

# Practical guide to effective contract management

## Session 2

### Key Issues in Australian standard conditions of contract

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#### Introduction

The issues about which I have been requested to present, touch upon at least seven Australian standard conditions of contract. In addition to considering the general scheme of each of those contracts, I have been requested to consider particular provisions that fall conveniently under seven headings.

Of course it is beyond the scope of this presentation to consider in detail each of those provisions in respect of each standard form of contract.

Instead I will briefly review the evolution of the standard forms of contract, consider standard forms of contract generally and then canvas some practical distinctions between the approaches of the standard forms of contract to some key provisions.

I will address only issues arising from the express terms of each of the forms of contract. It is important to remember that, in the event of a dispute, creative lawyers are almost invariably able to mount a range of arguments, whether within the contract or outside it, designed to overcome difficulties which the express terms of the contract may present in particular circumstances.

My objective is to alert you to such potential difficulties so that you may consider them and hopefully avoid them altogether rather than discover them when it is too late.

#### Australian Standard Conditions of Contract and their Evolution

The forms of contract that we will consider, fall conveniently into two groups.

The JCC form of contract was prepared jointly by the Royal Australian Institute of Architects ("**RAIA**"), Master Builders Australia ("**MBA**") and the Building Owners and Managers Association ("**BOMA**").

The acronym JCC stands for the Joint Contracts Committee, which was a committee formed by representatives of each of the RAIA, MBA and BOMA. As such, the JCC form of contract was intended to reflect the interests of architects, builders and owners. The most recent form of JCC contract was published in 1994. (The RAIA announced last year that it did not propose to continue publishing it beyond the middle of last year.)

Since then, the RAIA has published two further forms of contract, one without any participation by MBA (CIC-1), and more recently, one prepared after those two bodies agreed to put some differences behind them (ABIC-1MW).

In the meantime, not to be out done, BOMA had become the Property Council of Australia and had published its own standard form of contract (PC1).

Along the way, the Australian construction industry was also evolving as a result of the move towards the design and construct method of procurement ("**D&C**"), the impact of a "no dispute" approach and the move towards plain English drafting.

The Committee OB/3 of Standards Australia was also motivated by these developments.

Representatives of approximately fourteen construction industry representative bodies, including the RAI and BOMA, constitute the Committee. Engineers are well represented by the balance of the members of the Committee.

Since having publishing the AS2124 form of contract in 1992, Standards Australia has published a form of contract adapted for D&C (AS4300), and both of those contracts has then been revised and modernised (AS4000 and AS4902 respectively). (I will refer to all four of the Standards Australia forms of contract collectively as the AS forms of contract.)

Accordingly, we will consider the following seven forms of contract:

- JCC;
- ABIC;
- PC1;
- AS2124;
- AS4000;
- AS4300; and
- AS4902.

### **Standard Conditions of Contract**

We have been building for many years and even though technology moves forward at a startling pace, the risks and issues that arise from a construction project tend not to have changed greatly over the years.

As a result, the participants in the construction industry are familiar with those risks and issues and are also conscious of the very complex ways in which they can impact upon one another.

The use of standard forms of contract provides a means by which participants may quickly familiarise themselves with the risk profile of any particular construction project.

This has advantages across the entire life of a construction project. At the outset, a standard form of contract will promote competition in the market by allowing tenderers to clearly understand the risks that it is proposed they would assume. Similarly, the resolution of disputes long after the completion of the project is facilitated by reference

to previous judicial consideration of the particular terms and expressions that are incorporated in standard forms of contract.

The participants will usually have views about the biases of the parties who have drafted and published the standard forms of contract and, subject to the state of the construction market, there will often be considerable jostling as the parties attempt to redefine the risk profile of the project to their advantage by tinkering with the critical provisions of the standard forms of contract.

Such amendments are undoubtedly one of the main causes of disputes in the construction industry. One of the aims of this presentation is to alert you to the nature of those risks.

### **Contract Document Discrepancies**

Each of the standard forms of contract contains a provision to the effect that where a contract document contains figures, is drawn to scale or is otherwise of greater particularity, then it will prevail over a less detailed document in the event of a discrepancy.

Each of the standard forms also requires that notice be given once a discrepancy is identified and that the contract administrator then directs the contractor as to the resolution of the discrepancy.

However, the standard forms differ in a number of respects:

- **Order of precedence**

JCC, ABIC and PC1 each have provision for an order of precedence which is to be used to determine discrepancies which arise.

- **Express entitlement to additional costs**

Each of the AS forms of contract makes provision for additional costs arising as a result of a discrepancy to be valued as a variation provided that the additional costs were beyond the reasonable anticipation of the contractor.

However, since AS4300 and AS4902 are D&C contracts, provision is only made for such claims in respect of a discrepancy if it arises within the Principal's Project Requirements and not if it arises within the Design Documents or between the Design Documents and the Principal's Project Requirements.

