Mar Corp Pty Ltd v Labrador Park Shopping Centre Pty Ltd [1989] FCA 46; (1989) ATPR (Digest) 46-048; and IOOF Australia Trustees (NSW) Ltd v Tantipech [1998] FCA 924; (1998) 156 ALR 470 ..... The Full Court held that neither cl 25.08 of the lease, nor the relevant terms of the deed, could defeat the tenant’s claim. That reflected, their Honours said, the public policy underlying s 52 of the Trade Practices Act. That public policy, they held at 479, “must extend to any document which purports to excuse a representor from liability for contravention of section 52?... ”*

(emphasis added)

### Conclusions

The legislation and the cases consistently support the view that a party who relies, to their detriment, upon wrong/ mistaken/ inaccurate/ incomplete:

statements  
representations  
documents  
conduct

....

(including, for example, pre-contract discussions, and/or tender documents, and/or documents such as geotechnical reports provided by a principal during the tender phase), even where the terms of the contract expressly exclude such reliance, may have an action for damages in misleading and deceptive conduct.

## 1.6 ALLIANCE CONTRACTS

Project alliancing is a distinct, project-specific, form of relationship contracting.<sup>1</sup> Under an alliance contract, the parties agree to work cooperatively, on an open book basis, with commercial incentives (painshare/gainshare) based on project outcomes, controlled by a (joint, senior) project alliance board and alliance management team, and on a “no dispute” basis.

### *Origins*

Graham Thomson, in perhaps the earliest substantive paper on project alliancing, entitled, “*Project Alliances*”, *AMPLA Yearbook 1997*<sup>2</sup>, suggested the following “*Principles of Project Alliancing*”:

- (a) *a primary emphasis on the business outcomes for all parties;*
- (b) *clear understanding of individual and collective responsibilities and accountabilities;*
- (c) *an equitable balance of risk and reward for the parties;*
- (d) *encouragement of openness and co-operation between the parties;*
- (e) *encouragement to develop and apply innovative approaches and achieve continuous improvement;*
- (f) *access to and contribution by the expertise and skills of the parties; and*
- (g) *a commercial basis which offers the opportunity to achieve rewards commensurate with exceptional performance.*

The drivers in favour of this type of project delivery were perceived, then and now, as including:

1. improved performance through commercial joint risk/reward incentives
2. avoids draconian contract terms/lack of trust/lack of co-operation
3. parties focus on project outcome (“win-win”), rather than individual claim entitlements

### ***Substantial Alliance Contracts Take-up in Australia***

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<sup>1</sup> Graham Thomson, ‘Alliance Partnering as a Tool for Project Delivery’ (paper presented at the Building for Growth Innovation Forum, Sydney, 4-5 May 1998).

<sup>2</sup> Thomson, G. (1997) ‘Project Alliances’, Australian Mining and Petroleum Law Association Yearbook (AMPLA), 127-146

Since that time, in Australia, there has been a substantial number, and substantial contract value, of alliance contracts that have followed, and a large number of academic papers produced<sup>3</sup>.

During the last decade, in Australia, the government agencies have voted with their feet. Public sector alliance contracts in Australia rose, dramatically, from a steady total contract value of around \$1 billion, up to the years 2004-2005, to a steady total contract value of around \$10 billion, from the years 2004-2005 to the present date, as depicted in Figure 2.4 below, from the seminal Report entitled, “*In Pursuit of Additional Value: A benchmarking study into alliancing in the Australian Public Sector*”, by Dr Colin Duffield and Evans & Peck<sup>4</sup>.

The substantive take-up in the public sector of this form of project delivery speaks volumes. Though Duffield et al, correctly, identify the VFM drawbacks in the alliancing model, alliancing will be likely to remain the model of choice when factors relating to technical or commercial complexity, and/or the need for early commencement, rate higher on a particular project than cost outcome alone.

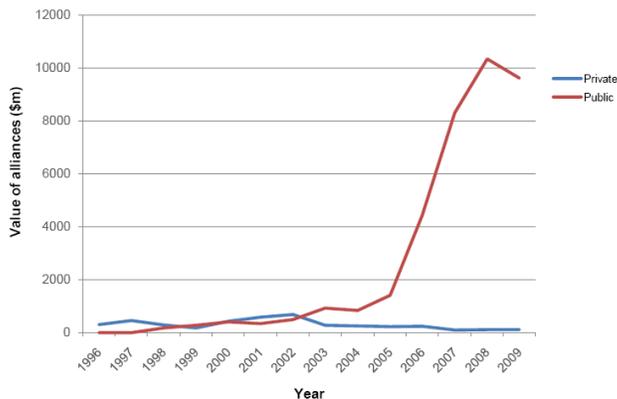


Figure 2.4: The use of alliancing in public and private sectors<sup>4</sup>

The source data for 'private' in Figure 2.4 has been adjusted to reflect two major private sector projects that have been delayed or cancelled since the information was collected.

### Features of Alliance Contracts

The key drivers in relation to alliance contracts are based on relationship contracting, rather than the parties having their separate contractual rights based on their original commercial bargain. The parties agree to work cooperatively, on an open book basis, with commercial incentives (painshare/gainshare) based on project outcomes, controlled by a (joint, senior) project alliance board and alliance management team, and on a “no dispute” basis. The substantive aim is for a win-win (or lose-lose) project outcome.

Alliance contracts, typically, have the following features:

1. work sharing according to “best person for the job” selection criteria

<sup>3</sup> See, for example, the listing of research in Clifton, C., Duffield, C., Tang, W., McMullan, J., Beck, P. & Morgan, P., 2002 (updated A Vaccari 2009), “Alliance Contracting - A Resource and Research Bibliography”, Department of Civil and Environmental Engineering Research Report RR/091/02. The University of Melbourne.

<sup>4</sup> Report commissioned in October 2009 by the Department of Treasury and Finance Victoria, entitled, “In Pursuit of Additional Value: A benchmarking study into alliancing in the Australian Public Sector”, by Dr Colin Duffield and Evans & Pec

2. management by alliance board/alliance management team
3. open book contracting
4. commercial risk/reward incentives based on project outcomes
5. no dispute

Thomson<sup>5</sup>, in 1997, set out the following *points to consider in relation to a development/construction contract, including:*

- *defining direct costs*
- *agreeing overheads*
- *agreeing forecast costs*
- *agreeing risk/reward regime*
- *agreeing key performance indicators*
- *audit provisions open-book nature of alliancing)*
- *consequential loss: limitation of liability*
- *“no dispute”*
- *design (especially state of completion)*
- *variations*
- *extensions of time*
- *force majeure*
- *remedial work and defects liability*
- *insurances and indemnities*
- *dispute resolution*
- *termination*

Those commercial checklist items are still relevant. Modern alliance contracts typically include provisions as follows:

- Project Objectives/Mission
- Project Alliance Principles/Charter
- Project Alliance Board
- Project Alliance Management Team
- Performance of the Work
- Payment
- Variation to TOC
- Extension of time
- Performance Payments: Painshare/Gainshare
- Insurances
- Securities
- Indemnities/Limitation of Liability
- Intellectual Property
- Confidentiality
- No Dispute/Resolution of Internal Disputes

Separately, the public sector procurement methods have been driven progressively by pre-contract requirements of government, typically including;

1. preparation of the Business Case
2. tender selection, generally on non-price criteria
3. joint development by the Owner and the preferred Non-Owner Participants (NOP) of the Target Outturn Cost (TOC)<sup>6</sup>
4. execution of Project Alliance Agreement

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<sup>5</sup> See note 3 above.

<sup>6</sup> On some projects, the owner has proceeded to TOC stage with 2 short-listed tenderers, seeking a price competitive benefit, then selecting between those tenderers on predominantly price criteria.

Ultimately, the parties will each derive a higher return depending upon the Actual Outturn Cost (AOC) relative to the TOC, and the actual completion date relative to the Project Schedule.

The documents and processes, correctly, vary project to project, and evolve with time. In particular, major projects have tended progressively towards more carve-outs from the work to be performed under the alliance provisions. It seems, however, that the key features of alliance contracts have not moved in any substantive way over the last 20 years or so<sup>7</sup>.

### ***Future of Alliance contracts in Australia***

The key area in which alliance contracts are least attractive as a project delivery tool is price certainty/value for money (VfM).

Duffield et al, in their *In Pursuit of Additional Value*<sup>8</sup> make a number of key findings, including :

1. *Business cases often did not clearly define the project VfM proposition to the rigour required for investment decision making.*
2. *Generally NOPs have a strong preference for alliancing over other traditional delivery methods. Additionally, NOPs have a strong preference for non-price selection approach over price selection approach.*
3. *Often physical works commenced prior to finalising the commercial arrangements with the NOPs.*
4. *In general the agreed (initial) TOC was higher than the business case cost estimate. The average increase was of the order of 35-45%.*
5. *A variety of commercial terms and conditions were found in the PAAs. In particular:*
  - *NOP corporate overhead and profit: Generally fixed upon agreement of the TOC, often variable as a percentage of actual costs.*
  - *No blame clause: Generally unconditional; little indication of modified clauses.*
  - *Dispute resolution: Generally silent; little indication of express provisions for resolution beyond the Alliance Leadership Team (ALT) (outside the alliance).*
  - *Incentive/penalty arrangements on time: Generally included; often not.*
  - *Owner reserved powers: Often reserved powers stated; sometimes not.*
  - *Performance security by NOPs: Little indication that security was required; generally not.*
6. *In general, Owner representatives (regardless of approach to selecting NOPs) rated their alliance's performance in all areas of non-price objectives as above expectations or game breaking.*
7. *The project's physical works were able to be commenced many months in advance of what would have been possible using traditional delivery methods (as noted elsewhere) leading to a commensurate earlier completion date.*
8. *The majority of projects met the Owners' target completion dates as set out in the business case.*
9. *There were no indications of any disputes between the Owner and the NOPs that needed to be resolved outside the alliance.*

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<sup>7</sup> The fact that the substantive features of alliance contracts have not changed over that period is , perhaps, a positive indication in relation to user satisfaction?

<sup>8</sup> See note 5 above.

10. *In general there was an increase from agreed (initial) TOC to adjusted (final) TOC. The average increase was of the order of 5-10%.*
11. *In general, the AOC was less than the adjusted (final) TOC. The average saving was of the order of 0.5%.*

Duffield et al conclude, among other things, that:

*....As a collaborative delivery method, **alliancing has demonstrated its ability to avoid disputes, improve non-cost outcomes and commence projects earlier than by traditional methods.** .....*

but that:

*To extract the optimum VfM from alliancing, **changes must be made at both the alliance and whole of government levels.** .....*

This is surely the key issue for alliance contracting in Australia today. There is little doubt that public sector owners choose alliance contracting as a valid project delivery model on a substantial (vast) number and contract value of projects today.

The drivers for this selection by public sector owners seems obvious:

1. early commencement of projects (often, before clear technical and commercial details have been finally resolved);
2. the ability to promote non-cost objectives highly valued by the public sector (eg environmental values, community stakeholder values, .....);
3. no disputes.

Despite these attributes, it is also clear that public sector owners are driven by public interests committed to improving the value for money proposition (this can be seen by the substantial number of Guides/studies published by various state government Departments of Treasury around Australia<sup>9</sup>).

Improving VfM will be the next challenge for alliance contracting in Australia. Perhaps improved VfM is to be obtained from any further enhancements/improvements that might be dragged out of the following types of area, already highly advanced:

- competitive tendering up to TOC stage
- project alliance board/alliance management team methods
- enhanced painshare/gainshare models

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<sup>9</sup> See, for example, the following, cited in *In Pursuit of Additional Value*: Department of Treasury and Finance, Victoria, 2006. Project Alliancing Practitioners' Guide. State Government of Victoria; Department of Treasury and Finance, Victoria, 2008. Investment Lifecycle Guidelines. State Government of Victoria; Department of Treasury and Finance - Commercial Division, Victoria, 2009, Guidance Note No. 1 - Language in Alliance Contracting: A Short Analysis of Common Terminology. Guidance Note No. 2 - Insurance in Alliance Contracting: Selling Insurable Risks. Guidance Note No 4: The reporting of VfM outcomes in alliance contracting. State Government of Victoria; Department of Treasury and Finance, Victoria, 2009. Good Practice Guidelines: Developing a State Purchase Contract Business Case. State Government of Victoria; Department of Treasury and Finance, Western Australia, 2002. Partnerships for Growth, Policies and Guidelines for Public Private Partnerships in Western Australia. ISBN 0 7307 4507 4. Government of Western Australia; Department of Treasury and Finance, Western Australia, 2009. Review of Alliance Contracting (Draft). Government of Western Australia

As far back as 2000, it seemed to me<sup>10</sup> that the traditional Anglo/USA confrontational style of contracting in international BOT projects in East Asia was dominant, even though many countries in that region were more culturally attuned to some form of co-operative form of transacting. Appelbaum<sup>11</sup>, for example, argued that the rise of the East Asian economies, especially China, might lead to the decline of North American and European global economic dominance and its associated legal forms, and reasoned that Confucianism (with its hostility to lawyers and confrontation) and communism (with its emphasis on party rule) afforded cultural barriers to the adoption of western legal practices in China and Hong Kong. He commented that the Chinese culture of *guanxi* is substantially embedded in those markets. Accordingly, he suggested, we would be more likely to observe, over time, legal practices dominated by regimes of “*flexible accommodation....(which) would seem to have an affinity for the informality and personal networks long associated with Chinese businesses*”.

In my view, the nature of alliance contracting has overtones of such cultural preferences: a preference by the participants towards relationship contracting, and away from the traditional Anglo/US confrontation style of contracting.

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<sup>10</sup> J McMullan, “Globalising Trends in BOT Projects in East Asia”, 27 Asia Business Law Review, January 2000

<sup>11</sup> Appelbaum R, “The Future of Law in a Global Economy”, Social and Legal Studies Vol 7 (2), p 171.

## **2. DESIGN/CONSTRUCT/OPERATE CONTRACTS**

### **2.1 DESIGN BRIEF**

The Design Brief is a document which is attached to the Design & Construct Contract. That document describes the works which are to be constructed for the Contract Sum.

The design brief is a technical document which includes some or all of the following:

1. schematic drawings of the proposal;
2. general specifications of the proposal and performance criteria for the works when complete;
3. site information;
4. any other technical details which impinge on the Works which are to be constructed.

The preparation of the Design Brief is a matter for the Principal. Usually that function will be performed by the Principal's design consultants. The Design Brief is not intended to be a detailed design, merely that it is sufficiently detailed to express exactly what it is that is to be designed and constructed by the Design & Construct Contractor.

The Design & Construct Contract obliges the Design & Construct Contractor to produce a detailed design, to comply with the requirements expressed in the Design Brief, and to obtain the approval of the Principal (usually the Principal's design consultants who prepared the Design Brief) prior to commencing construction. Claims usually arise, at this point, between the Principal (on the basis that the detailed design, as produced, is low quality, or does not adequately perform the function which is described in the design brief) and the Contractor. It is critical, therefore, for the Design Brief to be adequate in describing the works which are to be constructed and the functions which they are to perform.

The types of documents/technical information which might be expected on a civil engineering project would include any or all of the following:

- site information
- demographic information
- civil engineering quality/quantity inputs
- preferred (or permitted) treatment methods
- output criteria
- compliance with Codes/Standards

The information to be included may seem, at first glance, to be reducing the design input which was being hoped for from the design and construct contractor. The level of information provided to, and restrictions placed upon, will vary depending on the project. There will always be a minimum level of specification which will be necessary from, and in fact should be desired by, the Principal. Further, in some cases, there will be political restraints on a particular project.

Such matters are, contractually, necessary to be included in the Design Brief.

### **2.2 CHOICE OF DESIGN & CONSTRUCT**

#### ***"Buildability"***

The primary advantage of a design and construct contract is that it allows the construction contractor to bring his construction expertise into the design process, and thereby reduce the cost of construction. There is a view that the ability of the construction contractor to design the works with the convenience of construction in mind will result in cost savings to the Principal at the time of tender.

The design and construction contractor is able, in producing the detailed design, to incorporate certain design criteria which may suit the contractor for ease of construction. Accordingly, the tender price is likely to be lower (taking into account the cost of the actual design work) than where a Construction Contractor was pricing works which had been designed by others, with no regard to the "buildability" of that design.

It is yet to be seen whether this will be true in the civil engineering sector. It would have little relevance, for example, if the design complexities mean that construction contractors simply engage or joint venture with pure design professionals. Further, the capacity of any contractor to incorporate notions of "buildability" into a particular project design is directly related to his previous experience in design and construction.

The incorporation of construction expertise in the design process is certain, it seems, to result in substantially more efficient designs and lower tender prices.

### ***Single Point of Responsibility***

There are a number of potential situations in traditional style contracts where the boundaries of the responsibility of the designer for design and the construction contractor for construction may become unclear.

There is potential for dispute as to responsibility, where the works as constructed fail to perform in accordance with the specifications (for example, leaking, cracking, discolouration ...). In such instances, the Construction Contractor might assert that the problems are a design flaw, whereas the designer might assert that the design was adequate but the works as constructed did not comply with that design. Where the Contractor has responsibility for both the design and construction, this problem does not arise.

There are several such potential areas of overlapping responsibility. For example:

- claims sometimes arise in traditional contracts (where the detailed design has been performed by the Principal prior to entering into the Contract) where the Contractor is asserting that the design cannot (or cannot conveniently) be constructed;
- where the Works, as constructed, do not perform the required function in accordance with the specifications, and/or are defective, a difficulty sometime arises where the Contractor is asserting that the problem is a design fault, and the designer is asserting that the problem is a construction fault;
- claims sometimes arise where the construction contractor is delayed by the designer during the construction phase (for example, in waiting for asserted errors or ambiguities in the design documents to be resolved).

In each of those instances, the Principal would be faced with the designer and the construction contractor blaming each other and denying liability to the Principal. Contractors often assert that the Principal and/or the Principal's design consultants have failed to take into account whether or not the works as designed by the Principal are able to be built, and whether construction cost savings could have been achieved if the design were other than as produced at the time of tender. Usually such claims do not arise until after the execution of the Construction Contract (because they were not perceived until that time).

Where the Design & Construct Contractor has responsibility to produce the detailed design, this type of claim will not arise.

### ***Perceived fast tracking***

There is a view that a Design & Construct Contract increases the possibility for "fast tracking" of the Project.

Some minor improvements in the programming of capital works can often be achieved through the Design & Construct model. The pre-tender phase is likely to be shorter than for a traditional contract (because it is only necessary to prepare the Design Brief, rather than the detailed design which would take substantially longer) prior to inviting tenders. The detailed design work is able to be performed after execution of the Design & Construct Contract, and during the early stages of construction, in a staged manner.

However, the timing benefits of this process may be illusory. At the point of commencing construction, at least the stage 1 building approval is required for the foundations. Accordingly, at that point, the design of the structural matters must be complete to the point where the foundation details are known. The detailed structural issues, and the architectural detail, may be able to be produced later to then obtain subsequent staged building approvals.

Further, in relation to capital works within the civil engineering sector, it is likely that the perceived advantages of fast tracking would be negligible for a number of reasons, eg:

- the lengthy lead times to acquire the site and/or obtain planning and EPA approvals make minor time improvements largely irrelevant;
- the complexity of obtaining political support for a particular project is, typically, a higher priority than minor time improvements, accordingly it is unlikely that an authority would be able, in any event, to substantially shorten the overall project implementation, to the point where, again, there is little to be gained in minor time improvements.

It seems that "fast tracking" is a minor (maybe irrelevant) factor in this respect.

## **2.3 DESIGN RISK UNDER THE CONTRACT**

### ***The Contract Provisions***

The allocation of risk under a Design & Construct Contract is slightly more complex than under a traditional contract. Under a traditional contract, the adequacy of the design (with all of the consequences which flow from inadequate design in respect of both the Works, and/or delay or additional costs caused to the Contractor) rests with the Principal. The Principal may or may not have adequate remedies against the original designer pursuant to their (separate) professional engagement agreement. This is likely to be a major factor (in favour of using the design/construct model) for civil engineering authorities.

Unlike the traditional contracts, the responsibility for detailed design rests with the Contractor. There are a number of risk areas for the Contractor in this role:

1. compliance with the Design Brief;
2. design warranties as to the adequacy of the design generally;
3. design approval by the relevant building authorities.

Each of these matters need to be properly addressed in the Design & Construct document.

### ***Compliance with the Design Brief***

The design obligation on the Contractor is to prepare the detailed design (in AS4300-1995, referred to as the *Design Documents*) in accordance with the requirements spelled out in the Design Brief (in AS4300-1995, referred to as the *Principal's Project Requirements*). For

example, clause 1 of AS4300-1995 defines the *Principal's Project Requirements* as follows:

- 'Principal's Project Requirements' means the written summary or outline of the Principal's requirements for the Works described in the documents stated in Annexure Part A and -*
- (a) shall include the stated purpose for which the Works are intended;*
  - (b) may include the Principal's design, timing and cost objectives for the Works; and*
  - (c) where stated in Annexure Part A, shall include a Preliminary Design;*

The responsibility for adequacy of the design rests with the Principal for the Design Brief, and the Contractor for the detailed design. For example, clause 8.1 of AS4300-12995 relates the obligation to pay for extra work due to discrepancies, to whether the discrepancy occurs in the Principal's Project Requirements (the Contractor gets a variation), or in the Design Documents (the Contractor does not get a variation) provides:

#### **8.1 Discrepancies**

*..... If the direction causes the Contractor to incur more or less cost than the Contractor, having complied with Clause 4.1(c), could reasonably have anticipated at the time of tendering, then to the extent that such ambiguity or discrepancy is -*

- (a) in the Principal's Project Requirements, the difference shall be valued under Clause 40.5; and*
- (b) in the Design Documents or between the Design Documents and the Principal's Project Requirements, such ambiguity or discrepancy shall be at the Contractor's risk and the direction shall not entitle the Contractor to any extra payment or an extension of time.*

The responsibility for the Design Documents (detailed design) remains with the Contractor, to the extent that the Design Documents are always to accord with the Design Brief. For example, clause 8.4 of AS4300-12995 provides:

#### **8.4 Supply of Documents by Contractor**

*..... The Contractor shall supply to the Superintendent the documents and information required by the Superintendent and as required by the Contract, in a form satisfactory to the Superintendent and at those times ....., not less than 14 days before the work contained in those documents is commenced.*

*A direction by the Superintendent to vary anything in the Design Documents shall be a variation to the work under the Contract only to the extent that the Design Documents, before such variation, complied, or would have complied, with the Principal's Project Requirements.....*

In addition, there should be a process whereby the detailed design is ultimately submitted to the Principal for the Principal's approval prior to construction. Again, this is a risk area for the Contractor, and also for the Principal. This is the point at which major dispute as to the

adequacy of the detailed design will usually arise. This area of risk is not present in a traditional contract.

In all other respects the risk allocation under a Design & Construct is similar to that which one might find under a traditional contract. It is a matter for the parties to negotiate the allocation of those risks.

#### *Design Warranties*

One critical inclusion in the Design & Construct Contract will usually be design warranties by the Contractor. For example, clause 4.1 of AS4300-1995 provides:

### **4 WARRANTIES**

#### **4.1 Contractor's Warranties**

*Without limiting the generality of Clause 3.1, the Contractor warrants to the Principal that the Contractor -*

- (a) at all times shall be suitably qualified and experienced, and shall exercise due skill, care and diligence in the execution and completion of the work under the Contract;*
- (b) subject to Clause 9, shall engage and retain the Consultants identified in the Contractor's tender and who are suitably qualified and experienced;*
- (c) has examined and carefully checked any Preliminary Design included in the Principal's Project Requirements and that such Preliminary Design is suitable, appropriate and adequate for the purpose stated in the Principal's Project Requirements;*
- (d) shall execute and complete the Contractor's Design Obligations and produce the Design Documents to accord with the Principal's Project Requirements and, if Clause 10 applies, accept the novation and retain the Consultants for any work the subject of a prior contract with the Principal; and*
- (e) shall execute and complete the work under the Contract in accordance with the Design Documents so that the Works, when completed, shall -*
  - (i) be fit for their stated purpose; and*
  - (ii) comply with all the requirements of the Contract and all Legislative Requirements.*

There may be further warranties which might be added, on a project by project basis.

#### ***Independent Design Review by Principal?***

A question arises for the Principal, in the Principal's review of the detailed design, as to how far that review should be taken. There is no contractual obligation on the Principal to review the design. For example, clause 8.4 of AS4300-1995 provides:

*..... Neither the Principal nor the Superintendent shall be bound to review or comment upon the Design Documents or to check the Design Documents for errors, omissions or compliance with the requirements of the Contract. The Principal's or the Superintendent's receipt of, or review of, or comment on, the Design Documents and any other documents provided by the Contractor, shall not relieve the Contractor from*

*responsibility for the Contractor's errors or omissions or departure from the Contractor's Design Obligations or other requirements of the Contract.*

On the one hand, the Principal has a contractual remedy against the Contractor if the detailed design is ultimately inadequate. On the other hand, the Principal has to review the detailed design in any event to ensure that it complies with the Design Brief. It may be convenient, and prudent, therefore, to have the detailed design reviewed by independent professional consultants to ensure that the design is adequate prior to construction.

Contractually, presuming that the design and construct contractor is substantial, the Principal will be protected. In theory, therefore, independent design review is unnecessary. In practice, however, again, it seems that future civil engineering authorities will err on the side of independently reviewing designs prepared by the contractor, rather than let the contractor fall into error and then simply rely on the contract.

Under the Design & Construct Contract, the parties may or may not have a third person in the role of Superintendent/Architect. (This is equally true of construction only contracts.)

Often the person in the role of Superintendent under a traditional contract is also the designer. To the extent that the construction of the Works is not consistent with the original design philosophy, there is still some control able to be exercised over the construction Contractor. Under a Design & Construct Contract, there would still be a Superintendent, he is merely not the (detail) designer.

### ***Potential for Design Dispute***

The unique area for dispute arising in design & construct contracts, rather than traditional contracts, arises at the time of the proprietor's review of the contractor's detailed design. The Contract will usually provide that the Contractor must design the Works in accordance with the requirements of the Design Brief, to the satisfaction of the Principal or the Superintendent. For example, clause 8.4 of AS4300-1995 provides:

*.... If the Contract provides that the Contractor must obtain the Superintendent's direction whether documents are suitable or are not suitable then, within the time stated in Annexure Part A or, if no time is stated, within 14 days after receipt of the documents, the Superintendent shall notify the Contractor that the documents are suitable or are not suitable. If the Superintendent notifies the Contractor that the documents are not suitable, the Superintendent shall give reasons why the documents are not suitable and the Contractor shall submit new or amended documents for the Superintendent's direction pursuant to this Clause 8.4....*

By definition, however, the Design Brief will be descriptive rather than detailed and will rely, in most instances, on defining function and performance criteria, rather than specific design elements. The Contractor will, naturally, be inclined to use lesser quality materials to reduce cost (the Contract Sum having already been agreed). The Principal, on the other hand, would usually have a higher impression of the degree of quality which was intended within the Design Brief. Accordingly, there is always a possibility (in practice, it seems a probability) of substantial dispute as to the exact materials and/or construction criteria which are required pursuant to the Design Brief. Further, in many instances, the dispute will be a technically esoteric dispute as to the likely performance of materials and/or workmanship which have not yet been incorporated into the Works.

