

THE CONTRACTING ESSENTIALS FOR LAWN MOWER MECHANICS

Cleaning up- Part 3

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 to your third lesson on the contracting essentials for lawn mower mechanics.

This third article will discuss the 'cleaning up' of the contract. These clauses keep the ground tidy and clean up after the operation of a lawn mower. They outline what must be done by both parties prior to the *Works* at the end of a project.

The "cleaning up" clauses include:

- clause 4 *Separable portions*
- clause 20 *Superintendent*
- clause 27 Cleaning Up
- clause 33 Suspension
- clause 35 Defects Liability
- clause 39 Default or Insolvency
- clause 40 Termination by Frustration

4. Separable Portions

4 Separable portions

Separable portions may be directed by the *Superintendent*, who shall clearly identify for each, the:

- (a) portion of the Works;
- (b) date for practical completion; and
- (c) respective amounts for security, bonus, liquidated damages and delay damages (all calculated pro-rata according to the ratio of the Superintendent's valuation of the separable portion to the contract sum).

Superintendent's Power and Responsibilities

If the construction *contract* does not specifically provide for *separable portions*, clause 4 gives the *Superintendent* power to direct *separable portions* at any time during the *Contract*. Such power must be exercised by the *Superintendent* reasonably and in good faith. *Superintendent's* duty to act reasonably and in good faith will be discussed in clause 20.

The *Superintendent* must ensure all *the Works* are covered by *separable portions* and identify for each *separable portion* the matters set out in clause 4(a), (b) and (c).

Relevant Case Law

In *Philips Hong Kong v Attorney – General (Hong Kong)* (1991) 7 Const LJ 340 (HK CA), the contract provided for the liquidated damages on each separable portion if the work could not be finalised before the completion date of each separable portion respectively. There was, however, no separable portions provided in the contract and the contract specifically stated that 'no section, portion or part of the Works shall be taken over by the Employer before the issue of a taking-over certificate for the whole of the Works'. Even though common law provides that liquidated damages are void if the purpose is to penalise the wrongdoing rather than compensating the injured, the court held that liquidated damages provisions which also specified liquidated damages respectively on separable portions would not be void as a penalty if in fact there were no separable portions.

In *Bramall and Ogden Ltd v Sheffield CC* (1983) 29 BLR 73, the parties entered into a JCT Standard Form Contract 1963 edition for the erection of 123 dwellings. The Appendix provided for liquidated and ascertainable damages "at the rate of £20 per week for each uncompleted dwelling". The court held that a rate per separable portion would require the clause itself to apply liquidated damages to the separable portions rather than to the works overall.

20. Superintendent

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.

Essence of Clause

Clause 20 outlines the function and role of the *Superintendent* under the *Contract*. Put simply the *Superintendent* has two key roles under the *Contract*,

- To be an agent of the *Principal* in conveying the *Principal's* instructions to the *Contractor* and in carrying out the role of ordering changes to the *Works*.
- Performing the function of certifier or assessor for the purpose of arriving at a reasonable measure or value of work, quantities or time.

Duality of Superintendent's role

In *Perini Corporation v. Commonwealth of Australia*,¹ the common law expressly recognized this dual role of the *Superintendent*. Perini (the *Contractor*) had contracted with the Post Master General (the *Principal*) to construct the Redfern mail exchange. During the project, Perini claimed a number of *EOTs* some of which were granted, some of which were not. Perini brought an action against the Post Master General claiming that the Director of works (the *Superintendent*) was basing his decisions on governmental policy as opposed to his own discretion. In outlining the nature of the *Superintendent's* role the Court found:

"It is now necessary to consider the duties of the Director of Works (the *Superintendent*). The plaintiff (the *Contractor*) and the defendant (the *Principal*) are the only parties to the agreement but in it they have agreed that the Director of Works (the *Superintendent*) 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 (the Principal.)** 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."

Accordingly, even though the duality of the *Superintendent's* role may not be expressly stated in the *Contract*, it is nonetheless an implied term.

¹[1969] 2 NSW 530.

Reasonably and in good faith

Under AS 4902-2000 there is an express duty for the *Superintendent* to act reasonably and in good faith (or bona fide) when performing all their functions under the *Contract*. Regardless of whether such a term is included in the *Contract*, the Courts have held such a duty to be implied.² In fact, the only way in which the parties can set aside such a duty, is by way of including a term which provides that the *Superintendent* has the discretion to exercise their duties but is under no obligation to do so.³ For example in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*⁴ the Court held that the “the contract may only be effective as a workable business document if the subclauses are read in a way this is subject to the requirements of reasonableness.”⁵

Put simply what is meant by the duty of ‘good faith’ is the duty to act honestly. The characteristics which conduct must have in order to be honest include:

- Not acting arbitrarily or capriciously;
- Not acting with an intention to cause harm; and
- Acting with due respect for the intent of the *Contract* as a matter of substance and form.

In order for the *Superintendent* to act reasonably, they must do all that can be reasonably expected in the circumstances to achieve the contracts aim. Where such action would require the *Superintendent* to go beyond the bounds of reason or bring ruin upon itself, such an action will fall outside the scope of reasonableness and not be required.⁶

Superintendent as agent of Principal

The abovementioned duty and duality of the *Superintendent's* role may increase the *Principal's* exposure to liability as the *Superintendent* may likewise act as an agent for the *Principal*. (For example when giving directions to vary *the Works* under subclause 36.1) This is especially so where the *Superintendent* is an employee of the *Principal*. Accordingly, the *Principal's* obligation to ensure that the *Superintendent* acts reasonably and in good faith means that:

- If a *Principal* provides instructions to the *Superintendent* which are unreasonable, the *Principal* may be liable for a breach of *Contract*.
- The *Principal* must acknowledge that not all *directions* given to the *Superintendent* can be acted on if the *Superintendent* believes these to be unreasonable or not in good faith.

²*Peninsula Balmain v Abigroup Contractors Pty Ltd* [2002] NSWCA 11. (For a more detailed discussion of this case see Presentation 1- the Dangerous Bits **Time and Progress** page 12-13)

³*Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd* [2008] QSC 58 (For a more detailed discussion of this case see Presentation 1- the Dangerous Bits **Time and Progress** page 13)

⁴(1992) 26 NSWLR 234.

⁵*Renard Constructions (ME) Pty Ltd v Minister for Public Works* at 258.

⁶*Hospital Products Ltd v United States Surgical Corp* [1984] 156 CLR 41.

27. Cleaning Up

27. Cleaning up

The *Contractor* shall keep the *site* and *WUC* clean and tidy and regularly remove rubbish and surplus material.

Within 14 days after the *date of practical completion*, the *Contractor* shall remove *temporary works* and *construction plant*. The *Superintendent* may extend the time to enable the *Contractor* to perform remaining obligations.

