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CONSTRUCTION MATTERS

July 2015

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Summary of Key Proposed Changes in AS 11000

Standards Australia has released a draft AS 11000, which is intended to supersede AS 2124-1992 and AS 4000-1997. Standards Australia states that the "objective of AS 11000 is to provide general guidance for legal contracts in all sectors of industry, including construction, engineering, health, manufacturing and infrastructure". AS 11000 was drafted to provide a more balanced approach to risk allocation between the Contractor and the Principal.

We have set out a summary of the key proposed changes in AS 11000 and identified the risk allocations for each proposed change as compared to the previous AS 2124 and AS 4000 contracts.

Proposed Change	Description	Risk Allocation
Good Faith	Subclause 2.1 of the draft AS 11000 contains a new obligation for the parties to act in good faith. However, 'good faith' is not defined. The previous obligation under AS 4000 for the Superintendent to fulfil its role and functions "reasonably and in good faith" has been removed. In the AS 11000, the Superintendent is only required to act "honestly".	Neutral
Early warning	Subclauses 2.2 to 2.5 of the draft AS 11000 initiate an 'early warning' procedure, where a party must notify the other party and the Superintendent as soon as it becomes aware of any event or circumstance that "may impact upon the time, cost, scope or quality" and "may become an issue". This is aimed at ensuring that issues are promptly resolved.	Neutral
Service of notices	The draft AS 11000 now allows for the service of notices by email. This is in addition to the other methods of service (e.g. fax, mail). This means that security of payment claims can be served by email.	Neutral
Programming	The draft AS 11000 requires the Contractor to submit a program to the Superintendent after accepting a tender. The program must be activity-based and time-linked, show the dates and times by which the work is to be carried out, and demonstrate how the Contractor will achieve practical completion on time.	More Principal-friendly
Interest rate	The draft AS 11000 proposes a drop in the prescribed interest rate to 12% (see item 31 in Part A). The interest rate was previously 18% in AS 2125 and AS 4000.	Neutral

Subcontracting	Clause 12 of the draft AS 11000 requires that the main Contractor use the AS 11002 subcontract conditions, with no other amendments or additions except those necessary to reflect the contract between the Principal and Contractor. Failure to use AS 11002 is proposed to constitute a substantial breach of the contract.	More Principal-friendly
Causes of delay	The draft AS 11000 contains provisions allowing the Contractor to claim an extension of time for any events beyond the reasonable control of the Contractor which cause delay and which occur before the date for practical completion. Delays occurring after the date of practical completion are separate grounds for an extension of time.	More Contractor-friendly
Notification of delay	The draft AS 11000 contains an obligation on a party who becomes aware of anything which will "probably cause delay" to promptly and in any event within 5 business days give the Superintendent and the other party written notice of the cause and the estimated delay. If it is the Contractor giving the notice, it must also state whether it anticipates claiming an extension of time for the delay.	More Principal-friendly
Overlapping delays	The draft AS 11000 proposes a new method for assessing an extension of time if there are two or more causes of delay which overlap. Unlike in clause 34.4 of AS 4000, the Superintendent is not required to apportion overlapping delays according to the respective causes' contribution. If not all those causes of delay would entitle the Contractor to an extension of time, then the Contractor will be entitled to an extension of time for the period of the overlap but not any delay damages (even where the cause of delay is an act of prevention).	More Contractor-friendly
Extensions of time	Clause 37.9 of the draft AS 11000 proposes an EOT regime as follows: • Within 20 business days of receiving an EOT claim, the Superintendent must assess and direct the EOT or request additional information reasonably necessary to assess the claim. • The Contractor must provide any additional information requested by the Superintendent within 20 business days. • The Superintendent must assess and direct the EOT within 20 business days after receiving the additional information from the Contractor. Failure to do so will automatically entitle the Contractor to an extension of time unless, the Superintendent or a party has issued an early warning notice in respect of that claim.	More Principal-friendly
Delay damages vs delay costs	The draft AS 11000 differentiates delay damages and delay costs under proposed clauses 37.22 and 37.23. Delay damages will only be available for delays caused by an act of prevention. Delay costs will only be available for delays arising out of variations.	Neutral
Prospective variations	The draft AS 11000 requires the Contractor to promptly, and in any event, within 5 business days, notify the Superintendent if the Contractor considers a direction by a Superintendent to be a variation. The Superintendent must then respond within 5 business days. If the Superintendent does not agree that the direction is a variation, the early warning procedure will apply. **Pricing Variations** Rates and prices for variations include an allowance for profit and overheads, unless otherwise stated. There is a specific right to recover delay costs for delays caused by a variation if not already priced as part of the variation.	More Contractor-friendly
Defects	Subclause 32.1 of the draft AS 11000 requires the Contractor to rectify any work upon becoming aware that such work does not comply with the contract, even in the absence of a direction from the Principal or Superintendent.	More Principal-friendly