Further, AS4902 provides that in those circumstances, the additional costs will be "assessed" rather than being valued as a variation. Nor is it an express precondition that the additional costs were beyond the reasonable anticipation of the contractor.

Neither JCC nor PC1 deal expressly with an entitlement to additional costs in respect of discrepancies. Of course this does not prevent the contractor from raising a dispute within the contract or outside it.

Perhaps the best approach is that taken in ABIC. It combines an order of precedence with a right to recover any loss, expense or damage if the clarifying instruction is other than to the effect of the order of precedence.

## **Subcontracts**

The position generally at law is to the effect that the contractor is entitled to enter into subcontracts but that the right may be limited or negated if the circumstances are such that the Court considers the principal entitled to expect the contractor to undertake the work personally. Whether or not this is the case will depend on the circumstances.

Each of the standard forms of contract allows for subcontracting. JCC and ABIC do so expressly. PC1 and the AS forms of contract do so by implication in that they impose express limits on the right to subcontract, which presuppose the existence of the right.

Each of the standard forms of contract requires that the liabilities, obligations etc. of the contractor will be preserved notwithstanding any subcontracts.

JCC and ABIC expressly prohibit the subcontracting of the whole of the works. PC1 and the AS forms of contract do not include that express limit.

PC1 and the AS forms of contract allow for the subcontracting of identified parts of the works to be conditional upon the consent of the principle, which consent is not to be unreasonably withheld. Under these contracts, those parts of the works need to be specifically identified. No consent is required under PC1 if the subcontract is with a subcontractor identified in the contract.

Each of the standard forms requires as a minimum that the subcontract include terms by which the subcontractor may be novated in the event that the head contract is terminated.

AS4000, AS4300 and AS4902 prevent the contractor from allowing a subcontractor to enter into a further subcontract without the consent of the principal.

AS4300 and AS4902 also deal more specifically with the termination of the head contract, the novation of subcontractors and the requirements for consultants to carry professional indemnity insurance. They also include a power of attorney by which a novation may be implemented.

## **Programming**

Construction programs are now a universal management tool in the construction industry.

As useful as they are, they can give rise to unexpected difficulties under the contract.

For example:

- What is the effect of the principal failing to comply with an obligation included in a construction program? Will this give rise to an entitlement to delay and/or disruption costs on the part of the contractor?

- What is the effect of an instruction that the construction program be varied? Will this amount to an instruction giving rise to an entitlement on the part of the contractor to acceleration costs?
- How does the construction program relate to the time for practical completion under the contract?

JCC does not deal expressly with the status of the construction program at all.

PC1 provides that the contractor must prepare and update a construction program for approval. It further provides that such approval will not effect the time for practical completion, will not constitute any endorsement or instruction on behalf of the principal and will not effect the principal's obligations.

ABIC requires that the contractor prepare and update a construction program. The construction program is not part of the contract. It may be amended by an instruction that may give rise to a claim for loss, expense or delay on the part of the contractor. ABIC does not expressly deal with the failure of the principal to comply with the program. This may explain why the construction program is not a part of the contract.

AS2124 and AS4300 provide that a construction program may be volunteered, directed or included in the contract. It is to be complied with unless there is reasonable cause. The superintendent may direct changes to the program, the costs of which will be valued as a variation unless they were necessitated by a fault of the contractor. The construction program will not effect the obligation of the principal as to the time for the provision of information etc.

AS4000 and AS4902 provide that the superintendent may direct the provision of a construction program. It is deemed to be a contract document. Any costs arising by reason of a directed change are to be "assessed". The costs are not specifically required to be valued as a variation. There is no specific provision to the effect that the construction program will not effect the obligation of the principal as to the time for the provision of information etc. However, the necessity for such an express provision is not so marked in this form of contract since the obligation as to the timing for the provision of information etc. is here included within the same clause.

## **Variations**

Variations are appropriately the subject of a separate presentation today. Accordingly, I will only to address some key issues.

- Are there any limits on scope?

Each of JCC and the AS forms of contract include an express provision in different permutations to the effect that a variation must be within the general scope of the contract and must be contemplated by, and capable of being performed under, the contract.

PC1 and ABIC do not contain any express limit on the scope of a variation.

The general law is to the effect that there will be no power to order a variation unless the contract includes an express power to vary and further that any such power will be subject to a limit imposed by the law.

Accordingly, it is not clear that the inclusion of an express limit advances the position. This no doubt explains why PC1 and ABIC do not include an express limit.

- Must the variation instruction be in writing?

JCC requires that the variation instruction be in writing before, or as soon as possible after, it is instructed.

PC1 requires that the variation instruction be in writing, however, the provision which deals with the pricing of a variation is triggered on a direction, which need not be in writing.

