# WHEN DOES AN ARBITRATION COMMENCE?

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## INTRODUCTION

As a preliminary issue one must not confuse the issue of the time of commencement of an arbitration with the later in time, related but different issue, of when the Arbitrator enters into the reference. The commencement of an arbitration, pursuant to the *Commercial Arbitration Act*, (1984) NSW ("the Act"), requires both the arising of a dispute and the appointment of an Arbitrator, and that each of these events be communicated by a way of notice to the other party. The identification of the point of time when both requirements are fulfilled can be important for instance if agreed time bans are an issue, or if other matters of dispute arise between the parties after the fulfilment of both limbs, or the matters in issue between the parties change between the two events occurring. This paper will deal with some of the issues arising from the question of commencement, taking account of the industry standard contract clauses for the construction industry.

## STATUTORY PROVISIONS – NSW

The relevant statutory provisions for NSW include:

### Commercial Arbitration Act (1984) NSW

(a) **Deeming provision** – section 3(5)

This section states the conditions under which an arbitration shall be deemed to have commenced. The provision reads as follows:

> "For the purposes of this section, an arbitration shall be deemed to have been commenced if –
>
> (a) a dispute to which the relevant arbitration agreement applies has arisen; and
>
> (b) a party to the agreement –
>
> (i) has served on another party to the agreement a notice requiring that other party to appoint an arbitrator or to join or concur in or approve of the appointment of an arbitrator in relation to the dispute;
>
> (ii) has served on another party to the agreement a notice requiring that other party to refer, or to concur in the reference of, the dispute to arbitration; or
>
> (iii) has taken any other step contemplated by the agreement, or the law in force at the time the dispute arose, with a view to referring the dispute to arbitration or appointing, or securing the appointment of, an arbitrator in relation to the dispute."

(b) **Extension of time** – section 48
This section of the Act gives the court power to extend the time fixed by an arbitration agreement (either before or after that time) for the doing of an act or taking any proceeding, either in, or in relation to, an arbitration. The court will extend the time provided the circumstances are such that undue hardship will be caused if time is not extended, and the extension does not contravene the provision of any enactment limiting the time for the commencement of arbitration proceedings.

(c) **Extension of the dispute to other matters not covered in the notice** – section 25
Where the parties agree to extend the ambit of the arbitration proceedings that are underway, the arbitrator may elect to make an order directing that the arbitration be extended so as to include the further dispute provided it is made before the final award in relation to the first dispute. The order may be made on such terms and conditions as the arbitrator thinks fit.

(d) **Consolidation of arbitration proceedings** – section 26
Under this Section, the Arbitrator may order (or provisionally order) or the Court may order, where the Arbitrator has failed or refused to make an order, that arbitration proceedings be consolidated, heard at the same time or stayed where two or more arbitration proceedings have a common question of law or fact, the rights to relief claimed arise out of the same transaction or series of transactions or some other reason makes it desirable to make the order. Note that the proceedings may continue pending a consolidation application (Section 26(6)); that there need not be the same parties in all proceedings (Section 26(7)), and the parties can in any event agree to consolidate (Section 26(8))."

(e) **The cost of arbitration terminated before award** – section 36
This provision has not been dealt with in this paper in any detail.

(f) **Exclusion agreements** – section 40
The Act also provides for agreements between the parties that exclude the right of appeal under section 38(2) of the Act, in relation to questions of law arising out of an award in the course of arbitration.
Pursuant to section 40(6), an exclusion agreement will be invalid where it is a "domestic" arbitration agreement unless entered into after the commencement of the arbitration.
Where the arbitration agreement is not "domestic", an exclusion agreement becomes effective whenever it is made. There are certain exceptions to this general rule (outlined in section 41(1)) which are only effective where either:
(i) the exclusion agreement is entered into after the commencement of the arbitration (section 41(1)(d));
(ii) the contract is expressed to be governed by a law other than the

law of New South Wales (section 41(1)(e)).
This paper does not expand on the topic of exclusion agreements.

**LIMITATIONS ACT (1969) (NSW) – section 72**
The relevant statutory limitation provisions for NSW include sections 69-73 of the *Limitation Act* (1969) (NSW). Specifically, the provisions contained in section 72(1) are relevant to the question of commencement of arbitration. The section states that an arbitration is commenced between the party giving notice and the party receiving the notice on the date when notice is received.