To the extent that a proprietor does not adequately describe, in the Design Brief, the materials and/or workmanship which is to be performed under the Contract, there is potential for this type of dispute.

***Potential Design Conflict/ Choice of Designer***

A potential conflict for the contractor may arise in designing the Works under a Design & Construct Contract. The Contractor, having contracted to construct the Works for the Contract Sum, and to the extent not expressly prescribed within the Design Brief, will be required, as any designer must, to make a number of design decisions. On the one hand, the Contract Sum having been agreed, the Contractor will be inclined to keep costs to a minimum. On the other hand, the Contractor, also being the designer, would wish the materials and/or workmanship to result in a constructed product which performs adequately (at least in accordance with the Design Brief).

For example, in designing the Works, a Contractor might be inclined (remembering that the Contract Sum has already been agreed) to use lower quality materials (where they have not been specified in the Design Brief) irrespective of the design life of those materials. The Design & Construct Contractor may conclude that his contractual obligations cease at the end of the Defects Liability Period (this is not strictly correct, however problems of proof may make this practically so) and, therefore, there is no reason for the Design & Construct Contractor to prefer more expensive materials to less expensive materials, provided that the less expensive materials would last at least to the end of that Defects Liability Period. The Principal, on the other hand, would prefer the more expensive materials in order to reduce long-term maintenance costs. (This is an example of the type of detail which should be included in the Design Brief.)

This issue would usually arise at the stage of approval, by the Principal, of the detailed design as prepared by the Contractor. The issue will turn on what has or has not been specified in the Design Brief. (There is some limited opportunity to assert implied terms, but difficulties in relation to the implication of terms, generally, limit the practical effect of implying terms into the Contract). The Contractor, in performing his design role, will have a conflict between the proper performance of that design role and the desire to keep costs to a minimum.

There will be difficulties in tender assessment. An authority would want tenderers to take the competing capital cost/operating cost issues into account when submitting their design proposals in their tenders. The assessment of such tenders will be more complex, the more flexible the Design Brief.

There will be further difficulties at the time of approval by the Principal of the contractor's detailed design. At that point, the Principal and the contractor (the Contract Sum already being agreed) will have competing interests in relation to the operating and maintenance costs of the Works as designed, the only reference being the matters set out in the Design Brief.

The design & construct tenderer, when bidding on the tender documents, will usually be required to disclose the identity of the detail designer. The Principal will usually wish to have some control over the choice of designer (whether the Principal has a particular preference or whether the Principal is merely interested to have a suitably competent designer). On complex projects, the Principal may require the engagement by the Contractor of a suitable firm of professional design consultants. In this manner, the Principal will have remedies against the Contractor in contract and/or against the professional consultants in negligence should the (detailed) design ultimately prove to be

inadequate. (The Principal will also wish to ensure, in that instance, that the particular design consultants have adequate professional indemnity insurance.)

One possible method of addressing this issue is to require the successful Design & Construct Contractor to "novate" the Principal's existing professional services contract with the original designers. This form of "novation" contract has other consequences which should be considered, beyond this short discussion of Design & Construct. In any event, however, it is probably unnecessary for the Principal to insist on the choice of one particular firm of design consultants over another, especially if, in fact, that would result in higher tender prices.

The perceived disadvantage as to choice of designer, when weighed against issues of "buildability" and single point of design responsibility, may be illusory. There is a perceived disadvantage in having the administration of the construction contract performed by a person other than the original designer. It is correct that the original design philosophy is likely to be more adequately addressed by the original designer, in the administration of the construction contract, than by a subsequent, different, contract administrator. It may be, however, that, again, this disadvantage is illusory.

The likelihood is that, subject to the choice of a suitable person for the role, any professional contract administrator would have regard to the design philosophy in superintending the construction of the works.

## **2.4 DESIGN BUILD OPERATE CONTRACTS**

The objectives for the delivery of a Design Build Operate (DBO) project are:

1. for the Contractor to design and construct the Works in accordance with the Specifications and deliver the Facility to the Principal by the Date for Commercial Operation for the Contract Price;
2. for the Principal to obtain control and ownership of the Facility on achieving Commercial Operation;
3. for the Contractor to operate, manage and maintain the Facility from Commercial Operation and to provide the Services at the Facility from Commercial Operation until the end of the Contract Term.

### **2.4.1 KEY CONCEPTS**

*Commercial Operation:* that stage when practical/substantial completion of the Construction Works has been achieved, and the Operational Commissioning Tests have been passed.

*Date for Commercial Operation:* the date by which Commercial Operation of the Facility is to be achieved (as extended).

*Date of Commercial Operation:* the date on which Commercial Operation is achieved.

*Delay Liquidated Damages:* liquidated damages for delay payable by the Contractor to the Principal.

*Design Development:* an alteration, change, amendment, enhancement to or finalisation of the design of the Construction Works.

*Endorsed Drawings and Specifications:* the drawings and specifications prepared by the Contractor and, when approved by the Principal, endorsed by the Principal.

*Equipment:* equipment, machinery, apparatuses, materials, etc to be provided and incorporated in the Facility by the Contractor.

*Facility:* the facility to be designed, engineered, procured, constructed, equipped, commissioned and delivered by the Contractor .

*Government Approval:* an authorisation, consent, approval, licence, lease, ruling, permit, required from a Government Authority relating to the Construction Works, the Facility or to the execution, delivery or performance of the project.

*IP Rights:* intellectual property rights (present or future) including rights conferred under statute, common law and equity, including those in and in relation to inventions, patents, designs, copyright, registered and unregistered trade marks, trade names, brands, logos and get-up, names, circuit layouts and confidential information and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields, any patent, registered design, trademark or name, copyright or other protected right.

*Major Subcontract:* a subcontract under which a Major Subcontractor (above an agreed amount) provides services, Equipment costing more than some specified amount or involving certain critical components or services of the Construction Works.

*Milestone:* the dates of completion of phases of the Construction Works, the Operational Commissioning Tests and Commercial Operation.

*Operation and Maintenance Manual:* Facility instructions of the operation (including anticipated modes of operation during normal and emergency conditions) and maintenance of the Facility, produced by the Contractor.

*Operational Commissioning Tests:* tests and criteria described in the Contract, to be achieved as a pre-condition to commencing operation.

*Training Works:* training programs, courses and development of the technical and support systems to be carried out by the Principal or its subcontractors during the Construction Period.

#### **2.4.2 CONTRACTOR'S OBLIGATIONS**

The Contractor's obligations should include the provision of all Equipment, and the performance of all works and services required for the design, engineering, procurement, construction, equipping, commissioning and delivery of the Facility and the completion of the Construction Works in accordance with the Contract.

The Contractor should be required to do the following:

##### **1. Completion of the Design and Construction Works**

The Contractor should perform all such work, including the required design and construction work, and supplying all Equipment, (including work and Equipment not specifically mentioned in the Contract but which can be reasonably inferred from the Contract).

**2. Execution of the Construction Works**

The Contractor should execute the Construction Works in a professional, efficient, cost effective, safe and environmentally responsible manner and in accordance with the Endorsed Drawings and Specifications, the Specifications, all Government Approvals, and all applicable Laws.

**3. Operation of facility**

The Contractor should be required to operate and maintain the Facility, in accordance with the Contract, for the agreed operation period, commencing on the Date of Commencement of Operations, including, in accordance with the Contract requirements:

- a. keeping the Facility available;
- b. operating the Facility to specified performance levels;
- c. maintaining the Facility;
- d. reporting;
- e. delivering back the Facility at end of the Contract.

**4. Government Approvals**

The Contractor should acquire all Government Approvals which are necessary for the performance of the Construction Works.

**5. Industrial Relations**

The Contractor should be responsible for industrial relations connected with the performance of the Construction Works. It should keep the Principal's Representative informed of any disputes with or demands by its and the Subcontractors' workforce and any other circumstances which could result in industrial action affecting the normal working of the Site. The Contractor's and the Subcontractors' employees should be obliged to work in accordance with the relevant awards, Site agreements and the arrangements in place from time to time.

**6. Services**

The Contractor should obtain all services at or in the vicinity of the Site, which are necessary for the performance of the Construction Works and the ongoing operation of the Facility.

**7. Operation and Maintenance Manual**

The Contractor should prepare and submit for the approval of the Principal's Representative an Operation and Maintenance Manual, including a process for the following components:

- a. the engagement and training of appropriately qualified operations and maintenance personnel to provide services for the operation and maintenance of the Facility;
- b. the operation and maintenance of the Facility in an environmentally and aesthetically acceptable manner;
- c. all relevant instructions manuals and special directions from the relevant manufacturers of any Equipment and provision of such written instructions which are not available from such manufacturers;
- d. establishment of an inspection and maintenance system; and
- e. any reports to be provided by the Contractor.

**8. "As executed" Drawings**

The Contractor should provide to the Principal a complete, accurate and correct set of "as executed" drawings.

### **2.4.3 PRINCIPAL'S OBLIGATIONS**

The Principal should be required to do the following:

1. **Payment**

The Principal should make timely payment to the Contractor of all amounts due under the Contract as and when due.

2. **Access to and possession of Site**

The Principal is responsible for acquiring and providing legal and physical possession of the Site and providing possession and use of and access to all other areas reasonably required for the proper execution of the Construction Works, and to give possession/access on or before the Commencement Date.

3. **Site Information**

The Principal should make available to the Contractor prior to the Commencement Date such data on climatic, hydrological and general conditions relating to the Site as should have been obtained from the Principal from investigations undertaken relevant to the Works and/or the Site.

4. **Contract Price**

The Principal is to pay the Contract Price (usually a fixed lump sum for the Design & Construct Work , with some payment regime for the Operation Phase).

### **2.4.4 KEY COMMERCIAL ISSUES**

The DBO contract will usually include terms, negotiated commercially, providing for the following:

#### **Security**

The Contractor should be required to provide the security specified in the Contract (this is usually a major commercial issue) in favour of the Principal at the times, and in the amount, manner and form specified in the Contract. The Contractor will usually be required to provide the security, at the date of execution of the Contract, in the form of an on demand, unconditional and irrevocable bank guarantee, to secure the due performance of the Contract, from a registered Australian bank under the Banking Act 1959 (Cth) (or an otherwise agreed institution).

#### **Intellectual Property rights**

The Contract should usually provides for the following:

1. all intellectual property rights created in relation to the project are vested in the Principal;
2. the Contractor agrees not to contest the title to IP Rights owned by the Principal;
3. the Principal will usually (it seems this is implied in any event) grant the Contractor a non-exclusive royalty-free non-transferable licence to use, reproduce, modify and adapt the Principal's IP Rights for the sole purpose of performing its obligations under the Contract;
4. the Contractor will usually be asked to warrant that the execution of the Contract should not infringe any IP Rights of any third party.

#### **Subcontracts**

Prior approval of the Principal's Representative should be required for Major Subcontracts, where the subcontract value exceeds an agreed amount. The Contract should impose the following restrictions on the Contractor when subcontracting:

1. The Contractor should only engage Subcontractors who are safe, environmentally responsible, careful, skilled, experienced, and competent in their respective disciplines.
2. The Contractor should provide to the Principal full particulars in writing of the Construction Works to be subcontracted and the name and address of the proposed Major Subcontractor, the proposed site for the subcontracted work, information establishing the financial, technical and personnel capacity (including details of previous experience and safety and environmental records) to successfully execute such subcontracted work.
3. The Contractor should ensure that the Major Subcontractors enter into a tripartite agreement, including the Principal, and subcontracts should include provisions that the Subcontractor undertakes to the Contractor obligations and liabilities which should enable the Contractor to discharge the Contractor's obligations and liabilities to the Principal under the terms of the Contract in respect of the subcontracted work, including:
  - a. warranties given by the Contractor;
  - b. indemnities given by the Contractor;
  - c. a termination for convenience provision similar to that contained in the Contract (if any);
  - d. provisions providing for and enabling the ultimate ownership by the Principal of all IP Rights;
  - e. a warranty by Subcontractors undertaking fabrication work that they have reviewed the drawings provided by the Contractor and that such drawings should be suitable for the fabrication work proposed;
  - f. provision that the Principal is able to enter the site upon which the Subcontractor is undertaking the subcontracted work; and
  - g. upon the termination of the Contract or repudiation or abandonment of the Contract by the Contractor, if so directed by the Principal's Representative, undertakings that the Subcontractor will provide to the Principal all designs, documents, materials and other things intended for incorporation in the Construction Works, and acquiesce in the assignment or novation to the Principal at the Principal's absolute discretion of the Contractor's interests in its contract.

### **Design**

The Contractor is responsible for the design of the Construction Works in accordance with the Specifications. The Contract should provide that the Contractor produce drawings and specifications for approval by the Principal, and, when approved by the Principal, endorsed by the Principal to become the Endorsed Drawings and Specifications. The Contractor is then required to construct the Works in accordance with the Endorsed Drawings and Specifications. The approval by the Principal of the Endorsed Drawings and Specifications does not affect the obligations of the Contractor under the Contract.

### **Procurement**

The Contractor is to procure, and transport at its own risk and expense to the Site, the Equipment.

### **Quality assurance**

The Contractor should establish, implement and maintain a quality assurance and control program to achieve the following:

1. that purchased Equipment, the Facility and all related documentation meet the requirements of the Contract;
2. that the quality of the Facility not be degraded during receiving, storing, transporting, handling, erection, installation, inspection and testing; and

3. that systems, Equipment and structures are fabricated, installed and erected in strict compliance with all applicable instructions, the Contract and the requirements of the Principal.

### **Substantial Completion**

The Contractor is required to bring the Works to Commercial Acceptance by the Date for Commercial Acceptance.

### **Operational Commissioning**

Upon Practical/Substantial Completion, the Contractor should be required to carry out Operational Commissioning Tests described in the Contract.

### **Manufacturer's warranties**

The Contractor should obtain for the Principal, from the respective manufacturers, the best available and legally enforceable warranties for the Equipment, extending to, at least, the end of the Defects Liability Period, requiring the respective manufacturers at their expense to remove and replace Equipment which are defective.

### **Completion guarantee**

The Contractor will be required to guarantee that it will achieve Commercial Operation of the Facility by the Date for Commercial Operation.

### **Delay Liquidated Damages**

Where the Contractor fails to attain Commercial Operation of the Facility by the Date for Commercial Operation, the Contractor will be required to pay, to the Principal, Delay Liquidated Damages.

### **Defects Liability Period**

The Contractor guarantees that the Facility or any part is free from defects in design and engineering, the Furniture and Fittings, the Equipment and the Construction Works. If, during the Defects Liability Period, any defect is found in the design and engineering, the Equipment or the Construction Works, the Contractor should, at such times as the Principal reasonably requires and in a manner which causes as little disruption to the operation of the Facility as reasonably possible, promptly and at its cost repair, replace or otherwise make good (as the Contractor may at its discretion determine) such defect as well as any damage to the Facility caused by such defect.

### **Transfer of ownership and risk**

The Contract will usually provide that the ownership of the Equipment transfers to the Principal:

1. when the relevant Equipment is identified as being intended solely for incorporation, use or consumption in the Construction Works; or
2. where such Equipment cannot reasonably be so identified, at the time when it is incorporated, used or consumed in the Construction Works; or
3. in any event no later than payment of the relevant progress claim the value of which includes the Equipment.

### **Care of Construction Works**

The Contractor is always made responsible for the care and custody of the Construction Works until the Date of Commercial Operation and is required to make good at its own cost any loss or damage that may occur to the Construction Works from any cause whatsoever prior to that date.

### **Insurance**

The Contract should provide that the Contractor is to arrange from the Commencement Date, for the relevant periods, and amounts:

1. construction all risks insurance policy;
  2. public liability policy covering legal liability to third parties for personal injury, or property damage;
  3. professional indemnity;
  4. workers' compensation;
  5. other insurances (eg motor vehicle, marine, etc);
- under policies containing terms , exclusions and excesses, approved by the Principal.

**Other Terms**

The DBO Contract will include terms (similar in most respects to construction contracts) in relation to:

- Site conditions
- Unforeseen conditions
- Force majeure
- Delay costs
- Termination
- Termination for the Principal's convenience

### 3. THE SUPERINTENDENT

#### 3.1 DUAL ROLE OF THE SUPERINTENDENT

The Superintendent is **not** a party to the contract; he is a person named in the contract by the two parties to the contract (the Proprietor and the Contractor) and given certain functions under that contract by those two parties.

The role of the Superintendent would usually include:

1. assessment of progress claims and issue of progress certificates
2. assessment of claims for extra payment for variations to the contract
3. assessment of claims for extension of time
4. assessment of quality of materials and workmanship in accordance with the contract documents
5. assessment of claims for extra payment (such as claims under the latent conditions provisions) under the contract

Accordingly, though the Superintendent is usually appointed by and paid by the Proprietor (and may sometimes be the Proprietor's original design consultant), the Superintendent's role is principally to decide major issues of potential dispute under the contract between the Proprietor and the Contractor.

In such contracts there is (at least) an implied term that the Superintendent will act fairly. There is a strong contractual argument that if the Superintendent does not act fairly towards the Contractor, this constitutes a breach of contract by the Proprietor.

Interestingly, in AS2124-1992, following on from AS2124-1986, clause 23 expressly provides that the Proprietor is to ensure that the Superintendent acts fairly at all times. This is unusual. Clause 23, in the 1992 edition and in the 1986 edition, imposes a **direct contractual obligation** on the Principal to **ensure** that the Superintendent acts in a manner consistent with honesty, fairness and reasonableness. (It also imposes a contractual warranty on the Principal that the Superintendent's measure of work, quantities or time is, itself, reasonable.)

Clause 23 of AS2124-1992 provides:

#### 23. SUPERINTENDENT

*The Principal shall ensure that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the Contract, the Superintendent -*

- (a) *acts honestly and fairly;*
- (b) *acts within the time prescribed under the Contract or where no time is prescribed, within a reasonable time; and*
- (c) *arrives at a reasonable measure or value of work, quantities or time.*

.....

Clause 20 of AS4000-1997 provides:

#### 20. SUPERINTENDENT

*The Principal shall ensure that at all times there is a Superintendent, and that the Superintendent fulfils all aspects of the role and functions reasonably and in good faith.*

*Except where the Contract otherwise provides, the Superintendent may give a direction orally but shall as soon as practicable confirm it in writing. If the Contractor in writing requests the Superintendent to confirm an oral direction, the Contractor shall not be bound to comply with the direction until the Superintendent does so.*

The dual role of the Superintendent (on one hand he is retained and paid by the Proprietor, yet on the other hand he has a quasi-certifier role between the two parties to the contract) has been the subject of judicial comment.

The Institution of Engineers Australia Code of Ethics requires, in clause 5 (b):

*"...in our capacity as Superintendent administering a Contract, we must be impartial in our interpretation of the Contract..."*

The role of the Superintendent is complex. It requires substantial engineering skills, a sound understanding of the law of contract, and in particular the provisions of the particular project documents. The Superintendent has two distinct roles under a traditional form of construction contract. On one hand he has a number of functions in which he acts, either expressly or impliedly, as the agent of the Proprietor. On the other hand, the two parties to the contract agree, at the time of entering into the contract, that the Superintendent is to perform certain assessment/certifier functions under the contract. Those functions are quite distinct.

In most instances, the Superintendent will be either an employee of the Principal (typically on major public sector contracts the Superintendent is a senior person from that public sector organisation) or a paid consultant of the Proprietor (usually, a senior engineer from a private engineering consulting firm). Accordingly, where there is a dispute under the Contract, the Contractor, if dissatisfied with the decision of the Superintendent, will **usually** assert that the Superintendent is biased in favour of the Proprietor.

The **dual** role of the Superintendent under such construction contracts has been recognised by the Courts. The leading case in this area is a decision of the New South Wales Supreme Court (Macfarlan J) in *Perini Corporation v. Commonwealth of Australia* [1969] 2 NSW 530. In the *Perini* case, Perini Corporation had contracted with the Department of the Postmaster-General to construct the Redfern Mail Exchange. During the project, the Contractor claimed a number of extensions of time, some of which were granted, some of which were refused, and some of which were granted but not to the full extent claimed. As was common at the time, the work was undertaken on behalf of the Commonwealth of Australia by the Department of Works. The Superintendent under the contract was the Director of Works. The Court had to consider the role of the Superintendent. The Contractor claimed that the Director of Works was obliged to but had not exercised his own discretion in considering whether there was an entitlement to an extension of time, and that, in fact, the Director had been guided by "Departmental policies". Effectively, the Contractor was saying that the Director of Works had acted as a rubber stamp of the Proprietor.

The Court made the following observations in relation to the role of the Director of Works:

*"The second matter on which I will speak generally concerns the position of the Director of Works. This gentleman is undoubtedly an important officer in the Commonwealth Public Service. Unlike other senior Commonwealth public servants, there is not any provision made by statute for his appointment or duties. However, his position appears to be fairly clear. At the head of the permanent administrative staff of the Department of Works is the Director-*

*General of Works who is charged with the general supervision of the Department and its activities throughout the Commonwealth. In each State there is a Director of Works who, in relation to the State for which he is appointed, discharges the same general duties as the Director-General does for the Commonwealth...*

*The fundamental basis upon which the plaintiff sought to litigate its case against the defendant was that the defendant was in breach of certain terms implied in the agreement... the plaintiff's argument was that in the discharge of the duties imposed upon him by clause 35, the Director of Works, with the encouragement and support of the defendant, acted in a manner that was outside his mandate."*

The Contractor argued that the Department was liable for damage suffered by it, in consequence of the error of the Director of Works, on three different bases:

1. the Department was **vicariously liable** for anything that the Director did wrongly;
2. the Director of Works, in relation to his functions under clause 35 was a **certifier** and, as such, the Department was obliged under the contract to ensure that the Director performed his role as a certifier properly or, at least, was required to refrain from taking any action or course of conduct which would oblige or influence the Director to act otherwise than in accordance with his duties as certifier; and/or
3. the Director of Works was an **arbitrator** and, accordingly, was obliged to act judicially.

The Court concluded (without much trouble) that there was no basis for interpreting that the Director of Works was to act as an arbitrator (this was not pressed in the trial). The Court then considered the issue of vicarious liability and, in particular, the position of the Director of Works having regard to his public service obligations. In this respect the Court said, at page 536:

*"In my opinion the cases make plain that throughout the period of performance of all these duties, the senior officer remains an employee of the government or semi-government body, but that in addition and while he continues as such an employee he becomes vested with duties which oblige him to act fairly and justly and with skill to both parties to the contract. The essence of such a relationship in my opinion is that the parties by the contract have agreed that this officer shall hold these dual functions and they have agreed to accept his opinion or certificate on the matters which he is required to decide... "*

The Court then went on to consider the particular duties of the Director of Works, at page 536:

*"It is now necessary to consider the duties of the Director of Works. He, of course, has not bound himself by contract with either the plaintiff or the defendant. The plaintiff and the defendant are the only parties to the agreement but in it they have agreed that the Director of Works shall have the powers and duties stated in it. Many of these powers and duties are administrative and supervisory in their character and are performed by the Director of Works as a servant and agent of the Commonwealth. I have already expressed the opinion that in respect of the duties imposed upon him by clause 35 of the general conditions that he is a certifier. The word "certifier" does not have an exact meaning but is used to describe a function which is somewhere between those of a servant and those of an arbitrator."*

In summary, the Court concluded:

1. the Director of Works was a certifier under the Contract and as such had certain duties imposed on him by the Contract;

2. the Director of Works had a discretion as to whether or not he would grant an extension of time;
3. in making his decision, the Director was entitled to consider departmental policy but would be acting wrongfully if he were to consider himself as controlled by departmental policy;
4. there was an implied term in the Contract that the Commonwealth would not interfere with the Director of Works' duties as certifier; and
5. there was an implied term of the contract that the Commonwealth would ensure that the Director of Works properly performed his duty as certifier.

This, it is suggested, is the current law on the status of the dual role of the Superintendent under a traditional form of construction contract.

### 3.2 FUNCTIONS OF THE SUPERINTENDENT

#### *The Superintendent as assessor/certifier under the Contract*

The Superintendent is appointed by both parties to the Contract to perform certain functions as assessor/certifier. Those functions will include, principally:

- certification of progress claims
- assessment of variations
- assessment of extensions of time
- assessment of quality of workmanship and materials
- assessment of claims under the contract (for example, latent conditions claims)

The critical considerations in respect of these functions are as follows:

1. in his role as a certifier/assessor, the Superintendent has a duty to act fairly/impartially;
2. the Superintendent must exercise **this** role independently; and
3. the precise nature of this role will vary from case to case depending on the terms of the Contract.

With this background, we now turn to the primary functions of the Superintendent in his certifier/assessor role:

#### *Progress Claims*

In all traditional standard form contracts, the Contractor is required to periodically deliver, to the Superintendent, progress claims for payment under the contract. The Superintendent is usually required to assess those progress claims (by reference to the degree of completeness **and** the quality of the materials and workmanship). The Superintendent must calculate the amount due, at that time, having regard to:

- work carried out by the Contractor in performance of the contract; and
- claims for breach of contract.

The Superintendent has to make more than a complex technical assessment. He is also required to make a legal assessment of complex legal causes of action upon which a Contractor might base a claim for additional payment. (This process is referred to in more detail in Section 5.)

#### *Variations*

The Superintendent is required to regularly exercise legal judgments under the Contract in the authorisation and valuation of variations. There are two separate issues. The Contractor may assert from time to time that particular works which he has been required to perform (either in accordance with the contract documents, or alternatively pursuant to a direction of the Superintendent) constitute a Variation. The test applied by the Courts is, in substance, that particular work constitutes a variation if it is **work outside the Contract**, ie the works upon which the Contractor tendered/contracted, having regard to the terms of the Contract. The second complex area of assessment for the Superintendent in relation to variations is in the **valuation of variations**.

### *Extension of Time Claims*

The assessment of claims for extension of time is extremely complex. Typically, under a traditional form of construction contract, the Contractor would be entitled to extensions of time in the following circumstances:

- where delays are caused by the Proprietor (for example, if the Proprietor fails to deliver the site on the agreed date, or the design drawings/specifications are wrong requiring further work to remedy the error);
- where delays are caused through events beyond the parties' control (for example, inclement weather or industrial strife).

The first task of the Superintendent in assessing claims for extension of time by the Contractor is to determine whether, having regard to the express terms of the contract, the Contractor is entitled to an extension of time at all. In each case, it will be a complex analysis for the Superintendent to determine whether an extension of time is due to the Contractor at all. The more complex calculation, however, comes in relation to the quantification of extensions of time. A delay might occur because of two days rain...but the effect of the two days rain may be to delay work commencing on the site for a further three days. Alternatively, a delay may occur to one part of the works which is non-critical to practical completion of the total project.

The Superintendent is required to assess claims for extension of time and grant such extensions as are due to the Contractor under the Contract. (A more detailed discussion of extensions of time is set out in Section 4.)