If the *Contractor* fails to comply with the preceding obligations in this clause, the *Superintendent* may direct the *Contractor* to rectify the non-compliance and the time for rectification.

If:

- (a) the *Contractor* fails to comply with such a *direction*; and
- (b) that failure has not been made good within 5 days after the *Contractor* receives written notice from the *Superintendent* that the *Principal* intends to have the subject *work* carried out by others,

the *Principal* may have that *work* so carried out and the *Superintendent* shall certify the cost incurred as moneys due from the *Contractor* to the *Principal*. The rights given by this paragraph are additional to any other rights and remedies.

Essence of the clause

Clause 27 governs the *Contractor's* duty to keep the *site* clean and tidy and regularly remove rubbish and surplus materials. This duty remains throughout the period that *WUC* is being carried out by the *Contractor* up to *practical completion* and during the *defects liability period*. The *Contractor's* duty extends to its *subcontractors* as well, which means that the *Contractor* should ensure that the *subcontractors* act in accordance with the requirements of this clause as well.

In respects to the *Contractor's temporary works* and *construction plant*, this clause also requires the same removal from the *site* after achieving *practical completion*. The removal of *temporary works* and *construction plant* should be completed within 14 days after the date of *practical completion*, or otherwise upon the *Superintendent's* discretion to extend the time if in the circumstances that is necessary. The *Contractor* may need to request the *Superintendent* to extend this time if it appears possible that the *Superintendent* may not agree *practical completion* has been reached.

Date of Practical Completion

The *Contractor* must notify the *superintendent* at least 14 days prior to the date the *Contractor* anticipates reaching *practical completion* and the *Contractor* may apply for *certificate of completion* when its *practical completion* is reached. The *Superintendent* then has 14 days either to issue the certificate or to give reasons why the *Contractor* has not reached *practical completion*. If no such *direction* is provided by the *Superintendent* after the 14-day period, this means that it is impossible for the *Contractor* to remove the items within

the time required by this clause and the *Superintendent* should extend the time for removal accordingly.

Superintendent's Direction

The failure by the *Contractor* to comply with the cleaning up and removal obligation gives the *Superintendent* the right to direct the *contractor* to comply and state the time for compliance to take place. The direction may be given orally but must be confirmed in writing as soon as practicable (under clause 20). The *Contractor* is not obliged to comply with the *Superintendent's* direction until it is confirmed in writing.

If the *Contractor* fails to comply with this direction within a reasonable time, the *superintendent* may notify the *Contractor* that the *Principal* intends to engage others at the *Contractor's* cost to carry out the *work* of cleaning up and removal if the *Contractor* fails to comply with the further notice within 5 days of its receipt. This further global notice should be carried out in writing.

33. Suspension

33.1 Superintendent's suspension

The *Superintendent* may direct the *Contractor* to suspend the carrying out of the whole or part of *WUC* for such time as the *Superintendent* thinks fit, if the *Superintendent* is of the opinion that it is necessary:

a) because of an act, default or omission of:

(i) the *Superintendent*, the *Principal* or its employees, consultants, agents or other contractors (not being employed by the *Contractor*); or

(ii) the *Contractor*, a *consultant*, a *subcontractor* or the employees or agents of any of them

b) for the protection or safety of any person or property; or

c) to comply with a court order.

Essence of Clause

Clause 33 provides for the temporary suspension of the design and construction *Contract* by the *Superintendent*. While suspension does not end the *Contract* altogether, it has a very close relationship with termination and hence should not be treated lightly.

The common law has consistently refused to imply a right of suspension. Accordingly, if the parties would like to have the option of suspension, they must include such a clause within their *Contract*. They should also ensure that the *Contract* deals adequately with the immediate and practical consequence of suspension and how long a *contract* can be suspended for before termination occurs.

Superintendent's suspension

Under sub-clause 33.1(a)i and ii the *Superintendent* has the power to suspend the *Contract* whether the defaulting act or omission comes from the *Principal*, *Contractor* or one of their respective agents. Nonetheless, the exercise of such a power is strictly contingent on the *Superintendent* acting "reasonably and in good faith. It is the responsibility of the *Principal* to ensure that the *Superintendent* upholds such a duty. Failure by the *Superintendent* to do so will be a breach of the *Contract* by the *Principal*.

For example, if the *Superintendent* knows that the *Principal* cannot afford to make a progress payment to the *Contractor*, it would be unreasonable for the *Superintendent* to allow the *Contractor* to continue *WUC*. It is submitted that in such circumstances the *Superintendent* would have an obligation to notify the *Contractor* and if necessary to suspend *WUC*.

Under such circumstances the *Contractor* would be entitled to costs relating to suspension under subclause 33.4. Moreover, clause 33.1 enables the *Contractor* to recover costs not only for the act, default or omission of the *Principal* but also for an act, default or omission of

the *Superintendent*. If such a suspension arises due to a *qualifying cause of delay*, the *Contractor* may likewise be entitled to an *EOT*.

The *Superintendent's* power to suspend the *Contract* due to an act, omission or default of the *Principal* (or for those for who the *Principal* is responsible for) minimises the liability of the *Principal*. This is because the *Principal* will only be liable to pay the *Contractor's* cost arising out of suspension as opposed to delay or general damages pursuant to clause 34.9 and 39.1 respectively.

However, if the cause of suspension is due to a breach of omission of the *Contractor* then the *Contractor* would not be entitled either to an *EOT* or costs arising from suspension.

33.2 Contractor's Suspension

If the *Contractor* wishes to suspend the carrying out of the whole or part of *WUC*, otherwise than pursuant to subclause 39.9, the *Contractor* shall obtain the *Superintendent's* prior written approval. The *Superintendent* may approve the suspension and may impose conditions of approval.

Under AS 4902-2000 the *Contractor's* power to suspend *WUC* is far more limited than suspension power afforded to the *Superintendent*. Moreover, under sub clause 39.2(b) if the *Contractor* wrongfully suspends work, it will be deemed a serious breach of the *Contract* which will enable the *Principal* to terminate the *Contract*.

If the *Contractor* does wish to suspend work, they are required to obtain prior written approval from the *Superintendent*. As is outlined in sub clause 33.2, such notice may impose conditions on the *Contractor's* suspension for instance; the suspension must not affect the *date for practical completion*.

33.3 Recommencement

As soon as the *Superintendent* becomes aware that the reason for any suspension no longer exists, the *Superintendent* shall direct the *Contractor* to recommence suspended *WUC* as soon as reasonably practicable.

The *Contractor* may recommence *WUC* suspended pursuant to sub clause 33.2 or 39.9 at any time after reasonable notice to the *Superintendent*.

