

THE CONTRACTING ESSENTIALS FOR LAWN MOWER MECHANICS

Introduction

A contract is like a lawn mower. Each has about 50 operable parts, some are dangerous, others fuel the engine and others clean up and catch the grass.

Welcome then to your first lesson on the contracting essentials for lawn mower mechanics.

This first article will focus on the terms that are the dangerous parts. These terms require some caution; these are the parts that cut deepest when one accidentally places their hands too close to the mower blades. These are the parts of a contract that pose the most risk to the parties.

The dangerous parts include:

- clause 8 *Contract* documents;
- clause 15 Damages to persons and property other than *WUC*;
- clause 25 Latent conditions;
- clause 34 Time and Progress; and
- clause 36 Variations

8 CONTRACT DOCUMENTS

Basic concept

Building *Contracts* are effected and constituted by a number of documents. These documents should be treated as one instrument and read together for purpose of ascertaining the parties' intentions. Anything in one such document must be read as included in all other such documents, unless the context requires otherwise. Clause 8 deals with interpreting *Contract* documents.

What are *Contract* documents?

The *Contract* documents incorporating AS 4902-2000 would normally include;

- Formal instruments of agreement;
- General conditions of *Contract* AS 4902-2000;
- Special conditions (if any);
- Specification;
- Drawings;
- Notice of acceptance of tender;
- Conditions of tendering (where appropriate);
- Form of tender (if appropriate);
- Other documents which also evidence the parties' consensus.

8.1 Discrepancies

Figured shall prevail over scaled dimensions in a discrepancy. Otherwise, if either party discovers any inconsistency, ambiguity or discrepancy in any document prepared for the purpose of carrying out *WUC*, that party shall give the *Superintendent* written notice of it. The *Superintendent*, thereupon, and upon otherwise becoming aware, shall direct the *Contractor* as to the interpretation and construction to be followed.

The *Contractor* shall bear the cost of compliance with a *direction* under this subclause to the extent that any inconsistency, ambiguity or discrepancy in the design documents or between the design documents and the Principal's project requirements necessitates the *direction*.

If compliance with any other *direction* under this subclause causes the *Contractor* to incur more or less cost than otherwise would have been incurred had the *direction* not been given, the difference shall be assessed by the *Superintendent* and added to or deducted from the *contract sum*.

8.1 Discrepancies in documents and dimensions

- This clause is particularly relevant to assist resolution of inconsistencies, ambiguities and discrepancies in documents prepared by the parties to the *Contract*.
- If either party to the *Contract* (not just the *Contractor*) discovers any ambiguity, discrepancy, error or omission in any document, that party must notify the *Principal's* representative in writing of the ambiguity, discrepancy, error or omission.
- This clause creates a positive imposition on the *Principal* to notify if the *Superintendent* if the *Contractor* does not. This may result in a breach if the *Principal* does not. e.g. failure to notify of its designer's design discrepancies.
- In the event of an ambiguity, discrepancy, error or omission being discovered and

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brought to the attention of the *Principal's* representative, the *Principal's* representative will direct the *Contractor* as to the interpretation to be followed by the *Contractor* in carrying out the *work* in relation to an ambiguity or discrepancy and the action to be taken by the *Contractor* to rectify any error or omission.

What are design documents?

These are documents produced by the *Contractor* under the *Contract*.

What is an inconsistency?

An example would be:

- Mains flush toilet design shown in architectural drawings and cistern flush pipe work shown in the hydraulic drawings.

What is an ambiguity?

- *BMD Major Projects Pty Ltd v Victorian Urban Development Authority*¹ - the Court accepted that there was some ambiguity about the terms of the specification. Pagone J said:
 "the words "does not exceed" in clause 5.4.4.1 appearing before the words "1.0m thickness" do not mean that the thickness cannot exceed one metre in thickness. The natural meaning of the phrase "does not exceed 1.0m thickness" in the clause is that each layer must come within that limit: it may be less, but it may not be more...there was some ambiguity about the matter, the proper course was to pursue the process provided for in clause 8.1 of the Contract for the resolution of ambiguities and discrepancies...that process might have resulted in BMD having an entitlement under clause 40.5, but it was not pursued. The process not having been followed, it was not open to BMD to seek as a variation something which, on my view, requires the resolution of what must either be described as an ambiguity or a discrepancy within the meaning of clause 8.1
- It can be seen from the decision in *BMD* above that failure to follow the procedure as set out in clause 8.1 could deny a party of its entitlement to claim variations under clause 36.

What is a discrepancy?

Discrepancy is a conflict or variation as between figures.²Where any discrepancy exists between figured and scaled dimensions, the figured dimensions will prevail.

15 Damage to persons and property other than WUC

15.1 Indemnity by *Contractor*

Insofar as this subclause applies to property, it applies to property other than *WUC*.

The *Contractor* shall indemnify the *Principal* against:

- (a) loss of or damage to the *Principal's* property; and
- (b) claims in respect of personal injury or death or loss of, or damage to, any other property,

arising out of or as a consequence of the carrying out of *WUC*, but the indemnity shall be reduced proportionally to the extent that the act or omission of the *Superintendent*, the *Principal* or its

¹ [2007] VSC 409 (19 October 2007)

²W.A Krebs, *Collins Gem Australian English Dictionary* (1986) 154.

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consultants, agents or other *Contractors* (not being employed by the *Contractor*) may have contributed to the injury, death, loss or damage.

This subclause shall not apply to:

- (a) the extent that the *Contractor's* liability is limited by another provision of the *Contract*;
- (b) exclude any other right of the *Principal* to be indemnified by the *Contractor*;
- (c) things for the care of which the *Contractor* is responsible under subclause 14.1; and
- (d) claims in respect of the *Principal's* right to have *WUC* carried out.