ABIC requires that the contractor give notice in writing in respect of any variation instructed and that the contractor then be instructed to proceed before there will be any entitlement. However, it is not made expressly clear under the contract that the instruction to proceed must be in writing. The clause heading suggests so but the clause does not appear to require it.

AS2124 and AS4300 provide that the variation instruction may be directed or approved in writing. A direction need not be in writing.

AS4000 and AS4902 provide that the variation must be directed in writing.

Broadly speaking, a requirement of writing will be effective but is not insurmountable given the creativity of construction litigators and such tools as the Competition and Consumer Act 2010 (Cth), estoppel and separate contracts.

- When must the variation be assessed?

ABIC requires that a variation must be assessed within 20 days of the claim.

AS4000 and AS4902 provide that the variation must be assessed as soon as possible.

The other forms of contract do not address the time within which the value of the variation must be assessed.

### **Extensions of Time**

Again, the subject of extensions of time is to be dealt with by a separate presenter today.

The single biggest issue in respect of extensions of time is what is known as the Prevention Principle.

The Prevention Principle is to the effect that the principal should not be entitled to the benefit of liquidated damages if it is the principal that has caused the delay. This is reasonable enough. However, real difficulties arise where the contractor could have claimed an extension of time under the contract but did not, or did not do so within time.

This is the explanation for the inclusion in each of the standard forms of contract of a power that may be exercised unilaterally by the contract administrator to extend time under the contract.

If the contract does not include a unilateral power to extend time and the contractor has been delayed by the principal but is not entitled to an extension of time, the contractor's argument is that liquidated damages should be set aside and completion should be allowed within a reasonable time.

It is said that otherwise the imposition of liquidated damages offends against the Prevention Principle because the principal has prevented the contractor from completing within time but has an entitlement to liquidated damages.

The inclusion in the contract of a unilateral power to extend time enables the principal to argue that the contractor is not entirely without relief so that time under the contract and liquidated damages need not be set aside.

There has recently been considerable debate and judicial consideration of whether such a unilateral power to extend time under the contract is a power which must, or should, be exercised in favour of the contractor or whether instead its inclusion is only to protect the principal from the effects of the prevention principle, whether or not the unilateral power has been exercised.

PC1 is notable in this regard for including, not only a unilateral power to extend time, but also an express provision to the effect that the unilateral power to extend time is not required to be exercised for the benefit of the contractor.

### **Practical Completion**

The following critical issues under any construction contract all turn upon the date for practical completion:

- liquidated damages;
- any bonus for early completion;
- the contractor's demobilisation from site;
- release of security;
- defects liability period;
- the power to order variations; and
- the principal's right to occupy the works.

Each of the standard forms of contract defines practical completion in broadly similar terms, that is that the works must be substantially complete, tested and authorised, but that there may be minor works left which are not practicable to be completed immediately.

Each of the standard forms of contract makes provision for practical completion to be achieved in parts, stages or separable portions.

However, the contracts each deal differently with the principal's entitlement to occupy parts of the works before all of the works have reached practical completion.

JCC provides to the effect that if the owner occupies before practical completion and without the contractor's agreement then the whole stage is deemed to have reached practical completion. There is no express provision allowing for stages to be created once the contract is underway.

ABIC allows for stages to be created after the contract is underway, with reasonable consequences for security and claims. The owner may also occupy the works before practical completion, however, this will have the effect of deeming that stage of the works to have reached practical completion and a claim may follow.

PC1 does not allow for the creation of a stage after the contract is underway, however, the principal may occupy the works without there arising a deemed practical completion.

Each of the AS forms of contract allows for the direction of a separable portion during the course of the contract, although AS2124 and AS4300 appear only to allow this where the part of the works in question has reached practical completion. None of the Australian standard forms of contract addresses the occupation of the works before practical completion.

### **Risk Allocation Otherwise**

Risk under a construction contract arises in three broad contexts:

- time;
- cost; and
- quality.

Our brief consideration of the various issues canvassed in this paper has at least touched on most aspects of the allocation of risk under the standard forms of contract.

However, we have not considered two significant further risks that ought always to be considered:

- latent conditions; and
- design risk.

### **Conclusion**

A comparison of the standard forms of construction contracts used in Australia serves to helpfully reveal the key issues in any construction project.

The differences between the standard forms also highlight the risks, which arise in respect of those key issues, and the different approaches which might be taken when negotiating and drafting the contract, managing the works on site and administering the contract.

Each of the standard forms contains provisions that are commendable, however, the particular circumstances of every construction project are unique. This requires a careful assessment of which approach is the most appropriate for any particular project and participant.

One must also tread cautiously when inclined to amend or vary. Standard form construction contracts are intricate, subtle and finely balanced documents. One apparently innocuous amendment may quite easily and unexpectedly result in drastic consequences.