The *Superintendent* cannot continue the suspension of *WUC* longer than reasonably necessary. Failure by the *Superintendent* to do so will result in a breach of *Contract* by the *Principal* enabling the *Contractor* to claim delay or general damages. Such provisions will apply whether or not the cause of the initial suspension entitled the *Contractor* to only claim the cost of suspension. Accordingly, if suspension results from the *Superintendent's* power under clause 33, it is in the *Principal's* best interest to have *WUC* recommenced as soon as practicable after the reason for suspension no longer exists.

Where the suspension is results from the *Contractor's* powers under subclause 33.2 or 39.9, the recommencement clause operates in a different manner. The *Contractor* **may** recommence work after notice is provided to *Superintendent*. As the clause provides no further guidance as to when the *Contractor* should recommence work, it is prudent for the

Superintendent to outline in their approval of suspension that the *Contractor* must recommence *WUC* as soon as is reasonably practicable after the reason for suspension ceases to exist. If the *Contractor* does not comply with this condition of the approval notice, the *Contractor* will be deemed to have substantially breached the *Contract* under sub clause 39.2(b).

33.4 Cost

The *Contractor* shall bear the cost of suspension pursuant to paragraph a(ii) of subclause 33.1 and subclause 33.2. If the *Contractor* made the protection, safety or court order necessary, the *Contractor* shall bear the cost of suspension pursuant to paragraph (b) or (c) of subclause 33.1. If the *Contractor* otherwise incurs more or less cost than otherwise would have been incurred, the difference shall be assessed by the *Superintendent* and added to or deducted from the *contract sum*.

Subclause 33.4 deals with the question of who bears the costs which arise out of suspension. Put simply, where the suspension is caused by the *Superintendent*, *Principal* or any other parties for whom the *Principal* is responsible, then the *Contractor* is entitled to claim the *Contractor's* costs. Moreover, if the suspension causes a delay in the progress of *WUC*, the *Contractor* must notify the *Superintendent* of the delay and if is necessary claim and *EOT*.

If the suspension is due to a breach, default or omission by the *Contractor*, the *Contractor* will not be entitled to costs nor an *EOT*. Furthermore, if such a suspension delays the *date of practical completion* the *Contractor* may be liable to the *Principal* for liquidated damages.

35 Defects liability

35 Defects liability

The *defects liability period* stated in *Item 32* shall commence on the *date of practical completion* at 4:00pm.

The *Contractor* shall carry out rectification at times and in a manner causing as little inconvenience to the occupants or users of *the Works* as is reasonably possible.

As soon as possible after the *date of practical completion*, the *Contractor* shall rectify all *defects* existing at the *date of practical completion*.

During the defects liability period, the *Superintendent* may give the *Contractor* a *direction* to rectify a *defect* which:

a) shall identify the *defect* and the date for completion of its rectification;
and

b) may state a date for commencement of the rectification and whether there shall be a separate *defects liability period* thereof (not exceeding that in *Item 32*, commencing at 4:00pm on the date the rectification is completed and governed by this clause).

If the rectification is not commenced or completed by the stated dates, the *Principal* may have the rectification carried out by others but without prejudice to any other rights and remedies the *Principal* may have. The cost thereby incurred shall be certified by the *Superintendent* as moneys due and payable to the *Principal*.

Essence of Clause

Sub-clause 35 provides relief to the *Principal* for any residual *defects* arising from the work performed under the *Contract* by the *Contractor*. While not formally defined under the *Contract*, defect can be taken to mean any element in the design and/or construction of a structure, which in qualitative terms falls short of what should have been supplied. The common law has further expanded on this definition:

“In the context of an architectural design, a *defect* is a flaw.”⁷

It is important to note that flaw refers to any goods/services supplied in a manner which is not complicit with the *Contract*. Accordingly, goods may be defective even though those goods are capable of being used adequately for their ordinary purposes.⁸

For example, if a *Contractor* was contracted to build a pool 2.5 meters in depth, yet only built the pool 2 meters in depth, the pool may be considered defective in spite of its capability to be used for its ordinary purposes.

The defects liability period

The *defects liability period* is a period of time between *practical completion* and final completion, during which it is the obligation of the *Contractor* to rectify, (at its own expense)

⁷ *Pearson Education Ltd v The Charter Partnership* [2005] EWHC 2021 (TCC) at [122]

⁸ *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344.

any defects arising in completing the *Contract*. The liability period is a creature of contract; it will typically be 3-12 months after the date of *practical completion* as is outlined in *Item 32* of Part A.

Under sub-clause 35 the *Contractor* shall **rectify all defects** which are in existence at the time of *practical completion*. Accordingly, under the standard form of subclause 35, the *Contractor* may be responsible for rectification of all defects, regardless of who is responsible for their causation.

The clause further requires that the *Superintendent* provide a *direction* to the *Contractor* which must identify the *defect* and the date for completion of its rectification. (Note: part b of the clause is optional for the *Superintendent* to include in the *direction*.) Such a mechanism works for the benefit of both parties. It provides the *Principal* with an entitlement to have the defects rectified with no further costs, while the *Contractor* is entitled to carry out the rectification themselves, which may be less than the cost for reimbursing the *Principal* should they have to hire a third party for rectification.

Contractor's liability during defects period

The *Principal* is generally constrained in recovering damages from a *Contractor* in respect of defects arising during a defects liability period.⁹ The remedy which is hence available for the *Principal* is to have the defects repaired by the *Contractor* at its own expense. Although the clauses provisions operate under this manner, this does not preclude the *Principal* from recovering damages if this procedure isn't followed correctly by the *Contractor*.

In *Kamstra Construction Ltd v Mather*¹⁰ a builder performed defective electrical work on the central heating boiler of a house. The defect became apparent at around Christmas, when the boiler was most needed for heating. In spite of the work still being within the 6 month defect liability period, the owners arranged for a gas company to perform emergency repairs to the boiler. Notwithstanding the defects liability period, the Court found that the owners were entitled to recover costs from the builder.

Whether a *Principal* is entitled to recover costs in arranging for someone other than the *Contractor* to rectify a defect is dependent on the terms of the *Contract*. What is clear though, is that if a *Contractor* has been instructed to repair a defect during the period, yet fails to undertake such an obligation, the *Principal* will be able to recover the costs of engaging a third party to repair the defect.

Contractor's liability after defects period

The right of the *Principal* to call the *Contractor* back to the site to repair defects will expire at the end of the defects liability period. However, (unless the *Contract* contains express provisions to the contrary) the *Principal* will retain the right to damages stemming from any defect caused by the *Contractor* which has not been rectified. This also includes *defects* which only manifest themselves after the defects liability period.

⁹*P&M Kaye Ltd v Hoiser & Dickson Ltd* [1972] 1 WLR 146.