### *Quality*

The parties define the works to be performed under the contract, in the contract documents. Those documents consist, typically, of the drawings and specifications, but may also include, in certain circumstances, post-tender correspondence, and other technical descriptions of the proposed works. The parties, at the time of entering into the contract, appoint the Superintendent to check the quality of materials and workmanship against the contract documents and to take such steps as are set out in the contract to effect the requisite quality standards. The Superintendent's role is, traditionally, to watch over the works, to give directions to remedy work which is not in accordance with the provisions of the contract, and where that direction is not complied with, to take the steps provided in the Contract to remove part of the work from the Contractor and to have that work remedied by others at the cost of the Contractor. (A more detailed discussion of quality issues is contained in Section 6.)

### *Administration of the Contract*

The Superintendent administers the Contract by giving directions, which the Contractor is obliged to follow (subject to the Contractor's right to claim additional payment where the Superintendent errs by requiring the Contractor to perform work beyond the requirements of the Contract). For example, clause 23 of AS2124-1992 provides:

..... If, pursuant to a provision of the Contract enabling the Superintendent to give directions, the Superintendent gives a direction, the Contractor shall comply with the direction.

*In Clause 23 "direction" includes agreement, approval, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement.*

*Except where the Contract otherwise provides, a direction may be given orally but the Superintendent shall as soon as practicable confirm it in writing.*

*If the Contractor in writing requests the Superintendent to confirm an oral direction, the Contractor shall not be bound to comply with the direction until the Superintendent confirms it in writing.*

### **The Superintendent as agent of the Principal**

The Superintendent is also required to act as the agent/adviser of the principal in respect of certain (other) functions.

The Superintendent has a dual role. The Superintendent is required to act as a certifier/assessor. In performing that role there is, clearly emerging from the cases, an obligation to act fairly, impartially and **not** at the direction of one or other of the parties (usually the Proprietor). The respective roles of the Superintendent relate to different, mutually exclusive, functions.

There are a number of functions which the Superintendent acts as the agent/adviser of the principal, including:

1. notification of successful and unsuccessful tenderers
2. arrangements for execution of contract documents
3. vetting of Contractors' insurances
4. vetting of security deposits
5. approvals and clearances by statutory authorities
6. advice on rate of progress and expenditure
7. recommendations on contractual actions to be taken by the Proprietor
8. management of site staff

In addition to the above, the JCC Standard Form Contracts set out, in clause 5.02, a listing of functions of the Architect when acting as the agent of the Proprietor (in addition to a similar listing of functions when acting as an assessor, valuer or certifier). That list of functions in which the Architect is to act as the agent of the Proprietor sets out the matters in relation to which the Architect should issue instructions, to the Contractor, principally:

1. performance of the works
2. variations
3. site conditions
4. nominated sub-contractors and suppliers
5. substitution of materials and workmanship
6. postponement of work
7. making good of defects in the works
8. the removal, re-execution, replacement of works executed by the Contractor

Each of these functions (the list is far more extensive than the items referred to above), are examples of the types of function upon which the Proprietor usually relies on its professional

advisers for advice, before, during and after the performance of the works by the Contractor under the contract.

In relation to this role, the Superintendent must:

1. comply with the instructions of the Proprietor (irrespective of whether those instructions are reasonable, fair or contrary to the interests of the Contractor); and
2. the Superintendent owes a duty of care to the Proprietor in the performance of those functions.

If the Superintendent fails to perform those functions in accordance with paragraphs (i) and (ii) above, the Superintendent may be liable to the Proprietor for breach of contract **and/or** in negligence.

### 3.3 LIABILITY OF THE SUPERINTENDENT

#### Liability to the Proprietor

The Superintendent is in a contractual relationship with the Proprietor to perform his functions (all of his functions whether as agent of the Proprietor or as an assessor/certifier under the construction contract). This liability will arise, potentially, both in contract and in tort. (See *Brickhill v. Cooke* [1984] 6 BCLRS 47 in which the New South Wales Supreme Court, Court of Appeal, held that a client could sue an engineer in tort as well as in contract.)

In many instances, there will be a written contract between the Principal and the Superintendent. Those terms of engagement may or may not include provisions relating to the services to be performed, the payment to be made in respect of those services, and, possibly, limitation of liability and extent of professional indemnity insurance cover. In other cases, there may be no written engagement. In that case the contractual obligation arises through the conduct of the parties in the Proprietor requesting the Superintendent to do certain work and the Superintendent being entitled to be paid a reasonable sum for those works. Where the Superintendent is an employee of the Proprietor, there will be an employment contract whether in writing or otherwise between the Proprietor and the Superintendent.

In addition to their contractual relationship, the Superintendent will owe the Proprietor a duty of care in the performance of his functions. Until 1974, there was a view that certifiers were somehow immune from liability (to anyone) in the performance of their certification functions. As late as 1973 this "immunity" was still thought to exist. In *Sutcliffe v. Thackrah*, the House of Lords considered the earlier cases, including *Arenson v. Arenson*, and held that there was no such immunity.

The Superintendent, therefore, in the performance of his functions under the contract, both as agent of the Proprietor, and as an assessor/certifier under the contract, is potentially liable to the Proprietor if he fails to perform the obligations either in accordance with the terms of his contract with the Proprietor, or alternatively, if he fails to perform his task to the requisite standard of care.

#### Liability to the Contractor

The Superintendent has no contractual relationship with the Contractor. Accordingly, to the extent that he may have potential liability to the Contractor at all it would only be in negligence. The Superintendent is not immune in tort in relation to his performance of his role as assessor/certifier. The Superintendent's potential liability to the Contractor, depends on whether he owes a duty of care to that Contractor in all the circumstances and whether, in the performance of those functions, he has performed those functions to the requisite degree

of care and skill. On first principles, there seems little doubt that the Superintendent and the Contractor are in a sufficiently proximate relationship that the Superintendent ought to owe a duty of care to the Contractor

In *Junior Books v. Veitchi* which has been limited to its factual situation (nominated sub-contractor heavily relied on for its expertise) the House of Lords concluded that a nominated sub-contractor (no contract with the owner) could owe a duty of care to an owner in relation to the construction of a tiled floor by the nominated subcontractor.

It seems that various parties likely to be involved on construction contracts, albeit that there is no contractual relationship between the particular parties, nevertheless have those other parties in mind when they are performing their particular roles on the project.

There are, however, obvious practical disincentives against bringing such a claim, in particular:

1. the Proprietor would usually be a better defendant for the Contractor where the conduct complained of is a failure by the Superintendent to perform his assessor/certifier role. (Although, conceivably, such an action against a Proprietor might be time-barred, yet an action in negligence against a Superintendent might still be available...);
2. in performing an assessor/certifier role, a subjective assessment is likely to involve exercise of discretion by professional men, accordingly it is unlikely to be the type of decision which would easily be established as having been negligent (although, again, one might conceive actions where, through perhaps mere inadvertence error had occurred...); and
3. the failure by a Contractor to explore his remedies through to arbitration/litigation (where the Superintendent's decision would be re-visited in any event) would usually be a complete answer to a claim in negligence against the Superintendent by the Contractor.

On balance, therefore, it seems that an action in negligence is available to a Contractor against the Superintendent but practical reasons make it unlikely that such an action would usually be pursued.

#### 4. TIME UNDER THE CONTRACT

##### 4.1. PRACTICAL COMPLETION

The obligation of the Contractor under the Contract is to bring the Works to practical completion by the Date for Practical Completion. “*Practical Completion*” has no meaning other than the meaning defined in a particular Contract. It is **not** a term of art. In all of the major standard form contracts in Australia, the definition of practical completion sets out the specific requirements that the Contractor must achieve. For example, clause 1 of AS2124-1992 provides:

*“Practical Completion” is that stage in the execution of the work under the Contract when -*

- (a) the Works are complete except for minor omissions and minor defects -
  - (i) which do not prevent the Works from being reasonably capable of being used for their intended purpose; and*
  - (ii) which the Superintendent determines the Contractor has reasonable grounds for not promptly rectifying; and*
  - (iii) rectification of which will not prejudice the convenient use of the Works; and**
- (b) those tests which are required by the Contract to be carried out and passed before the Works reach Practical Completion have been carried out and passed; and*
- (c) documents and other information required under the Contract which, in the opinion of the Superintendent, are essential for the use, operation and maintenance of the Works have been supplied;*

Clause 1 of AS4000-1997 provides:

*“Practical Completion”*

*is that stage in the carrying out and completion of WUC when:*

- a) the Works are complete except for minor defects:
  - i) which do not prevent the Works from being reasonably capable of being used for their stated purpose;*
  - ii) which the Superintendent determines the Contractor has reasonable grounds for not promptly rectifying; and*
  - iii) the rectification of which will not prejudice the convenient use of the Works;**
- b) those tests which are required by the Contract to be carried out and passed before the Works reach practical completion have been carried out and passed; and*
- c) documents and other information required under the Contract which, in the Superintendent’s opinion, are essential for the use, operation and maintenance of the Works have been supplied;*

The usual elements of practical completion are:

- the completion of the Works except for minor omissions and minor defects -

- which do not prevent the works from being reasonably capable of being used for their intended purposes;
- in relation to which there are reasonable grounds for not promptly rectifying them;
- the rectification of which omissions or defects will not prejudice the convenient use of the Works; and
- all tests required under the Contract have been completed; and
- any other particular requirements (for example, the delivery of “as built” drawings)

From time to time, particularly in project - specific contract documentation, the Principal will define a number of further pre-requisites to Practical Completion (for example, the obtaining of certificates from the Fire Insurance Council of Australia...). On larger private sector projects, the Contract may provide many more requirements to be achieved as pre-conditions to practical completion, including for example:

- as built drawings
- operation and maintenance manuals
- certificates of completion from relevant authorities
- reinstatement of damage to services....

The obligation on the Contractor, therefore, is not to bring the Works to “perfect” completion by any particular date, but to bring the works to “Practical Completion” by the “Date for Practical Completion”.

Where the Contractor fails to bring the Works to Practical Completion by that Date for Practical Completion, the Contract will usually provide for the payment of “liquidated damages” by the Contractor to the Principal (we refer to this further below). Those damages represent the damages for breach of contract which the Principal will be entitled to recover from the Contractor because the Contractor has breached the Contract, namely by failing to bring the works to Practical Completion by the required date under the Contract.

### ***Separable Portions***

From time to time, in particular contracts, there may be several stages and/or several relevant parts of the Works which are required by the Principal to be brought to Practical Completion by a particular date. In such circumstances, the Works are divided into “separable portions” (alternatively referred to, from time to time, as “Separable Parts”). The separable portions are expressly defined in the Contract and there will be a separate regime of Dates for Practical Completion in respect of each separable portion, and liquidated damages in respect of each separable portion.

## **4.2 EXTENSION OF TIME**

### **4.2.1 Delays**

The Contractor’s obligation is to bring the Works to practical completion by the Date for Practical Completion. A failure to bring the Works to practical completion by that date will usually expose the Contractor to a claim for damages (usually “liquidated damages”) by the Principal. The requirement to bring the Works to practical completion are generally to be found in this form in such major standard form contracts as AS2124, JCC, NPWC3 and others. Where delay occurs, the Contractor may have an entitlement to an extension of time to the Date for Practical Completion, depending on the express provisions of the particular contract.

Clause 35.2 of AS2124-1992 provides:

**35.2 Time for Practical Completion**

*The Contractor shall execute the work under the Contract to Practical Completion by the Date for Practical Completion. Upon the Date of Practical Completion the Contractor shall give possession of the Site and the Works to the Principal.*

Clause 34.1 of AS4000-1997 provides:

**34.1 Progress**

*The Contractor shall ensure that WUC reaches practical completion by the date for practical completion.*

Clause 35.5 of AS2124-1992:

**35.5 Extension of Time for Practical Completion**

*When it becomes evident to the Contractor that anything, including an act or omission of the Principal, the Superintendent or the Principal's employees, consultants, other contractors or agents, may delay the work under the Contract, the Contractor shall promptly notify the Superintendent in writing with details of the possible delay and the cause.*

*When it becomes evident to the Principal that anything which the Principal is obliged to do or provide under the Contract may be delayed, the Principal shall give notice to the Superintendent who shall notify the Contractor in writing of the extent of the likely delay.*

*If the Contractor is or will be delayed in reaching Practical Completion by a cause described in the next paragraph and within 28 days after the delay occurs the Contractor gives the Superintendent a written claim for an extension of time for Practical Completion setting out the facts on which the claim is based, the Contractor shall be entitled to an extension of time for Practical Completion.*

*The causes are -*

- (d) *events occurring on or before the Date for Practical Completion which are beyond the reasonable control of the Contractor including but not limited to -  
industrial conditions;  
inclement weather;*
- (e) *any of the following events whether occurring before, on or after the Date for Practical Completion -*
  - (iv) *delays caused by -*
    - *the Principal;*
    - *the Superintendent;*
    - *the Principal's employees, consultants, other contractors or agents;*
  - (v) *actual quantities of work being greater than the quantities in the Bill of Quantities or the quantities determined by reference to the upper limit of accuracy stated in the Annexure*

- (otherwise than by reason of a variation directed under Clause 40);*
- (vi) latent conditions;*
  - (vii) variations directed under Clause 40;*
  - (viii) repudiation or abandonment by a Nominated Subcontractor;*
  - (ix) changes in the law;*
  - (x) directions by municipal, public or statutory authorities but not where the direction arose from the failure of the Contractor to comply with a requirement referred to in Clause 14.1;*
  - (xi) delays by municipal, public or statutory authorities not caused by the Contractor;*
  - (xii) claims referred to in Clause 17.1(v);*
  - (xiii) any breach of the Contract by the Principal;*
  - (xiv) any other cause which is expressly stated in the Contract to be a cause for extension of time for Practical Completion.*

*Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not a cause referred to in the preceding paragraph, then to the extent that the delays are concurrent, the Contractor shall not be entitled to an extension of time for Practical Completion.*

*In determining whether the Contractor is or will be delayed in reaching Practical Completion regard shall not be had to -*

- whether the Contractor can reach Practical Completion by the Date for Practical Completion without an extension of time;*
- whether the Contractor can, by committing extra resources or incurring extra expenditure, make up the time lost.*

*.....*

By comparison, clause 34.3 of AS4000-1997 is far more succinct. Clause 34.3 provides:

**34.3 Claim**

*The Contractor shall be entitled to such extension of time for carrying out WUC (including reaching practical completion) as the Superintendent assesses ('EOT'), if:*

- a) the Contractor is or will be delayed in reaching practical completion by a qualifying cause of delay; and*
- b) the Contractor gives the Superintendent, within 28 days of when the Contractor should reasonably have become aware of that causation occurring, a written claim for an EOT evidencing the facts of causation and of the delay to WUC (including extent).*

*If further delay results from a qualifying cause of delay evidenced in a claim under paragraph (b) of this subclause, the Contractor shall claim an EOT for such delay by promptly giving the Superintendent a written claim evidencing the facts of that delay.*

Delays enabling the Contractor to claim an extension of time under the Contract could usually be characterised as follows:

(i) ***Delays caused by the Principal***

Certain delays under a construction contract are caused by the Principal. Such delays might include, for example:

- delays in providing clear access to the site
- delays in providing detailed drawings and specifications
- errors in the drawings and specifications
- failure to provide certain matters to be provided under the Contract by the Principal (for example, water, electricity, gas...)

Where the Principal delays the Contractor in the performance of the Works, the Contract should expressly provide that the Contractor is to be entitled to an extension of time. The Contract also should provide that the Contractor is expressly entitled to payment for the costs associated with that delay, usually referred to as “delay costs”, however in the absence of such an express provision the Contractor will have a claim for damages for breach of contract in any event.

There is a substantial body of law as to the effect of such delays where the Contract does **not** expressly provide the Contractor with a right to an extension of time and/or delay costs. In brief, where the Principal prevents the Contractor from performing his contractual obligations, and the Contract provides no mechanism to extend the time under the Contract (sometimes referred to as the “prevention principle”), the Principal is unable to enforce his contractual remedies against the Contractor in respect of the Contractor’s failure to perform the works by the time under the Contract.<sup>12</sup> Alternatively time is said to be “set at large” (meaning no more than that, in the absence of a contractual mechanism to extend time, the Date for Practical Completion has no contractual effect). This does not have the result that the Contract has no completion date, rather the Contractor is required to complete the work under the Contract within a reasonable time.

In practice, modern construction contracts always expressly provide an entitlement in the Contractor to both an extension of time (and to delay costs), where delays are caused by the Principal to the Contractor in the performance of the Works.

(ii) ***Delays caused by the Contractor***

Certain delays are caused by the Contractor. Such delays might include, for example:

- where the Contractor is late in arriving on site
- where the Contractor performs the Works at too slow a rate to complete the Works by the Date for Practical Completion (or has allowed insufficient time in his tender)
- where the Contractor perform the Works in a defective manner, and the work has to be rectified

In such circumstances, the Contract should not (and rarely does) provide that the Contractor is entitled to an extension of time and/or additional payment in respect of those delays. These are all matters for which the Contractor is contractually responsible.

(iii) ***Neutral delays/force majeure***

Certain delays which occur on major engineering contracts are not caused through the fault of either party but are referred to, from time to time as “force majeure” delays or events. Such delays might include, for example:

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<sup>12</sup> The authority for this principle is usually said to “Peak”. The principle is alternatively referred to as the “Peak prevention principle”.

- inclement weather
- industrial stoppages
- Acts of God, civil wars...

It is a price-sensitive commercial matter for negotiation by the parties, at the time of entering into the Contract, as to whether particular force majeure events will or will not entitle the Contractor to an extension of time, and/or an adjustment of the Contract Sum, under the Contract. (Where the Contract expressly provides that the Contractor is to be entitled to an extension of time for such events, one might expect lower tender prices. Where the Contract does not expressly provide for an extension of time in such events, one might expect higher tender prices.)

The Western Australian Supreme Court considered the effect of using 'nil' and 'N/A' in Annexure Part A to the Australian Standard General Conditions of Contract AS2124: *Silent Vector Pty Ltd t/as Sizer Builders v Squarcini* [2008] WASC 246. See <http://www.austlii.edu.au/au/cases/wa/WASC/2008/246.html>

The entitlement to, and assessment of, claims for extension of time is a major area of potential dispute under engineering contracts.

#### 4.2.2 Notification of Claims

Where delays occur under a construction contract and the Contractor intends to claim an extension of time (and/or delay costs) the Contract usually expressly provides for a notification regime and for the assessment of such claims.

##### *Notification of the Claim*

The Contractor is usually expressly required to give notice of circumstances which might lead to a delay of any kind, immediately the Contractor becomes aware of such circumstances. This provision usually applies not only to circumstances out of which the Contractor might ultimately claim an extension of time, but to all circumstances where the Contractor is likely to be delayed in achieving practical completion by the Date for Practical Completion (even where, for example, the delay was caused through the Contractor's own fault and the Contractor is not entitled to such an extension of time).

The obligation of the Contractor to give the first notice (in AS2124-1992, when it becomes aware of a delay, giving notice of the mere fact of a possible delay and the cause) appears, in AS2124-1992, in the first paragraph of clause 35.5:

*When it becomes evident to the Contractor that anything, including an act or omission of the Principal, the Superintendent or the Principal's employees, consultants, other contractors or agents, may delay the work under the Contract, the Contractor shall promptly notify the Superintendent in writing with details of the possible delay and the cause.*

In most contracts, there is a two-tier notification requirement, namely that the Contractor notify the Superintendent (or the Principal as the case may be) immediately upon becoming aware of the likely occurrence of a delay, and again, providing details of the extent of the delay and other such matters, within a reasonable time of the Contractor being able to calculate the extent and likely cost and effect on the construction program of that delay.

The obligation of the Contractor to give the second notice (in AS2124-1992, within 28 days of the delay occurring, giving details of the claim, and the facts upon which it is based) appears, in AS2124-1992, in the third paragraph of clause 35.5:

*If the Contractor is or will be delayed in reaching Practical Completion by a cause described in the next paragraph and within 28 days after the delay occurs the Contractor gives the Superintendent a written claim for an extension of time for Practical Completion setting out the facts on which the claim is based, the Contractor shall be entitled to an extension of time for Practical Completion.*

The Contract will usually provide that where the Contractor fails to give the necessary notice (or as the case may be, either of the necessary two notices), the Contractor will be barred under the Contract from bringing a claim for an extension of time and/or delay costs. There is a substantial body of law as to the effect of such time bar clauses (see below). From time to time, the Courts have declined to give effect to such time bar clauses for various reasons. Ideally, however, the Contractor who wishes to make such a claim should strictly comply, however, with such time bar notice provisions.

#### **AS4000-1997 No Time Bar?**

Interestingly, however, Clause 41.2 of AS4000-1997 provides:

##### **41.2 Liability for failure to communicate**

*The failure of a party to comply with the provisions of subclause 41.1 or to communicate a claim in accordance with the relevant provision of the Contract shall, inter alia, entitle the other party to damages for breach of Contract but shall neither bar nor invalidate the claim.*

The effect of this is to make time bars in that standard form meaningless (as a bar). In fact, to date, the usual practice when using this standard form has been to amend AS4000-1997 to remove this Clause 41.2.

#### **Criticality/float**

A pre-requisite to claiming an extension of time, often expressly included in the Contract, is that the Contractor will, in fact, be delayed in achieving practical completion by the Date for Practical Completion. In effect, the Contract will usually provide that even though a delay might occur, unless that delay occurs to a critical activity (namely, an activity which, if delayed, will consequently delay the Works from being brought to practical completion by the Date for Practical Completion), the Contractor is **not** to be entitled to an extension of time. This pre-requisite to an extension of time is not articulated in every contract (in some contracts, there is no expression of this requirement). For example, clause 35.5 of AS2124-1992 provides:

*If the Contractor is or will be **delayed in reaching Practical Completion**.....*

Clause 34.3 of 4000-1997 provides:

*The Contractor shall be entitled to such extension of time for carrying out WUC (including reaching practical completion) as the Superintendent assesses ('EOT'), if:*

- a) *the Contractor is or will **be delayed in reaching practical completion** by a qualifying cause of delay; ....*

This has been confused, from time to time, with a separate issue as to “Who Owns the Float?” On one view, where a Contractor has carefully arranged his affairs (or “husbanded” his time) so as to make certain activities non-critical, then delays which are caused to the Contractor, for which the Contract provides an extension of time, should result in an extension of time (thereby, in fact, giving the Contractor even more time “up his sleeve”). The opposite view is that the Contractor, where delayed on a non-critical activity, should never be entitled to an extension of time where he will not, in fact, be delayed under the Contract.

Contract provisions usually expressly provide for the latter (namely, that the Contractor is not entitled to an extension of time **unless** that delay is likely to delay him in achieving practical completion, i.e. that the delay occurs to a critical activity only). Despite this, the Courts have tended towards a view that the Contractor, where he has carefully husbanded his time in a particular way, should not be penalised by being denied an extension of time in such circumstances.

Such issues will need to be resolved in each case depending on the particular provisions of the Contract. The likelihood is, however, that a Court would prefer to find in favour of a Contractor where a delay is caused by the Principal (albeit to a non-critical activity) where such an interpretation is available to it.

#### 4.3 LIQUIDATED DAMAGES

The contractual obligation on the Contractor, in respect of time under the Contract, is to bring the Works to practical completion by the Date for Practical Completion.

Where the Contractor breaches the Contract by failing to bring the Works to practical completion by the Date for Practical Completion, the Principal would, in the absence of any other provision, have a contractual entitlement to sue for general damages.

The convention has evolved, for the common convenience of the parties, that such damages are pre-agreed at the time of entering into the Contract. For this purposes, such damages are usually referred to as “liquidated damages” (in this context, the use of the word “liquidated” means, a specific amount, rather than an amount to be determined by the Courts).

The requirements to bring the Works to practical completion are generally to be found in this form in such major standard form contracts as AS2124, JCC, NPWC3 and others.

For example, clause 35.6 of AS2124-1992 provides:

***Liquidated Damages for Delay in Reaching Practical Completion***

*If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor shall be indebted to the Principal for liquidated damages at the rate stated in the Annexure for every day after the Date for Practical Completion to and including the Date of Practical Completion or the date that the Contract is terminated under Clause 44, whichever first occurs.*

*If after the Contractor has paid or the Principal has deducted liquidated damages, the time for Practical Completion is extended, the Principal shall forthwith repay to the Contractor any liquidated damages paid or*

*deducted in respect of the period up to and including the new Date for Practical Completion.*

Clause 34.7 of AS4000-1997 provides:

***Liquidated damages***

*If WUC does not reach practical completion by the date for practical completion, the Superintendent shall certify, as due and payable to the Principal, liquidated damages in Item 24 for every day after the date for practical completion to and including the earliest of the date of practical completion or termination of the Contract or the Principal taking WUC out of the hands of the Contractor.*

*If an EOT is directed after the Contractor has paid or the Principal has set off liquidated damages, the Principal shall forthwith repay to the Contractor such of those liquidated damages as represent the days the subject of the EOT.*

In fact, though such liquidated damages are to be paid by the Contractor to the Principal (usually, they are deducted by the Principal from monies due to the Contractor, where the Principal decides to deduct such liquidated damages at all), the liquidated damages provision is primarily for the benefit of the Contractor. The operation of a liquidated damages clause effectively limits the potential exposure of the Contractor to damages for late completion.

There are a number of issues which arise in respect of liquidated damages as follows:

1. The Courts have generally declined to enforce “penalty” clauses (see below). For this reason, it is usual to make the liquidated damages a genuine pre-estimate of the damages likely to be suffered by the Principal in the event of late completion (albeit that this pre-estimate is made at the time of entering into the Contract rather than when the delay occurs, at the end of the construction period). It may suffice to say, however, that a daily estimate of damages is rarely (if ever) treated as a penalty clause by the Courts. Penalty clauses usually take the nature of an amount unrelated to the actual damage suffered, and which penalty only comes into effect on a particular date.
2. The quantum of liquidated damages is usually estimated by the parties at the time of entering into the Contract, based on the damages likely to be suffered by the Principal if in fact the Contractor is late in completing the Works. Accordingly, as a matter of contractual negotiation, the amount of damages is typically a “genuine pre-estimate” of those damages. In the absence, however, of agreement on that amount, the parties are open to leave out the liquidated damages clause altogether. In such circumstances, the Principal could sue the Contractor for general damages if the Contractor was late in completing the Works. (The usual reason why the Contractor will insist on a liquidated damages clause is for the reason set out above, namely to limit his potential exposure in such circumstances.)
3. There is no requirement on the Principal to establish that it has, in fact, suffered loss (the whole purpose of pre-agreeing liquidated damages is to avoid the potential upside/downside on losses).

### ***“Nil” Liquidated damages***

From time to time, parties (usually by mistake, but this could sometimes be the commercial agreement) insert the word “Nil” in the item for liquidated damages.