15.2 Indemnity by *Principal*

The *Principal* shall indemnify the *Contractor* in respect of claims referred to in paragraph (d) of subclause 15.1.

Basic Concept

By their very nature, building operations are full of risk to life, limb and property. Injury or damage may be caused to a third person or to the property of that person. The possibility therefore exists that a party to a construction *Contract* will be made a defendant in an action for damages. Consequently this contract contains provisions requiring one party, to indemnify the other in respect of claims by third parties.

What does indemnify mean?

Indemnify means to 'reimburse another for a loss suffered because of a third party's or one's own act or default'.³ An analogy would be to use an umbrella to protect others from the weather.



This usually requires the party giving the indemnity (the *Contractor*) to take out an insurance policy. However, the insurance policy alone may not be enough and the *Contractor* will as a part of the indemnity make up the difference as part of protection.

³B.A. Garner, *Black's Law Dictionary* (8th edition 2007) 783.

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- Clause 15 is a balanced clause under AS 4902-2000 and it is often amended by the *Principal*.
- It applies to property other than *WUC*. So an example of property other than *WUC* would be cars on the street.
- It is important to note that clause 15.1 only covers the *Principal* and not others. The clause covers **any** acts or omissions not just negligent acts.
- The words 'arising out of or as a consequence of' make the width of this clause very wide. An example of loss or damage 'arising out of or as a consequence of' would be a truck delivering building materials to the site and the truck driver loses control the truck ploughs into a neighbour's property and causes loss of life or damage to the property.
- The term 'damage' is not limited. It includes consequential loss. For example if a *Contractor* failed to complete a shopping mall's roof by the date for practical completion, the loss of business suffered by each of the shop owners would be a consequential loss. Under clause 15 the *Contractor* would be liable for this consequential loss to the *Principal*.
- Clause 15.2 is an indemnity in the favour of the *Contractor*. An example of a claim in respect of the *Principal's* right to have *WUC* carried out would be if the Council were to obtain an injunction to stop the *WUC* being carried out because the *Principal* did not have the appropriate development approvals. The *Contractor* would be indemnified against such a claim.

25 Latent Conditions

25.1 Scope

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 near surrounds

Essence of Clause

Where the *Contractor* encounters site conditions that differ from those on which the tender is based, the *Contract* will provide for an extension to time and/or payment to the *Contractor*.

Such a circumstance is known as a 'latent condition.'

When is a condition Latent?

In order for a condition to be latent, it must be a physical condition of the *site* itself or its surroundings. Moreover, (and most importantly) a condition which differs from those on which the tender is based will not be latent where it should have **reasonably been anticipated by a competent Contractor.**

Where the condition should have been reasonably anticipated it will be deemed a 'patent condition' and fall outside the ambit of subclause 25.

When is a condition reasonably anticipated?

In *BMD Major Projects Pty Ltd v Victorian Urban Development Authority*⁴ the Victorian Court of Appeal developed a test for determining whether a condition can be reasonably anticipated.

BMD (the *Contractor*) was obliged to excavate, fill and rehabilitate a quarry so that development could proceed on the reclaimed land. BMD claimed extra payment from Victoria Urban (the *Principal*) as the quarry floor was lower than shown on the reports provided by Victoria Urban.

In determining whether the lower quarry gave rise to a latent condition the Court developed an 'objective test.' Put simply, what is reasonably to be anticipated by the *Contractor* at the time of tender is to be determined on an **objective assessment of the facts**, rather than what the particular *Contractor* may or may not have done.

⁴ [2009] VSCA 221

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Facts to be considered include;

- What conditions have been encountered.
- Whether such conditions were physical.
- Whether they differed materially from those ascertainable; and
- What could have reasonably been anticipated.

The court held that the extra depth of the quarry was in fact latent as it would not be reasonable for BMD to anticipate this condition.

25.2 Notification

The *Contractor*, upon becoming aware of a latent condition while carrying out *WUC*, shall promptly, and where possible before the latent condition is disturbed, give the Superintendent written notice of the general nature thereof. If required by the Superintendent promptly after receiving that notice, the *Contractor* shall, as soon as practicable, give the Superintendent a written statement of:

- a) the latent condition encountered and the respects in which it differs materially;
- b) the additional work, resources, time and cost which the *Contractor* estimates to be necessary to deal with the latent condition; and
- c) other details reasonably required by the Superintendent.

The initial notice described in clause 25.2 is for the purposes of notifying the *Superintendent* that the *Contractor* believes that they have encountered a latent condition. Such a notice must be provided promptly (as soon as practicable after discovering the latent condition.) The *Superintendent's* response and request for particulars should also be provided promptly.

If the *Superintendent* fails to respond promptly to the *Contractor*, the *Contractor* may deal with the latent conditions as they see fit and still claim for costs associated with the latent conditions under sub clause 25.3.

When alerting the *Superintendent* of a latent condition, the *Contractor* should provide a notice of delay under clause 34.2 to both the *Superintendent* and the *Principal*. The *Contractor* should likewise claim and *EOT* under subclause 34.3.

Principal's will often insert a bar here, in the event that no notifications is provided by the *Contractor*.

25.3 Deemed Variation

The effect of the latent condition shall be a deemed variation, priced having no regard to additional cost incurred more than 28 days before the date on which the *Contractor* gave the notice required by the first paragraph of subclause 25.2 but so as to include the *Contractor's* other costs for each compliance with subclause 25.2.