Security of Payment (SOP) legislation	The draft AS 11000 contains a number of provisions to enable compliance with SOP legislations of the States and Territories. For example: • time is to be calculated in business days as defined in the relevant SOP legislation; • the Superintendent can receive payment claims and issue progress certificates on behalf of the Principal; and • payment claims and payment certificates issued under the contract are deemed to be payment claims and payment schedules under the SOP legislations.	Neutral
Dispute resolution	Clause 45 of the draft AS 11000 provides additional flexible dispute resolution procedures. There are options including conferences, mediation, arbitration, expert determination, litigation, contract facilitation, and a dispute resolution board.	Neutral

Contractors, Take Notice!

Facts

The proceedings arose out of a subcontract between John Holland Pty Ltd and CMA Assets Pty Ltd (**CMAA**), the plaintiff.

The works subcontracted to CMAA included the demolition of berths, berthing dolphins and mooring dolphins, which formed part of the works to upgrade and extend a wharf at Finucane Island.

CMAA brought claims against John Holland for variation and delay costs. The claims for delay were based on the subcontract provisions for extension of time and payment for delay.

The subcontract provided that CMAA would not be entitled to an extension of time (and delay costs as a result) unless it notified John Holland of:

- its intention to apply for an extension of time;
- an estimate of the length of the delay;
- the steps it will take to minimise delay;
- all the facts upon which the claim is based;
- the number of days of extension claimed; and
- the effect on the approved construction programme.

CMAA did not strictly comply with these notice requirements and sought to circumvent them by arguing that:

- it had notified John Holland of the likelihood of delay and that no further notice was required;
- it was never in a position to provide information on all of the notice requirements;
- a failure to give notice does not defeat a claim once and for all. Instead, CMAA are entitled to costs incurred before the period to which notice applies;
- a strict application of the subcontract is harsh and results in absurdity; and
- John Holland should be estopped (prevented) from relying on the notice provisions as the parties had adopted a convention by which they did not strictly comply with notice provisions throughout the course of performing the works.

The Decision

The Court applied the subcontract strictly and rejected CMAA's argument that it should be entitled to an extension of time.

The Court found that because CMAA had not complied fully with the notice requirements under the subcontract, an extension of time had not been triggered.[1] Accordingly, CMAA was not entitled to these specific delay costs.

Although a strict application of the subcontract may have been "harsh", the Court could not justify an interpretation of the subcontract which would contradict the clear wording of the subcontract.[2] This was especially the case given the provisions of the subcontract were designed to mirror obligations in the Head Contract.

Finally, the Court found that John Holland was permitted to rely on the notice provisions under the subcontract. There was not enough evidence to support the claim that there was a common assumption between the parties that they had dispensed with the need to comply with the notice provisions.[3]

Take Away Point

This judgment has important implications for all contractors who seek to claim delay costs under a contract. The judgment makes it clear that Courts will be reluctant to make a finding that a contractor is entitled to an extension of time in circumstances where the contract prescribes clear notice requirements which have not been met.