Courts have interpreted this to mean what it says, namely that the Contractor, if late, pays zero damages to the Principal in respect of that lateness. (If the parties, in fact, intended to delete the liquidated damages clause, and rely on general damages for any lateness, they should delete the entire liquidated damages provision, rather than write “Nil”). In *J-Corp Pty Ltd v Mladenis* [2009] WASCA 157 (28 August 2009), the Western Australian Court of Appeal was considering whether a clause limiting liquidated damages to "NIL DOLLARS (\$00.00)" prevented the owners from claiming general damages for delay when the builder failed to reach practical completion on their home by the due date. The preliminary question requiring determination by the Court was whether, on proper construction, the clause specifying "NIL" liquidated damages excluded the respondents' right to claim common law damages for losses suffered due to the appellant's breach of Contract? The Court reviewed a number of earlier conflicting authorities on the point (in particular, *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30; Cf *Baese Pty Ltd v RA Bracken Building Pty Ltd* (1990) 6 BCL 137; *Cellulose Acetate Silk Co Ltd v Widnes Foundry* (1925) Ltd [1933] AC 20) before examining the Contract terms. The Court reasoned:

*[C]lear words are needed to rebut the presumption that a contracting party does not intend to abandon any remedies for breach of contract arising by operation of law*

The Court found that there were no "clear and unequivocal words" in the Contract that excluded the owners from claiming general damages for delay. The words "NIL liquidated damages" meant precisely that. There could be no recovery for liquidated damages. However, general damages were still available to the owners.

This decision reaffirms that the use of 'NIL' or 'N/A' for liquidated damages clauses in building contracts will not necessarily exclude a party's right to common law damages

### ***Penalties and liquidated damages***

Liquidated damages or penalties provisions in building contracts typically relate to the obligation to complete the work within the specified time. In cases where the act concerned is a breach of contract, the court may inquire whether the payment or forfeiture provided for in the contract is a penalty, or liquidated damages.

If it is deemed to be a penalty, the party claiming it will not be allowed to recover the full amount, if his damage was in fact less, yet on the other hand will not be limited to that amount if his damages have been greater. If it is held to be liquidated damages, the aggrieved party will be entitled to the stipulated sum, whether the real damage be greater or less or absent.

The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

Whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged as at the time of the making of contract, not as at the time of the breach.

The task of construction has suggested various tests from time to time:

- It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.
- It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.
- There is a presumption that it is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more events, some of which may occasion serious and others trifling damage”.
- It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.

In *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, at 192, Mason and Wilson JJ observed:

*“A penalty provision has been regarded as unenforceable or, perhaps void, ab initio ....In the majority of cases involving penalties, the courts, if called upon to assist in partial enforcement ..Penalty clauses are not, generally speaking, so expressed as to entitle the plaintiff to recover his actual loss. Instead they prescribe the payment of a sum which is exorbitant or a sum to be ascertained by reference to a formula which is not an acceptable pre-estimate of damage....“is one of degree and will depend on a number of circumstances including; (1) the degree of disproportion between the stipulated sum and the loss likely to be suffered by the plaintiff, a factor relevant to the oppressiveness of the term to the defendant, and the (2) the nature of the relationship between the contracting parties, a factor relevant to the unconscionability of the plaintiff’s conduct in seeking to enforce the term.”*

This principle was recently considered again, by Cox CJ, with approval in *State of Tasmania v Leighton Contractors Pty Ltd (No 3)* [2004] TASSC 132 (16 November 2004).

#### 4.4 DELAY COSTS

Where the Contractor is delayed in completing the Works, he will usually be exposed to additional costs, irrespective of who caused the delay.

Such “delay costs” will usually arise out of the continuing costs to be borne by the Contractor (for example, crane hire, site shed hire, foreman salaries, other continuing costs including the contribution which the particular project is required to make to the head office overheads...).

Where, therefore, the delay is caused by a breach of contract on the part of the Principal (for example, delay in providing access to the site, or in the provision of drawings and specifications, or through a failure by the Principal to perform activities required of the Principal...) the Contractor will suffer financial loss in addition to the mere loss of time. The Contractor will therefore wish to claim an adjustment to the Contract Sum, or “delay costs”, in addition to claiming an extension of time to the Date for Practical Completion.

The best drawn Contracts will usually expressly provide for the Principal to pay such “delay costs” to the Contractor (on the reasoning that in the absence of such an express clause the Contractor will nevertheless have an entitlement to damages against the Principal). Further, the clause will usually expressly limit the Contractor’s entitlement in such circumstances.

For example, clause 36 of AS2124-1992 provides:

**36. DELAY OR DISRUPTION COSTS**

*Where the Contractor has been granted an extension of time under Clause 35.5 for any delay caused by any of the events referred to in Clause 35.5(b)(i), the Principal shall pay to the Contractor such **extra costs as are necessarily incurred** by the Contractor by reason of the delay.*

*Where the Contractor has been granted an extension of time under Clause 35.5 for any delay caused by any other event for which payment of extra costs for delay or disruption is provided for in the Annexure or elsewhere in the Contract, the Principal shall pay to the Contractor such extra costs as are necessarily incurred by the Contractor by reason of the delay.*

*Nothing in Clause 36 shall -*

- (a) oblige the Principal to pay extra costs for delay or disruption which have already been included in the value of a variation or any other payment under the Contract; or*
- (b) limit the Principal's liability for damages for breach of contract.*

Clause 34.9 of AS4000-1997 provides:

**34.9 Delay damages**

*For every day the subject of an EOT for a compensable cause and for which the Contractor gives the Superintendent a claim for delay damages pursuant to subclause 41.1, damages certified by the Superintendent under subclause 41.3 shall be due and payable to the Contractor.*

Interestingly, in AS2124-1992, the delay cost provisions of the Contract refer to the entitlement of the Contractor to claim “extra costs necessarily incurred”. On one view, this entitlement somehow limited the Contractor’s entitlement (for example, when compared to the similar provisions in the JCC Contract which refer to “loss, damage or expenses”).

Contracts will usually expressly provide the Contractor’s entitlement to delay costs in particular circumstances, and, possibly, seek to limit and/or impose pre-conditions on the extent of that recovery.

## **4.5 PROGRAM**

The obligation on the Contractor in respect of programming is merely to:

1. proceed with the Works with reasonable expedition
2. provide a program within a set period of award of the Contract
3. achieve practical completion by the Date for Practical Completion

For example, clause 33 of AS2124-1992 provides:

**33.1 Rate of Progress**

*The Contractor shall proceed with the work under the Contract with due expedition and without delay.....*

### **33.2 Construction Program**

.....

*A construction program shall not affect rights or obligations in Clause 33.1. The Contractor may voluntarily furnish to the Superintendent a construction program.*

*The Superintendent may direct the Contractor to furnish to the Superintendent a construction program within the time and in the form directed by the Superintendent.*

*The Contractor shall not, without reasonable cause, depart from -*

- (a) a construction program included in the Contract; or*
- (b) construction program furnished to the Superintendent.*

*The furnishing of a construction program or of a further construction program shall not relieve the Contractor of any obligations under the Contract including the obligation to not, without reasonable cause, depart from an earlier construction program.*

The practice on larger projects is to expressly set out detailed requirements as to the requirements for the program. The Contractor is only required to achieve the contract dates. The sequencing of the Works (within limits) is up to the Contractor. Where the Contractor is directed to perform the Work in a certain manner or sequence, that direction may result (depending upon the terms of the tender documents) in a variation claim to the Contractor. The programming obligations are, however, subject to the requirement (provided this appears in the Contract provisions) to expeditiously perform the Works so as to achieve practical completion by the Date for Practical Completion.

## **4.6 TIME BARS**

The Courts have generally attempted to read down time bars, where this is possible in the context of the Contract, to be directory/procedural, rather than mandatory. In that event, the party failing to comply with the time bar may be liable in damages to the other party (for damages caused by the failure to comply with the time bar), but not **barred**. For example, in *Jennings Construction Ltd v Q H and M Birt Pty Ltd* (1987) 3 BCL 189, the Court interpreted the catch-all clause 48 of NPWC3-1981 as not barring progress claims and variations (but only final claims). The Court will give effect to time bar clauses, however, where the intention of the parties to give the clause this effect is clear from the contract (for example, in relation to a potential latent conditions claim in *Wormald Engineering Pty Ltd v Resources Conservation Co International* (1989) 8 BCL 158 .

The usual arguments made by a party which has failed to give the requisite notices in the face of a time bar clause include:

1. the true interpretation of the clause, in the particular case, is that the clause is directory/procedural, not mandatory (the claim is not barred, though the injured party is entitled to damages);

2. there is an implied term which has the effect, in the particular case of making the particular time bar clause inapplicable (for example, an implied term that the party bringing the claim must first have all of the necessary information, or that the other party is not in default under the Contract);
3. in the event that the particular claim is barred in contract, the claim can be brought outside the Contract (for example, in restitution, or under the Trade Practices Act, or in negligence);
4. that the other party has somehow waived his right to rely on the time bar (for example, there were discussions of the claims encouraging the claimant to wait until some later time before making the particular claim);
5. that the particular claim (for example, for an extension of time) is barred but the claimant is not barred from suing for general damages for breach of contract.

Interestingly, AS4000-1997 has adopted a more lenient view towards failure to comply with time bars (this may explain the general failure of principals, public and private sector, to move to the latest revision?). Clause 41.2 of AS4000-1997 provides:

***Liability for failure to communicate***

*The failure of a party to comply with the provisions of subclause 41.1 or to communicate a claim in accordance with the relevant provision of the Contract shall, inter alia, entitle the other party to damages for breach of Contract but shall neither bar nor invalidate the claim.*

It seems that the Courts, and arbitrators, on balance, are far more likely to adopt the reasoning in *Wormald* and give effect to clearly worded time bars.

## 5. PAYMENT

### 5.1 PROGRESS CLAIMS/PROGRESS CERTIFICATES/PROGRESS PAYMENTS

#### *Progress Claim*

In all traditional standard form contracts, the Contractor is required to periodically deliver, to the Superintendent, progress claims for payment under the contract. The Contractor is required to submit details supporting its claim for payment (discussed further below). In most standard form contracts in Australia, the Superintendent is required to assess those progress claims (by reference to the degree of completeness **and** the quality of the materials and workmanship).

For example, in AS2124-1986, clause 42.1 provides, in part, as follows:

#### *42.1 Payment Claims, Certificates and Time for Payment.*

*At the times for payment claims stated in the Annexure...the Contractor shall deliver to the Superintendent claims for payments supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. **Claims for payment shall include all amounts then due to the Contractor under the Contract or for breach thereof.***

Accordingly the Superintendent must calculate the amount due, at that time, having regard to:

1. work carried out by the Contractor in performance of the contract; and
2. claims for breach of contract.

This is potentially a complex calculation.

It might be said that the value of works to be assessed in relation to paragraph (i) could be performed by a quantity surveyor. (In fact, on a number of major projects in the late 1980's, project financiers often preferred quantity surveyors, rather than engineers/architects/superintendents, to assess progress claims... this, possibly, was a preference of project financiers rather than Proprietors.) The difficulty with this type of assessment, however, is that it is necessarily linked to an assessment of quality of materials and workmanship. It is necessary to ensure that the works as completed are in accordance with the technical requirements of the drawings and specifications, and are free of defects. This assessment, in itself, may ultimately become the subject of technical debate.

But perhaps the more complex area is the assessment of payment claims for "breach" of contract. Claims for breach of contract might include, for example:

- additional payment to the Contractor for latent conditions
- claims for delay costs arising out of extensions of time which were the fault of the Proprietor
- claims for variations which arose out of the Proprietor's failure to give access to the site, or additional work caused by faulty design documentation
- claims for variations arising out of directions by the Superintendent relating to works not included in the contract/tender documents

In addition, in modern times, the Superintendent might expect from time to time to receive even more complex claims, such as:

- restitution/quantum meruit claims (where the works as constructed are so different from that tendered on, that the contract sum is no longer applicable)
- claims for negligence (for example, for additional works caused by negligent preparation of the design drawings specifications)
- claims for misleading and deceptive conduct under the *Competition and Consumer Act 2011 (Cth)*

Interestingly, this type of claim was traditionally, for example, under AS2124-1986, not been required to be assessed by the Superintendent in assessing a progress claim. However, under AS2124-1992, this provision was amended to **expand** the nature of claims which were to be assessed by the Superintendent. The additional words seem to include the negligence/quantum meruit/TPA type claims. In every case, the ambit of the Superintendent's assessment of progress claims will depend on the language of the Contract.

### ***Progress Certificate***

When the Superintendent has assessed the progress claim he issues the Progress Certificate.

For example, clause 42.1 of AS2124-1992 provides:

*Within 14 days after receipt of a claim for payment, the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. The Superintendent shall allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issued pursuant to Clause 42.8 or a Certificate issued pursuant to Clause 44.6, amounts paid under the Contract and amounts otherwise due from the Principal to the Contractor and/or due from the Contractor to the Principal arising out of or in connection with the Contract including but not limited to any amount due or to be credited under any provision of the Contract.*

Clause 37.2 of AS4000-1997 provides:

*The Superintendent shall, within 14 days after receiving such a progress claim, issue to the Principal and the Contractor:*

- a) a progress certificate evidencing the Superintendent's opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference ('progress certificate'); and*
- b) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.*

*If the Contractor does not make a progress claim in accordance with Item 28, the Superintendent may issue the progress certificate with details of the calculations and shall issue the certificate in paragraph (b).*

....

It is critical that the progress certificate be issued by the time stated in the Contract (under some contracts, if the certificate is not issued within the time, the Contractor is entitled to payment of the whole claim.

For example, clause 42.1 of AS2124-1992 provides:

*..... if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim....*

Clause 37.2 of AS4000-1997 provides:

*If the Superintendent does not issue the progress certificate within 14 days of receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant progress certificate*

Where the Superintendent is not satisfied by the material submitted by the Contractor, the correct course is to make the assessment rather than wait for the additional information (in the absence of written agreement from the Contractor).

### ***Progress Payment***

The Progress Certificate is provided to both the Principal and the Contractor. To the extent that either party disputes that Progress Certificate, they are required under the Contract to take certain steps within a particular number of days to dispute that Progress Certificate. Failing any dispute arising in relation to the Progress Certificate, the Principal then becomes contractually obliged to make the Progress Payment to the Contractor, in accordance with that Progress Certificate, within the number of days as set out in the Contract.

For example, clause 42.1 of AS2124-1992 provides:

*Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal as the case may be.....*

Clause 37.2 of AS4000-1997 provides:

*The Principal shall within 7 days after receiving both such certificates, or within 21 days after the Superintendent receives the progress claim, pay to the Contractor the balance of the progress certificate after deducting retention moneys and setting off such of the certificate in paragraph (b) as the Principal elects to set off. If that setting off produces a negative balance, the Contractor shall pay that balance to the Principal within 7 days of receiving written notice thereof.*

Progress certificates, and progress payments, do NOT constitute evidence that the works are properly performed, or that they have been accepted. Progress certificates, and progress payments, merely constitute interim assessments, and interim payments on account.

For example, clause 42.1 of AS2124-1992 provides:

..... *A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.*

*Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by Clause 42.8.*

Clause 37.2 of AS4000-1997 provides:

*Neither a progress certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily. Payment other than final payment shall be payment on account only.*

The Principal's obligation to pay on the Progress Certificate is critical. The failure to pay on a certificate has caused serious contractual problems to principals, wrongly believing that this obligation could be avoided because of some other factor (for example, defects, lateness, etc, not, for some reason addressed in the progress certificate.)

## 5.2 SECURITY

### ***Prior to Practical Completion***

The Superintendent, in issuing the Progress Certificate, will calculate the cash retention, if any which is to be taken into account in making any progress payment. (I address cash retention and security in more detail in Section 7.)

The convention, historically, was for the Contractor to provide security for the performance of his obligations to the Principal, by the Principal deducting cash retention from progress payments, usually of the order of 5% of the value of work completed to any point, up to the Date of Practical Completion. The purpose of allowing the deduction of cash retention from the value of works completed, up to the point of Practical Completion, was to enable the Principal, should the need arise, to use those funds to pay others (if necessary) to rectify and/or complete the Contract Works in part or in total as the case required. In modern times, in fact, cash retention security has been substantially replaced by bank guarantee security (this is addressed in more detail in Section 7).

From the time of commencing the work up until practical completion, therefore, when issuing Progress Certificates, the Superintendent will usually note the amount of cash retention to be deducted, or not, from such Progress Payments.

The Contract will usually provide that such cash retention or security is to be returned, in part (usually 50%) at Practical Completion.

### ***Defects Liability Period***

The Contract will usually expressly provide for a Defects Liability Period.

Typically such a period might be of the order of 12 months on a major construction contract, could be as little as 3 months on a minor construction contract, or could conceivably be for 2 years or more on a complex industrial project requiring lengthy commissioning periods for equipment. In practice, however, on major works, the Defects Liability Period would usually be of the order of 12 months.

During that Defects Liability Period, the Contractor will usually be expressly obliged to return to the site and rectify defects which become apparent. (We refer to the defects liability provisions in more detail in Section 6).

Accordingly, at practical completion, **part** of the cash retention or bank guarantees will usually be returned to the Contractor, and the balance of the cash retention or bank guarantees will be retained throughout the Defects Liability Period. That security which is retained throughout that period is retained for the purpose of, should the need arise, the Principal rectifying such defects.

### ***Final Completion***

At the end of the Defects Liability Period, usually referred to as Final Completion, the Contractor will usually be required to submit a Final Payment Claim, including all claims which he wishes to make under the Contract. The Contract will usually expressly exclude any further claims being made by the Contractor under the Contract. The Contractor is usually expressly barred from bringing any further claims under the Contract (remembering that the work has now been completed for 12 months or more).

For example, clause 42.7 of AS2124-1992 provides:

#### ***42.7 Final Payment Claim***

*Within 28 days after the expiration of the Defects Liability Period, or where there is more than one, the last to expire, the Contractor shall lodge with the Superintendent a final payment claim and endorse it "Final Payment Claim".*

*The Contractor shall include in that claim all moneys which the Contractor considers to be due from the Principal under or arising out of the Contract or any alleged breach thereof.*

*After the expiration of the period for lodging a Final Payment Claim, any claim which the Contractor could have made against the Principal and has not been made shall be barred*

The Principal/Superintendent will then issue the Final Certificate, and return the balance of any cash retention or security monies will be returned to the Contractor (with deductions as may be necessary for uncompleted work, if any).

For example, clause 42.8 of AS2124-1992 provides:

#### ***42.8 Final Certificate***

*Within 14 days after receipt of the Contractor's Final Payment Claim or, where the Contractor fails to lodge such claim, the expiration of the*

*period specified in Clause 42.7 for the lodgement of the Final Payment Claim by the Contractor, the Superintendent shall issue to the Contractor and to the Principal a final payment certificate endorsed "Final Certificate". In the certificate the Superintendent shall certify the amount which in the Superintendent's opinion is finally due from the Principal to the Contractor or from the Contractor to the Principal under or arising out of the Contract or any alleged breach thereof.*

Unlike other certificates, the Final Certificate will usually be evidence of the satisfactory completion of the Contractor's obligations under the Contract. The Principal is not (in standard form and other well drawn contracts) barred from making further claims (for example, defects may not become apparent in substantive structures for several years...).

For example, clause 42.8 of AS2124-1992 provides:

*Unless either party, either before the Final Certificate has been issued or not later than 15 days after the issue thereof, serves a notice of dispute under Clause 47, the Final Certificate shall be evidence in any proceedings of whatsoever nature and whether under the Contract or otherwise between the parties arising out of the Contract, that the Works have been completed in accordance with the terms of the Contract and that any necessary effect has been given to all the terms of the Contract which require additions or deductions to be made to the Contract Sum, except in the case of -*

- (a) fraud, dishonesty or fraudulent concealment relating to the Works or any part thereof or to any matter dealt with in the said Certificate;*
- (b) any defect (including omission) in the Works or any part thereof which was not apparent at the end of the Defects Liability Period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the Final Certificate; or*
- (c) any accidental or erroneous inclusion or exclusion of any work, plant, materials or figures in any computation or any arithmetical error in any computation.*

### 5.3 VALUATION OF PROGRESS CLAIMS

#### *Value of Completed Work/Value to Complete*

The nature of a construction contract is that payment is to be made progressively throughout the completion of the Works until practical completion.

The Contractor's entitlement to payment, however, will be in accordance with the Contract Sum, not the **actual** value of work. All being equal the two amounts (the Contract Sum, and the actual value of the work), should be reasonably similar. The Contract Sum, however, is a matter for the tenderers to compete on and, accordingly, one could imagine that the Contract Sum could be greater than or less than the actual value of the work.

Accordingly, when the Superintendent comes to value the progress claims, he will usually make his assessment on the basis of percentage completion of the Works relative to the Contract Sum, rather than the actual value of work completed.

There are, however, a number of possible alternative methods for valuation which would include:

1. the value of the completed work on a pure valuation basis;
2. the value of the work still to be completed under the Contract, on a pure valuation basis, deducted from the total Contract Sum.

Where financiers are involved in the funding of construction work, the latter method of valuation has tended to be adopted from time to time, the financiers being concerned to ensure, for the purposes of their security, that there are at all times sufficient funds left in the finance facility to complete the work if necessary. Accordingly, in certain cases, the Superintendent in assessing the progress claims may be interested in the calculation of the value of the work to be completed, as opposed to the percentage of work completed on a pro-rata basis. Ultimately, this will be a subjective assessment by the Superintendent.

For example, clause 42.1 of AS2124-1992 provides:

*..... the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating **the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal.....***

### **Bill of Quantities/Fixed Price/Schedule of Rates**

The Contract Sum which is included in the tenders is a matter for competition between the respective tenderers. The Contract will provide that the Contract Sum is to be a lump sum, a schedule of rates, or any other combination.

For example, clause 3.1 of AS2124-1992 provides:

#### **3.1 Performance and payment**

*The Contractor shall execute and complete the work under the Contract.  
The Principal shall pay the Contractor -*

- (a) for work for which the Principal accepted a lump sum, the lump sum;*
- (b) for work for which the Principal accepted rates, the sum ascertained by multiplying the measured quantity of each section or item of work actually carried out under the Contract by the rate accepted by the Principal for the section or item, adjusted by any additions or deductions made pursuant to the Contract.*

The Principal will usually decide as to whether the Contract Sum is to be a fixed price, or alternatively, on a Schedule of Rates basis (for example, where the rough quantities are known, but for flexibility and/or difficulty of calculation reasons, the exact final quantities are not known and the Principal prefers to compare the tenderers on the basis of their unit rates rather than a total fixed price). (This is addressed in Section 1.) The Contract Sum may be calculated on a number of different bases, depending on the nature of the particular Contract:

#### **Fixed Price**

The tenderers will all bid a single price to be the Contract Sum. The price (subject to variations and other such matters expressly provided for in the Contract) will not vary, irrespective of the quantities ultimately encountered on the Contract.

#### **Schedule of Rates**

The tenderers all submit a price based on unit rates. Those prices are, however, submitted pursuant to a schedule containing quantities, usually prepared by the Principal, which indicates quantities within a certain limit of accuracy. Where the quantities, however, are ultimately outside that limit of accuracy (whether or not that limit of accuracy is expressly provided in the Contract) those rates may ultimately be inapplicable under the Contract.

### ***Bill of Quantities***

From time to time, the tenderers will be asked to bid on a fixed price basis but subject, however, to a bill of quantities. In such circumstances, the fixed price is to be applicable only so far as the bill of quantities is accurate within certain limits (whether or not those limits are expressly provided within the Contract itself).

### ***Priced Bill of Quantities***

In addition to the above, the Contract may also provide for the Contractor, after he has been awarded the Contract (and the price has been agreed) to prepare a Priced Bill of Quantities. The Priced Bill of Quantities is usually prepared to assist the valuation of progress claims, variations, and other assessment purposes.

For example, clause 3.3 of AS2124-1992 provides:

#### **3.3            *Adjustment for Actual Quantities - Schedule of Rates***

*Where otherwise than by reason of a direction of the Superintendent to vary the work under the Contract, the actual quantity of an item required to perform the Contract is greater or less than the quantity shown in the Schedule of Rates -*

- (a) where the Principal accepted a lump sum for the item, the difference shall be valued under Clause 40.5 as if it were varied work directed by the Superintendent as a variation;*
- (b) where the Principal accepted a rate for the item the rate shall apply to the greater or lesser quantities provided that where limits of accuracy are stated in the Annexure the rate shall apply to the greater or lesser quantities within the limits and quantities outside the limits shall be valued under Clause 40.5 as if they were varied work directed by the Superintendent as a variation.*

*If a Schedule of Rates omits an item which should have been included, the item shall be valued under Clause 40.5 as if it was extra work directed by the Superintendent as a variation*

In assessing progress claims, therefore, the Superintendent will sometimes be required to have regard to whether certain quantities for particular items are within a limit of accuracy expressly or impliedly included for particular items in either a schedule of rates or a bill of quantities.

Where such items are outside such a limit of accuracy (whether an express limit of accuracy or an implied limit of accuracy) the Contractor will potentially be entitled to claim payment based on a reasonable sum for the work performed (usually referred to as a “quantum meruit” claim, to which we refer further in Part 5.4.3 below and generally in Section 10).

### ***Payment for Offsite Goods***

The Contract will usually expressly provide whether the Contractor is entitled to include, in progress claims, an amount for goods which have been either ordered, or supplied, but for particular reasons not yet delivered to the site.

Such items might include, for example, bulk steel where that steel has to be purchased and then shipped to a fabrication site prior to delivery to the construction site.

The Principal is potentially exposed to loss where goods are to be paid for which have not yet been delivered to the site (for example, if the goods are lost, stolen, or damaged while offsite and out of the Principal's control, or alternatively if the goods are not adequately identified and the Contractor, having received payment for the goods, then goes into liquidation, thereby exposing the Principal to a potential dispute over ownership of the goods).

For example, clause 42.4 (this is an alternative clause) of AS2124-1992 provides:

**42.4 Unfixed Plant and Materials**

*If the Contractor claims payment for plant or materials intended for incorporation in the Works but not incorporated the Principal shall not be obliged to make payment for such plant or materials but the Principal may make payment, if the Contractor establishes to the satisfaction of the Superintendent that -*

- (a) such plant or materials have reasonably but not prematurely been delivered to or adjacent to the Site;*
- (b) ownership of such plant and materials will pass to the Principal upon the making of the payment claimed; and*
- (c) such plant or materials are properly stored, labelled the property of the Principal and adequately protected.*

*Upon payment to the Contractor of the amount claimed, the plant or materials the subject of the claim shall be the property of the Principal free of any lien or charge.*

The Contract should always expressly provide for, at the minimum, the following where payment is to be made for offsite goods:

- adequate written evidence of the passing of title in the goods to the Principal, upon payment for those goods;
- adequate identification of the particular goods, appropriate labelling, and separation of those goods from other goods not within the ownership of the Principal, at all times;
- adequate insurance of those goods while out of control of the Principal, so as, in the event of their loss, to enable Principal to have, at a minimum, a good claim against an insurer for the cost of those goods.

In the absence of any of the above, the Superintendent should not certify for payment of goods which have not yet been delivered to the site.

## 5.4 VARIATIONS

### *Whether Work Constitutes a Variation*

The usual area in which the Superintendent is required to regularly exercise legal judgments under the Contract is in the authorisation and valuation of variations.

These are two separate issues.

The Contractor may assert from time to time that particular works which he has been required to perform (either in accordance with the contract documents, or alternatively pursuant to a direction of the Superintendent) constitute a Variation. The test applied by the Courts is, in substance, that particular work constitutes a variation if it is work outside the works upon which the Contractor tendered/contracted, having regard to the terms of the Contract.