The latent condition is deemed a variation without notification under clause 36. Sub clause 25.3 limits the time period over which the *Contractor* may recover costs for the latent

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condition, as no more than 28 days before the date on which the *Contractor* provided notice to the *Superintendent*.

Under clause 25.3 the *Contractor's* costs of dealing with the latent condition will be priced as if it were a variation under subclause 36.4. The *Superintendent* should request that the *Contractor* provide an estimate of the costs as to avoid the potential for future disputes between parties.

34 Time and Progress

34.1 Progress

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

Key mandatory obligation

Sub clause 34.1 prescribes the *Contractor's* key obligation to bring the works to practical completion by the *date for practical completion* outlined in Part A Item 7 of the *Contract*. The *Contractor* therefore has an absolute and positive obligation to ensure that the works reach practical completion by the specified *date for practical completion*.

Practical Completion

Practical Completion under clause 1 of the *Contract* is a defined event and is normally amended by the *Principal*.

Works may be deemed to have reached 'practical completion' where minor omissions and/or defects will not prevent the works from being used for their intended purposes. The aforementioned obligation regards practical as oppose to absolute completion. Accordingly, minor omissions or defects which may be easily rectified will not indicate that the *Contractor* has breached their obligations.

For every day that the *Contractor* does not achieve practical completion after the *date for practical completion*, they will be liable for liquidated damages as stated in Part A Item 29 of the *Contract*. For every day the *Contractor* achieves practical completion prior to the *date for practical completion*, the *Contractor* will be entitled to a bonus (if any) as stated in Item 30.

34.2 Notice of Delay

A party becoming aware of anything which will probably cause delay to *WUC* shall promptly give the *Superintendent* and the other party written notice of that cause and the estimated delay.

There is a contractual obligation for a party to provide a notice of delay where they are of the belief that a circumstance has arisen which will probably delay the *WUC*. Such an obligation applies to **both parties** and not merely the *Contractor*. Even if the delay will not affect the *date of practical completion* but merely the *WUC* the obligation still arises. Failure of a party to notify of such a delay will amount to a breach of *Contract* under sub clause 34.2.

It is important for the *Principal* to realise that they too have an obligation to notify the *Contractor* and *Superintendent* of anything of which they are aware that may delay the progress of *WUC*.

Notice of the delay must be given promptly which means 'as soon as practicable.'

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:

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(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).

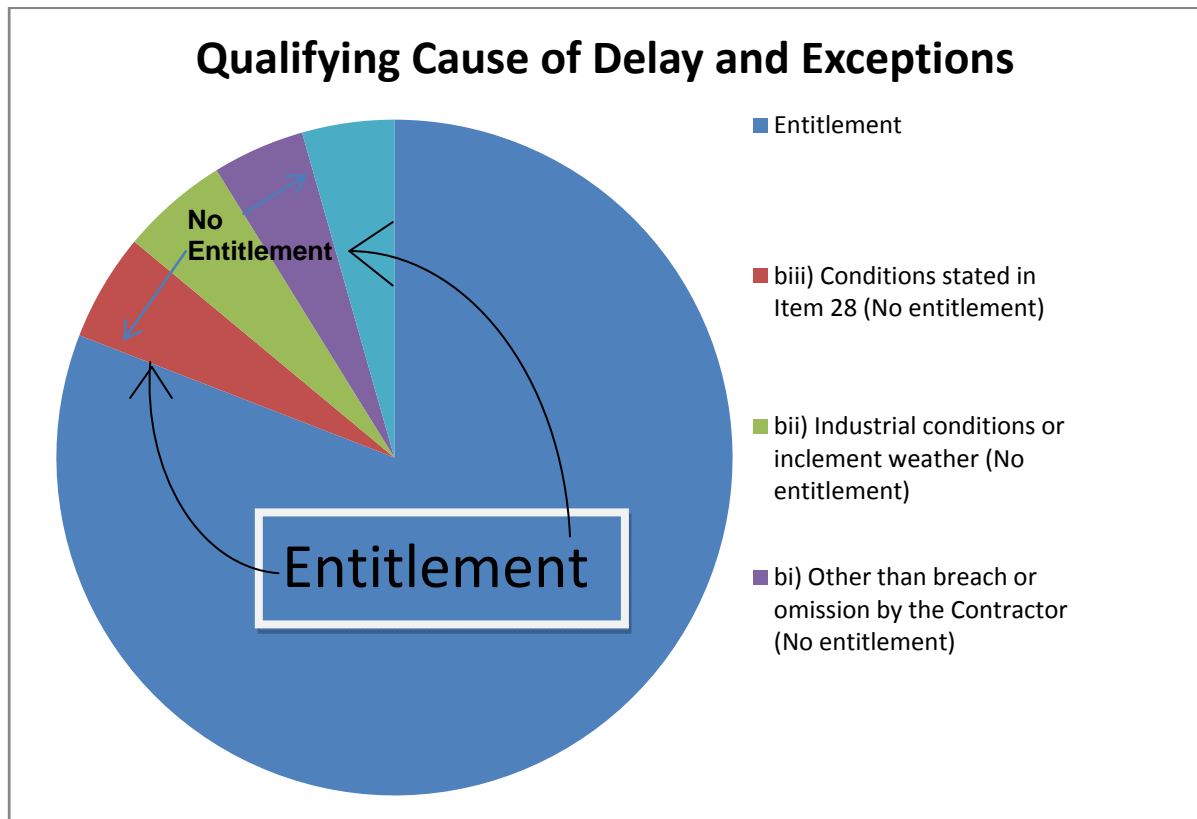
If further delay results from a *Qualifying cause of delay* evidenced in a claim under paragraph (b) of this subclause, the *Contractor* shall claim an *EOT* for such delay by promptly giving the Superintendent a written claim evidencing the facts of that delay.