¹⁰[1997] EWCA Civ 2746.

39 Default or insolvency

Default

Overview

Subclause 39.1 preserves the party's common law rights to terminate the *Contract* or to recover damages for breach of *Contract*. Subclauses 39.2 to 39.11 constitute an alternative to the common law rights by which a party may seek to exercise its rights under the *Contract* when the other party defaults in its obligations under the *Contract*.

Subclauses 39.2 and 39.7 of the *Contract* provide that certain breaches are not substantial breaches, thereby enabling the party not in breach to serve a show cause notice without having to prove that the particular breach in question is a substantial breach of the *Contract* at common law. The *Contract* provides that a particular breach listed, if proved, to be a substantial breach of contract at common law, thereby entitling that party to exercise the rights given to it under subclause 39.4 or 39.9. In addition, a party has the rights given to it under subclause 39.2 to 39.9 (as appropriate).

Subclause 39.10 gives that party the same remedies, rights and liabilities as the party would have had under the law governing the *Contract* had the defaulting party repudiated the *Contract* and the other party had consequently elected to treat the *Contract* as at an end and recover damages.

If a party elects to proceed to exercise its rights in relation to default by the other party (subclause 39.2-39.6 in the case of a *Principal* and subclause 39.7-39.9 in the case of the *Contractor*), those provisions in effect set out a code by which the party should proceed. Those provisions must be strictly complied with. The preservation of a party's common law right by subclause 39.1 however does enable a party also as an alternative remedy to exercise its common law rights to terminate the *Contract* for fundamental breach either under subclause 39.4 and 39.9.

39.1 Preservation of other rights

If a party breaches (including repudiates) the *Contract*, nothing in this clause shall prejudice the right of the other party to recover damages or exercise any other right or remedy.

The essence of subclause 39.1 is that it preserves the common law rights of a party to recover damages or to exercise any other right or remedy at law where the other party has breached the *Contract* or has repudiated the *Contract*.

The importance of preserving a party's rights to terminate at common law is demonstrated by the case of *Amann Aviation Pty Ltd v Commonwealth*¹¹, where the Commonwealth purported to terminate the *Contract* at common law. It was held that failure to expressly preserve common law rights in the *Contract* meant that the *Contract* could only be terminated pursuant to the procedures set out in the *Contract* itself. The purported termination was in fact breach of the *Contract* entitling the other party to damages.

¹¹ (1992) 92 ACL 601

**Contracting Essential for AS 4902-2000:
Part 3- Cleaning Up**

39.2 Contractor's default

If the Contractor commits a substantial breach of the Contract, the Principal may, by hand or by registered post, give the Contractor a written notice to show cause.

Substantial breaches include, but are not limited to:

- (a) failing to:
 - (i) perform properly the Contractor's design obligations;
 - (ii) provide security;
 - (iii) provide evidence of insurance;
 - (iv) comply with a direction of the Superintendent pursuant to subclause 29.3; or
 - (v) use the materials or standards of work required by the Contract;
- (b) wrongful suspension of work;
- (c) substantial departure from a program without reasonable cause or the Superintendent's approval;
- (d) where there is no program, failing to proceed with due expedition and without delay; and
- (e) in respect of clause 38, knowingly providing documentary evidence containing an untrue statement.

Subclause 39.2 permits the *Principal*, where the *Contractor* has committed a substantial breach of the *Contract*, to give the *Contractor* written notice to show cause why the *Principal* should not exercise the rights referred to in subclause 39.4 to either take any part or the whole of the *work* remaining to be completed, or terminate the *Contract*. The notice given by the *Principal* must be given either by hand or by registered post.

Subclause 39.2 sets out that certain breaches are for the purposes of the *Contract* substantial breaches the *Contract*. It is important to note that the substantial breaches set out in subclause 39.2(a)-(e) are not exhaustive. By subclause 39.2, the parties agree that such a substantial breach as listed in paragraphs (a)-(e) will amount to a repudiation of the Contract if cause is not shown by the *Contractor*. Breach of the *Contract* by the *Contractor* which is not specifically listed in subclause 39.2 must be proved by the *Principal* to be a substantial breach of the *Contract* in the particular circumstances if the notice is disputed or litigation ensues.

A notice alleging a breach of any of the breaches in subclause 39.2 (a)-(e) or any breach which is alleged to be a substantial breach must provide sufficient details of what the breach to enable the *Contractor* :

- to know what is alleged against the *Contractor*; and
- to what it is that the *Contractor* is required to show cause.

In *Matthews v Brodie*,¹² the court laid out guidelines as to the amount of detail required to be supplied in a show cause notice. The court stated:

'If the builder under the clause had an opportunity after the notice of preventing determination of the Contract by remedying the default, there is a basis for implying an obligation on the owner to specify the default in his notice. It is therefore not sufficient merely to assert in the notice the actual breach complained of. It is necessary to go further and to provide details of how it is put that the builder has breached the contract by supplying details of the conduct of the builder which constitutes that breach.'

The notice must supply sufficient details of the alleged breach so that the *Contractor* can answer the allegations of breach made against it.

¹²McGarvie J, 2 April 1980

**Contracting Essential for AS 4902-2000:
Part 3- Cleaning Up**

39.3 Principal's notice to show cause

A notice under subclause 39.2 shall state:

- (a) that it is a notice under clause 39 of these General Conditions;
- (b) the alleged substantial breach;
- (c) that the Contractor is required to show cause in writing why the Principal should not exercise a right referred to in subclause 39.4;
- (d) the date and time by which the Contractor must show cause (which shall not be less than 7 clear days after the notice is received by the Contractor); and
- (e) the place at which cause must be shown.

Subclause 39.3 sets out the procedural requirements of a *Principal's* notice to the *Contractor* to show cause. The courts interpret clauses such as clause 39 very strictly. If the clause sets out the procedural requirements for such a notice, those requirements must be strictly followed. A failure to comply strictly with the procedural requirements of the notice will render the notice ineffective and may result in the party serving the notice, if it acts further on the notice, itself being in breach of the *Contract*. The *Principal* must provide particulars of what is alleged against the *Contractor* so that the *Contractor* can show cause to it.

A notice given under subclause 39 must:

- state it is a notice given under clause 39 of the *Contract*. This is to make it clear to the *Contractor* that it is a notice requiring the *Contractor* to show cause and is not some other notice which does not necessitate such an immediate response from the *Contractor*;
- state the alleged substantial breach with sufficient particulars of the *Contractor's* alleged substantial breach sufficient for the *Contractor* to know what it is to which it must show cause;
- require the *Contractor* to show cause in writing why the *Principal* should not exercise a right referred to in sub clause 39.4;
- alert the *Contractor* to the fact that the *Principal* may either take the whole or part of the *work* to be completed by the *Contractor* out of the hands of the *Contractor* or the *Principal* may terminate the *Contract*;
- state the actual date and actual time by which the *Contractor* must show cause. That date and time so stated must not be less than 7 clear days after the notice is received by the *Contractor*. It is not sufficient for the notice to state that cause must be shown by the *Contractor* 'within 7 clear days after the notice is received'. As service of the notice must be by hand or by registered post the *Principal* must ensure it is received by the *Contractor* at least 7 clear days before the date specified in the notice.