1 CMA Assets Pty Ltd (formerly known as CMA Contracting Pty Ltd) v John Holland Pty Ltd [No 6] [2015] WASC 217, [373].

2 Ibid, [375].

3 Ibid, [381].

Is There a Hidden Danger in WA High-Rise Buildings? Ripples of Alucobest Spread to WA

A smouldering cigarette butt on the eighth floor balcony of a high-rise building. The building, gleaming with its aluminium facade, rising into the sky. One would have thought that this could be an unexceptional scene in any city in Australia. But, within about 10 minutes, a wall of fire spreads up the external walls and balconies over 15 floors of the building. Approximately 400 occupants are evacuated, and property damage of about AU$5 million is sustained. Fortunately there was no loss of life, but this was self-evidently too close a call. A post-incident analysis report by the Melbourne Fire Brigade (**MFB**) concluded that the external Alucobest aluminium cladding contributed to the rapid vertical spreading of the fire. The MFB also found that the Alucobest cladding breached BCA applicable requirements as to non-combustibility.

The fire incident occurred at the Lacrosse Docklands building, a 23-story residential and retail building, on 25 November 2014. While alarming in itself because of the potential for risk to life and limb, this incident revealed a potential hidden safety risk in Australian high-rise buildings – combustible external aluminium cladding.

The fire has led to concern as to the extent to which non-compliant combustible external cladding such as Alucobest has been used in Australian high-rise buildings. The Victorian building regulator, Victorian Building Association (**VBA**), has sprung into action, by contacting about 20,000 building practitioners in Victoria to request information about possible non-compliant use of cladding. VBA has also used coercive powers to compel the Lacrose Apartment builder, L U Simon, to disclose any other buildings where they were used.

This has led to ripple effects nationwide, including in WA, where the Western Australian Building Commission (**WABC**) issued Industry Bulletin 54 "External wall cladding – fire safety" dated 28 May 2015, advising that:

> "*Fire safety concerns have been raised on the use of certain aluminium composite panels for external wall cladding where that product had not been tested to meet the requirements of the Building Code of Australia (BCA) for that use. Such products can lead to rapid vertical spread of fire via the façade of the building which raises serious safety concerns.*"

The WABC also recently worked with the City of Perth to determine whether the use of external cladding similar to that used at the Lacrosse Building in a Perth CBD building complied with fire performance requirements of the BCA. In that instance, the WABC found that the fire-rated version of Alucobest used met building standard specifications.

The City of Perth has been in the process of auditing up to 70 buildings identified as potentially high-risk to determine if non-compliant combustible external cladding has been used. It was reported that, as recently as last week, nine apartment buildings in the City of Perth have some form of external aluminium cladding.

The potential identification nationwide and in WA of more non-compliant cladding may ultimately result in liability on the part of designers and builders and associated litigation.

Importance of Strategy Negotiation, Claims and Disputes

Strategic thinking is a major part of how to present and respond to claims and how to conduct all forms of dispute resolution.
Each case is unique. But there are lessons learnt from similar situations that can be taken into account as part of a plan to achieve an optimal outcome.

Effectively using past lessons comes from experience. Partners Brendan Reilly and Greg Steinepreis have over 50 years of collective experience in claims and dispute resolution. They recently shared some of that collective experience, as well as giving general insights into strategic thinking on claims and disputes, during a presentation that was warmly received by those in attendance. Following are some key takeaway points.

- An effective strategy is vital.
- Know your objective. Know your opponent.
- Set strategy. Set plans to execute strategy.
- Have command of the contract and the facts.
- Focus on issues that advance attainment of objective. Don't be distracted by extraneous matters.
- Legal and commercial strategies must be synchronised.
- All players, at every level, need to commit to strategy.
- Clearly define roles, responsibilities and deliverables.
- Accountability is critical.
- Small, focused teams work best.
- Fight from a position of strength.
- Maintain credibility.
- Enhance strengths; minimise weaknesses.
- Hit deadlines. Be disciplined. Be clinical.

Events Update

Advance Notice – Next Construction Breakfast Briefing

The next breakfast briefing will be:

'***A Conversation with Richard Mickle***'

Join us for an informal but illuminating chat with Richard Mickle. Richard was state manager of major contractor John Holland in WA and then MD of infrastructure advisory firm Appian Group before that group joined PwC Perth this year. He performed key recent roles in relation to the delivery of Fiona Stanley Hospital, Elizabeth Quay and the new stadium.

Thursday 13 August

7:15 a.m. for 7:30 a.m. breakfast, 8 a.m. seminar

Venue – Squire Patton Boggs, Level 21, 300 Murray St Perth

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