Operation of clause:

EOT for *WUC* and other matters including reaching practical completion

One of the key elements of subclause 34.3 is the *Contractor's* entitlement to an *EOT* for carrying out *WUC* as well as any other requirements for reaching *practical completion*. Put simply, the clause enables a *Contractor* to claim an *EOT* for *WUC* as well as any other matters which must be fulfilled before practical completion can be reached. Some examples of matters other than *WUC* may include; awaiting drawings from architects, approval from government bodies and any other administrative matters which must be fulfilled before practical completion is reached.

qualifying cause of delay



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Subclause 34.3 requires that the *Contractor* is, or will be delayed from reaching practical completion due to a *qualifying cause of delay*.

The original definition of a *qualifying cause of delay* is very wide and is drafted using both positive and negative connotations. The entitlement to a *qualifying cause of delay* is drafted in the positive and includes; any act, omission or default by the *Principal*, *Superintendent* or any of their agents which delays the *Contractor*. Moreover, such acts, omissions and/or defaults are not limited to breaches and include any circumstances caused by the *Principal* or *Superintendent* which delay the *Contractor*.

What does not constitute an entitlement (i.e. what will not give rise to an *EOT*) is drafted in the negative. This includes any breach of *Contract* by the *Contractor*, industrial conditions of inclement weather occurring after the *date for practical completion* and any other instances outlined by the parties in *Item 28*.

This clause is often amended.

Notice and additional requirements

The *Contractor* must provide notice to the *Superintendent* within 28 days of the event and apply for an *EOT* at the time notice is served. The *EOT* application must provide details of the facts causing delay and the period claimed for the delay.

28 days is normally not enough time for most *Contractors* to comply. However, the 28 days is **not a bar** and if not complied with by the *Contractor* constitutes a breach of the *Contract*.

If the *Contractor* fails to apply for an *EOT* the *Superintendent* should nevertheless grant an *EOT* for the period of delay under subclause 34.5. This clause is vital to the operation of the *Principal's* entitlement to enforce liquidated damages. Accordingly, the *Principal* may claim damages for any loss suffered as a result of the *Contractor's* failure to make such an application.

Every subsequent *qualifying cause of delay* must be dealt with separately by all parties, with the *Contractor* required to apply for a separate *EOT* for each delay.

34.4 Assessment

When both non-qualifying and qualifying causes of delay overlap, the *Superintendent* shall apportion the resulting delay to *WUC* according to the respective causes' contribution.

In assessing each *EOT* the *Superintendent* shall disregard questions of whether:

- a) *WUC* can nevertheless reach practical completion without an *EOT*; or
- b) The *Contractor* can accelerate.

but shall have regard to what prevention and mitigation of the delay has not been effected by the *Contractor*.

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Concurrency of delays to the Critical path

Where the delay is caused concurrently by the parties, the *Superintendent* may apportion the *EOT* based on each party's contribution. However, in order for the relevant delays to be deemed 'concurrent' the delays in question must impact the **critical path** of the project.

For example, where the *Contractor's* cause of delay does not impact on the critical path of the project, yet the *Principal's* cause of delay does, the *Superintendent* will assess the claim in light of the *Principal's* qualifying cause of delay rather than treating the delays as concurrent.

Under clause 34.4(b) the *Superintendent* may not take into account whether or not the *Contractor* can accelerate. The *Superintendent* may nevertheless direct acceleration (provided the *Contractor* can do so) but cost consequences fall on to the *Principal*.

Finally, when assessing an application for an *EOT* the *Superintendent* may take into account whether the *Contractor* could have prevented or mitigated the delay.

34.5 Extension of Time

Within 28 days of receiving a *Contractor's* claim for *EOT*, the *Superintendent* shall give to the *Contractor* and *Principal* a written direction evidencing the *EOT* so assessed. If the *Superintendent* does not do so, there shall be deemed assessment and direction for an *EOT* as claimed.

Notwithstanding, that the *Contractor* is not entitled to or has not claimed an *EOT*, the *Superintendent* may at any time and from time to time before issuing the final certificate direct an *EOT*.

Deemed Assessment

Where the *Superintendent* fails to process an *EOT* claim within 28 days of receiving the claim from the *Contractor*, the *Contractor* is automatically entitled to the *EOT* claimed.

(However, if the claim does not comply with subclause 34.3(b) the *Contractor* will lose such a benefit.)

This clause is always amended.

Duties and Obligations of Superintendent

Under subclause 20, the *Superintendent* must act 'reasonably and in good faith' when exercising any of its powers under the *Contract*. The Courts have hence inferred, that where the *Contract* contains such an express duty on the *Superintendent*, the *Superintendent* is obliged to exercise his discretion to grant an *EOT* for the benefit of both the *Principal* and the *Contractor*.

Such an issue arose in the case of *Peninsula Balmain v Abigroup Contractors Pty Ltd*.⁵ Peninsula Balmain (the *Principal*) and Abigroup (the *Contractor*) entered into a building *Contract*. The *Contract* between the two parties contained an *EOT* clause similar to subclause 34.5 which stipulated that the *Superintendent* may at any time and from time to

⁵ [2002] NSWCA 11

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time before issuing the final certificate direct an *EOT*. The NSW Court of appeal held that although the *Superintendent* was an agent of the *Principal*, they nonetheless had a duty to act 'reasonably and in good faith' towards both the *Principal* and the *Contractor* when granting an *EOT*. Accordingly, even if the granting of an *EOT* would not benefit the *Principal*, the *Superintendent* was still obliged to make such a *direction* if such a *direction* would be fair and reasonable in nature.