It is recommended that a notice to show cause always be served by hand in order to be able to show that the notice was properly served and that it was served at least 7 clear days before the date stated in the notice by which the *Contractor* is to show cause. In this instance 7 clear days means that the day of service and the date shown in the notice by which cause is to be shown should not be counted.

If the notice is served by registered post, a longer period of time will be necessary to enable service to be effected. Clause 7(b)(iii) states that a notice shall be deemed to have been 3 days after posting. In order to be certain that the notice has been served at least 7 clear days before the date stated in the notice to show cause, it must be sent by registered post at least 12 days before the relevant date stated in the notice.

A failure to comply with any of the specific requirements of subclause 39.3 will render

the notice ineffective. If the Principal purports to act on the notice by taking over the work or terminating the Contract when the notice is defective, the purported action of the Principal will be invalid. The Principal itself may be in breach of the Contract, enabling the *Contractor* to have the right to repudiate or to claim damages subject to due notification under clause 41, for that breach of Contract.

The *Contractor* may show cause in two ways. It may:

1. remedy its breach complained of; or
2. whether or not the breach is capable of being remedied, it may provide an explanation or propose a course of action, which in effect constitutes sufficient cause for the *Principal* not to take the *work* out of the hands of the *Contractor* or to terminate the *Contract*.

Where the *Contractor* has purported to 'show cause', the *Principal* is required to give reasonable consideration to whether the *Contractor* has shown cause. A *Principal's* assessment will be tainted by unreasonableness when the *Principal* did not take into account all the relevant and available information when making its decision. For example in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*¹³ the court held that:

'Inherent in the notion of being "satisfied" is an ability to comprehend the factual background on which satisfaction is required...in my view, when the principal's mind... was so distorted by prejudice and misinformation that he was unable to comprehend the facts in respect to which he had to pass judgment.'

39.4 Principal's rights

If the *Contractor* fails to show reasonable cause by the stated date and time, the *Principal* may by written notice to the *Contractor*:

take out of the *Contractor's* hands the whole or part of the work remaining to be completed and suspend payment until it

- (a) becomes due and payable pursuant to subclause 39.6; or
- (b) terminate the *Contract*.

The *Principal's* right either to take out of the hands of the *Contractor* all or part of the work remaining to be completed, or to terminate the *Contract* is conditional upon the *Contractor* not having shown cause to a duly served show cause notice. The *Contractor* may fail to show cause in two ways:

1. it may fail to respond to the notice to show cause at all, in which case usually the *Principal* could proceed to exercise its option either to take the work or part of it out of the hands of the *Contractor* or to terminate the *Contract*; or
2. Alternatively, the *Contractor* may purport to show cause but not satisfy the *Principal* that it has shown due cause why the *Principal* should not exercise either of its rights under subclause 39.4.

For example, supposing the *Principal's* ground given in the notice to show cause is that the

¹³(1992) 26 NSWLR 234 at 276

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Contractor has substantially departed from a construction program without reasonable cause or the Superintendent's approval. In most instances, the Contractor would not be able to remedy such a breach, but it may offer an explanation as to why it has substantially departed from the construction program and, more particularly, may propose a course of action in the future, which will enable it to expedite its work, thereby satisfying the Principal that the Contractor can still complete the Works by the date for practical completion.

Since clause 20 imposes an obligation on the Principal to ensure the Superintendent acts reasonably in exercising the Superintendent's role and functions under the Contract, it could be argued that a similar obligation can be implied as applying to the Principal. The *Principal must* act reasonably in evaluating whether or not the Contractor has shown cause. The *Renard Constructions*¹⁴ case above the court held that since *Principal's* decision was based on a fundamental misunderstanding of the relevant matters and was grounded on misleading, incomplete and prejudicial information, the *Principal's* decision however honest was objectively unreasonable and therefore an invalid exercise of power.

In accordance with sub clause 39.4, the *Principal* must give a further written notice to the Contractor indicating which of these two options the *Principal* intends to take. If the *Principal* takes work out of the hands of the Contractor, the *Principal* must strictly comply with subclauses 39.5 and 39.6. This further notice does not have to be given by hand or by registered post, but must comply with the requirements of clause 7.

The *Principal* may suspend further payment to the Contractor until it becomes due and payable pursuant to subclause 39.6. The suspension of payment may be made in respect to payments then outstanding by the *Principal* to the Contractor, even if the Contractor is entitled to such payment by virtue of a progress certificate issued by the Superintendent pursuant to subclause 37.2(a).

Alternatively the *Principal* may exercise its right to terminate the Contract. If the *Principal* terminates the Contract, subclause 39.10 deals with the Principal's remedies, rights and liabilities under the Contract.

In cases of doubt whether the Principal should or should not exercise its rights either to take over work or terminate the Contract, the safe course for the Principal to take is to issue a notice of dispute under clause 42 or to take action if necessary to seek urgent declaratory relief under subclause 42.4 to have a court determine whether or not the Contractor has shown cause

39.5 Take out

The Principal shall complete work taken out of the Contractor's hands and may:

- (a) use materials, equipment and other things intended for WUC; and
- (b) without payment of compensation to the Contractor:
 - (i) take possession of, and use, such of the construction plant and other things on or in the vicinity of the site as were used by the Contractor;
 - (ii) contract with such of the consultants and subcontractors; and
 - (iii) take possession of, and use, such of the design documents, as are reasonably required by the Principal to facilitate completion of WUC taken out.

If the Principal takes possession of construction plant, design documents or other things, the Principal shall maintain them and, subject to subclause 39.6, on completion of the work taken out, shall return such of them as are surplus.

¹⁴(1992) 26 NSWLR 234 at 279

The Superintendent shall keep records of the cost of completing the work taken out.

Subclause 39.5 applies only when the *Principal* elects under subclause 39.4(a) to take out of the *Contractor's* hands, the whole or part of the *work* remaining to be completed pursuant to the *Contract*.

The Principal has extensive rights under the subclause to use materials, equipment and other things intended for WUC by the Contractor without payment of compensation to the Contractor, as well as to take possession of and to use such of the Contractor's construction plant and other things on or in the vicinity of the site as were being used by the Contractor. This also includes the Contractor's subcontractors' construction plant. It is submitted that the words 'other things' are sufficiently wide enough to permit the Principal also to use the Contractor's temporary works and materials intended for but not yet incorporated into the Works. It is however necessary for the Principal to be able to demonstrate that such construction plant and other things are necessary for the Principal to complete the work taken out of the Contractor's hands.