**THE DISPUTE AND THE RELEVANT ARBITRATION AGREEMENT**
Section 4 of the Act defines an "arbitration agreement" to mean "an agreement in writing to refer present or future disputes to arbitration".

Determining the scope of an arbitration agreement necessarily involves consideration of, on the one hand, the parties freedom to contact and on the other, the jurisdiction of the courts to intervene in arbitration agreements. If the arbitration agreement is a pre-dispute agreement, as is the case with all the construction industry standard contracts and is couched in wide terms, for example "in respect of, or with regard to, this agreement", then the Courts are reluctant to read it down. A wide arbitration agreement clause, such as "in respect of", can be interpreted to mean "in connection with" (See *Patterson v Chadwick* [1974] 2 AER 772). Similarly, the clause has been interpreted as "the widest possible meaning of any expression intended to convey some connection or relation between two subject matters" (*Trustees Executors & Agency Company Limited v Riley* [1941] VCR 110 at 111) On other occasions "in respect of" may be interpreted in a narrow way. (See *Achbar v CF Green & Co Limited* [1975] 1 QB 582) (Sharkey & Dorter, Commercial Arbitration at 22) It is apparent therefore that it depends on the context as to how the Court will interpret the subject matter or scope of the agreement.

In Australia, there are strong judicial statements favouring the freedom of parties to make arbitration agreements and for the courts to uphold those agreements: see *Tuta Products Pty Limited v Hutcherson Bros Pty Limited* (1972) 127 CLR 253 at 257-58 per Barwick CJ. Where however the arbitration is specifically framed for a particular dispute, then the interpretation and the application of the agreement to the dispute will be more problematic.

**NOTICE TO APPOINT AN ARBITRATOR**
The date of appointment of an arbitrator may be important in determining what disputes come within the Arbitrator's jurisdiction. Subject to the content of the notice of dispute, disputes referred by an arbitration clause in a contract include all disputes within the contemplation of the clause up to the date of the appointment of the arbitrator. Disputes arising after the date of appointment must be the

subject of separate proceedings unless the parties agree to the contrary *(Cory Bros & Co Limited v Universe Petroleum Co Limited (1933) 46 L Rep 312).*

## NOTICE COMMENCING ARBITRATION

### Agreed procedure

Where there is a procedure agreed between the parties, it must be followed for the arbitration to commence: *Transpelrol Ltd v Ekali Shipping Co Limited* [1989] 1 Lloyd's Rep 62. (Jacobs p. 1143).

### No agreement between the parties

The requirements for a notice of the commencement of arbitration, where there has not been any agreement as to procedure, were clearly laid out in *Nea Agrex SA v Baltic Shipping Company Limited* [1976] QB 933. It was held in this case that in order to commence arbitration there must be a notice in writing served by the one party on the other party, requiring the other party, either:

(i) to appoint an arbitrator; or

(ii) to agree to the appointment of an arbitrator.

The first alternative (under (i)), is appropriate where the reference concerns two arbitrators, one to be appointed by each party. In such cases, the arbitration is deemed to have commenced when the one party expressly or by implication requires the other party to appoint her or his arbitrator.

The second alternative (under (ii)), is appropriate in the event of a reference to a single arbitrator. The arbitration is then deemed to have commenced when one party, expressly or by implication, indicates to the other that it is appropriate to submit the dispute to arbitration in accordance with the agreement (Jacobs page 1143 [3.390]).

The approach taken in *Nea Agrex* is consistent with Australian authority: *Gosford Meats Pty Limited v Queensland Insurance Company Limited* [1970] 3 NSWLR 400. It was held in *Gosford Meats* (at 405) that:

> "All that is necessary is a manifestation, sufficiently clear and certain, of an intention or desire that there should be arbitration. There must of course be an existing unresolved difference; but it is not essential that the nature of this difference be stated as part of what is only a manifestation of the intention or desire of the parties with respect to a matter which is common ground between them"

It should be noted however, that although it is not necessary to precisely indicate one's intention to arbitrate, the general intention has to be expressed to the other party rather than the Architect. In *Blackpool Borough Council v F Parkinson Limited* (1993) 9 CLJ 29, a standard JCT agreement was entered between the Defendant/Contractor and the Plaintiff/Employer with regard to building works. One month after practical completion, the Defendant claimed for loss and expense under clauses in the contract. Some preliminary steps were taken towards the appointment of an arbitrator at this time include a letter to the Architect

requesting the appointment of an Arbitrator. Almost one year later, the Architect issues a final certificate. The Defendant solicitor then sent the Plaintiff a formal notice of arbitration in which the Plaintiff was requested to concur with the appointment of an Arbitrator.