Nonetheless, the *Principal* and *Superintendent* may avoid such an obligation by amending subclause 34.5. In *Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd*⁶ the parties entered into a *Contract* to carry out construction works in Pialba. The second limb of the *EOT* clause read as follows;

"Notwithstanding that the *Contractor* is not entitled to or has not claimed an extension of time, the superintendent may at any time and from time to time before the issue of the final certificate by notice in writing to the *Contractor* extend the time for practical completion for any reason in the superintendent's absolute discretion and without being under any obligation to do so."

While the Queensland Supreme Court reaffirmed the *Peninsula Balmain* principles, Justice McMurdo held that where the *EOT* clause expressly negates the *Superintendent's* obligation to grant an *EOT*, the parties may confer a power on the *Superintendent* to grant a discretionary *EOT* without imposing any obligation as to the exercise of that power. Accordingly, under such a *Contract* the *Superintendent* has the ability to grant a discretionary *EOT*, yet is not obliged to do so.

Second Limb and Liquidated damages

The second limb of subclause 34.5 enables the *Superintendent* to grant an *EOT* where the *Contractor* has failed to apply or would otherwise be entitled to an *EOT*. Unless the *Superintendent* had this power to extend time unilaterally, the *Principal* would be denied the right to enforce payment of liquidated damages because the *Contractor* could assert there is no longer a valid *date for practical completion* from which to calculate such liquidated damages.

The *Contractor* must also be cautious of requests to hand over certain areas of the project site prior to the *date for practical completion*. Such a request will effectively create a separable portion to the project under sub clause 4, which will vary the quantities of liquidated damages.

34.6 Practical Completion

The *Contractor* shall give the *Superintendent* at least 14 days' written notice of the date upon which the *Contractor* anticipates that practical completion will be reached.

When the *Contractor* is of the opinion that practical completion has been reached, the *Contractor* shall in writing request the *Superintendent* to issue a certificate of practical completion. Within 14 days after receiving the request, the *Superintendent* shall give the *Contractor* and the *Principal* either a certificate of practical completion or written reasons for not doing so.

⁶ [2008] QSC 58

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If the *Superintendent* is of the opinion that practical completion has been reached, the *Superintendent* may issue a certificate of practical completion even though no request has been made.

The *Contractor* must provide two notices to the *Superintendent* regarding practical completion. The first must be sent 14 days prior to anticipating practical completion. The second should be a request for a certificate of practical completion, sent at a time where the *Contractor* is of the opinion that they have reached practical completion. Failure by the *Superintendent* to either issue the certificate of practical completion or supply reasons for refusing to issue the certificate within 14 days of the request will be a substantial breach of the *Contract* by the *Principal*.

The second limb of the clause enables the *Superintendent* to issue a certificate of practical completion at a time which they see fit. Such a power is to the benefit of the *Principal*, as any liquidated damages will be due and payable once the certificate is issued.

34.7 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 29 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 subject of the *EOT*.

Essence of Clause

Liquidated damages represent the parties' agreement reached at the time of entering into the *Contract* of the loss that will be suffered by the *Principal* if the *Contractor* does not reach practical completion by the *date for practical completion*.

Rate of Damage to be fixed in Item 29

Liquidated damages are outlined in Part A Item 29 of the *Contract*. It is essential for parties to ensure that the rate of liquidated damages is fixed as a 'rate per day.' Failure to fix liquidated damages as a rate may give rise to Court's interpreting the provision as a penalty rather than a genuine covenant of pre-estimated damages. The Courts have generally declined to enforce penalty clauses;

"A penalty provision has been regarded as unenforceable or, perhaps void, ab initio... Penalty clauses are not generally speaking, so expressed as to entitle the plaintiff to recover his actual loss."⁷

Liquidated damages will be payable to the *Principal* even if no actual loss is suffered by the *Principal* due to the *Contractor* failure to reach practical completion by the *date for practical completion*. However, if in the events which occur, the *Principal* suffers greater loss than the

⁷ *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 192

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rate stated in *Item 29*, the *Principal* may only recover the maximum of the rate prescribed in *Item 29*. Accordingly, it is beneficial to both *Contractor* and *Principal* to fix a rate of liquidated damages under *Item 29* when entering into the *Contract*.

Liquidated damages not to be prescribed as 'nil'

Liquidated damages are not an essential clause of the *Contract* and hence the parties may choose to not include this provision in their agreement. In such circumstances parties should delete the clause altogether as oppose to entering 'nil' or '0' into *Item 29* as to do so may preclude the *Principal* from recovering any general damages.

The common law is currently ambiguous in regards to this proposition. In *J-Corp Pty Ltd v Mladenis* [2009] WASCA 157 (28 August 2009) the Western Australian Court of Appeal held that specifying liquidated damages as "NIL" would not prevent a *Principal* from claiming for general common law damages. However, other cases within other jurisdictions including; *Temloc Ltd v Errill properties Ltd* (1987) 39 BLR 30 and *Baese Pty Ltd v RA Bracken Building Pty Ltd* (1990) 6 BCL 137 have held that where liquidated damages are specified as being 'nil' the *Principal* loses their right to claim general damages.

Recovery of Liquidated Damages

Once the *Superintendent* makes an assessment for liquidated damages, the *Principal* is able to recover the money immediately. In practice it would be expected that the *Superintendent* would certify the assessment under subclause 37.2(b) thereby enabling the *Principal* to set off the liquidated damages against moneys due to the *Contractor*.

34.8 Bonus for early practical completion

If the *date of practical completion* is earlier than the *date for practical completion* the *Superintendent* shall certify as due and payable to the *Contractor* the bonus in *Item 30(a)* for every day after the date of practical completion to and including the *date for practical completion*.