A number of issues regularly arise in relation to whether or not work constitutes a variation, including:

- whether work subsequently performed by the Contractor is or is not included in the contract documents
- whether particular work to be performed by the Contractor is, in accordance with the terms of the Contract, to be inferred from the contract documents
- whether the circumstances in which work properly described in the contract documents is to be performed are different from the circumstances described in the tender/contract documents.

These types of variations differ from the easy to understand type of variation, namely where the Proprietor wishes to change the work described in the original contract documents and seeks a quotation from the Contractor prior to that work being performed, which quotation the Proprietor then accepts and orders the variation or not.

The Superintendent's assessment of whether or not work constitutes a variation is more than a technical assessment. It requires skills in interpreting contract documents, a judicial impartiality in listening to the views of the Proprietor and the Contractor, and an ability to interpret documents which often are non-specific in relation to the subject matter of the asserted variation.

As was the case in relation to the assessment of complex claims under the contract in certification of progress claims, the Superintendent is appointed by both parties to the contract to make this assessment. The choice of the Superintendent is, in theory, a matter for the parties at the time of entering into the contract, but is, in practice, a matter which is usually decided solely by the Proprietor.

### *Payment for Variations without Written Instruction*

The Contract will usually provide that the Contractor is not entitled to payment for variations unless the Principal/Superintendent has given the Contractor a written instruction.

In fact, there are several cases where the Contractor will be entitled to additional payment, albeit that he has not been given a written instruction. Those examples include:

- where the work required to be performed by the Contractor is beyond the scope of the Works described in the contract documents
- where work is wrongly rejected by the Principal/Superintendent, and is therefore re-performed/rectified by the Contractor
- where there is a separate agreement to pay for the additional work, or to waive the requirements for the written instruction

The basis for claiming additional payment in these circumstances is not to be found in the Contract Conditions. The basis for the claim would be that the Contractor was directed to perform extra work, beyond that which was included in the Contract. In such circumstances, the Contractor's claim is based in restitution rather than (or even despite) the express contract provisions.<sup>13</sup> (Restitution is discussed in chapter 12.)

### ***Valuation of Variations***

The second complex area of assessment for the Superintendent in relation to variations is in the **valuation of variations**.

The common contract regime for valuing variations is, generally, as follows:

- the Proprietor (usually through the Superintendent acting as agent of the Proprietor) and the Contractor attempt to agree on the value of the approved variation;
- failing such agreement, the Superintendent assesses the value of the variation in accordance with any pre-agreed (at the time of entering into the contract) rates which may be applicable for such variations;
- where there is no such applicable pre-agreement, the Superintendent determines a "reasonable sum", including an amount for the builders on-costs and profit (but, depending in all circumstances, on the express language of the contract).

This regime cannot be avoided. In practice, the tiered analysis of the valuation of variations is set out in detail.

For example, clause 40.5 of AS2124-1992 provides:

#### **40.5 Valuation**

*Where the Contract provides that a valuation shall be made under Clause 40.5, the Principal shall pay or allow the Contractor or the Contractor shall pay or allow the Principal as the case may require, an amount ascertained by the Superintendent as follows -*

- if the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used;*
- if Clause 40.5(a) does not apply, the rates or prices in a Priced Bill of Quantities or Schedule of Rates shall be used to the extent that it is reasonable to use them;*
- to the extent that neither Clause 40.5(a) or 40.5(b) apply, reasonable rates or prices shall be used in any valuation made by the Superintendent;*
- in determining the deduction to be made for work which is taken out of the Contract, the deduction shall include a reasonable amount for profit and overheads;*
- if the valuation is of an increase or decrease in a fee or charge or is a new fee or charge under Clause 14.3, the value shall be the actual increase or decrease or the actual amount of the new fee or charge without regard to overheads or profit;*

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<sup>13</sup> The authorities for this proposition are set out, for example, in Cremean, Brooking on Building Contracts, 3<sup>rd</sup> Edition, at p.130. "...Although a fixed price contract may put a 'limit' on the work described in the contract this cannot prevent payment for additional or varied work..." and "...Extra work may consist of the re-execution of work which the engineer has wrongly condemned..."

- (f) *if the valuation relates to extra costs incurred by the Contractor for delay or disruption, the valuation shall include a reasonable amount for overheads but shall not include profit or loss of profit;*
- (g) *if Clause 11(b) applies, the percentage referred to in Clause 11(b) shall be used for valuing the Contractor's profit and attendance; and*
- (h) *daywork shall be valued in accordance with Clause 41.*

*When under Clause 40.3 the Superintendent directs the Contractor to support a variation with measurements and other evidence of cost, the Superintendent shall allow the Contractor the reasonable cost of preparing the measurements or other evidence of cost that has been incurred over and above the reasonable overhead cost.*

Clause 36.4 of AS4000-1997 provides:

### **36.4 Pricing**

*The Superintendent shall, as soon as possible, price each variation using the following order of precedence:*

- a) *prior agreement;*
- b) *applicable rates or prices in the Contract;*
- c) *rates or prices 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*
- d) *reasonable rates or prices, which shall include a reasonable amount for profit and overheads, and any deductions shall include a reasonable amount for profit but not overheads.*

Effectively, the Superintendent is being asked to put a valuation on works which, by definition, was not agreed between the parties at the time of entering into the contract. It is work which the Contractor is obliged to perform (the Contractor bound himself to do this by entering into a contract which included a variation clause). The parties did not agree, at the time of entering into the contract, on how much the Contractor would be paid for such work. They merely agreed on the valuation regime.

It is a contractual term, therefore, between the parties, decided upon at the time of entering into the contract, that the Superintendent is to have the last word on the valuation of variations.

## **5.5 LATENT CONDITIONS**

In certain circumstances, the Contract will expressly provide an entitlement to extension of time and/or additional payment where the Contractor encounters site conditions that differ from those upon which the tender was based.

For example, Clause 12.1 of AS2124-1992:

*Latent Conditions are -*

- (a) *physical conditions on the Site or its surroundings, including artificial things but excluding weather conditions, which differ materially from the physical conditions which should*

*reasonably have been anticipated by the Contractor at the time of the Contractor's tender if the Contractor had -*

- (i) *examined all information made available in writing by the Principal to the Contractor for the purpose of tendering; and*
- (ii) *examined all information relevant to the risks, contingencies and other circumstances having an effect on the tender and obtainable by the making of reasonable enquiries; and*
- (iii) *inspected the Site and its surroundings; and*

....

Clause 25.1 of AS4000-1997 provides:

*Latent conditions are physical conditions on the site and its near surrounds, including artificial things but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by a competent Contractor at the time of the Contractor's tender if the Contractor had inspected:*

- a) *all written information made available by the Principal to the Contractor for the purpose of tendering;*
- b) *all information influencing the risk allocation in the Contractor's tender and reasonably obtainable by the making of reasonable enquiries; and*
- c) *the site and its near surrounds.*

In *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2009] VSCA 221 (7 October 2009), the Victorian Court of Appeal considered a latent conditions claim in relation to a contract in which a contractor was to excavate, fill and rehabilitate reclaimed land in a quarry for a residential development. The latent conditions clause provided, so far as relevant, as follows:

*physical conditions on the Site or its surroundings, including artificial things but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by [BMD] at the time of [BMD's] tender ...*

The Court of Appeal made general observations, to the effect that:

1. The test (under the particular Clause) was to be determined objectively; that is, that what should reasonably have been anticipated by the contractor at the time of tender is to be determined by an objective assessment of the facts rather than by what the particular contractor may have done or not have done.
2. The enquiry required a determination of questions of fact, namely:
  - a. what conditions had been encountered;
  - b. whether they were physical conditions;
  - c. whether they differed materially from those ascertainable; and
  - d. what could have reasonably been anticipated.
3. The effect of a latent condition clause is to:

*shift to the principal the economic burden of a risk which had been contractually assumed by the contractor. It is fundamental to the shifting of that risk that the occasion for the shift be, as much as possible, beyond the control or fault of the parties but be determined by, and be dependent upon, objective criteria and measures.*

4. Though the particular principal had clearly excluded any warranty as to the accuracy of its documents, even so, the fact that it gave out the documents as the basis for a fixed-price tender was something significant to weigh in the balance in determining how far a reasonable contractor should be expected to go in comprehending the effects of any other possibly relevant material in its possession or which it might obtain on reasonable inquiry.

In *Glenorchy City Council and Tasmania v Tacon Pty Ltd trading as Tacon Civil Construction* [2000] TASSC 51 (26 May 2000), the Tasmanian Supreme Court upheld an arbitrator's decision on a latent conditions claim under a contract for the construction of a sewer outfall pipe (the contract included Clause 12.1 of AS2124-1992). The Court (Cox CJ) said as follows:

*The definition contemplates a difference of conditions between what are in fact encountered and what the contractor should reasonably have expected if he had examined the relevant information, rather than between what are encountered and what the contractor, having examined the information, did reasonably expect. ....  
..... (the Arbitrator's) conclusion that the contractor could not reasonably have anticipated the conditions encountered was a determination of fact which this Court has no jurisdiction to review.*

(emphasis added)

In *Ryde City Council v Transfield Pty Ltd t/as Transfield Tunnelling and Anor* [2002] NSWSC 1037 (7 November 2002), the NSW Supreme Court upheld an arbitrator's<sup>14</sup> decision on a latent conditions claim, under a contract for the construction of a major storm water drainage tunnel. The particular contract defined Latent Conditions, so far as relevant:

*sub-surface physical conditions, including artificial obstructions, encountered by the Contractor at the Site during the execution of the Work, which differ materially ... but does not include .... any conditions ..... should reasonably have foreseen as likely to be encountered during the execution of the Works .*

The Arbitrator (and ultimately the Court) was persuaded to some extent as to what "should reasonably have been foreseen", by the extent to which the actual work ultimately differed from the work originally intended.

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<sup>14</sup> The Arbitrator was Mr T McDougall.

## 6. QUALITY

### 6.1 REQUIREMENTS UNDER THE CONTRACT

#### *Quality Requirements in Contract Documents*

The provisions, historically, which set out the quality requirements are non-comprehensive<sup>15</sup>, the Contract usually relies on the subjective assessment of a person such as the Superintendent. Accordingly, when one looks at the standard form such as, for example, AS2124-1992, there is little or no guidance as to what is to be suitable in defining the standard of quality. The Contract merely states that the quality of the Work shall be in accordance with the contract documents.

For example, clause 30.1 of AS2124-1992 provides:

#### **30.1 Quality of Materials and Work**

*The Contractor shall use the materials and standards of workmanship required by the Contract. In the absence of any requirement to the contrary, the Contractor shall use suitable new materials.*

There is a comprehensive regime, however, of assessment as to quality by, for example, the Superintendent, and then the giving of directions to rectify defective work. In modern times, this position has been changed by the introduction of quality assurance systems.

The substantive content of a quality assurance system relates to procedures whereby quality of work is checked, discussed, certain certificates are required to be completed by particular parties, and generally the procedures are set out which will ensure the delivery of appropriate quality on a contract. Essentially, therefore, the determination of quality remains a subjective assessment by particular persons nominated under the particular contract.

#### **Implied Terms**

Most contracts will expressly provide that works are to be performed to achieve certain performance criteria, in particular that the work is to be:

- (i) fit for the purpose for which it was intended;
- (ii) merchantable quality;
- (iii) unless otherwise specified, new;
- (iv) performed with reasonable care and skill....

These pre-requisites, usually expressly included in the contract, are common to many contracts, not merely engineering contracts. In fact, were these requirements not to be expressly included in the contract, it would be likely that they would be implied into the contract in any event.

There are a number of reasons why such terms as set out above are usually implied, (if not expressly included) in engineering contracts, including:

- such terms are likely to pass the implied term tests;
- such terms are, from time to time implied into such contracts by legislation (for example, the *Competition and Consumer Act 2011 (Cth)*<sup>15</sup>;
- common usage (it is usual, in such engineering contracts, that such terms are accepted amongst members of the industry, though, in particular cases, depending

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<sup>15</sup> Prior to the *Competition and Consumer Act 2011 (Cth)*, renaming and re-structuring the *Trade Practices Act 1974 (Cth)*, this was contained in several Acts, including the *Trade Practices Act 1974 (Cth)*, *Goods Act 1958*, *Fair Trading Act...*

on the nature of the particular work to be performed, one could imagine circumstances where the terms would not be implied...)

Accordingly, in most engineering contracts, in addition to the express specification of the works required to be performed and set out in detail in the Drawings and Specifications, there will usually be a number of implied terms that the works be fit for the purpose for which are intended, that the goods be of merchantable quality, that the materials, unless otherwise specified, be new, and that the workmanship be performed to a standard of reasonable care and skill.

### ***Codes***

The nature of engineering contracts is such that a number of SAA (Standards Association of Australia) Codes and usually be expressly included in the specification, or where no express inclusion is made, may be implied into the contract. For example, where structural steel work is required, one would expect that the code on structural steel work would be either expressly referred to in the specification, or if not expressly included, that there would be an implied term that all work conform to that Code.

A difficulty arises from time to time in preparing those contracts. On one hand, the natural intention of draftsman of such contracts, when preparing the Drawings and Specifications, is to expressly refer to particular SAA Codes, particularly related to the area of work to be performed under the contract. (For example, if there is to be structural steel work, the tenancy is to expressly refer to the SAA Code on structural steel work.) On the other hand, however, there is an interesting contract interpretation issue, namely that where particular codes are expressly referred to in the specification, one could infer that other codes, not expressly included, do not need to be complied with.

The likelihood is, however, that in the absence of expressly excluding an obligation to comply with any particular code, that a Court if it ever needed to do so, would interpret any contract as to include an implied term, at least, that Codes, were relevant, were to be complied with.

There is a view (wrongly) expressed from time to time that as a matter of law all Codes be complied with. In fact an examination of the Codes in most instances, indicates an obligation to exercise an engineering judgment. Further, there is, in fact, rarely any express obligation pursuant to legislation and/or any building regulations that particular SAA Codes be complied with. In all those circumstances, therefore, it is unlikely that one could simply presume that, as a matter of law, all SAA Codes must be complied with. They do not have the force of legislation.

Having regard to the common usage of such Codes, however, and the usual practice of requiring, as a minimum, compliance with particular codes in relation to particular such work, it is likely, it seems that the engineering contracts would usually be interpreted as including, at least, an implied term that codes were generally to be complied with.

## **6.2 DEFECTS**

### ***Judgment of the Superintendent***

In most engineering contracts there is a person in the role of the Superintendent (whether it be a Superintendent or the principal himself performing the same role). The test on quality, historically, in engineering contracts, is exercised by that person subjectively.

The identification of defects in engineering works can be complex. It will usually require a personal engineering skill on the part of the person making the assessment. Further, such judgments are often the subject of bitter disputes. For example, a contractor may take the view that work has been satisfactorily completed, albeit that some minor defects are apparent (for example rough fabrication on steel work, or for example inaccuracies in fabrication elements), those minor defects being capable of easy rectification. Accordingly, therefore, the Superintendent when making an assessment as to quality, will usually be required to exercise engineering judgment, and contract judgment. The determination by a Superintendent that work is “defective” will usually have serious consequences and it is likely, perhaps, that this will colour the Superintendent’s subjective engineering judgment.

The test remains, however, under most engineering contracts, as to whether work meets the relevant quality standards, a subjective assessment by the Superintendent.

### ***Direction to Remedy***

Where the Superintendent concludes that work is defective, there is a usual regime which the Superintendent can follow to procure compliance by the Contractor with the quality standards under the contract. The first step which the Superintendent should follow is to give the Contractor formal notice, in writing, that particular work is defective, and that such work is to be remedied.

For example, in AS2124-1992, Clause 30.3 provides that the Superintendent may give the Contractor a notice to rectify defective work, at the contractor’s expense.

### **30.3 Defective Materials or Work**

*If the Superintendent discovers material or work provided by the Contractor which is not in accordance with the Contract, the Superintendent may direct the Contractor to -*

- (a) remove the material from the Site;*
- (b) demolish the work;*
- (c) reconstruct, replace or correct the material or work; or*
- (d) not to deliver the material or work to the Site.*

*The Superintendent may direct the times within which the Contractor must commence and complete the removal, demolition, replacement or correction.*

*If the Contractor fails to comply with a direction issued by the Superintendent pursuant to Clause 30.3 within the time specified by the Superintendent in the direction and provided the Superintendent has given the Contractor notice in writing that after the expiry of 7 days from the date on which the Contractor receives the notice the Principal intends to have the work carried out by other persons, the Principal may have the work of removal, demolition, replacement or correction carried out by other persons and the cost incurred by the Principal in having the work so carried out shall be a debt due from the Contractor to the Principal.*

The effect of that notice is to require the contractor to rectify those works within a reasonable time. Failing this, the Superintendent may choose to give a further notice threatening to take those works out of the contractor’s hands and rectified, at the contractor’s expense, by others.

The notice requiring that rectification should be clear and should expressly refer to the clause pursuant to which the notice is being made. In particular, the Superintendent should be careful to ensure that the direction is clear that the works are required because the contractor has failed to comply with the contract. There is a common dispute where the Superintendent gives such a direction. The contractor will usually assert that the work is either not defective, or that he will carry out the necessary rectification at a more convenient time, that necessary rectification being minor and more conveniently performed as a final clean up. Further, in some cases, the notice if not clearly given might be construed (usually wrongly) as a direction to perform additional works as a variation.

The form of the Notice under clause 30.3 might be as follows:

|  |
|--|
| <p><b><i>NOTICE PURSUANT TO AS2124-1992 CLAUSE 30.3</i></b></p> <p><i>PROJECT:</i><br/><i>CONTRACT NO:</i><br/><i>PRINCIPAL:</i><br/><i>CONTRACTOR:</i></p> <p><i>DATE ISSUED:</i></p> <p><i>TO: The Contractor</i></p> <p><i>Pursuant to Clause 30.3 of the General Conditions of Contract, the Superintendent notifies the Contractor that the following materials or work are not in accordance with the Contract:</i></p> <p style="text-align: center;">[[ insert details ]]</p> <p><i>The Superintendent directs the Contractor to reconstruct, replace or correct the material and/or work set out above (“the rectification work”) and directs that the Contractor complete the rectification work within [[ ]] days of the date upon which the Contractor receives this notice</i></p> <p><i>AND TAKE NOTICE THAT if the Contractor fails to comply with this direction within the time specified in this direction then after the expiry of [[ ]] days from the date on which the Contractor receives this notice the Principal intends to have the rectification work carried out by other persons, and the cost of that rectification incurred by the Principal shall be a debt due from the Contractor to the Principal.</i></p> <p>.....<br/><i>Superintendent</i></p> |
|--|

To complicate matters further, from time to time, the contractor might conclude that the works may require rectification, but that the performance of that rectification would be outside the terms of the contract upon which he tendered. Again, in that circumstance, even if the Superintendent clearly required the works to be rectified, those works would be performed as a variation.

### 6.3 QUALITY ASSURANCE PROGRAMS

#### *Nature of Programs*

In the last 20 years or so, major construction contract works have tended to be performed pursuant to, amongst other things, Quality Assurance Programs. Quality Assurance Programs are, by nature, a structured method of the parties agreeing on procedures to test, record, certify, and if necessary, rectify, all relevant aspects of quality on a particular contract. Accordingly, programs usually require matters such as:

- the provision of particular forms recording test results
- the completion of such forms and signing off of test result forms by each of the parties
- the preparation of lists of items requiring rectifications
- the preparation of such defective works
- schedules of items requiring signing off by the Superintendent/Principal (as the case may require)

Such programs are, by their nature, preventative measures aimed at preventing the works being completed with defects. They are pro-active in nature.

#### *Contractual Requirement to Comply*

Quality Assurance Programs have only been used in Australia, substantively, in the last 20 years or so. For this reason, the major standard form contracts in Australia are still to embrace Quality Assurance Programs completely. To the extent that such major standard forms currently envisage the use of Quality Assurance Programs, they tend towards requirements to the effect that Quality Assurance Programs shall be complied with “if” such programs are provided for in the contract documents (i.e. the major standard forms do not require Quality Assurance Programs, merely compliance with such programs if they are provided elsewhere).

For example, clause 30.2 (an optional clause) of AS2124-1992 provides:

#### **30.2 Quality Assurance**

*The Contractor shall, if requirements are so stated in the Contract - plan, establish and maintain a quality system which conforms to those requirements; provide the Superintendent with access to the quality system of the Contractor and each of the subcontractors of the Contractor to enable monitoring and quality auditing.*

*Any such quality system shall be used only as an aid to achieving compliance with the Contract and to document such compliance. Such system shall not relieve the Contractor of the responsibility to comply with the Contract.*

**NOTE:** *The inclusion of Quality Assurance requirements in a contract will require detailed clauses in the Specification or elsewhere in the Contract which have regard to the Quality Standard selected for the work.*

In addition, the major standard forms have tended to expressly provide that the mere compliance with a Quality Assurance Program does not, in itself, satisfy totally the Contractor’s obligations of vis-a-vis quality under the Contract.

To date, therefore, the compliance with the quality requirements of the Contract still remains a subjective assessment for the Superintendent albeit that the likelihood of achieving such quality objectives is enhanced by reason of complying with any required Quality Assurance Programs.

#### 6.4 DEFECTS LIABILITY PERIOD

##### *Right and Privilege of the Contractor*

Once the Contractor achieves practical completion, the Defects Liability Period will commence.

Typically, on major engineering contracts, there will be a 12 months Defects Liability Period within which defects which become apparent are to be rectified, upon the Contractor being given reasonable notice, by the Contractor at his expense.

The Defects Liability Period may extend for any time, that being a matter for the parties to negotiate under the Contract, however the convention is for the Defects Liability Period on major works to be of the order of 12 months. The period might be as little as, for example, 12 weeks on a minor residential building contract, or as long as several years on a major industrial equipment contract.

The critical obligation throughout the Defects Liability Period on the Contractor is that upon being given reasonable notice he attends the site (remembering that by this time he has left the site), within a reasonable period, and rectifies the defect.

There is a fundamental misconception as to the nature of this obligation. In fact, the Defects Liability Period provisions constitute **both a right and an obligation**.

For example, clause 37 of AS2124-1992 provides:

##### *37. DEFECTS LIABILITY*

*..... As soon as possible after the Date of Practical Completion, the Contractor shall rectify any defects or omissions in the work under the Contract existing at Practical Completion.*

*At any time prior to the 14th day after the expiration of the Defects Liability Period, the Superintendent may direct the Contractor to rectify any omission or defect in the work under the Contract existing at the Date of Practical Completion or which becomes apparent prior to the expiration of the Defects Liability Period. The direction shall identify the omission or defect and state a date by which the Contractor shall complete the work of rectification and may state a date by which the work of rectification shall commence. ....*

*If the work of rectification is not commenced or completed by the stated dates, the Principal may have the work of rectification carried out at the Contractor's expense, but without prejudice to any other rights that the Principal may have against the Contractor with respect to such omission or defect and the cost of the work of rectification incurred by the Principal shall be a debt due from the Contractor.*

It is the privilege of the Contractor to be entitled to return to the site and rectify defects as they appear during the Defects Liability Period. The alternative would be for the Principal to have the defects rectified by others, at the Contractor's expense, and to deduct the costs of that rectification from the security money still being withheld by the Principal throughout the Defects Liability Period. It would be substantially cheaper, as a rule, for the Contractor to attend the site and rectify the Works himself.

In addition, it is also the obligation of the Contractor to return to the site within the period specified under the Contract (or where such a period is not specified, within a reasonable period) to rectify those defects. In this respect, the provisions constitute an obligation on the Contractor to attend and rectify.

***Failure to Rectify/Rectification by Principal***

In the same manner that the Contract usually provides that, where the Contractor fails to rectify defects, the Principal may take those works out of the hands of the Contractor and perform those Works at the Contractor's expense, similar provisions apply to a failure by the Contractor to rectify defects throughout the Defects Liability Period.

Where the Contractor fails to attend within a reasonable time throughout the Defects Liability Period and rectify such defects, the Principal becomes entitled to have those works rectified by others, and to deduct the cost of that rectification from the monies presently held by the Principal as security for that purpose.

***NOTICE PURSUANT TO AS2124-1992 CLAUSE 37***

*PROJECT:*  
*CONTRACT NO :*  
*PRINCIPAL:*  
*CONTRACTOR:*  
*SUPERINTENDENT:*

*DATE ISSUED:*

*TO: The Contractor*

*Pursuant to Clause 37 of the General Conditions of Contract, the Superintendent notifies the Contractor that the work contains omissions or defects ("the defective work") as follows:*

*[[ insert details ]]*

*The Superintendent directs the Contractor to commence to rectify the defective work within [[]] days of the date of this notice, and to complete the work of rectification within [[ ]] days of the date of this notice.*

*The Superintendent directs that in respect of the work of rectification there shall be a separate Defects Liability Period of 12 calendar months which separate Defects Liability Period shall commence on the date the Contractor completes the work of rectification.*

*AND TAKE NOTICE THAT if the work of rectification is not commenced or completed by the stated dates, the Principal may have the work of rectification carried out at the Contractor's expense, but without prejudice to any other rights that the Principal may have against the Contractor with respect to such omission or defect and the cost of the work of rectification incurred by the Principal shall be a debt due from the Contractor.*

.....  
*Superintendent*

***Liability for Defects after Defects Liability Period***

The Contract will usually expressly provide that, upon the completion of the Defects Liability Period, and upon the issue of the Final Certificate, the Contractor shall make no further claim under the Contract against the Principal. The rationale for this limitation is that, by that time, the Contractor will have had time to sufficiently calculate any entitlement to which he claims to be entitled and to give notice of such a claim, and for the Superintendent to deal with all such claims under the Contract. In some cases, where the parties so negotiate, a similar exclusion on making claims may be imposed on the Principal. This, however, is rare and there is no logical reason why this should be so.

## 7. INSURANCE

### 7.1 CARE AND CONTROL OF THE WORKS

The Contractor, from the date that it is given access to the site by the Principal until the date that it achieves practical completion and returns the site to the Principal, has the care and control of the site. The Contractor is required to protect the Works during this period, and, if necessary, reinstate the works, at the Contractor's expense, where they are damaged during this period.

For example, clause of 16 of AS2124-1992 provides:

#### **16. CARE OF THE WORK AND REINSTATEMENT OF DAMAGE**

##### **16.1 Care of the Work Under the Contract**

*From and including the earlier of the date of commencement of work under the Contract and the date on which the Contractor is given possession of the Site to 4 p.m. on the Date of Practical Completion of the Works, the Contractor shall be responsible for the care of the work under the Contract.*

*Without limiting the generality of the Contractor's obligations, the Contractor shall be responsible for the care of unfixed items the value of which has been included in a payment certificate under Clause 42.1, things entrusted to the Contractor by the Principal for the purpose of carrying out the work under the Contract, things brought on the Site by subcontractors for that purpose, the Works, the Temporary Works and Constructional Plant, and the Contractor shall provide the storage and protection necessary to preserve these items and things, and the Works, the Temporary Works and Constructional Plant.*

*After 4 p.m. on the Date of Practical Completion the Contractor shall remain responsible for the care of outstanding work and items to be removed from the Site by the Contractor and shall be liable for damage occasioned by the Contractor in the course of completing outstanding work or complying with obligations under Clauses 30.6, 31.1 and 37.*

##### **16.2 Reinstatement**

*If loss or damage (except loss or damage which is a direct consequence, without fault or omission on the part of the Contractor, of an Excepted Risk defined in Clause 16.3) occurs to anything while the Contractor is responsible for its care, the Contractor shall at the Contractor's own cost promptly make good the loss or damage.*

The obligation to care and be responsible for the works is usually qualified for certain Principal-related risks.