The matters at issue were whether an arbitration "commenced" for the purposes of the standard form contract; whether service of a letter on an Architect requesting appointment of an Arbitrator was sufficient service upon the Plaintiff such as to prevent the final certificate having conclusive effect; whether a notice of arbitration was effective to prevent the final certificate having conclusive effect; and whether a formal notice of arbitration was sufficient to commence arbitration and prevent a final certificate from having conclusive effect.

It was held that no precise form of words was necessary, and that a letter was sufficient to bring about the commencement of an arbitration. However, the letter requesting the appointment of an Arbitrator was not served directly on the other party but was instead sent to the Architect. Service upon the Architect was held not sufficient service upon the employer and for that reason the letter did not commence an arbitration.

**EXTENSION OF TIME – section 48**

As previously stated, the issue of the point of time at which an arbitration actually commences, can be critical where there is a time bar. The consequences of being out of time may be such that the right to arbitrate is lost (but the Claimant can still litigate in Court). On other occasions a substantive right may be at risk.

In *Gosford Meats Pty Limited v Queensland Insurance Co Limited* [1970] 3 NSWLR 400, for example, although the parties had exchanged correspondence outlining their individual claims and denying liability and had even chosen an Arbitrator, the Court held at first instance that as nothing further had been done before the time expired, the dispute had not been referred to arbitration within the time bar. This decision was overturned on appeal The Court of Appeal held (at 405) that there had been a reference to arbitration within time as:

> "All that is necessary is a manifestation, sufficiently clear and certain, of an intention or desire that there should be arbitration. There must of course be an existing unresolved difference; but it is not essential that the nature of this difference be stated as part of what is only a manifestation of the intention or desire of the parties with respect to a matter which is common ground between them. The issues will become known to the Arbitrator or Arbitrator's in due course when the appointment as such is accepted and the reference is entered upon.... But for the moment it is sufficient that the parties are actually aware of what it is they intend or desire should be arbitrated upon."

The Act gives statutory support pursuant to section 48, to the view that the consequences of a time bar can produce "undue hardship". Section 48(3) states that an order shall not be made unless "the Court is satisfied that in the circumstances of the case undue hardship would otherwise be

caused". "Undue hardship" means extensive hardship. The Court takes the following into account when deciding whether such hardship is in existence: the length of delay; whether the delay was due to the fault of the Claimant or to circumstances beyond his control; if due to the fault of the Claimant, the degree of that fault; whether the Claimant was misled by the other party; whether the other party had been prejudiced by the delay and, if so, the degree of that prejudice; and the amount at stake. (Sharkey & Dorter, op.cit., at 32).

Of overall importance is the construction of the contract to arbitrate. Depending upon the construction, it may be possible to reach back into earlier clauses and couple them with a newly arising dispute so that the new dispute can be referred to arbitration. It is apparent that the possibility of such a unification of disputes depends upon whether the drafting of the claims and disputes clauses in the particular contract puts the claims "hand in hand" with the arbitration commencement (see: *Jadranska Sloboldna Plovidba v Oleagine S.A.* [1984] 1 WLR 300). (Sharkey & Dorter, op. cit., at 32).

## EXTENSION OF THE DISPUTE TO OTHER MATTERS NOT COVERED IN THE NOTICE – section 25

The notice of dispute is the primary means by which a dispute is referred to arbitration. Subject to the provisions of the arbitration agreement, the notice may be cast in either wide or narrow terms at the parties discretion. Strictly speaking, the scope of the arbitration is limited to the matters raised within the notice of dispute as agreement between the parties is required before the ambit of arbitration proceedings can be extended (pursuant to section 25 of the Act), and the arbitrator has no jurisdiction to hear matters falling outside the scope of the arbitration as originally defined.