The *Contractor* hereby waives that part of a bonus exceeding the *Item 30(b)* amount.

Parties may agree to provide the *Contractor* a bonus for early practical completion. The bonus should be a daily rate outlined in *Item 30(a)* with the maximum limited outlined in *Item 30(b)*. The advantage of such a provision for the *Contractor* is that there is no need to prove the bonus as it will be due and payable at the time practical completion is reached.

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*.

Essence of Clause

Where the *Contractor* is delayed in completing *WUC* it is likely that they will incur additional costs. Therefore, where the delay is caused by the *Principal* (*compensable cause*) the *Contractor* may claim an adjustment to the *Contract* sum known as 'delay costs.'

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Prior to making such a claim the *Contractor* must provide a prescribed notice to both the *Superintendent* and *Principal* under clause 41.1.

What *Principal's* tend to do is add an extra *Item* under Part A of the *Contract* in which they prescribe the rate for delay damages as 'nil.'

Operation of Clause

Delay damages are similar (in some respects) to liquidated damages payable to the *Principal* for the *Contractor's* delay. However, rather than simply allowing the *Contractor* to make a claim for 'delay damages,' the *Contract* requires that the *Contractor* follow a **further step** in order to make a claim.

Further Step

Under the general form of the *Contract*, delay damages are not pre-arranged. Accordingly, they are damages that the *Contractor* must prove by supplying a prescribed notice to the *Superintendent* and *Principal* under subclause 41.1. The prescribed notice must set out the general basis and quantum of the claim. The *Contractor* may provide further details regarding the claim within 28 days of providing the prescribed notice. If the *Contractor* fails to provide further details, the initial prescribed notice will be deemed to be the claim for delay damages.

Within 56 days of receipt of the original prescribed notice the *Superintendent* is required to assess the claim and notify the parties in writing of the decision. The *Principal* and *Contractor* have a further period of 28 days to provide a notice of dispute if either party disagrees with the *Superintendent's* assessment. However, if no such notice is provided the *Superintendent* is required to certify the delay damages as moneys due and payable by the *Principal* to the *Contractor*.

Alternative

The parties may avoid these processes by pre-arranging that delay damages be paid at a daily rate. However, such an alternative is not in the general form of the *Contract* and must therefore be implemented through a special condition. If the parties choose to come to such an arrangement, sub clause 34.9 should be amended so that the *Contractor* does not have to follow the procedures set out in subclause 41.1.

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36 Variations

36.1 Direct Variations

The *Contractor* shall not vary *WUC* except as directed in writing.

The *Superintendent*, before the *date of practical completion*, may direct the *Contractor* to vary *WUC* by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the *Contract* (including being within the warranties in subclause 2.2):

- a) Increase, decrease or omit any part;
- b) Change the character or quality;
- c) Change the levels, lines, positions or dimensions;
- d) Carry out additional work;
- e) Demolish or remove material or work no longer required by the *Principal*.

Operation of Clause

Sub clause 36.1 precludes the *Contractor* from varying *WUC* unless directed in writing by the *Superintendent*. Nonetheless, the *Superintendent* may not direct a variation where to do so would be unreasonable or not given in good faith.

In addition to the *Superintendent* being able to vary *WUC* contained in sub clause 36.1(a) to (e) there are three further requirements which must be present before *Superintendent* can direct a variation:

- the variation must be of a **character** contemplated by the provisions of the *Contract*;
- the variation must be of the **extent** contemplated by the provisions of the *Contract*; and
- the variation must be **capable** of being carried out under the provisions of the *Contract*.

Put simply these factors require that any variation handed down by the *Superintendent* fall within the **scope** of the *Contract*.

What falls outside the scope of the *Contract*?

Each design and construct *Contract* will be subject to its own scope based on the project in question. However, the Courts have held that where a variation alters the stated purpose of the *Works*, such a variation will fall outside the scope of the *Contract*.

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In *Kell and Rigby Holdings Pty Ltd v Lindsay Bennelong Developments Pty Ltd*⁸ the Court held that a variation which alters the stated purpose of *the Works* was beyond the scope of the *Contract*. The case involved Lindsay Bennelong Development Pty Ltd (the *Principal*) and Kell and Rigby Holdings Pty Ltd (the *Contractor*) entering into a *Contract* for the construction of a mixed residential and commercial development. The project was to be completed in three stages, with each stage being a requisite for completing the construction of the project. The stated purpose of the works was to construct and complete commercial and residential buildings under the *Contract*. In May 2010 stage 2 and 3 of the project were yet to be completed. In June 2010 the *Superintendent* issued a notice of variation to the works, which deleted the remaining stage 2 works and the yet to be completed stage 3 works. The Court found this variation to be invalid as it would effectively amend the stated purpose of the works to be the 'construction of uncompleted commercial and residential buildings.' Such a purpose would be of an uncommercial nature and hence invalidated the variation.

Some further examples of variations falling outside the scope of the *Contract* may include;

- a variation to build a pool under a *Contract* for constructing a house.
- a variation to demolish a high rise building where a *Contractor* has been *Contracted* to construct it.

Variation gives rise to an *EOT*

After the variation is directed by the *Superintendent*, the *Contractor* should be provided with an adequate *EOT*. Failure by the *Superintendent* to provide an *EOT* may equate to an act of prevention by the *Principal* thereby negating the *Principal's* right to liquidated damages.

36.2 Proposed variations

The *Superintendent* may give the *Contractor* written notice of a proposed *variation*.