The Principal may also contract with such of the Contractor's subcontractors and consultants as are reasonably required by the Principal to facilitate completion of WUC. This provision in AS 4000-1997 ensures that if the Principal does exercise this power, it has the contractual right to contract with these persons, thereby preventing the Contractor seeking to prevent, by legal action, the Principal from taking over the Contractor's subcontractors and consultants to finish the work that they were carrying out for the Contractor pursuant to the Contract.

If the Principal takes possession of construction plant and other things as permitted under subclause 39.5, it must maintain them. Subject to the Principal's rights given under subclause 39.6 on completion of the work, it must also return such construction plant and other things as are surplus to completing the work taken out of the hands of the Contractor.

The *Superintendent* is obliged to keep records of the cost of completing the *work* so taken out of the hands of the *Contractor* by the *Principal*. The *Superintendent* is not obliged to keep daily records of this cost, but must keep sufficient records of the cost of completion to enable the *Superintendent* to issue the certificate required under subclause 39.6.

39.6 Adjustment on completion of work taken out

When work taken out of the Contractor's hands has been completed, the Superintendent shall assess the cost thereby incurred and shall certify as moneys due and payable accordingly the difference between that cost (showing the calculations therefor) and the amount which would otherwise have been paid to the Contractor if the work had been completed by the Contractor.

If the Contractor is indebted to the Principal, the Principal may retain construction plant or other things taken under subclause 39.5 until the debt is satisfied. If after reasonable notice, the Contractor fails to pay the debt, the Principal may sell the construction plant or other things and apply the proceeds to the satisfaction of the debt and the costs of sale. Any excess shall be paid to the Contractor.

If the work is taken out of the Contractor's hands and has been completed by the Principal, the Superintendent is then obliged to assess the Principal's cost to complete the work and to certify as moneys due and payable. The Superintendent must assess the difference between that cost and the amount that would have otherwise been payable to the Contractor had the work

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been completed by the Contractor. The Superintendent is also required in that certificate to set out the necessary calculations by which the Superintendent calculated the amount owing.

39.7 Principal's default

If the *Principal* commits a substantial breach of the *Contract*, the *Contractor* may, by hand or by registered post, give the *Principal* a written notice to show cause.

Substantial breaches include, but are not limited to:

- (a) failing to:
 - (i) provide security;
 - (ii) produce evidence of insurance;
 - (iii) rectify inadequate *Contractor's* access to the site if that failure continues for longer than the time stated in *Item 36(a)*;
 - (iv) rectify inadequate *Contractor's* possession of the site if that failure continues for longer than the time stated in *Item 36(b)*;
 - or
 - (v) make a payment due and payable pursuant to the *Contract*, and
- (b) the Superintendent not giving a *certificate of practical completion* or reasons as referred to in subclause 34.6.

39.8 Contractor's notice to show cause

A notice given under subclause 39.7 shall state:

- (a) that it is a notice under clause 39 of these General Conditions;
- (b) the alleged substantial breach;
- (c) that the *Principal* is required to show cause in writing why the *Contractor* should not exercise a right referred to in subclause 39.9;
- (d) the date and time by which the *Principal* must show cause (which shall not be less than 7 clear days after the notice is received by the *Principal*); and
- (e) the place at which cause must be shown.

39.9 Contractor's rights

If the *Principal* fails to show reasonable cause by the stated date and time, the *Contractor* may, by written notice to the *Principal*, suspend the whole or any part of *WUC*.

The *Contractor* shall remove the suspension if the *Principal* remedies the breach.

The *Contractor* may, by written notice to the *Principal*, terminate the *Contract*, if within 28 days of the date of suspension under this subclause the *Principal* fails:

- (a) to remedy the breach; or
- (b) if the breach is not capable of remedy, to make other arrangements to the reasonable satisfaction of the *Contractor*.

Damages suffered by the *Contractor* by reason of the suspension shall be assessed by the *Superintendent*, who shall certify them as moneys due and payable to the *Contractor*.

Subclauses 39.7 to 39.9 deal with the *Contractor's* rights when the *Principal* commits a substantial breach of the *Contract*. The procedures as to giving of notice by the *Contractor* to the *Principal* mirror the procedures applicable to the *Principal's* requirements under sub clause 39.3. It is important to note though that the rights of the *Contractor* if the *Principal* fails to show cause to the *Contractor's* notice to show cause are much more restricted than those rights given to the *Principal* under subclause 39.4.

The *Contractor* is obliged to give a written notice to show cause to the *Principal* if the *Principal* commits a substantial breach of the *Contract*, and such notice must be given either by hand or by certified post. Subclause 39.7 sets out a number of substantial breaches which obviates the need for the *Contractor* to prove that the particular breach is a substantial breach. Again the

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list is not exclusive, but the *Contractor* must prove that other breaches not listed in subclause 39.7(a) and (b), if asserted, are in fact substantial breaches.

Failure by the *Principal*:

- to provide *security would be a substantial breach only if Item 14 required the Principal to provide security and the Principal failed to provide it as required*;
- to produce evidence of insurance *would only be a substantial breach if the Principal was required under the Contract to take out either contract works insurance under Alternative 2 of clause 16 or public liability insurance under Alternative 2 of clause 17*;
- to rectify inadequate Contractor's possession of the site would only be a substantial breach if that failure continues for longer than the period stated in Item 31. Pending that time stated in Item 31 being reached, subclause 24.1 provides that a delay in giving possession is not a breach of the Contract but would be a ground for an EOT and usually would also be a compensable cause of delay under subclause 34.9; and
- to make a payment due and payable (normally under a *progress certificate*) pursuant to the *Contract* is a substantial breach.

The Contractor may, by written notice to the Principal, suspend the whole or any part of WUC. The Contractor shall remove the suspension if the Principal remedies the breach.

The *Contractor* may terminate the Contract, if within 28 days of the date of suspension the *Principal* fails to remedy the breach or if the breach is not capable of remedy, to make other arrangements to the reasonable satisfaction of the *Contractor*.

Damages suffered by the *Contractor* by reason of the suspension shall be assessed by the *Superintendent*, who shall certify them as moneys due and payable to the *Contractor*.

39.10 Termination

If the Contract is terminated pursuant to subclause 39.4(b) or 39.9, the parties' remedies, rights and liabilities shall be the same as they would have been under the law governing the Contract had the defaulting party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages.

If Alternative 2 of subclause 10.2 applies and the Principal has terminated the Contract, the Principal may also, without payment of compensation, take possession of the design documents.