A Claimant may think there is a tactical advantage in giving a narrow notice of dispute. Where a respondent has a cross-claim falling within the arbitration agreement, that claim is limited to the matters contained in the notice. As a result the cross-claim may be reduced to a pure defence and the respondent will then have to serve a separate notice of dispute for further arbitration proceedings on the claim.

However, the Claimant may face problems as it is difficult to have the ambit of the notice enlarged once it has been served. As a consequence, a separate notice would have to be served for those claims falling outside the scope of the first arbitration (See: *Halinka (Sydney) Pty Ltd v Magney & Ors* (Supreme Court of NSW, Common Law Division, Smart J, 12 July 1985, unreported) for an example of the problems that can arise where a subsequent notice of dispute is required to broaden the ambit of the original notice of dispute).

Alternatively, a Claimant may sometimes wish to enlarge the terms of notice of dispute previously given. This may be because of further facts

coming to light, or alternatively, a lack of sufficient preparation.

The contract between the parties may provide for consolidation of disputes. Where such clauses exist the prima facie power rests with the party wishing to consolidate the disputes. Nevertheless it is subject to whatever conditions the Arbitrator may deem appropriate in the particular factual circumstances. Where there is no such clause in existence the parties have to rely upon section 25 of the Act. Either way the factors which need to be considered in determining whether or not the disputes can be consolidated include: the stage of the arbitration at which the application is made; the potential prejudice to either party; the type and extent of nexus between the different disputes; and the time and cost of allowing the dispute in. (Sharkey & Dorter, op. cit., at 43).

The problems that may arise over consolidation of disputes were highlighted in the matter of *Commissioner of Main Roads v Citra Constructions Limited* (Supreme Court of Western Australia, Olney J 19 February 1985, unreported). In this matter, the Claimant had different claims arising at various stages during the disputes procedure. The Court considered correspondence between the parties pertaining to the agreement (or lack thereof), to a proposal for an Arbitrator to deal with the disputes, and also examined minutes of the preliminary conference. It was held that although the parties themselves were unable to agree about what it was they agreed to submit to arbitration, on the evidence, the matters of dispute had been consolidated. (Sharkey & Dorter, op. cit., at 43).

Where an Arbitrator takes the view that it is too early to decide whether the ambit or scope of an arbitration should be extended, he will surrender his jurisdiction to the Court once the disputes have crystallised into separate arbitration proceedings. The question of consolidation is then one to be taken up by the Court, not the Arbitrator pursuant to section 26 of the Act. (Sharkey & Dorter, op. cit., at 44).

**STATUTORY LIMITATION AND NOTICE**

A respondent can rely upon a statutory time limit, which applies to arbitration, as a defence to a claim only if the time limit has expired. To prevent an arbitration from being barred by lapse of time, a claimant must properly serve a notice upon the defendant.

Section 72(1) of the *Limitations Act* (1969) (NSW) provides that an arbitration is commenced between parties on the date when one party gives a notice to the other, requiring the other party to appoint or concurring with the appointment of an arbitrator, or, where the arbitration agreement so provides, submit or concur in the submission of the difference or matter to a person named.

Where an arbitration agreement is in existence, it is desirable that the notice of dispute conform precisely with the provisions of that agreement. However, failure to do so can be overcome by serving a new valid notice,

provided the time for service has not expired. Similarly, the court does not adopt an unduly strict or technical approach to the requirements of a valid notice. For example, in the matter of *Presbyterian Church (NSW) Property Trust v Rodean Constructions Pty. Ltd.* [1982] 2 NSWLR 398, it was decided that a notice is not necessarily invalid because a machinery provision in the arbitration agreement has not been strictly followed.

The *Limitations Act* (NSW) does not prescribe any other requirements for a valid notice. It is important to note that section 34 of the *English Limitations Act* 1980, upon which the Australian provisions have been modelled, is similarly unclear as to the level of detail required in a notice.

**INDUSTRY STANDARD DISPUTE CLAUSES**

The Australian Standard AS2124-1992 includes clauses 47.1 ad 47.2 which outline the requirements for notice and conciliation where disputes arise between the parties. Similar clauses are included in the Building Works Contract – JCC-A 1993 at section 13. Further, the government recently released new dispute resolution clauses to be used in conjunction with AS 2124 – 1986. (Each of these sets of clauses are attached to this paper at Annexures A, B and C respectively). The government has also released clauses for use with NPWC3 (1981) which are not extracted in this paper.