The *Contractor* shall as soon as practicable after receiving such a notice, notify the *Superintendent* whether the proposed *variation* can be effected, together with, if it can be effected, the *Contractor's* estimate of the:

- a) effect on the *program* (including the *date for practical completion*); and
- b) cost (including all time-related costs, if any) of the proposed *variation*.

The *Superintendent* may direct the *Contractor* to give a detailed quotation for the proposed *variation* supported by measurements or other evidence of cost.

The *Contractor's* costs for each compliance with this subclause shall be certified by the *Superintendent* as moneys due to the *Contractor*.

⁸[2010] NSWSC 777

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Operation of Clause

Although it is submitted that the *Superintendent* is not required to provide written notice to the *Contractor* regarding the variation, the *Superintendent* should nonetheless provide written notice to the *Contractor* whenever possible. This would preclude the *Contractor* from later making separate claims for delay damages arising out of the variation.

Once the *Contractor* receives notice they are to inform the *Superintendent* as soon as practicable whether or not the variation can be effected under the *Contract*. Put simply, this provides the *Contractor* with an opportunity to raise the issue of whether the variation is within the scope of the *Contract*. In addition to outlining whether the variation may be effected, the *Contractor* must also provide an estimate of the variation's effect on the construction program, *date for practical completion* and any costs associated with the proposed variation.

The second limb of the clause enables the *Superintendent* to likewise request that the *Contractor* provide a detailed quotation for the proposed variation including measurements and costs. If the *Contractor's* quotation is subsequently accepted, there is then an agreement for the proposed variation to proceed on the basis of the *Contractor's* quotations.

Once all relevant information is provided to the *Superintendent* by the *Contractor*, the *Principal* may assess the information to determine whether to proceed with the proposed variation.

As a variation is a *compensable cause*, the *Contractor* may claim delay damages resulting from the variation unless the agreement for the proposed variation includes provisions for all time related costs.

36.3 Variation for convenience of *Contractor*

If the *Contractor* requests the *Superintendent* to direct a *variation* for the convenience of the *Contractor*, the *Superintendent* may do so. The *direction* shall be written and may be conditional. Unless the direction provides otherwise, the *Contractor* shall be entitled to neither extra time nor extra money.

Prior to granting a variation for the convenience of the *Contractor* it is prudent for the *Superintendent* to gain express authority from the *Principal*. Without this authority the *Superintendent* may be exposed to liability to the *Principal* where the *Superintendent* does not have the authority to vary work for the *Contractor's* convenience.

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 *Contract*

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c) rates or prices in a 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.

That price shall be added to or deducted from the *Contract* sum.

Operation of Clause

As outlined in sub-clause 36.4, there is a hierarchy of mechanisms which the *Superintendent* must use when pricing a variation. Where the parties have made an agreement to pricing the variation (such as through the provisions provided for under subclause 36.2) the *Superintendent* must price the variation accordingly.

However in instances where no such agreement is in place, the task of pricing can prove more complex. Effectively, the *Superintendent* is being asked to price works which by definitions were not agreed to by parties. Moreover, rates and prices contained in the *Contract* and the prices contained in the schedule of rates may not be applicable to the variation in question. Accordingly, the parties must ultimately adhere to the *Superintendent's* determinations regarding pricing. It is noteworthy to mention that the *Superintendent* has a duty to act in good faith when making such determinations.

Sub Contracts

AS4913 is the standard form of sub contract used under AS4902. However, the sub contract is not perfectly back to back with AS4902 as one would presume.

Disclaimer

This is intended as a guide only and should not be used in place of professional legal advice.

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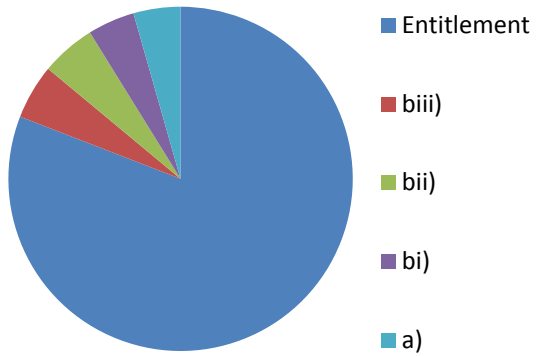
Interpretation and Construction of Contract

	Comment
In the <i>Contract</i> , except where the context otherwise requires:	
<i>Item</i> means an <i>Item</i> in Annexure Part A;	
<i>certificate of practical completion</i> has the meaning in subclause 34.6;	See Time and Progress page 13-14
<i>compensable cause</i> means: (a) any act, default or omission of the Superintendent, the <i>Principal</i> or its consultants, agents or other <i>Contractors</i> (not being employed by the <i>Contractor</i>); or (b) those listed in <i>Item</i> 31;	See Time and Progress page 15
<i>Contract</i> has the meaning in clause 6;	
<i>Contractor</i> means the person bound to carry out and complete <i>WUC</i> ;	
<i>Contractor's design obligations</i> means all tasks necessary to design and specify <i>the Works</i> required by the <i>Contract</i> , including preparation of the design documents and, if the documents stated in <i>Item</i> 10 as describing the <i>Principal's</i> project requirements include a preliminary design, developing the preliminary design;	See Contract Documents page 2
<i>date for practical completion</i> means: (a) where <i>Item</i> 7(a) provides a <i>date for practical completion</i> , the date; (b) where <i>Item</i> 7 (b) provides a period of time for practical completion, the last day of the period, but if any <i>EOT</i> for practical completion is directed by the Superintendent or allowed in any arbitration or litigation, it means the date resulting therefrom;	See Time and Progress page 9, 11, 13, 14 and 15 See Variations page 18
<i>date of practical completion</i> means: (a) the date evidenced in a certificate of practical completion as the date upon which practical completion was reached; or (b) where another date is determined in any arbitration or litigation as the date upon which practical completion was reached, that other date;	See Time and Progress page 9, 14, 15 and 17