For example, clause 16.2 of AS2124-1992 provides:

##### **16.2 Excepted Risks**

*The Excepted Risks are -*

- (a) any negligent act or omission of the Principal, the Superintendent or the employees, consultants or agents of the Principal;*

- (b) *any risk specifically excepted in the Contract;*
- (c) *war, invasion, act of foreign enemies, hostilities, (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any Government or public authority;*
- (d) *ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by the Contractor or the Contractor's employees or agents;*
- (e) *use or occupation by the Principal or the employees or agents of the Principal or other contractors to the Principal (not being employed by the Contractor) or a Nominated Subcontractor engaged by the Principal pursuant to a prior contract the benefit of which has been assigned to the Contractor pursuant to the Contract) of any part of the Works or the Temporary Works;*
- (f) *defects in the design of the work under the Contract other than a design provided by the Contractor.*

Clause 14.3 of AS4000-1997 provides:

### ***16.3 Excepted risks***

*The excepted risks causing loss or damage, for which the Principal is liable, are:*

- a) *any negligent act or omission of the Superintendent, the Principal or its consultants, agents, employees or other contractors (not being employed by the Contractor);*
- b) *any risk specifically excepted elsewhere in the Contract;*
- c) *war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any Government or public authority;*
- d) *ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by the Contractor or its subcontractors or either's employees or agents;*
- e) *use or occupation of any part of WUC by the Principal or its consultants, agents or other contractors (not being employed by the Contractor); and*
- f) *defects in the design of WUC, other than design provided by the Contractor.*

In addition, the Contract will usually provide that the Contractor will indemnify the Principal against certain risks.

For example, clause 17 of AS2124-1992 provides:

## **17. DAMAGE TO PERSONS AND PROPERTY OTHER THAN THE WORKS**

### **17.1 Indemnity by Contractor**

*The Contractor shall indemnify the Principal against -*

- (a) *loss of or damage to property of the Principal, including existing property in or upon which the work under the Contract is being carried out; and*
- (b) *claims by any person against the Principal in respect of personal injury or death or loss of or damage to any property,*

*arising out of or as a consequence of the carrying out by the Contractor of the work under the Contract, but the Contractor's liability to indemnify the Principal shall be reduced proportionally to the extent that the act or omission of the Principal or employees or agents of the Principal may have contributed to the loss, damage, death or injury.*

*Clause 17.1 shall not apply to -*

- (iv) *the extent that the liability of the Contractor is limited by another provision of the Contract;*
- (v) *exclude any other right of the Principal to be indemnified by the Contractor;*
- (vi) *things for the care of which the Contractor is responsible under Clause 16.1;*
- (vii) *damage which is the unavoidable result of the construction of the Works in accordance with the Contract; and*
- (viii) *claims in respect of the right of the Principal to construct the work under the Contract on the Site.*

## **17.2 Indemnity by the Principal**

*The Principal shall indemnify the Contractor in respect of damage referred to in Clause 17.1(iv) and claims referred to in Clause 17.1(v).*

Contractually, therefore, the Principal need not insure the works during the period that the Contractor is responsible. That reinstatement obligation, however, in the absence of insurance, would rely upon the financial capacity of the Contractor to reinstate any damage. In fact, the Principal, as well as the Contractor, the subcontractors, the consultants, and all stakeholders in the project, will wish to be covered by insurance for the varying risk areas.

## **7.2 TYPES OF CONSTRUCTION INSURANCE**

There are three major construction insurances on an engineering project:

### Contractors All Risk

Contractors all risk insurance covers loss caused to the works which may occur between the commencement of the project and the handing over of the works by the Contractor to the Principal at practical completion. Such losses might include, for example:

- damage caused to part completed works by severe weather conditions
- damage caused by accidents on site

The insurance of such risks is usually required under the Contract to be effected by either the Principal or the Contractor.

The loss covered, on its face, is one which would normally be borne by the Contractor. The Contractor is given access (usually, for all practical purposes, exclusive access) of the site at the commencement of the works. From that moment the Contractor, under the Contract, has the “care and responsibility” for the Works. Accordingly, if, for example, part

completed works are damaged by severe weather conditions, the Contractor would usually be required to restore the works to that condition without entitlement to payment from the Principal. This, however, would be a hollow remedy for the Principal if, for example, after such damage, the Contractor did not have sufficient funds to complete that reinstatement work.

For that reason, it is equally critical for the Principal and the Contractor that such potential losses be covered by the Contractors All Risk Insurance.

#### Public Liability/Third Party Liability

The Contract will usually also require the Principal or the Contractor to effect public liability/third party insurance. The losses which might usually be covered by such insurance include, for example, claims by persons who suffer injury or property loss because of defective equipment on the site or defective works.

The Contractor has the care and responsibility for the works. He also has the control of the Site. If, for example, a crane was to tip over while working on the site and fall across the fence onto parked cars in the adjacent street, those property owners might typically sue either the Contractor or the Principal or both. A more critical example might be personal injury claims from workers injured on the site, asserting that their injury was somehow caused by the Principal's failure (for example, to require better safety precautions, to ensure that the site does not collapse....).

The Contractor might be sued, in negligence, for his failure to properly secure the site, ensure that the equipment did not fall onto adjoining land...the Principal might be sued in negligence (in previous years this might have been generally referred to as "occupiers liability") on the basis that a danger associated with his occupation of the land has caused damage to people on adjoining land. Again, the Contractor will typically have given an indemnity to the Principal in respect of such losses caused by the negligence of the Contractor or those for whom the Contractor is responsible. For the same reasons as above, however, this may be a hollow remedy for the Principal if, in fact, the Contractor does not have sufficient funds to meet any such claims.

Further, some events will not be caused by the negligence of any person (for example, accidental damage). In those circumstances, it will be necessary for both the Principal and the Contractor to have such potential claims and/or losses covered by insurance.

#### Workers Compensation

The Contract will usually require that the Contractor effect all necessary and relevant workers compensation insurances.

In modern times, this provision has been a mere contractual obligation imposed on the Contractor to comply with the relevant workcare legislation. To the extent that any workman employed on the site is injured or becomes ill the workman would usually have his normal remedies under the workcare legislation against his employer.

Again, however, in the event that the Contractor fails to effect the relevant workcare insurances, there is a potential claim made by a workman employed on the site against the Principal in negligence (although, under the workcare legislation itself, it would be a failure by the Contractor to effect necessary insurances would not necessary dis-entitle such workman).

The Principal is usually satisfied, therefore, with merely imposing the obligation on the

Contractor and, from time to time making cursory checks that this has, in fact, been complied with by the Contractor.

In addition to these three major insurances, from time to time the Contract may impose an obligation on either the Principal or the Contractor to effect other insurances including, possibly:

- motor vehicle insurance
- marine insurance (where goods are to be supplied from overseas)
- environmental insurance (although, in fact, the environmental insurance market in Australia is extremely limited)

### 7.3 INSURANCE - PRINCIPAL OR CONTRACTOR?

The Contract will usually provide **either** that the Principal is to effect the Contractors all risk and/or the public liability insurance, and the Contractor is to effect the workers compensation insurance **or** that the Contractor is to effect all of those insurances.

The Contract could provide, either, that the Contractor effect the insurances, and include the cost of the insurances in the Contract Sum, or alternatively, the Principal effect the insurances. Where the Contractor is to effect the insurances, it is necessary for the Contract to specify the types and extent of the insurances, the deductibles, and other details of the insurances to be effected and maintained by the Contractor, for the Contract Sum. Where the Principal is to effect the insurances, it will be necessary for the Contractor to carefully review the insurances, to see whether the Contractor should effect other additional insurances to cover the risks for which the Contractor is potentially liable under the Contract.

For example, clause 18 of AS2124-1992 provides both alternatives:

*18A*

*Before the Contractor commences work, the Contractor shall take out an insurance policy covering all the things referred to in Clause 16.1 against loss or damage resulting from any cause whatsoever until the Contractor ceases to be responsible for their care.*

*Without limiting the generality of the obligation to insure, the policy shall cover the Contractor's liabilities under Clause 16.2 and things in storage off Site and in transit to the Site.*

*The insurance cover may exclude -*

- (a) the cost of making good fair wear and tear or gradual deterioration but shall not exclude the loss or damage resulting therefrom;*
- (b) the cost of making good faulty design, workmanship and materials but shall not exclude the loss or damage resulting therefrom;*
- (c) consequential loss of any kind, but shall not exclude loss of or damage to the Works;*
- (d) damages for delay in completing or for the failure to complete the Works;*
- (e) loss or damage resulting from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel resulting from any cause;*
- (f) loss or damage resulting from the Excepted Risks (b) and (c) in Clause 16.3.*

*The insurance cover shall be for an amount not less than the sum of -*

- (i) the Contract Sum;*
- (ii) the amount stated in the Annexure to provide for costs of demolition and removal of debris;*
- (iii) the amount stated in the Annexure to cover fees of consultants;*
- (iv) the value stated in the Annexure of any materials or things to be supplied by the Principal for the purposes of the work under the Contract; and*
- (v) the additional amount or percentage stated in the Annexure of the total of the items referred to in sub-paragraphs (i) to (iv) of this paragraph.*

*The insurance policy shall be in the joint names of the Principal and the Contractor, and shall cover the Principal, the Contractor and all subcontractors employed from time to time in relation to the work under the Contract for their respective rights, interests and liabilities and, unless otherwise specified elsewhere in the Contract, shall be effected with an insurer and in terms both approved in writing by the Principal which approvals shall not be unreasonably withheld. The policy shall be maintained until the Contractor ceases to be responsible under Clause 16.1 for the care of anything.*

*18B*

*On or before the Date of Acceptance of Tender, the Principal shall effect a policy of insurance in relation to the work under the Contract in the terms of the policy or proposed policy included in the documents on which the Contractor tendered. The policy or proposed policy shall include the name of the insurer. The Principal shall maintain the policy while ever the Contractor has an interest therein and the Principal shall pay all premiums.*

Where the Principal is to effect those insurances, of course, one would expect lower tender prices (to reflect the cost of that insurance). Accordingly, therefore, it is a cost neutral issue to the Principal as to whether the Principal effects the insurance or the Contractor effects the insurance.

A modern trend has been for Principals to effect a project insurance on major projects. In that way, the Principal can have the benefit of potential cost economies for its insurance requirements on the projects, and the Principal can be comfortable that the insurances have, in fact, being effected.

The Contractor would usually, however, be required under the Contract to do all of the work of arranging the relevant insurances and providing evidence to the Principal that those insurances have been effected.

On first principles, one would expect the Contractor to effect the insurances. The Principal, typically, will be less - resourced than the Contractor, the Contractor will be aware of the dates proposed for the construction works, the nature of those works, details such as the number of men to be employed on site, the machinery involved, and the nature of the work, all of which will be relevant to one or other of the insurances to be effected.

Nevertheless, under the Contract, it is either the Principal or the Contractor who will usually be required to effect the above insurances.

### ***Project Insurance***

In the last 20 years or so, on major projects, the trend has been for the Principal to effect projects insurance to cover all of the various kinds of insurance over the entire project.

Such project insurances are usually placed with one insurer and include:

- Contractors All Risk
- Public Liability
- Workcare Compensation
- Motor Vehicle Insurance
- Any other insurances relevant to the particular project

The rationale for this has been economy of scale and the desire to ensure, for the Principal, that all relevant insurances have been effected and that no particular losses might fall between the gaps of the respective insurances.

### ***Professional Indemnity Insurance?***

A more complex issue relates to whether the Principal should require professional indemnity insurance to be effected by the Contractor and/or others. Historically, the Contractor did not carry professional indemnity insurance, the Contractor has been a construction Contractor rather than a professional adviser. In modern times, however, major construction contractors have tended to include, on their staff, a number of professional people, including engineers, architects, project managers and other such professionals. Further, such Contractors have tended to become involved in design and construct contracts whereas, in previous times, their role related to construction only.

In all of those circumstances, therefore, the service has been provided by major contractors have included in modern times from time to time, professional services. Accordingly, professional indemnity insurance has become a regular requirement of Principals of such Contractors on projects where professional services are being provided by the Contractor.

This is an expensive type of insurance. It is not an insurance which Principals will necessarily wish to pay for in the absence of a good reason to do so. On balance, however, wherever the Principal is relying on the professional expertise of the Contractor in addition to his contracting obligations, the Principal may choose to require (as it would do normally in respect of its own professional consultants) the Contractor to effect and provide evidence of professional indemnity insurance for the project.

From time to time, the Principal will, in effecting a project insurance, include professional indemnity insurance in respect of all of the professional consultants employed on the project.

### ***Cross-Liability***

The insurance policies will usually be required to include provisions that the insurer will waive its rights of subrogation against each of the respective insureds.

For example, clause 21.6 of AS2124-1992 provides:

#### ***21.6 Cross Liability***

*Any insurance required to be effected by the Contractor in joint names in accordance with the Contract shall include a cross-liability clause in which the insurer agrees to waive all*

*rights of subrogation or action against any of the persons comprising the insured and for the purpose of which the insurer accepts the term "insured" as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased thereby).*

### ***Liability of Sub-contractors***

In *Erect Safe Scaffolding (Australia) Pty Ltd v Sutton* [2008] NSWCA 114, the New South Wales Court of Appeal restricted the operation of indemnity and insurance clauses that were included in the sub-contract for the benefit of the head contractor. The court held that the indemnity did not cover the head contractor for its own negligence, even where the danger or hazard was created by the sub-contractor. The court also found that the obligation to obtain insurance was limited to obtaining cover for the indemnity.

## 8. SECURITY

### 8.1 CASH RETENTION/BANK GUARANTEE

The Contract will usually provide that the Contractor will be required to provide security for the performance of its obligations under the Contract.

For example, clause 5.1-5.2 of AS2124-1992 provides:

#### **5.1 Purpose**

*Security, retention moneys and performance undertakings are for the purpose of ensuring the due and proper performance of the Contract.*

#### **5.2 Provision of Security**

*If it is provided in the Annexure that a party shall provide security then the party shall provide security in the amount stated in the Annexure and in accordance with this Clause.*

That security, historically, was provided by cash retention. The Principal would deduct an amount (usually of the order of 5% of the value of the works completed) from each progressive progress claim from the commencement of the works up until practical completion. At practical completion, usually, part of that cash retention would be returned to the Contractor if it was not required for any reason under the Contract). Typically, the Principal would retain, say, 2.5% of the total Contract sum throughout the Defects Liability Period.

In the last 20 years or so, the provision of bank guarantee security has tended to be preferred by contractors in lieu of cash retention. The attraction of providing a bank guarantee, for the contractor, is that (providing the contractor has sufficient credit at its bank) the cost of the bank guarantee to the Contractor (typically of the order of 2% per annum of the sum involved) is negligible (and can be added to the tender price) compared to having cash flow.

The amount provided by way of bank guarantee will usually mirror the amount which would otherwise have been provided by way of cash retention. For example, typically, on smaller projects, the Contractor provides one bank guarantee for amount equal to 2.5% of the contract sum at commencement of the works, a second bank guarantee for 2.5% of the contract sum half way through the completion of the works, the first bank guarantee is returned at practical completion, and the second bank guarantee is returned at the end of the Defects Liability Period.

The critical issue in relation to the form of a bank guarantee is that the bank guarantee (so far as the Principal is concerned) be as good as cash.

#### ***Security by Principal?***

The convention has always been to require the Contractor to provide security to the Principal.

In fact, the Principal always has the advantage of the Contractor having completed part of the works prior to becoming entitled to receive payment for that work. (For example, where the Contract commences at the start of month one, submits its progress claim at the end of that month one, receives that progress payment towards the end of month two, then, at all times, the Contractor has completed at least 1-2 months of work for which he has not yet been paid.)

From time to time, however, the Principal has been requested to give security to the Contractor. This is not usual. (In fact, the annexure to AS2124 includes a place for the parties to indicate whether the Principal is to provide security or not.) Where the Principal is to provide security, again, that security will usually be provided by way of bank guarantee.

One could envisage circumstances in which the Principal might provide security where, for example:

1. the company with which the Contractor was contracting was **not** the registered proprietor of the land, and
2. the Principal was a company with minimal assets.

Alternatively, there may be some issue about the financial security of the Principal. Alternatively, the Principal might be a foreign corporation and there may be concerns as to the ability of the Contractor to obtain payment were enforcement proceedings ultimately become necessary.

In practice, however, the Principal rarely provides security to the Contractor.

### ***Protection for Principal***

The Principal has substantial security under the Contract to protect it from any failure to complete the works by the Contractor.

That security consists of any or all of the following:

- the value of the works completed by the Contractor, for which the Contractor has not yet been paid (this will, typically, at any time, be of the order of 1-2 months of works completed by the Contractor);
- the value of any cash retention or bank guarantee provided by way of security by the Contractor to the Principal.

Accordingly, at any time, if the Contractor fails to complete the works, the Principal will have a substantial amount of money with which to step into the shoes of the Contractor and complete the works.

Such circumstances might arise when, for example:

- the Contractor goes into liquidation during the progress of the works;
- the Contractor, because of a contractual dispute with the Principal, terminates the Contractor and leaves the site;
- the Contractor, for reasons of the Principal, is terminated by the Principal.

In each of these circumstances, irrespective of the Contractor's right to sue for damages if it has a claim against the Principal, the Principal will in fact typically be holding sufficient funds to re-start the work with another Contractor and complete the works at the Contractor's expense.

## **8.2 SECURITY TO REMEDY DEFAULT/DEFECTIVE WORK**

The Principal, at any time, is holding substantial security to enforce compliance with the Contract/ the rectification of defective work.

There are a number of potential circumstances when the Principal may seek to have recourse to the securities. For example, under AS2124-1992 :

- protection of people or the works (clause 15)

- effecting insurance policies not properly effected (clause 21.3)
- rectifying defective work prior to practical completion (clause 30.3)
- rectifying defective work during the Defects Liability Period (clause 37)
- performing cleaning up not properly performed (clause 38)
- performing urgent protection work not properly performed (clause 39)
- where a party fails to pay monies due (clause 42.11)
- paying unpaid subcontractors (clause 43)
- recovering any shortfall where the works are taken out of the contractor's hands (clause 44.6)

Where the Contractor performs defective work, and fails upon the Principals or the Superintendents instruction to rectify that defective work, at some point the Principal will become entitled to step into the shoes of the Contractor, rectify that defective work at the Contractor's expense, and deduct the cost of that rectification from monies otherwise due to the Contractor.

Accordingly, where defective works is not remedied by the Contractor, the Principal will usually deduct the cost of that rectification from the next progress payment or, failing that, from subsequent progress payments and any cash retention or bank guarantee security as presently held by the Principal.

### **8.3 CONVERSION OF BANK GUARANTEES**

#### ***Ability to Convert to Cash: Form of Guarantee***

The rationale for providing security to the Principal is to put the Principal in the position where, irrespective of any contractual entitlement, it can complete the works if necessary, or rectify defective works if necessary, using funds provided by the Contractor.

The modern use of bank guarantees as an alternative to cash retention should have simply substituted a form of security which was equivalent to cash for that cash retention. For various reasons, however, the form of bank guarantee has tended to include, on occasion, certain restrictions on the Principal's ability to present that bank guarantee and convert it to cash.

For example, typical conditions might include:

- notification of the Contractor with sufficient time, if necessary, for the Contractor to be able to commence Court proceedings to restrain the presentation of the guarantee;
- the need to obtain a judgment from a Court or an Arbitrator entitling the Principal to convert the bank guarantee to cash.

These conditions will, potentially, have the effect of removing the efficacy on the bank guarantee altogether.

The form of the bank guarantee will, therefore, be a commercial issue. The restrictions on presenting the bank guarantee will not diminish the security value of the bank guarantee, but may make presentation more inconvenient.

A draft form of unconditional undertaking is provided in AS2124-1992. Annexure Part provides:

***APPROVED FORM OF UNCONDITIONAL UNDERTAKING***

*(Clause 5.3)*

*At the request of ..... ("the Contractor") and in consideration of ..... ("the Principal") accepting this undertaking in respect of the contract for ..... ("the Financial Institution") unconditionally undertakes to pay on demand any sum or sums which may from time to time be demanded by the Principal to a maximum aggregate sum of \$.....*

*The undertaking is to continue until notification has been received from the Principal that the sum is no longer required by the Principal or until this undertaking is returned to the Financial Institution or until payment to the Principal by the Financial Institution of the whole of the sum or such part as the Principal may require.*

*Should the Financial Institution be notified in writing, purporting to be signed by ..... for and on behalf of the Principal that the Principal desires payment to be made of the whole or any part or parts of the sum, it is unconditionally agreed that the Financial Institution will make the payment or payments to the Principal forthwith without reference to the Contractor and notwithstanding any notice given by the Contractor not to pay same.*

*Provided always that the Financial Institution may at any time without being required so to do pay to the Principal the sum of \$..... less any amount or amounts it may previously have paid under this undertaking or such lesser sum as may be required and specified by the Principal and thereupon the liability of the Financial Institution hereunder shall immediately cease.*

*DATED:*

The obligation to give notice of intention to present a bank guarantee could, conceivably, be seen as preventing a mad scramble to the Courts by a Contractor where it simply guessed that the bank guarantee was to be presented. Accordingly, one could possibly justify the inclusion of a condition requiring formal notice to be given a certain number of days prior to presentation of a bank guarantee. Even that, however, will seemingly introduce the additional legal hurdle of, in appropriate circumstances, having to defend a Supreme Court injunction application prior to the Principal's ability to complete the project using the Contractors security monies.

The second condition, however completely removes the advantage of the security. The obligation to obtain a judgment from a Court or an Arbitrator will, typically, involve the Principal in many months of protracted and expensive litigation as a pre-condition to being able to complete the works using the Contractor's money. This seems an unnecessarily expensive condition to impose on the security to be provided by the Contractor to the Principal.

In fact, the more common convention is that where cash retention is not to be provided by the Contractor, the form of bank guarantee is to be a condition-free irrevocable direction to the bank requiring the bank to pay the funds to the Principal **without** reference to the Contractor.

### ***Right to Convert to Cash***

The Principal will, under the Contract, become entitled to take the cash retention monies and/or convert a bank guarantee to cash and use those funds in limited circumstances only.

Such circumstances might include:

1. the Contractor failing to comply with a notice to rectify defective work and the Principal taking those defective works out of the hands of the Contractor;
2. the Contractor having the whole of the works remaining to be performed under the Contract taking out of its hands, and the Principal completing those works;
3. the Principal becoming entitled to claim, as a debt due, from the Contractor, sums of money relating to the Contractor's failure to complete the works by the Date for Practical Completion (including, where provided, the deduction of liquidated damages).

Typically, the Contract will expressly provide those circumstances in which the Principal may have recourse to the security including the conversion of bank guarantees to cash.

For example, clause 5.3 of AS2124-1992 provides:

***Recourse to Retention Moneys and Conversion of Security***

*A party may have recourse to retention moneys and/or cash security and/or may convert into money security that does not consist of money where -*

- (a) the party has become entitled to exercise a right under the Contract in respect of the retention moneys and/or security; and*
- (b) the party has given the other party notice in writing for the period stated in the Annexure, or if no period is stated, five days of the party's intention to have recourse to the retention moneys and/or cash security and/or to convert the security; and*
- (c) the period stated in the Annexure or if no period is stated, five days has or have elapsed since the notice was given.*

There have been a series of court decisions in modern times as to the right of the Principal to convert securities. The substantive view of the Courts has been that securities are to be the equivalent of cash, and available to the Principal for use on the project, the Contractor having the ability to seek recovery where necessary from the courts or arbitration.

***Injunction to Restrain Presentation of Guarantee***

The presentation of a bank guarantee at a Contractor's bank is a serious financial step for the Contractor.

Accordingly, where the Contractor becomes concerned that the Principal is about to present such a bank guarantee at the Contractor's bank, the Contractor will consider whether it would be in his interest to attempt to have the Courts restrain the Principal from presenting the bank guarantee, by way of injunction.

The Principal, in theory, in holding the bank guarantee, is in the same position as if it were holding cash. In theory, the Principal merely needed to present the bank guarantee at the bank named on the guarantee and the bank, without contacting the Contractor, will simply exchange the bank guarantee for the relevant amount of cash.

In practice, however, the Contractor has, from time to time disputed the right of the Principal to convert the bank guarantee to cash under the Contract (for example, the Contractor and the Principal may be in dispute as to whether the Principal has wrongfully terminated the Contract).

On one view, the Contractor should usually be successful in an injunction application where it can establish a prima facie case to be argued in the Courts and a lack of commercial

inconvenience being caused to the Principal if the injunction is granted (typically, the Contractor will be required to give an undertaking as to damages should the Contractor ultimately fail in any proceedings against the Principal and the Principal suffer loss as a result of being restrained from presenting the bank guarantee).

On balance, however, the Principal will usually be inconvenienced by being able to have recourse to the cash (for example, it will need to arrange alternative funds).

The Courts have tended to decide such applications on the balance of convenience. Contract disputes can be complex and the rights of the parties are not always clear at first (they will be necessarily subjected to substantial pre-trial preparation on the documents and the facts relied upon by the parties will often vary). In those circumstances, where the Contractor is prepared to provide an undertaking as to damages, and where the Principal will not in fact be substantially inconvenienced by the inability to have recourse to the security (for the present), the Contractor will typically obtain an injunction, at least for a short period, restraining the Principal from presenting the bank guarantee while the issues are sorted out in the proceedings.

For this reason, where the Contractor becomes concerned that the Principal is about to present the bank guarantee, there is often a mad scramble to the Courts to obtain that injunction **before** the Principal in fact presents the bank guarantee at the Contractor's bank.

The Federal Court has recently reviewed the circumstances in which a court will prevent a party from calling on a performance guarantee. The case reinforces the general principle that courts are reluctant to interfere except in limited circumstances, such as fraud: *Clough Engineering Limited v Oil & Natural Gas Corporation Limited* [2008] FCAFC 136.

#### ***Security Provision Void as against "Public Policy"***

In *Materials Fabrication Pty Ltd v Boulderstone Pty Ltd* [2009] VSC 405 (8 September 2009), Mr Justice Vickery (the Judge in charge of the Supreme Court of Victoria Technology, Engineering and Construction (TEC) List) recently considered whether a dispute resolution clause, which required a subcontractor to provide security to the head contractor (to the value of 10% of its claim) before commencing litigation. His Honour noted that the common law enshrines a right to commence legal proceedings and that this right is reinforced by s 24(1) of the Victorian *Charter*. His Honour said that the particular clause in the subcontract may:

*"severely inhibit, if not preclude, the exercise of a legitimate right for a party to a dispute to conduct a trial of its cause before a court".*

His Honour noted that a prospective litigant would most likely have already expended legal fees on commencing its action, thus the contractual requirement to pay 10% of its claim prior to commencing litigation may act as a deterrent or a disincentive to pursuing the full quantum to which the party may be entitled. His Honour held the clause to be void, on the grounds that it offended public policy.