Dispute resolution clauses such as those contained in NPWC3 (1981) emphasise the procedures for settling disputes. These clauses were known as "Caesar to Caesar" clauses. Where a dispute arose, either party to that dispute would generally give written notice to the superintendent and then plead a case for the superindentent's determination. A party that was dissatisfied with the superintendent's determination (or lack thereof) was able to give written notice to the other party requiring that the matter at issue be referred to arbitration. These clauses have given way to the current preference for conciliation prior to arbitration commencing.

Clause 47.1 of AS2124-1992 requires a notice of dispute, delivered by one party to the other, adequately identifying and providing details of the dispute. Clause 47.2 provides two alternative "conciliation" steps which are required to commence within 14 days after service of a notice and before proceeding with the arbitration. Each alternative states that notice is to be given by one party to the other where the dispute cannot be resolved or "if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute", and the dispute is to be referred to either arbitration or litigation. It is important to note that there is only a time limit on the commencement of the conciliation process – not on carrying it out.

Section 13 of the Building Works Contract – JCC-A 1993 deals with dispute resolution in a similar two stage manner. The section requires at clause 13.02 that;

> "within ten (10) days after service of a notice of dispute (pursuant to 13.01)... the parties shall confer at least once,... to attempt to resolve the dispute and failing

resolution of the dispute, to explore and if possible agree on methods of resolving the dispute by other means."

Where the dispute cannot be resolved in accordance with clause 13.02, the dispute may be referred to arbitration or litigation.

"Conciliation" intervenes between the serving of the initial notice of dispute and the commencement of the reference. The advent of the "conciliation" process via these standard form contract clauses, focuses on the issue of when an arbitration commences. The process highlights the problems caused by new disputes arising between the parties or the disputes broadening after the service of the notice of dispute and before the reference to arbitration. Issues raised by section 25 and section 26 of the Act will become more common as a result.

**When does an arbitration commence where a standard from contract has been used?**

Prior to the advent of the conciliation process, and the decision in *Turner Corporation Limited c Austotel Pty Ltd* (1992) 27 NSWLR 592, it was unclear whether the standard form contract arbitration clause constituted an "agreement" for the purposes of the Act.

The decision in *Hammond v Wolt* [1975] VR 108 dealt with the "arbitration" clause in the JCC standard form contract, in a situation where one party to an arbitration agreement made an application to stay court proceedings (the equivalent application in NSW would be made pursuant to S.53 of the Act). The application was unsuccessful as it was held that the clause did not constitute an "agreement" to arbitrate for the purposes of the Act because it provided the arbitrator with a discretion to either "arbitrate" or "assess" the dispute between the parties. It was held that the applicant must be able to demonstrate that, at the time of commencement of proceedings, there is a binding agreement to submit differences to arbitration.

This decision gave rise to an important question: where there is an agreement to arbitrate which also allows a dispute to be resolved by litigation, must the option to arbitrate be exercised *prior* to the litigation proceedings? The finding suggests that the answer to this question was no.

The relevant standard form clause in *Hammond's case*, was designed to give a party notice of the dispute before the commencement of proceedings, whether by arbitration or litigation. The clause did not provide for any time to elapse after the issue of the notice before litigation could commence. It was conceivable therefore, that litigation proceedings could begin immediately after the issue of the notice of dispute, pursuant to the arbitration clause. The party receiving the notice would therefore involuntarily forfeit his right to have the dispute resolved by arbitration, simply because the issuer of the notice moved quickly to litigation. This scenario defeated the intention of s.53 which allows a party to an arbitration agreement to bring a stay application.

It is now law in New South Wales that clause 13 of the JCC standard form contract constitutes an "agreement to arbitrate" for the purposes of section 53 of the Act: *Turner Corporation Limited v Austotel Pty Ltd* (1992) 27 NSWLR 592. This being so, is the arbitration deemed to have commenced (where a standard form arbitration clause has been used by the parties) after the conciliation process has failed?

In the *Austotel* case, Turner Corp. claimed by summons, certain declarations and orders in relation to its entitlement to extension of time and payment under a contract for the construction of the Rest Hotel at Milsons Point. Austotel sought an order that the proceedings be stayed pursuant to Section 53(1) of the Act.