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<i>design documents</i> means the drawings, specifications and other information, samples, models, patterns and the like required by the <i>Contract</i> and created (and including, where the context so requires, those to be created by the <i>Contractor</i>) for the construction of the Works;	See Contract Documents page 2-5
<i>direction</i> includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement;	See Contract Documents page 2 and 5 See Time and Progress page 12-13 See Variations page 19
<i>EOT</i> (from 'extension of time') has the meaning in subclause 34.5;	See Time and Progress page 9-16 See Variations page 18
<i>practical completion</i> is that stage in the carrying out and completion of <i>WUC</i> when: (a) <i>the Works</i> are complete except for minor defects: (i) which do not prevent <i>the Works</i> from being reasonably capable of being used for their stated purpose; (ii) which the Superintendent determines the <i>Contractor</i> has reasonable grounds for not promptly rectifying; and (iii) the rectification of which will not prejudice the convenient use of <i>the Works</i> ; (b) those tests which are required by the <i>Contract</i> to be carried out and passed before <i>the Works</i> reach practical completion have been carried out and passed; and (c) documents and other information required under the <i>Contract</i> which, in the Superintendent's opinion, are essential for the use, operation and maintenance of the Works have been supplied; preliminary design means the documents stated in <i>Item 11</i> ;	See Time and Progress page 9-10
<i>Principal</i> means the <i>Principal</i> stated in <i>Item 1</i> ;	
<i>Principal's project requirements</i> means the <i>Principal's</i> written requirements for <i>the Works</i> described in the documents stated in <i>Item 10</i> which: (a) shall include the stated purpose for which <i>the Works</i> are intended; (b) may include the <i>Principal's</i> design, timing and	See Contract Documents page 2 - 5

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cost objectives for <i>the Works</i> ; and (c) where stated in <i>Item 10</i> , shall include a preliminary design;	
<p><i>qualifying cause of delay</i> means:</p> <p>(a) any act, default or omission of the Superintendent, the <i>Principal</i> or its consultants, agents or other <i>Contractors</i> (not being employed by the <i>Contractor</i>); or</p> <p>(b) other than:</p> <p>(i) a breach or omission by the <i>Contractor</i>;</p> <p>(ii) industrial conditions or inclement weather occurring after the <i>date for practical completion</i> ;and</p> <p>(iii) stated in <i>Item 28</i>;</p>	 <p>See Time and Progress page 10-13</p>
<i>schedule of rates</i> means any schedule included in the <i>Contract</i> which, in respect of any section or <i>Item</i> of work to be carried out, shows the rate or respective rates of payment for the execution of that work and which may also include lump sums, provisional sums, other sums, quantities and prices;	See Contract Documents page 2-5
<i>site</i> means the lands and other places to be made available and any other lands and places made available to the <i>Contractor</i> by the <i>Principal</i> for the purpose of the <i>Contract</i> ;	See Latent Conditions page 6
<p><i>Superintendent</i> means the person stated in <i>Item 5</i> as the Superintendent or other person from time to time appointed in writing by the <i>Principal</i> to be the Superintendent and notified as such in writing to the <i>Contractor</i> by the <i>Principal</i> and, so far as concerns the functions exercisable by a Superintendent's Representative, includes a Superintendent's Representative;</p> <p><i>Superintendent's Representative</i> means an individual appointed in writing by the Superintendent under clause 21;</p>	
<i>the Works</i> means the whole of the work to be carried out and completed in accordance with the <i>Contract</i> , including variations provided for by the <i>Contract</i> , which by the <i>Contract</i> is to be handed over to the <i>Principal</i> ;	
<i>variation</i> has the meaning in clause 36;	See Variations page 17-20

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<i>work</i> includes the provision of materials;	
<i>WUC</i> (from 'work under the <i>Contract</i> ') means the work which the <i>Contractor</i> is or may be required to carry out and complete under the <i>Contract</i> and includes variations, remedial work, construction plant and Temporary works, and like words have a corresponding meaning.	
<p>In the <i>Contract</i>:</p> <p>(a) references to days mean calendar days and references to a person include an individual, firm or a body, corporate or unincorporate;</p> <p>(b) time for doing any act or thing under the <i>Contract</i> shall, if it ends on a Saturday, Sunday or Statutory or Public Holiday, be deemed to end on the day next following which is not a Saturday, Sunday or Statutory or Public Holiday;</p> <p>(c) clause headings and subclause headings shall not form part of, nor be used in the interpretation of, the <i>Contract</i>;</p> <p>(d) words in the singular include the plural and words in the plural include the singular, according to the requirements of the context. Words importing a gender include every gender;</p> <p>(e) communications between the <i>Principal</i>, the Superintendent and the <i>Contractor</i> shall be in the English language;</p> <p>(f) measurements of physical quantities shall be in legal units of measurement of the jurisdiction in <i>Item 8</i>;</p> <p>(g) unless otherwise provided, prices are in the currency in <i>Item 9(a)</i> and payments shall be made in that currency at the place in <i>Item 9(b)</i>;</p> <p>(h) the law governing the <i>Contract</i>, its interpretation and construction, and any agreement to arbitrate, is the law of the jurisdiction in <i>Item 8</i>; and</p> <p>(i) if pursuant to Annexure Part E to these General Conditions, clauses or their parts in these General Conditions are deleted, the <i>Contract</i> shall be read and construed as though the clause or its part has been deleted, whether or not that particular clause or its part has been struck from these General Conditions.</p>	