## 9. DEFAULT/TERMINATION

### 9.1 DEFAULT BY THE CONTRACTOR

The nature of default under a construction contract is complex. Those “defaults” comprise failures by the Contractor to perform the works in accordance with his obligations under the Contract. It is often a difficult matter to identify when a Contractor is in default. The grounds of default which might, if not rectified, lead to termination of the Contract are, usually, expressly specified.

For example, clause 40.2 of AS2124-1992 provides:

#### **44.2 Default by the Contractor**

*If the Contractor commits a substantial breach of contract and the Principal considers that damages may not be an adequate remedy, the Principal may give the Contractor a written notice to show cause.*

*Substantial breaches include but are not limited to -*

- (a) suspension of work, in breach of Clause 33.1;*
- (b) failing to proceed with due expedition and without delay, in breach of Clause 33.1;*
- (c) failing to lodge security in breach of Clause 5;*
- (d) failing to use the materials or standards of workmanship required by the Contract, in breach of Clause 30.1;*
- (e) failing to comply with a direction of the Superintendent under Clause 30.3, in breach of Clause 23;*
- (f) failing to provide evidence of insurance, in breach of Clause 21.1; and/or*
- (g) in respect of Clause 43, knowingly providing a statutory declaration or documentary evidence which contains a statement that is untrue.*

In addition to the express termination rights provided under the Contract, any party to a contract will also have common law rights of termination.

The more usual defaults by the Contractor potentially leading to termination include:

#### ***Delayed Progress***

The Contractor’s primary obligation, in relation to time, is to bring the works to practical completion by the Date for Practical Completion. In theory, if he so desired, the Contractor could leave the works until near the end of the Contract and then bring extra resources onto the works so as to complete by the Date for Practical Completion. In practice, however, the Contract will usually provide that **after** the execution of the Contract, the Contractor is to provide, to the superintendent, a programme for the performance of the works, and then to comply with that programme. The significance of providing the programme **after** execution of the Contract, is that the programme itself is **not** a Contract document. A minor failure to comply with the programme will not usually, in itself, either put the Contractor in default, or entitle the Principal to sue for damages and/or terminate the Contract.

The provisions of the Contract, however, usually provide that the works are to be performed generally in accordance with the programme prepared by the Contractor.

The primary purpose of the programme is to provide a benchmark to measure the progress of the Contractor during the Contract but prior to the Date for Practical Completion.

The failure of the Contractor to bring the works to practical completion by the Date for Practical Completion is easy to establish. Such a failure (to bring the works to practical completion by the Date for Practical Completion) will usually entitle the Principal to take steps towards termination of the Contract, and will certainly entitle the Principal to sue for damages, (usually pre-agreed damages, referred to as “liquidated damages”).

It is substantially more complex to establish that the Contractor is late in the progress of the works, **prior to** the Date for Practical Completion. The consequence of such a lack of progress, or “delayed progress”, where it occurs, is, again, complex. If a Contractor has provided a programme, and is failing to perform the works in accordance with that programme, he will usually be instructed by the principal/superintendent to bring the works back into compliance with that programme. If he fails to do so, he would usually be directed to provide a new programme showing how the works will, ultimately, be brought to practical completion by the Date for Practical Completion. If the Contractor is substantially behind the programme, then, in theory, it will be in default under the Contract, which could lead to the Principal becoming entitled to exercise the remedies of taking part of or all of the works out of his hands, or terminating the Contract.

The consequences of a wrongful termination, (where termination is not in accordance with the Contract), are extremely serious. Further, there is usually substantial difficulty in identifying whether the Contractor is in fact, so behind in his performance of the works as to put in doubt his ability to bring the works to practical completion by the Date for Practical Completion. In combination, these factors tend to discourage the Principal from exercising contractual remedies based on delayed progress.

Delayed progress alone, therefore, though potentially a serious default, is rarely the basis for termination unless the delayed progress is so substantial as to make it obvious that the Contractor will be unable to complete the works by the Date for Practical Completion.

### ***Defective Work/Failure to Rectify***

Where the principal/superintendent conclude that the works, as completed are defective, they will usually direct the Contractor to repair, remove, and rectify those defective works. Where the Contractor fails to rectify those works, in accordance with that direction, he will be in default, and serious consequences may follow.

Defective work might include any or all the following:

- in providing works to a lesser quality than that specified in the Contract documents;
- completing works in accordance with the specification, but which have defects for example, cracks or corrosion in components);
- completing works intended to have a particular function, but which do not ultimately perform that function (for example, supplying equipment/machinery which does not operate, or does not operate in accordance with the required performance specifications).

The Contractor will usually, where work is obviously defective, prefer to remedy that work, rather than face the potential consequences of such defective work. In fact, the Contractor has the **right**, as well as the **obligation**, to rectify defective work, rather than have the Principal simply rectify the defective work and deduct the cost of that rectification.

The usual regime available to the principal/superintendent under the Contract, where work is defective, is as follows:

1. direct the Contractor, in writing, to rectify the defective work within a specified period;

2. where the Contractor fails to rectify that work, direct the Contractor to rectify the work within a specified period, failing which the Principal will take all or part of that defective work out of the hands of the Contractor, rectify that work himself, and deduct the cost of that rectification from the Contractor's entitlements under the Contract;
3. remove all or part of the defective work from the Contractor's hands, have it rectified himself, and deduct the cost of that rectification from the monies owing to the Contractor under the Contract.

Where the defective work is serious enough, and where the Principal has been through the regime set out above but this is still not adequate, such a default would be sufficient potentially for the Principal to terminate the Contract (subject to the Principal acting strictly in accordance with the termination provisions of the Contract).

## 9.2 DEFAULT BY THE PRINCIPAL

The Principal is usually only in default where he fails to make a payment due under the Contract by the due date.

For example, clause 44.7 of AS2124-1992 provides:

### **44.7 Default of the Principal**

*If the Principal commits a substantial breach of contract and the Contractor considers that damages may not be an adequate remedy, the Contractor may give the Principal a written notice to show cause.*

*Substantial breaches include but are not limited to -*

- (a) *failing to make a payment, in breach of Clause 42.1;*
- (b) *failure by the Superintendent to either issue a Certificate of Practical Completion or give the Contractor, in writing, the reasons for not issuing the Certificate within 14 days of receipt of a request by the Contractor to issue the Certificate, in breach of Clause 42.5;*
- (c) *failing to produce evidence of insurance, in breach of Clause 21.1;*
- (d) *failing to give the Contractor possession of sufficient of the Site, in breach of Clause 27.1, but only if the failure continues for longer than the period stated in the Annexure; and/or*
- (e) *failing to lodge security in breach of Clause 5.*

In theory, the Principal can be in default in a number of other ways, for example:

- failing to provide the access to the site on the specified date;
- failing to provide the necessary Contract drawings/specifications by the date required under the Contract;
- failing to provide some matter (for example, water/electricity) as required under the Contract;
- failure to make a payment by the due date.

In practice, wherever there is any failure by the Principal, the Contractor will simply make a claim for additional payment/time and be satisfied with that claim.

The most critical default, therefore, which a Principal can make is a failure to make a payment by the date due under the Contract.

Where the Principal fails to make such a payment by the date due under the Contract, the Contractor will usually have serious remedies available to him, in order:

1. the right to suspend the works, with all necessary adjustments on time and cost which flow from that suspension, until the payment is made;
2. the right to terminate the Contract.

### **9.3 REMEDIES**

#### **1. Notice to Comply**

Where the Contractor is in default, the Contract will usually provide that the Principal may give a notice to the Contractor setting out the default and requiring the Contractor to comply. For example, in AS2124-1992, the Superintendent may give a direction to the Contractor pursuant to Clause 30.1 to repair defective work. That Contract provides that where such a notice is given, the Contractor is to comply with that notice, failing which he will be in “substantial default” for the purpose of the provisions of Clause 44. The procedure, therefore, for the principal/superintendent where the Contractors in default is to give the Contractor a Notice to Comply. The failure to comply with such a notice is, itself, a default under the Contract.

#### **2. Take Works Out of the Contractor’s Hands**

The failure of the Contractor to comply with a notice to comply will usually entitle the Principal, under the Contract, to remove that part of the works which are the subject of the notice from the Contractor’s hands, to have those works performed by others at the Contractor’s expense, and to deduct that cost from monies otherwise due to the Contractor under the Contract. Further, if necessary, the Contract will usually provide that the Principal may deduct such costs from the securities held under the Contract (if the monies owing to the Contractor under the Contract are not sufficient).

This is an extremely serious remedy for the Contractor.

It is a pre-cursor to termination of the Contract. Further, it will usually be substantially more expensive for the Contractor to have such works rectified by others at his expense, then it would have been had the Contractor himself been able to go back and re-perform that defective work.

#### **3. Termination**

Where the Contractor is in default, in a manner expressly set out in the Contract, the Principal may obtain the right to terminate the Contract altogether. (In addition to the express rights of termination provided in the Contract, the parties both have their common law rights of termination.) For example, in Clause 44 of AS2124-1992, the Contract expressly defines “substantial default”, sets out the express notice provisions which must be given to the Contractor, and brings up a show cause notice procedure which must be followed, prior to the Principal obtaining the right of termination.

The **consequences** of termination are extremely severe.

For example, again in AS2124-1992, those consequences include:

1. removing the Contractor from the site;

2. making no further payment to the Contractor (until the notice as to the final cost of the works referred to below);
3. retaining any constructional plant which may be on the site which may be necessary for the principal to complete the works;
4. having the works completed by others;
5. upon the superintendent, the works having been completed, providing a notice as to the final cost of the works, setting out any surplus or shortfall owing to the Contractor, the Contractor then may or may not become entitle to payment of any surplus, or (more usually) the principal becomes entitled to claim as a debt due the amount of any shortfall from the Contractor.

Accordingly, once the Contract has been terminated, the Contractor will receive no further money and, in fact, usually, becomes liable at the end of the job for a shortfall. In practice, therefore, termination is usually hotly contested.

***NOTICE PURSUANT TO AS2124-1992 CLAUSE 44.2***

***PROJECT:***  
***CONTRACT NO:***  
***PRINCIPAL:***  
***CONTRACTOR:***

***DATE ISSUED:***

***TO: The Contractor***

***Pursuant to Clause 44.2 of the General Conditions of Contract, the Principal notifies the Contractor as follows :***  
***This notice is a notice under Clause 44 of the General Conditions of Contract.***

***The Contractor has committed the following substantial breach of contract:***

1. ***failing to proceed with the works with due expedition and without delay, in breach of Clause 33.1;***  
***PARTICULARS***
2. ***failing to use the materials or standards of workmanship required by the Contract, in breach of Clause 30.1;***  
***PARTICULARS***
3. ***failing to comply with a direction of the Superintendent under Clause 30.3 in breach of Clause 23;***  
***PARTICULARS***

***TAKE NOTICE THAT the Contractor is required to show cause in writing why the Principal should not exercise a right referred to in Clause 44.4. The time and date by which the Contractor is to show cause is 5pm on the date which is 14 days from the date on which the Contractor receives this notice. The place at which the Contractor is to show cause is at the office of the Principal, [ ]***

***Dated:***

.....  
***Principal***

In *Diploma Construction Pty Ltd v Marula Pty Ltd* [2009] WASCA 229 (18 December 2009), the Western Australian Court of Appeal reviewed the requirements for repudiation arising from a subcontract for plastering work that had been terminated by the Appellant before the plastering work had been completed by the Respondent. The Court of Appeal held (dismissing the appeal):

1. A notice of default must bring sufficiently to the attention of the recipient what the default is alleged to be. The notice must "*direct the contractor's mind to what is said to be amiss*".
2. In order to be a valid notice under the present contract, all that was required was for the Appellant to inform the respondent subcontractor "*of the details of the default*" alleged. The appellant had to clearly direct the Respondent's attention to the alleged default with sufficient specificity that the default was capable of being readily identified by the Respondent.

Where the Principal terminates the Contract, on the basis of the default of the Contractor, the Contractor will usually dispute that it is in default and/or will dispute that the Principal has correctly followed the procedure set out in the termination provisions. Should the Contractor be correct in such an assertion, namely that he has been wrongly terminated under the Contract, the potential damages which the Contractor might obtain against the Principal in a court action are substantial.

For this reason, the consequences of wrongful termination being so severe for the Principal, such a remedy is usually taken only as a last resort and must be taken strictly in accordance with the express termination provisions of the Contract.

#### **4. Conversion of Security to Cash**

The Contractor would usually provide security to the Principal under the Contract. In modern times, the usual form of security provided is by way of bank guarantee security. Where the Principal terminates the Contract, the Contract would usually expressly provide that, so far as is necessary to give effect to the termination provisions, the Principal may convert the security to cash and use those funds to perform the works. This is a key right of the Principal and, again, will usually result in the Contractor disputing, in Court if necessary, the right of the principal to convert the security to cash.

#### ***Wrongful Termination***

For the reasons set out above, the Contractor will usually dispute the termination of the Contract by the Principal on the grounds that the Contractor is in default. Where the Principal terminates the Contract, the Contractor if he wishes to contest this will usually say that the Principal has unlawfully terminated the Contract and, by the Principal's conduct, has evidenced an intention to repudiate the Contract and to no longer be bound by it. The effect of this is that the Contractor will not attempt to stay on the site but will leave the site and sue for damages.

## 10. CLAIMS

### 10.1 TYPES OF CLAIMS

Claims occur on every project. Possible claims might include any or all of the following:<sup>16</sup>

1. Lack of possession
2. Lack of information
3. Errors on drawings
4. Frequent amendment of drawings
5. “Design as you go”
6. Inconsistencies in documents
7. Errors in survey information
8. Changes in statutory requirements
9. Late approvals by outside bodies
10. Injunction proceedings
11. Latent conditions on site
12. Problems with designated materials
13. Suspension of works
14. Programme changes
15. Unreasonable administration
16. Late or inconsistent decisions
17. Measurement of quantities
18. Large quantity changes
19. Variations, extra works
20. “Fiddling” with quantities
21. Principal’s failure to make tests
22. Opening up and testing work
23. “Excepted risks”
24. Late payments
25. Bankruptcy of NSC
26. Inclement weather
27. Strikes
28. Delay in contractor supplied materials
29. Interface or interference problems – other contractors
30. Acceleration

This list suggests the many events which occur during a construction project which potentially result in a claim for additional payment, extension of time and/or delay cost.

Types of claims might include any or all of the following:

#### Administrative Based

1. Errors in interpretation of the contract language.
2. Changes to previously unspecified administrative requirements.
3. Government interference and revised statutory requirements.
4. Changed industrial guidelines and limitations including hours of work.
5. Suspension of work.
6. Unreasonable and inflexible contract administration, considering normal engineering/architectural practice and criteria on which the construction would have been based.
7. Inconsistent decisions by the Principal or Superintendent.
8. Interpretation and implementation of rise and fall provisions.

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<sup>16</sup> This list of claims is set out in a thorough article by Mr Max McDougall.

9. Quantum deficiencies in owner supplied material and its effect.
10. Late progress payments.
11. Effects of bankruptcy of a nominated sub-contractor.
12. Non provisions of facilities in a timely fashion.
13. Unilateral site agreement negotiations and amendments.

#### Technical Based

1. Defective plans and specifications i.e. Engineers/Architects should show due care and accuracy.
2. Drawing discrepancies and errors.
3. Revisions to Specifications.
4. Non disclosure of technical information.
5. Higher standards of performance.
6. Prototype “design as you go approach”.
7. Design versus faulty workmanship.

#### Performance Based

1. Late access to site or inadequate possession.
2. Late order to proceed.
3. Late issue of initial “For Construction” drawings.
4. Late inspections.
5. Late material and equipment supplies subject to defined responsibility.
6. Unreasonably delayed instructions, replies and information.
7. Late or frequent revisions to drawings.
8. Delays and interference by the Sub-contractors.
9. Delayed set out in survey.
10. Delays due to strikes – an area of responsibility often hotly disputed due to interplay with, and interference of, the Superintendent.
11. Delays outside the Contractor’s control but within his responsibility.
12. Late approval of submitted drawings.
13. Delays due to the weather.

#### Site Based

1. Relocation of existing work.
2. Working out of sequence.
3. Limitations on methods to be used and changes in methods.
4. Over inspection whereby unreasonable interference is experienced.
5. Improper inspection and changes to inspection methods.
6. Unreasonable punchlists on Contract completion.
7. Increased safety requirements.
8. Improper rejections.
9. Improper testing methods.
10. Frustrated performance due to changed circumstances.
11. Impracticability or impossibility of performance at a reasonable cost due to changed circumstances.
12. Latent conditions of site differing from what was expected.
13. Programme changes including differing priorities required by the Principal or Superintendent.
14. Failure of the Facilities Officer to carry out tests specified as his responsibility in the Contract.

15. Instructions to accelerate the works by the setting of dates inside those reasonably expected, taking into account circumstances and extensions of time.

## **10.2. QUANTIFICATION OF CLAIMS**

The key heads of claim are set out below. The heads of claim in paragraphs 1 and 2, unlike paragraphs 3 and 4, are able to be calculated precisely. The heads of claim in paragraphs 3 and 4, in contrast, are hypothetical, they must only be based on assumptions which may or may not be valid.

The heads of claim are as follows:

### ***1 Direct Costs***

This is the total of the additional materials and labour attributable to the claim. This is calculated by collating each item of material and labour which can be allocated, in whole or in part, to the claim. It will include, for example:

- sub-contractors
- suppliers
- equipment
- labour

This head of claim requires no more than detailed record collection and collation of each item.

### ***2 Job-Related Overheads***

This head of claim relates to overheads specifically related to this project. It excludes items in paragraph 1 above. It requires the pro-rata allocation, in whole or in part (usually in part), of overhead items relating to this particular claim. It will include, for example, the fair share of the following items, able to be allocated to this particular claim:

- site shed hire
- supervisor salaries
- site security
- electricity, and other services
- crane usage (unlike the item in paragraph 1 above, this would apply where there is no particular allocation of a crane to this particular item, but rather the shared use of a crane across many jobs on the site, without particular allocation to this claim)

This head of claim, like paragraph 1, should require no more than detailed record collection and collation of each item.

### ***3 Non-Job Related Overheads***

This head of claim relates to the fair share of organisation-wide overheads which should be allocated to each claim on a particular project. Items under this head would include the fair share of the following (attributable to this claim):

- contribution to organisation head office costs
- profit (return to shareholders)

This head of claim requires a series of hypothetical assumptions in its calculation. In theory, the best way to calculate such items is to apply, pro-rata, the organisation-wide turnover against overhead costs and profit over the past few years (say, 3-5 years), to the period of the particular claim. The method of calculation, which would need to be proved if the claim was

not settled, requires the contractor to calculate (and disclose) over the arbitrarily chosen period (the contractor would be better to select a more profitable period) the following:

- total organisation overheads, profit, against turnover over the chosen period
  - project turnover over the period of the claim
- to determine, ultimately, an organisation-wide percentage of overheads to turnover.

This requires certain hypothetical assumptions. It presumes that:

1. the profitability of the organisation during the period of the claim is the same as occurred over the past 3 years, 5 years, or whatever arbitrary sample is taken, and that the profitability of the organisation remains constant throughout the period of the particular project
2. the particular project, and claim period, is typical (i.e. that the particular project or claim period is not unusually profitable or non-profitable)
3. that the particular claim item is typical on the project (that the particular claim item is not likely to have not unusually high or unusually low overheads associated with it, relative to other items on the particular project).

From this, the percentage of organisation overheads and profit to turnover is determined, and applied to the particular claim period, to produce a daily non-job-related overhead cost. This can then be multiplied by the number of additional days caused to the project by each claim.

The calculation should, theoretically, be applied to determine the non-job-related overhead applicable to claim which do not, in fact, delay the total project. Arguably, the non-job-related overheads referable to the particular claim item, should be a pro-rata share of the total overheads to the project, based on the value of the claim relative to the total project costs, even where there is no delay caused to the project.

The above method is the basis for several commonly cited “formulae”, used in the calculation of non-job-related overheads. Those formulae include (there may be others):

- the Hudson formula<sup>17</sup>;
- the Emden formula<sup>18</sup>;
- the Eichleay formula<sup>19</sup>.

Given the hypothetical assumptions which go to making the analysis of non-job related overheads at any time, it seems unnecessary to make the distinction between the respective formulae mentioned above. In fact, the analysis being hypothetical, one would normally opt for a more simple formula.

In my view, if this head of claim is to be calculated (I refer to this further below), the contractor should choose a convenient period for the organisation (say 3 years) to determine a percentage of total non-job related overheads and profit to turnover. This percentage should be applied (reduced to a daily rate on the project) pro-rata to the claim period.

#### ***4 Loss of Productivity***

This head of claim refers to the additional cost caused to a contractor, where the contractor is delayed in performing work on the basis that the work was tendered.

For example, where a contractor is meant to have sole access to a work area, but finds that there are other contractors on that site, and this has the effect of increasing the duration

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<sup>17</sup> Hudson formula refers to the pro-rata formula to be found in the classic constructional text *Hudson on Building Contracts*.

<sup>18</sup> The formula to be derived from the text *Emden on Building Contracts*.

<sup>19</sup> This refers to a USA Board of Arbitrators decision in the 1960's.

which might be expected for a particular task, the contractor will have a claim, for extension of time and delay costs, to reflect that loss of productivity.

Losses of productivity can arise from a number of areas including:

- Increased labour or additional crews arising from acceleration or increased work scope.
- Trade Stacking.
- Overtime.
- Adverse weather.
- Out of sequence work.
- Disruption or remobilisation to alternate workfaces due to holds placed on the works.
- Contract changes.
- Restricted access.

The usual method of calculating such claims is to compare the actual time for completion of the work with the tendered time for completion of that work. Again, this requires certain hypothetical assumptions:

1. that the real rate of work would have accorded with the rate of work presumed for the purpose of preparing the tender
2. that there were no intervening reasons why this activity would have been able to occur more quickly or more slowly
3. that the tender was properly estimated

Again, the method of calculation is hypothetical. It requires the contractor to determine, and potentially prove if the claim is not settled, theoretical activity times (whether at the time of tender, or in preparing the claim), for comparison with the actual activity time.

The calculation of construction cost claims, therefore, is, in part, mere record collection and collation of recordable data (heads of claim 1 and 2) plus certain hypothetical calculations (heads of claim 3 and 4).

In practice, the contractor usually calculates heads of claim 1 and 2, and simply adds a percentage for “margin” in respect of heads of claim 3 and 4. Often, that percentage is included in the contract (for example, the item in Annexure Part A of AS2124-1992, in which a percentage is inserted to represent the contractor’s margin for overheads and profit on daywork under clause 41). In practice, this is the most convenient method and is likely to be as accurate as a more complicated mathematical assessment.

In the absence of such an agreed margin, or where the claim is large enough, however, the methods outlined briefly in paragraphs 3 and 4 above need to be followed.

### ***Restitution Claims***

In certain circumstances, the valuation of work outside the contract is to be made on a restitution basis, the amount to be calculated is a “reasonable sum” or “quantum meruit”.

In the High Court decision of *Lumbers v W Cook Builders Pty Ltd (in liquidation)* [2008] HCA 27, the High Court held that the respondent, W Cook Builders Pty Ltd (Builders), had no right to claim payment from Lumbers for work done or money spent where there was no contract between them. In essence, the High Court found that unjust enrichment (which is a type of restitution) will not arise if there is a contract. This is the case even if the contract reflects a bad deal and unjust enrichment would cure a problem caused by imperfect documentation (together with evidentiary and practical problems in the litigation).

In *Sopov & Anor v Kane Constructions Pty Ltd (No 2)* [2009] VSCA 141 (15 June 2009), the Victorian Court of Appeal has followed authority to conclude that the right of a builder to sue on a quantum meruit following a repudiation of the contract has been part of the common law of Australia.

### 10.3 EXPERT DETERMINATION

Expert determination has been used, successfully, regularly in modern times, in construction disputes. The advantage is that the process is cheap, quick, and final. The disadvantage is that the parties need to forgo the full legal processes (pleadings, discovery, evidence, cross-examination, appeal rights). On one view, giving up the full legal processes is may be of little disadvantage (especially in the lower money disputes), and that the cost and time saved in avoiding the protracted legal process has more commercial value.

Where the parties have agreed to go to expert determination (usually, as in commercial arbitration, this agreement is contained in the original contract), the expert and/or the person to nominate the expert, is set out in that agreement. Alternatively, the parties agree to refer their dispute to expert determination, pick an expert, and the parties execute an Expert Determination Agreement.

The process is up to the parties, but would usually follow this general approach:

1. The Claimant submits written submissions (including any documents Claimant relies on) to the Expert and to the other party.
2. The Respondent submits written submissions (including any documents Claimant relies on) to the Expert and to the other party.
3. The Claimant submits a reply (if any).
4. The parties have a meeting/conference/make submissions before the Expert, and make any further submissions.
5. The Expert delivers a written determination.

The legal standing of expert determination is complex. The parties are contractually bound by their agreement to refer the dispute to expert determination. The court will look to the contract (for example: “the parties agree to be bound”) and, accordingly, be slow to overturn the determination of the Expert, in the absence of some factor that goes beyond the contract that the parties bound themselves to (eg fraud, collusion, or some substantive total factual error, ...). In substance, it will usually be difficult (but not impossible) to persuade a court to set aside a determination of the Expert.

Mr Justice McHugh identified 3 key legal issues in a paper<sup>20</sup>. His Honour reviewed the historical development of the court’s approach to reviewing errors of the Expert in the determination.

The cases suggest the more universal approach taken by the courts will be that parties, except in extreme circumstances, are generally to be held to their agreement to be bound by the determination of the Expert).

In *Firedam Civil Engineering Pty Ltd v Shoalhaven City Council* [2010] NSWCA 59 (19 April 2010), the NSW Court of Appeal made a declaration that an expert determination was not binding on the parties. MacFarlan J, in the principal judgment, reasoned that, there being an inconsistency in the reasoning of the expert, in making the determination he had made, and determining that the Principal had, in making variations, delayed completion,

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<sup>20</sup> The Hon Michael McHugh AC, “Expert Determination”, paper delivered to the Chartered Institute of Arbitrators (Australia), 30 June 2007.

thereby entitling the Contractor to an extension of time, yet failing to give the Contractor delay costs:

*“the Contractor can fairly say, as it does, that it has not been told by the Expert why it is not entitled to delay costs”.*

Macfarlan J concluded that, the expert, in failing to give reasons, had gone outside the expert determination agreement, accordingly:

*“A departure from the Contract having been demonstrated by the Contractor, the whole of the Expert Determination must therefore be regarded as being outside the contemplation of the Contract. The Contractor is thus entitled to a declaration that the Expert Determination is not binding upon the parties to these proceedings.”*

In *TX Australia Pty Limited v Broadcast Australia Pty Limited* [2012] NSWSC 4 (16 January 2012), the NSW Supreme Court (Brereton J) was considering a challenge to an expert determination by a party to a broadcast infrastructure contract. The contract included an expert determination clause in relation to the fee, failing agreement, to be included in licence renewals. Broadcast Australia Pty Limited (BA) held a licence to use broadcast transmission towers owned by TX Australia Pty Limited (TXA), a joint venture of the Seven, Nine, and Ten, networks, which enabled BA to provide stand-by digital television transmission services to the Australian Broadcasting Corporation (ABC). TXA disagreed with the valuations made by the expert appointed pursuant to the contract, and argued:

1. The expert erred in adopting an objective “market value” assessment to ascertain fee as opposed to a subjective “fair value” approach (the contract referred to ‘fair market value’).
2. The expert did consider the special value of the contract to BA (“fair value” was inconsistent with TXA’s position as a monopolist), (the contract referred to “willing but not anxious and involuntary purchaser”).
3. The expert erred in failing to give weight to current fees under original contract.
4. The expert erred in using incorrect comparator in assessing “reasonable fee” (in comparing digital audio broadcasting to digital television broadcasting to assess cost recovery and profit margin).
5. The expert erred in failing to give detailed reasons.
6. The expert erred in that the decision was “manifestly unreasonable”.