The JCC-A 1985 contract provided at clause 13.01 for the issuing of a notice of dispute as a "condition precedent to the commencement by either party of proceedings, whether by way of litigation or arbitration...". Clause 13.02 then provided for the deposit of security and the issue of a notice requiring that the dispute be referred to arbitration. This notice is known as the Notice of Referral to Arbitration.

Three issues arose for determination in this particular case:

(1) Was there an "arbitration agreement" within the meaning of the Act?

(2) Should the matter be referred to arbitration?

(3) Was Austotel ready willing and able to do all things necessary for the proper conduct of the arbitration?

Turner submitted that there was no agreement to refer disputes to arbitration, and the parties were only bound to arbitrate where a notice of referral to arbitration was issued. Mr Justice Giles rejected this submission. His Honour, having considered *Hammond v Wolt* and *Woolworths Ltd v Herschell Constructions Pty Ltd* (In Liq), (both cases dealt with the JCCA 1985 form contract), stated (at 599):

> "I have some difficulty with the proposition... that the agreement to refer a dispute to arbitration and the referral itself are the one and the same thing, because they are not – the referral to arbitration occurs only because of the prior agreement of the parties that there shall be a referral when an election is made by giving the Notice of Referral to Arbitration."

Mr Justice Giles went on to say (at 601):

> "... in my opinion Clause 13 of the contract constitutes an agreement for the purposes of section 53 of the Act because Turner and Austotel agreed that disputes between them would be referred to arbitration if one of them gave to the other a Notice of Referral to Arbitration (and complied with Clauses 13.02.01 and 13.02.03), that being in my view an agreement to refer disputes to arbitration."

His honour then considered the matters required to be shown in support of an application for a stay under Section 53 of the Act, and having found that the matters raised were clearly appropriate for arbitration, made an order staying proceedings.

## ANNEXURE A – ASAS 2124 – 1992 CONTRACT

### 47 DISPUTE RESOLUTION

**47.1 Notice of Dispute**

If a dispute between the Contractor and the Principal arises out of or in connection with the Contract, including a dispute concerning a direction given by the Superintendent, then either party shall deliver by hand or send by certified mail to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.

Notwithstanding the existence of a dispute, the Principal and the Contractor shall continue to perform the Contract, the subject to Clause 44, the Contractor shall continue with the work under the Contract and the Principal and the Contractor shall continue to comply with Clause 42.1.

A claim in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration, may be included in an arbitration.

**47.2 Further Steps Required Before Proceedings**

*Alternative 1*

Within 14 days after service of a notice of dispute, the parties shall confer at least once, and at the option of either party and provided the Superintendent so agrees, in the presence of the Superintendent, to attempt to resolve the dispute and failing resolution of the dispute to explore and if possible agree on methods of resolving the dispute by other means. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute.

In the event that the dispute cannot be so resolved or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may by notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration or litigation.

*Alternative 2*

A party served with a notice of dispute may give a written response to the notice to the other party and the Superintendent within 28 days of the receipt of the notice.

Within 42 days of the service on the Superintendent of a notice of dispute or within 14 days of the receipt by the Superintendent of a notice of dispute or within 14 days of the receipt by the Superintendent of the written response, whichever is the earlier, the Superintendent shall give to each party the Superintendent's written decision on the dispute, together with reasons for the decision.

If either party is dissatisfied with the decision of the Superintendent, or if the Superintendent fails to give a written decision on the dispute within the time required under Clause 47.2 the parties shall, within 14 days of the date of receipt of the decision, or within 14 days of the date upon which the decision should have been given by the Superintendent confer at least once to attempt to resolve the dispute and failing resolution of the dispute to explore and if possible agree on methods of resolving the dispute by other means. At any such conference, each party shall be represented by a person having authority to agree to a resolution of the dispute.

In the event that the dispute cannot be so resolved or if at any time after the Superintendent has given a decision either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may, by notice in writing delivered by hand or sent by certified mail to the other party, refer such dispute to arbitration or litigation.