This clause preserves each party's common law rights in respect to damages for breach of the *Contract*. It provides that if the *Contract* is terminated, each party's rights, remedies and liabilities are the same as they would have been under the law governing the *Contract* had the defaulting party repudiated the *Contract* and the other party had elected to treat the *Contract* as at an end and to recover damages.

This clause is necessary otherwise a party terminating the *Contract* pursuant to clause 39 may not be able to recover damages because of such breach.

A party terminating the *Contract* under subclause 39.4(b) or 39.9, as the case may be, may also at the same time exercise its common law rights to terminate the *Contract* as such

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common law rights to terminate the *Contract* are expressly preserved by subclause 39.1.

Insolvency

What is insolvency?

A company is insolvent where it is unable to pay its debts as and when they fall due for payment. An insolvency process may be brought by a creditor or creditors in respect of a company that is insolvent with the objective of producing payment (in whole or in part) of its unpaid debts.

39.11 Insolvency

If:

- (a) a party informs the other in writing, or creditors generally, that the party is insolvent or is financially unable to proceed with the *Contract*;
 - (b) execution is levied against a party by a creditor;
 - (c) a party is an individual person or a partnership including an individual person, and if that person:
 - (i) commits an act of bankruptcy;
 - (ii) has a bankruptcy petition presented against him or her or presents his or her own petition;
 - (iii) is made bankrupt;
 - (iv) makes a proposal for a scheme of arrangement or a composition; or
 - (v) has a deed of assignment or deed of arrangement made, accepts a composition, is required to present a debtor's petition, or has a sequestration order made, under Part X of the Bankruptcy Act 1966 (Cwlth) or like provision under the law governing the *Contract*; or
 - (d) in relation to a party being a corporation:
 - (i) notice is given of a meeting of creditors with a view to the corporation entering a deed of company arrangement;
 - (ii) it enters a deed of company arrangement with creditors;
 - (iii) a controller or administrator is appointed;
 - (iv) an application is made to a court for its winding up and not stayed within 14 days;
 - (v) a winding up order is made in respect of it;
 - (vi) it resolves by special resolution that it be wound up voluntarily (other than for a member's voluntary winding up); or
 - (vii) a mortgagee of any of its property takes possession of that property,
- then, where the other party is:
- (A) the Principal, the Principal may, without giving a notice to show cause, exercise the right under subclause 39.4(a); or
 - (B) the Contractor, the Contractor may, without giving a notice to show cause, exercise the right under subclause 39.9.

The rights and remedies given by this subclause are additional to any other rights and remedies. They may be exercised notwithstanding that there has been no breach of contract.

The essence of sub clause 39.11 is that if a party does commit an act of insolvency as listed in sub clause 39.11(a), (b), (c) or (d), the other party may exercise its rights without having to give a notice to show cause. A party may exercise a right given to it under sub clause 39.11, even though the other party might not be in breach of the *Contract* but has only committed an act of insolvency as listed in sub clause 39.11.

The effect of sub clause 39.11 is that if the Principal instead wishes to terminate the *Contract* because of an act of insolvency by the Contractor, it must give the Contractor the appropriate notice to show cause under subclause 39.3 which of course must specify and substantiate a substantial breach of the *Contract* by the Contractor. The act of insolvency itself would not be a substantial breach because of the provisions of the last paragraph under subclause 39.11. However if the insolvent Contractor was not proceeding with the work, the Principal would have the right to specify grounds under subclause 39.2 (c) or (d) as

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appropriate.

In the case of the Contractor, the Contractor must give a notice to suspend and then a notice to terminate the Contract if the breach is neither remedied nor other suitable arrangements to the satisfaction of the Contractor are made. Neither of these notices by the Contractor has to be given by hand or by registered post.

Subclause 39.11 makes it clear that the rights and remedies given under subclause 39.11 are in addition to any other rights and remedies of the party under the *Contract* and may be exercised notwithstanding that there has been no breach of the *Contract*.

40 Termination by frustration

40 Termination by frustration

If the Contract is frustrated:

(a) the Superintendent shall issue a progress certificate for WUC carried out to the date of frustration, evidencing the amount which would have been payable had the Contract not been frustrated and had the Contractor been entitled to and made a

progress claim on the date of frustration;

(b) the Principal shall pay the Contractor:

(i) the amount due to the Contractor evidenced by all unpaid certificates;

(ii) the cost of materials and equipment reasonably ordered by the Contractor for WUC and which the Contractor is liable to

accept, but only if they will become the Principal's property upon payment; and

(iii) the costs reasonably incurred:

(A) removing temporary works and construction plant;

(B) returning to their place of engagement the Contractor, consultants, subcontractors and their respective employees

engaged in WUC at the date of frustration; and

(C) by the Contractor in expectation of completing WUC and not included in any other payment; and

(c) each party shall promptly release and return all security provided by the other.

What is frustration?

Frustration has been defined as an 'act of extraneous unforeseen and irresistible cause which results in the automatic discharge of the *Contract*'¹⁵. It is the termination of a *Contract* by the operation of law without the fault of any party to the *Contract*. It refers to instances where the circumstances surrounding the performance of the *Contract* change so radically and fundamentally that:

- a. the *Contract* becomes incapable of being performed; or
- b. the performance called for in the in the (changed circumstances) is not that which the parties promised.

The frustration of a *Contract* will not be found lightly and broadly speaking the most usual circumstance in which it will be found is where there has been a supervening event. An example is a major landslip in the area of the area of an existing or proposed construction.

Frustration occurs automatically as opposed to a *Contract* that is terminated after one party's repudiation.

Effects of frustration

Common law

¹⁵ Taylor v Caldwell (1863)122 ER 309

When a *Contract* is terminated by frustration, the whole of the *Contract* is terminated. The *Contract* is treated as having existed until the point where the frustrating event occurred. Its effects at common law are profound as it means the total discharge of all unperformed obligations by either party with no means of redressing the imbalance of loss or advantage between the parties. At common law a *Contractor* who has performed work pursuant to a frustrated *Contract* is entitled to be remunerated for that work, even if the owner is unable to take the benefit of the work.

Clause 40

Clause 40 gives the parties certain rights to payment and to recovery of costs caused by the act of frustration and enables each party to recover security provided to the other party under the *Contract*.

Any accrued rights and obligations remain enforceable after the frustrating event. Some *Contract* clauses such as arbitration clauses may be held to survive the frustration of the contract.

Under clause 40 a *Superintendent* must issue a *progress certificate* to show the amount that would have been payable at the date of frustration had the *Contract* not been frustrated and had the *Contractor* been entitled to and had made a progress claim on the date of frustration of the *Contract*.