Brereton J concluded, in upholding the expert’s determination:

1. The expert was correct in adopting an objective “market value” assessment.
2. The expert did consider the special value of the contract to BA.
3. The expert did give weight to current fees under original contract (he gave them little weight, the fees were 10 years old, but he did consider them).
4. The expert did not err in comparing digital audio broadcasting to digital television broadcasting to assess cost recovery and profit margin, errors in methodology employed by an expert valuer do not constitute errors of law. Further, expert evidence adduced in attempt to illustrate manifest error indicated that there was no “manifest error”.
5. The expert did not err in failing to give detailed reasons, the reasons provided were sufficient.
6. The court did not agree that the decision was “manifestly unreasonable”.

In summary, it seems that the court will look to the contract (for example: “the parties agree to be bound”) and, except in extreme cases, decline to overturn the determination of the Expert, in the absence of some factor that goes beyond the contract that the parties bound themselves to (eg fraud, collusion, or some substantive total factual error, ...).

## 10.4 DISPUTE REVIEW BOARDS

The use of a Dispute Review Board (DRB) on major projects has substantial support on projects worldwide and in Australia. A Dispute Review Board is, generally, created by the parties to the Contract, at the start of the Contract, to meet regularly, (irrespective of whether any dispute has been referred to it), to regularly review the progress of the Project, and, where requested, to provide a non-binding indication as to its view of the likely outcome of any dispute referred to it by either of the parties.

Several major world-wide standard form agreements now include DRB clauses. In the USA, several standard form agreements provide for the use of “project neutrals”; for example, the AIA Contract Documents “Initial Decision Maker”, and the ConsensusDocs use of a “Project Neutral” or “dispute review board” as alternative to mediation.

The statistics on the minimal number of disputes coming out of projects with a DRB is compelling.

The process, generally, is as follows:

1. Board members are selected by and approved by both parties (usually 1 board member from the Principal, 1 board member from the Contractor, the third chosen by those 2 board members) soon after award of the Contract.
2. Board members are provided with all contract documents and copies of construction progress reports and minutes of weekly project meetings.
3. Brief status meetings and site tours are held periodically (monthly) at the job site, board members confer with the Principal’s and the Contractor’s representatives, become familiar with project procedures and participants, and are informed of progress and potential disputes.
4. Disputes may be referred to the DRB by either party for a hearing (informal) and written report, then the DRB makes a fast, non-binding recommendation, including reasons.
5. Parties may proceed to the dispute resolution procedures if still dissatisfied.

The argued benefit of using the DRB is that it reduces disputes on major projects. The (USA- based) Dispute Resolution Board Foundation reports, for example, the following estimates on USA projects (as at 2007):<sup>21</sup>

- Project values have ranged from: one over \$1 billion; a hundred under \$5 million; six projects under \$1 million; and have averaged \$42 million each.
- 58% of the projects were “dispute free” - no disputes requiring hearings were brought to the DRB.
- 98.7% of the projects were completed without resorting to subsequent dispute resolution methods.

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<sup>21</sup> See at: [http://www.drb.org/manual/1.2\\_final\\_12-06.pdf](http://www.drb.org/manual/1.2_final_12-06.pdf)

## **11. THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENTS ACT (VIC) 2002**

### **11.1 THE LEGISLATIVE SCHEME**

The *Building and Construction Industry Security of Payments Act (Vic) 2002* (“the Act”) has operated in Victoria since 2002. Substantive amendments to the Act came into force on 1 March 2007. The Victorian legislation closely follows similar legislation introduced in 1999 in New South Wales<sup>22</sup>. The NSW Act was amended in important aspects in 2002<sup>23</sup>, and similar amendments have now been made to the Victorian Act, with some important additions, which came into force on 30 March 2007. The legislation is now in force in every state and territory of Australia.

The substantive measures introduced by the Act in 2002 were as follows:

1. to require delivery of a payment schedule with 10 business days of receiving a progress payment claim, failing which the full amount of the payment claim becomes due (albeit only a payment “on account”, which can be challenged under the Contract);
2. to introduce a quick system of independent adjudication where the parties dispute the amount of any progress claim;
3. to require immediate payment to be made (or alternatively security to be provided<sup>24</sup>).

In all states and territories other than Victoria, there have been a substantive number of adjudications. In addition, there have been a substantial number of adjudications in Queensland. In Victoria, however, to date, the Act has been little used. There have been few adjudications, due, principally, it seems, to the option for respondents to provide security rather than make payment to claimants (prior to the 2007 amendments), and since then, due to the critical limitations contained in Section 10A (Claimable Variations) and 10B (Excluded Claims).

The Act creates a regime of payment claim and payment schedule in relation to progress payments under construction contracts as follows:

1. Where a claimant (“the claimant”) is entitled to progress payments, it may deliver a “payment claim” to the respondent (“the respondent”) liable to make the payment.
2. In relation to progress claims relating to construction work, the respondent must deliver a “payment schedule”, within 10 business days of receiving the payment claim, failing which the full amount of the payment claim becomes due (albeit only a payment “on account”, which can be challenged under the Contract).
3. Where the payment schedule is for less than the payment claim, the Act provides a system of fast, independent, adjudication.
4. The Act provides for enforcement of the amount due, and judgment in favour of the claimant if required.

The courts have usually concluded that where the respondent fails to deliver a payment schedule within the required 10 business days, or where the claimant has obtained an adjudication determination in its favour, the respondent must pay (subject to the limited exceptions below), on account, the amount due, and, if necessary, has given summary judgment to enforce that obligation. The respondent, in effect, is forced to make the payment immediately, then, if the respondent disputes that payment, proceed under the

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<sup>22</sup> *Building and Construction Industry Security of Payments Act 1999 (NSW)*

<sup>23</sup> *Building and Construction Industry Security of Payments Amendment Act 2002 (NSW)*

<sup>24</sup> This was the substantive aspect of the proposed reforms contained in the 2006 Amending Act, claimants were not greatly assisted by security being provided, to the point where the process was hardly worth the effort. The option to provide security rather than make payment, is removed in the 2006 Amending Act.

Contract to recover that payment. (This is the opposite cash flow position to what occurred pre-legislation.)

The courts have, further, set out a number of general principles as to the matters required (the “basic and essential requirements”) for a valid adjudication determination.

## 11.2 PAYMENT CLAIM/PAYMENT SCHEDULE REGIME

The Act sets out a detailed process and timetable for payment claims and payment schedules. The claimant submits a “payment claim” under section 14 of the Act. That payment claim must be expressed (under the Act) to be a payment claim under the Act. The respondent is then required to deliver to the claimant, within 10 business days, a “payment schedule” within the meaning of the Act. Failing delivery of that payment schedule within that time, the full amount claimed by the claimant in the payment claim is due and payable as from that date.

Sections 14-15 of the Act provide:

### **14 Payment claims**

*(1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the **claimant**) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.*

*(2) A payment claim—*

*(a) ....*

*(b) ....*

*(c) must identify the construction work or related goods and services to which the progress payment relates; and*

*(d) ....*

*(e) must state that it is made under this Act.*

*.....*

### **15 Payment schedules**

*(1) A person on whom a payment claim is served (the **respondent**) may reply to the claim by providing a payment schedule to the claimant.*

*(2) A payment schedule—*

*(a) must identify the payment claim to which it relates; and*

*(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the **scheduled amount**); ....*

*.....*

*(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.*

*(4) If—*

*(a) a claimant serves a payment claim on a*

*respondent; and*  
*(b) the respondent does not provide a payment schedule to the claimant—*  
*(i) within the time required by the relevant construction contract; or*  
*(ii) within 10 business days after the payment claim is served;*  
*whichever time expires earlier—*  
*the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.*

The key points from Sections 14-15:

1. The payment claim must be in writing and must state that it is made under the Act.
2. The payment claim must identify the work the subject of the payment claim.
3. The respondent must deliver a payment schedule within the time specified in the Act.
4. The payment schedule must specify what the respondent proposes to pay, and reasons why that amount is less than the amount in the payment claim.
5. If no payment schedule within the specified time, the claimant may recover the whole amount claimed.
6. The time to deliver a payment schedule is 10 business days after receiving the payment claim.

Where a payment claim is made by the claimant, the respondent must deliver a payment schedule within 10 business days, failing which the full amount claimed is due immediately. (In both NSW and Victoria, there have been Applications for Summary Judgment by the claimant, where there has been inadvertent failure to comply with the requirement to deliver the payment schedule within 10 business days.) Where the payment schedule is delivered, the claimant is entitled to payment of the amount in the schedule by the due date under the Contract (or, if no payment schedule was delivered within 10 business days, the full amount claimed in the payment claim), by the due date under the Contract.

Where this payment is not made, the claimant is entitled to judgment for the amount. Defences to Applications for Summary Judgment have generally been unsuccessful.

The entitlement to payment is only “on account”. Section 47 of the Act preserves the rights of either party to dispute the amounts payable under the Contract. In fact, as with all progress payments, the amount owing under the Contract is, if necessary, to be resolved in accordance with the dispute resolution provisions of the Contract, except that payment must be made first in accordance with the Act. The purpose of the payment provisions is, in effect, intended to address, fairly and efficiently, the claimant’s cashflow, rather than determine the ultimate entitlements under the Contract.

The Act originally had limited operation, it applies only to work the subject of “progress claims”. The 2007 amendments expanded the application of the legislation to include a wider range of payments, including:

- final payments
- single payments and milestone (key event) payments
- subcontractors entitlements to amounts clients or head claimants hold on trust for subcontractors until works are completed

In Victoria, however, unlike any other state or territory, some claims are now expressly excluded from the operation of the Act as “Excluded Amounts” (see below), including claims for:

- “damages”
- delay costs
- latent conditions

Further, the Act now limits claims for variations to “Claimable Variations” (see below).

### **11.3 THE ADJUDICATION PROCESS**

#### ***Application for Adjudication***

Where the contractor (claimant) disputes the amounts contained in a payment schedule, it may lodge an adjudication application with an Authorised Nominating Authority (ANA) within 5 business days of receiving the payment schedule.

The adjudication application should include:

- a copy of the contract
- a copy of the payment claim
- a copy of the payment schedule
- submissions in relation to the adjudication application
- any other relevant documents (eg invoices from suppliers, measurements, test results, quality assurance certificates, statutory declarations, proof of insurance, legal advices and expert reports, photographs ....)

The adjudicator is nominated by an authorised nominating authority (ANA). The ANA must refer the application to an adjudicator “as soon as practicable”, who must notify both parties that he is willing to adjudicate by serving a Notice of Acceptance.

#### ***The Adjudication Process***

Within 10 business days of notifying his/her agreement to adjudicate, the adjudicator must determine the dispute. (The 10 business days may be extended by agreement of the parties.)

The adjudicator may:

1. only refer to the written submissions;
2. inspect work;
3. call a conference.

The adjudicator may not:

1. hear witnesses or conduct arbitration;
2. consider late documents.

The adjudicator must determine:

1. the amount to be paid under the Contract;
2. the date it was due;
3. the interest rate on late payments;
4. who is to pay the costs of the adjudication.

If the respondent fails to pay, the claimant may:

1. stop work after giving 2 business days warning in writing;
2. apply for judgment on the amount;
3. commence bankruptcy or wind up proceedings.

In addition, the claimant is also entitled to penalty interest.

The parties pay the adjudicator equally. The adjudicator may vary this if he decides that either the claim for payment or the reasons for not paying are wholly unfounded.

The dates are extremely tight once the payment schedule is referred to adjudication by the claimant. The process is generally as follows:

1. the claimant forwards an application for adjudication to an authorized nominating authority (ANA) appointed under the Act, with a copy to the respondent;
2. the ANA must refer the application to an adjudicator “as soon as practicable”, who must notify both parties that he is willing to adjudicate by serving a Notice of Acceptance;
3. the respondent may make submissions to the adjudicator within 2 business days of receiving the Notice of Acceptance from the adjudicator, or within 5 business days of receiving the copy of the adjudication application, whichever is later;
4. the adjudicator determines the claim within 10 business days of notifying his/her agreement to adjudicate, including:
5. the amount to be paid under the Contract;
  - a. the date it was due;
  - b. interest rate on late payments;
  - c. who is to pay the costs of the adjudication.

The claimant, in making the adjudication application, might include any or all of the following:

- copy of relevant adjudication materials (contract, payment claim, payment schedule)
- submissions in support of claimant’s claim
- other relevant documents (eg invoices from suppliers, measurements, test results, quality assurance certificates, statutory declarations, proof of insurance, legal advices and expert reports, photographs ....)

The respondent, in responding to the claimant’s adjudication application, might include any or all of the following:

- submissions in support of respondent’s arguments
- other relevant documents

The Act provides that the adjudicator may only refer to the written submissions, inspect work, and/or call a conference (all within 10 business days). It seems that the task of the adjudicator will usually be detailed, complex, and fast. The adjudicator may request further information from the parties, and/or call a conference, inspect the site, and/or request the parties’ agreement to extend the time for the determination.

Within 10 business days (this can be extended by agreement, I anticipate, however, that claimants would usually insist that the adjudication be limited to the 10 business days), the adjudicator is to decide the amount that is to be paid under the Contract. In fact, this is likely to be a substantive task (to be decided on both construction and legal bases, without witness evidence, based on the written submissions). Further, the decision is only as to the amount to be paid on account, ie the parties could still, if they chose<sup>25</sup>, take their dispute to court or arbitration, or other dispute resolution processes under the Contract.

#### Date adjudicated amount payable under the Contract:

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<sup>25</sup> ie, if the claimant believed that the amount adjudicated was so far below the proper amount, or if the respondent believed that the amount adjudicated was so far above the proper amount, and the wrong would not be rectifiable in the next progress claim....

The adjudicator is required pursuant to Section 23(1)(b) of the Act to determine the date upon which the adjudicated amount became or becomes payable.

Section 23(1)(b) of the Act provides, so far as relevant, as follows:

*An adjudicator is to determine ..... the date on which that amount became or becomes payable ...*

Section 12(1) of the Act provides, so far as relevant, as follows:

*A progress payment under a construction contract becomes due and payable .... on the date on which the payment becomes due and payable in accordance with the terms of the contract; or .... if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.*

#### Interest rate on Adjudicated Amount:

The adjudicator is required pursuant to Section 23(1)(c) of the Act to determine the rate of interest payable on the adjudicated amount.

Section 23(1)(c) of the Act provides, so far as relevant, as follows:

*An adjudicator is to determine .....the rate of interest payable on that amount in accordance with section 12(2) ...*

Section 12(2) of the Act provides, so far as relevant, as follows:

*Interest is payable on the unpaid amount of a progress payment that has become due and payable in accordance with sub-section (1) at the greater of the following rates ..... the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983**<sup>26</sup>; or .... the rate specified under the construction contract.*

#### Determination of the adjudicator's Costs:

The adjudicator is required to determine the appropriate allocation, between the claimant and the respondent, of costs of the adjudicator's fees.

#### **Cost of the Adjudication Process**

The adjudication process can be expensive, because the parties must pay (in addition to their own costs) the fees of the adjudicator.

An Application for Adjudication is made to an Authorised Nominating Authority ("ANA") under the Act. There are 6 Authorised Nominating Authorities under the Act in Victoria<sup>27</sup>. The adjudicator is selected by the ANA.

The hourly rate of the adjudicator will vary depending on the adjudicator's seniority and qualifications. For example, the adjudicator could be a senior counsel, at an hourly rate of \$600-700 per hour or more, plus GST. The total cost of the adjudicator could, in complex

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<sup>26</sup> The rate prescribed under section 2 of the *Penalty Interest Rates Act 1983*, as at 1 January 2016, is 9.5% per annum simple.

<sup>27</sup> The 7 ANA's are listed on the BCV website: [www.buildingcommission.com.au](http://www.buildingcommission.com.au)

adjudications, be of the order, for example, of \$60-70,000 (depending upon the extent of the work required of the adjudicator in the particular Adjudication Application).

The fees of the adjudicator will be set out in the adjudicator's Notice of Acceptance.

The adjudicator, in the determination, is required to determine the appropriate allocation, between the claimant and the respondent, of costs of the adjudicator's fees. The release of the determination will usually be made conditional upon payment of the adjudicator's fees.

#### **11.4 EXCLUDED AMOUNTS UNDER THE VICTORIAN ACT**

The *Building and Construction Industry Security of Payments Bill* was introduced into the Victorian parliament on 7 February 2006, the second reading speech was delivered by the Minister for Planning Rob Hulls on 9 February 2006. The substantive amendments came into effect on 30 March 2007. The amendments to the Victorian Act introduced Section 10A and 10B, comprising substantive carve-outs from the claims that could be considered by an adjudicator.

##### **Section 10A Claimable Variations**

The Act does not apply (the adjudicator may not take into account) claims for Variations other than "Claimable Variations" under Section 10A.

Section 10A of the Act provides, so far as relevant, as follows:

##### ***10A Claimable variations***

*(1) This section sets out the classes of variation to a construction contract (the **claimable variations**) that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.*

*(2) The first class of variation is a variation where the parties to the construction contract agree—*

*(a) that work has been carried out or goods and services have been supplied; and*

*(b) as to the scope of the work that has been carried out or the goods and services that have been supplied; and*

*(c) that the doing of the work or the supply of the goods and services constitutes a variation to the contract; and*

*(d) that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and*

*(e) as to the value of that amount or the method of valuing that amount; and*

*(f) as to the time for payment of that amount.*

*(3) The second class of variation is a variation where—*

*(a) the work has been carried out or the goods and services have been supplied under the construction contract; and*

*(b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the construction contract requested or directed the carrying out of the work or the supply of the goods and services; and*

*(c) the parties to the construction contract do not agree as to one or more of the following—*

*(i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;*

*(ii) that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;*

*(iii) the value of the amount payable in respect of the work or the goods and services;*

*(iv) the method of valuing the amount payable in respect of the work or the goods and services;*

*(v) the time for payment of the amount payable in respect of the work or the goods and services; and*

*(d) subject to subsection (4), the consideration under the construction contract at the time the contract is entered into—*

*(i) is \$5 000 000 or less; or*

*(ii) exceeds \$5 000 000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).*

*(4) If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, subsection (3)(d) applies in relation to that construction contract as if any reference to "\$5 000 000" were a reference to "\$150 000".*

Section 10A, in summary:

1. Agreed variations

The parties agree about the variation, the claimant's entitlement to a progress payment for it, the amount claimed or the method of valuing it, and when payment is due.

2. Disputed variations

The parties agree that the work has been carried out, or the goods and services supplied, at the respondent's request, but disagree about one or more of the following:

- Whether a progress payment can include an amount for the work, goods or services
- The value of the amount or how it was valued
- The time for payment of that amount.

Limits apply on the amount of disputed variations that may be claimed.

Limits on disputed variations

Limits apply, depending on the amount of the contract sum.

- Contracts over \$5 million

The parties must use the dispute resolution provisions in the contract. If there are no dispute resolution provisions in the contract, the disputed variations may be claimed under the Act.

- Contracts up to \$150,000

All disputed variations that fall within the description of ‘disputed variations’ above may be claimed under the Act.

- Contracts between \$150,000 and \$5 million

The Act applies to disputed variations that fall within the description of ‘disputed variations’ above, up to 10% of the value of the contract. Otherwise, the dispute resolution provisions in the contract (if any) must be used.

### **Section 10B Excluded Amounts**

The Act does not apply to certain types of claims described as “Excluded Amounts” under Section 10B.

Section 10B of the Act provides, so far as relevant, as follows:

#### ***10B Excluded amounts***

*(1) This section sets out the classes of amounts (excluded amounts) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.*

*(2) The excluded amounts are—*

*(a) any amount that relates to a variation of the construction contract that is not a claimable variation;*

*(b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to—*

*(i) latent conditions; and*

*(ii) time-related costs; and*

*(iii) changes in regulatory requirements;*

*(c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;*

*(d) any amount in relation to a claim arising at law other than under the construction contract;*

*(e) any amount of a class prescribed by the regulations as an excluded amount.*

The Victorian Act therefore expressly excludes from the operation of the Act as “Excluded Amounts, certain types of claim, including claims for:

- “damages”
- delay costs
- latent conditions
- .....

*Seabay Properties Pty Ltd v Galvin Construction Pty Ltd*

In *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011] VSC 183 (6 May 2011), Vickery J (the Judge in Charge of the Victorian Supreme Court Technology and Construction List) was considering whether a claim for liquidated damages was an “Excluded Amounts” under Section 10B of the Act. His Honour concluded that liquidated damages did constitute an “Excluded Amounts”.

His Honour referred to the rationale underlying the particular Victorian provisions as follows:

*120 In this context, the purpose behind excluding such matters defined by s.10B becomes clear. Matters such as: claims for non-claimable variations; compensation claimed for events such as latent conditions; time-related costs; changes in regulatory requirements; damages for breaches of the relevant construction contract; or any other claim for damages or claims arising other than under the construction contract, are all “excluded amounts”. Experience points to these classes of issues regularly arising in construction disputes. They are often attended with considerable complexity and speedy resolution can be an elusive goal.*

*121 Under the scheme of the Act such issues are removed from the interim payment regime provided for in the legislation. If such matters arise for determination in the course of a construction project to which the Act applies, they are not to be dealt with under the statutory scheme established for the provision of progress payments to the party entitled. Rather, they remain to be resolved under the general law, supported by court or arbitral proceedings. In this way the concept “pay now and argue later” is given full effect.*

*122 If it was that “excluded amounts” as defined in s.10B of the Act were only to apply to claims made by a claimant and not to any set-off or counterclaim raised by a respondent to a payment claim, the operation of the Act in numbers of cases could be seriously compromised. Contentious matters such as claims for damages arising from the construction contract could be raised by a respondent with the result that a claimant could be denied the cash flow which the Act is designed to protect.*

*123 Further, the Act is not designed to accommodate such claims. In the event of a dispute arising between a claimant and a respondent in relation to an entitlement to a progress payment under the Act, the statutory adjudication process may be invoked. Section 22(4) provides for a speedy resolution of an adjudication application. An adjudicator, who must conduct adjudication proceedings armed only with limited statutory powers, and who is directed to complete the adjudication process within an extremely narrow time frame, would be ill-equipped to deal with many of the claims defined as “excluded amounts” if raised by a respondent.*

*124 In my opinion, a proper construction of s.10B of the Act renders the defined “excluded amounts” applicable, not only to the statutory payment claim served by a claimant, but also to amounts claimed by a respondent. Such a construction serves to advance the purposes of the Act. The contrary construction tends to work contrary to those purposes. The construction which I favour, will better promote the operation of the object of the Act to provide a facility for prompt interim payment on account in favour of contractors and subcontractors, pending final determination of any disputes arising under a construction contract. These considerations, in my view, override all of the textual arguments advanced by Seabay which point in the opposite direction.*

*125 Nevertheless, the text of the Act is well able to bear the construction which I prefer. Section 10 of the Act defines the amount of a progress payment to which a person is entitled under a construction contract. Section 10(3) provides that:*

*“Despite subsection (1) and anything to the contrary in a construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of a construction contract”. The terms of the Act, therefore, expressly override the operation of the relevant construction contract in relation to “excluded amounts” as those amounts are defined in s.10B.*

*126 Furthermore, pursuant to s.23(1)(a) an adjudicator is directed to determine the amount of the progress payment (if any) to be paid by a respondent to the claimant. This subsection, directs the adjudicator back to s.10(3), and thereby requires an adjudicator to not take into account an excluded amount in calculating the amount of a progress payment.*

*127 Reference is made to s.23(2A)(a) which directs that, in determining an adjudication application, the adjudicator must not take into account any part of the claimed amount that is an excluded amount. In my opinion, this particular subsection is not intended to confine the excluded amounts, which an adjudicator is directed to ignore, to excluded amounts which are claimed by a claimant in a payment claim. If the subsection was to operate in this way it would bring itself into conflict with ss.23(1)(a) and 10(3).*

*128 Accordingly, in my opinion, the Adjudicator was correct in determining that Seabay’s claim for liquidated damages against Galvin should have been treated as an “excluded amount” and excluded from the adjudication determination made in relation to Galvin’s Payment Claim 28 claimed under the Act.*

In summary, in Victoria, an adjudicator is not able to take into account such claims in determining the amount payable in respect of the amount of the progress payment to which the claimant is entitled under the Contract.

## 11.5 JUDICIAL CHALLENGES

The adjudication process has been reviewed many times in the NSW Supreme Court: (for example, *Musico v Davenport* [2003] NSWSC 977, *Brodyn Pty Ltd v Davenport* [2003] NSWSC 1019, *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027, *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, *Transgrid v Walter Construction Group Ltd* [2004] NSWSC 21, *Transgrid v Siemens Ltd* [2004] NSWSC 87, *Paynter Dixon Constructions Pty Ltd v J F & C G Tilston Pty Ltd* [2004] NSWSC 85). A discussion of these cases is beyond this note. In brief, the courts have generally concluded that they will, in certain instances, review the adjudication determination.

The courts have tended towards preferring a less formal approach in the interpretation of provisions relating to payment claims and payment schedules. For example, in *Protectavale Pty Ltd v K2K Pty Ltd*, Finkelstein J reasoned<sup>28</sup>:

*It is necessary to decide whether the invoice meets the requirements of s 14. The test is an objective one; that is, it must be clear from the terms of the document that it contains the required information: *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [82]. But the terms must be read in context. Payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract, the history of the*

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<sup>28</sup> [2008] FCA 1248 at [10] – [11], cited by Vickery J in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* [2009] VSC 156

project and any issues which may have arisen between them regarding payment. Those matters are part of the context: Multiplex Constructions [2003] NSWSC 1140 at [76].

The manner in which compliance with s 14 is tested is not overly demanding: Leighton claimants Pty Ltd v Campbelltown Catholic Club Ltd [2003] NSWSC 1103 at [54] citing Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd [2002] NSWCA 136 at [20] ("The requirements for a payment claim] should not be approached in an unduly technical manner ... As the words are used in relation to events occurring in the construction industry, they should be applied in a commonsense practical manner"); Multiplex Constructions [2003] NSWSC 1140 at [76] ("[A] payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves"); Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) [2007] OSC 333 at [20] ("The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint").

(emphasis added)

The likelihood is that Australian courts are likely to be less inclined to uphold legal challenges to determinations of the adjudicator on the basis of technical failures to comply with the Act.