**47.3 Arbitration**

Arbitration shall be effected by a single arbitrator who shall be nominated by the person named in the Annexure, or if no person is named, by the Chairperson for the time being

of the Chapter of the Institute of Arbitrators Australia in the State or Territory named in the Annexure. Such arbitration shall be held in the State or Territory stated in the Annexure.
Unless the parties agree in writing, any person agreed upon by the parties to resolve the dispute pursuant to Clause 47.2 shall not be appointed as an arbitrator, nor may that person be called as a witness by either party in any proceedings.
Notwithstanding Clause 42.9, the arbitrator may award whatever interest the arbitrator considers reasonable.
If one party has overpaid the other, whether pursuant to a Superintendent's certificate or not and whether under a mistake of law or fact, the arbitrator may order repayment together with interest.

**47.4 Summary or Urgent Relief**
Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under Clause 42 or to seek urgent injunctive or declaratory relief in respect of a dispute under Clause 47 or any matter arising under the Contract.

## ANNEXURE B - JCC-A 1993 CONTRACT

### SECTION 13. DISPUTE RESOLUTION

**13.01 Notice of Dispute**
In the event of any dispute or difference arising between the Proprietor (or the Architect on his behalf whether or not acting under paragraphs 5.02.01 or 5.02.02) and the Builder (subject to the provisions of Clause 6.09) at any time as to the construction of this Agreement or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith then either party may give to the other notice in writing which shall be delivered by hand or sent by certified mail adequately identifying the matters the subject of that dispute or difference and the giving of such notice shall be a condition precedent to the commencement by either party of proceedings (whether by way of litigation or arbitration) with regard to the matters the subject of that dispute or difference as identified in that notice.

**13.02 Private Negotiation**
Within ten (10) days after service of a notice of dispute referred to in Clause 13.01 the parties shall confer at least once, but at the option of either party and provided the Architect so agrees, in the presence of the Architect, to attempt to resolve the dispute and failing resolution of the dispute, to explore and if possible agree on methods of resolving the dispute by other means. At each such conference each party shall be represented by a person having authority to resolve the dispute in the course of the conference.

**13.03 Further Notice Before Arbitration or Litigation**
In the event that the dispute cannot be resolved in accordance with the provisions of Clause 13.02 or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may by further notice in writing which shall be delivered by hand or sent by certified mail to the other party refer such dispute to arbitration or litigation. The service of such further notice under this Clause 13.03 shall also be a condition precedent to the commencement of any arbitration or litigation proceedings in respect of such dispute.

**13.04 Reference of Disputes**
At the time of giving the notice referred to in Clause 13.03 the party who wishes the dispute to be referred to arbitration shall provide to the other party evidence that he has deposited

with the Chapter of the Royal Australian Institute of Architects or the Master Builders' Association, in each case of the State, Territory or place in which the Site is located, the sum of one thousand dollars ($1000.00) by way of security for costs of the arbitration proceedings. Subject to compliance with the provisions of Clause 13.03 and the foregoing provisions of this Clause 13.04 such dispute or difference (unless meanwhile settled) shall be and is hereby referred to arbitration pursuant to the succeeding provisions of this Section 13.

**13.05 Identity of Arbitrator or Arbitrators**

Any arbitration under this Section 13 shall be effected:

13.05.91 By either a single arbitrator or by two arbitrators agreed upon in writing between the Proprietor and the Builder; or

13.05.02 failing such agreement within ten (10) days after receipt by the other party of the notice in writing given under Clause 13.03 by the one party then by two arbitrators, one being selected by the President or acting President for the time being of the Chapter of the Royal Australian Institute of Architects in the State or Territory in which the Site is located and the other being selected by the President or acting President for the time being of the Master Builders' Association of the State or Territory or place in which the Site is located.

**13.06 Umpire**

Where two Arbitrators are appointed they may either upon entering upon the reference or subsequently, when appropriate, appoint an Umpire. Should the Arbitrators fail to make an award or fail to agree as to an award to be made within two (2) calendar months of the completion of the hearing of the arbitration or within such further period as the parties may in writing determine upon an Umpire appointed by the two Arbitrators shall enter upon the reference in lieu of the Arbitrators.

**13.07 Security**

The Arbitrator, Arbitrators or Umpire shall have the power form time to time:

13.07.01 To make any order in regard to the provisions of further security for the costs of the arbitration proceedings; and

13.07.02 to direct in what manner any security for costs of the arbitration proceedings shall be applied.