Clause 40 imposes the following obligations on the *Principal*:

- to pay the *Contractor* the amount due to the *Contractor* evidenced by all unpaid *progress certificates*;
- to pay the *Contractor's* cost of materials and equipment reasonably ordered by the *Contractor* for *WUC* for which the *Contractor* is liable to accept provided that they will then become the *Principal's* property once the *Contractor* has been paid for those materials and equipment.
- to pay the *Contractor's* costs reasonably incurred of removing *temporary works* and *construction plant* and to return to their place of employment the *Contractor*, its *subcontractors* and their employees engaged in *WUC* at the date of frustration.
- to pay the costs reasonably incurred by the *Contractor* in the expectation of completing *WUC* and not included in any other payment.

The clause appears to apply only to enable the *Contractor* to recover moneys uncertified as at the date of frustration of the *Contract*. The clause does not give the *Principal* a specific right to recover moneys outstanding to the *Principal* under the *Contract* as at the date of frustration. The clause only vests the *Superintendent* with jurisdiction to issue a *progress certificate*. It can be argued that if a *Superintendent* had issued a certificate under subclause 37.2(b) before the date of frustration of the *Contract*, then the *Principal* would be entitled to set off any unpaid subclause 37.2 (b) certificate against all unpaid *progress certificates* in favour of the *Contractor* including the certificate issued pursuant to clause 40.

Case law

The effects of the doctrine of frustration were considered by the High Court of Australia in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*¹⁶. In this case the construction *Contract* was held to be frustrated where a *Contractor* had planned to perform its works

¹⁶ (1982) 149 CLR 337

according to a particular approved programme which involved several shifts per day and weekend work, but after the project commenced the *Contractor* was effectively prevented from working to this programme by an injunction. The injunction was to prevent nuisance from the works where at the time of contracting neither party foresaw the possibility of an injunction being ordered.

The *Codelfa* case concerned a situation where performance of the *Contract* by the *Contractor* was rendered impossible due to supervening events. In contrast a *Contract* may still be frustrated even if performance of the relevant obligations under it is still possible, provided that the supervening event renders the performance of those obligations a pointless exercise. In *Brisbane City Council v Group Projects Pty Ltd*¹⁷ a property developer agreed with a local council that it would provide and fund certain infrastructure for a land development, which included the provision of infrastructure on land that was owned by the council. The land upon which the developer proposed to develop properties was subsequently resumed by the Crown, rendering the property development impossible. Nevertheless it was still possible for the property developer to construct the relevant infrastructure on the council land surrounding the intended development. Notwithstanding the fact that it was possible for the developer perform these obligations, it was held that the underlying purpose of the *Contract* between the developer and the council had been sundered by the compulsory resumption of the land by the Crown, thereby frustrating the *Contract*.

Legislation

In Australia, legislation concerning the consequences of the frustration of a *Contract* applies in New South Wales¹⁸, Victoria¹⁹ and South Australia²⁰. The author is not aware of any construction cases that have examined the operation of these statutes.

Disclaimer

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

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¹⁷ (1979) 145 CLR 143

¹⁸ *Frustrated Contracts Act 1978* (NSW)

¹⁹ *Frustrated Contracts Act 1959* (Vic)

²⁰ *Frustrated Contracts Act 1988* (SA)

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>Construction plant</i> means appliances and things used in carrying out <i>WUC</i> but not forming part of <i>the Works</i> .	
<i>Consultant</i> means any person engaged by the <i>Contractor</i> to perform consultancy services in connection with <i>WUC</i> and includes any <i>Principal's</i> consultant whose prior contract is novated to the <i>Contractor</i> .	
<i>Contract Sum</i> means: a) where the Principal accepted a lump sum, the lump sum; (b) where the Principal accepted rates, the sum of the products ascertained by multiplying the rates by the corresponding quantities in the schedule of rates; or (c) where the Principal accepted a lump sum and rates, the aggregate of the sums referred to in paragraphs (a) and (b), including provisional sums but excluding any additions or deductions which may be required to be made under the Contract;	
<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 10</i> as describing the <i>Principal's</i> project requirements include a preliminary design, developing the preliminary design;	
<i>date for practical completion</i> means: (a) where <i>Item 7(a)</i> provides a <i>date for practical completion</i> , the date; (b) where <i>Item 7</i> (b) provides a period of time for practical	See Defects Liability page 10-11

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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 there from;	
<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 Cleaning Up page 5-6
<i>Deed of guarantee, undertaking and substitution</i> has the meaning in subclause 5.6	
<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;	
<i>direction</i> includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement;	
<i>Legislative requirement</i> includes: (a) Acts, Ordinances, regulations, by-laws, orders, awards and proclamations of the jurisdiction where WUC or the particular part thereof is being carried out; (b) certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in connection with the carrying out of WUC; and (c) fees and charges payable in connection with the foregoing;	
<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	See Defects Liability page 10-11 See Cleaning Up page 5-6

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<p>minor defects:</p> <ul style="list-style-type: none"> (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>; <p>(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</p> <p>(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 <i>Works</i> have been supplied; preliminary design means the documents stated in <i>Item 11</i>;</p>	
<i>Preliminary design</i> means the documents stated in <i>Item 11</i> .	
<i>Principal</i> means the <i>Principal</i> stated in <i>Item 1</i> ;	See Default or Insolvency page 12-21
<p><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:</p> <ul style="list-style-type: none"> (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 cost objectives for <i>the Works</i>; and (c) where stated in <i>Item 10</i>, shall include a preliminary design; 	
<i>Program</i> has the meaning in clause 32	
<i>Progress certificate</i> has the meaning in clause 17;	
<i>Public liability policy</i> has the meaning in clause 17	

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<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;	
<i>Security</i> means: (a) cash; (b) retention moneys; (c) bonds or inscribed stock or their equivalent issued by a national, state or territory government; (d) interest bearing deposit in a bank carrying on business at the place stated in Item 9(c); (e) an approved unconditional undertaking (the form in Annexure Part B is approved) or an approved performance undertaking given by an approved financial institution or insurance company; or (f) other form approved by the party having the benefit of the <i>security</i> ;	
<i>Selected subcontractor</i> has the meaning in subclause 9.3	
<i>Subcontractor</i> in clause 3 and 9 include a <i>consultant</i> ;	
<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; Superintendent's Representative means an individual appointed in writing by the Superintendent under clause 21;	see Separable portions page 2 see Superintendent page 3-4 see Cleaning Up page 5-6 see Suspension page 7-9
<i>Temporary works</i> means works used in carrying out and completing WUC, but not forming part of the Works.	see Cleaning Up page 5-6 see Termination by Frustration page 22-24
<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	

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<i>Principal</i> ;	
<i>variation</i> has the meaning in clause 36;	
<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</p>	

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.	
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