**13.08 Consolidation of Disputes**

In any such arbitration proceedings either party may raise by way of a further claim, set-off, defence or cross-claim and subject to any conditions as to costs or otherwise that may be imposed by the Arbitrator, Arbitrators or Umpire, as the case may be, any other dispute or difference whatever relating to the construction of this Agreement or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith and whether or not notices as referred to in Clauses 13.01 and 13.03 in respect of the other dispute or difference have been given.

**13.09 Costs**

The costs of an arbitration submission, reference and award under this Section 13 and the apportionment thereof shall be at the discretion of the Arbitrator, Arbitrators or Umpire, as the case may be.

**13.10 Proceeding with the Works**

Notwithstanding the foregoing provisions of this Section 13, the Builder shall if the Works (including the making good of any defects under Clause 6.11) have not been completed at all times (subject as otherwise may be provided for in this Agreement) proceed without delay to continue to perform and execute the Works and in so doing shall comply with all

instructions of the Architect provided that the same (other than as provided in Clause 6.09) shall not touch upon or involve the subject matter of the dispute or difference in respect of which a notice has been given pursuant to either of or both Clauses 13.01 and 13.03.

## ANNEXURE C

## Dispute resolution clauses to be used in conjunction with the **AS2124-1986 General Conditions of Contract**

**46 Disputes**
*Delete clause 46 and substitute the following:*

**46.1 Submission to the Superintendent**
If a dispute between the Contractor and the Principal arises out of or in connection with the Contract including a dispute concerning rectification or frustration of the Contract –

(a) The Claimant shall furnish in writing to the Superintendent and the Respondent details of its claim within 28 days of the facts or circumstances giving rise to the dispute first occurring and shall request the Superintendent to make a decision under Clause 46.

(b) The Respondent shall furnish in writing to the Superintendent a response to the claim within 28 days after receipt of the claim.

(c) Within:
   (i) 28 days after receipt of the information referred to in Clause 46.1(b), or
   (ii) if the Respondent fails to furnish the information referred to in Clause 46.1(b) 28 days after the expiration of the period referred to in Clause 46.1(b),

   the Superintendent shall give each party a written decision on the dispute.

Notwithstanding the existence of a dispute, each party shall continue to perform the Contract. In particular, the contractor shall continue with the work and the Principal shall continue, subject to the provisions of Clauses 46.3 and 46.4, to comply with Clause 42.1.

**46.2 Submission to Expert Determination**

(a) If either party is dissatisfied with a decision of the Superintendent made pursuant to Clause 46.1 it may within 14 days after the decision of the Superintendent's given to it, give written notice to the other party of its dissatisfaction and upon giving this notice the dispute shall be determined by an Expert in accordance with the expert determination process set out in the Contract ("Process").
   If either party fails to give notice to the other pursuant to paragraph (a) of Clause 46.2 within the period allowed by that paragraph the decision of the Superintendent shall be final and binding.

(b) If the Superintendent fails to give a written decision pursuant to Clause 46.1(c) either party may within 14 days after the expiration of the period allowed in Clause 46.1(c) give written notice to the other of that fact and upon giving this notice the dispute shall be determined by an Expert in accordance with the Process.

The appointment of an Expert shall be conclusive evidence that the particular dispute relates to matters properly the subject of expert determination as referred to in this clause. The determination of the Expert shall be made as an Expert and not as an Arbitrator and shall be final and binding on the parties except where the Expert's determination relating to a dispute is that one party shall pay the other an amount in excess of $500,000 then such determination shall not be final and binding but the Principal or the Contractor may give notice requiring the dispute to be referred to arbitration in accordance with the provisions of Clause 46.4

**46.3 Expert Determination**

Where, pursuant to Clause 46.2, a dispute is to be determined by an Expert in accordance with the Process:

(a) The Process shall be effected bv an Expert in the relevant field agreed upon and appointed jointly by the parties.

(b) In the absence of agreement as to the appointment of an Expert either party may request the person specified in the Annexure to nominate an Expert. If a person is not specified in the Annexure, the person to nominate an Expert shall be the Secretary General of the Australian Commercial Disputes Centre Limited at Sydney. The request shall indicate that the nominee shall not be an employee of the Principal or the Contractor, a person who has been connected with the work under the Contract or a person in respect of whom there has been a failure to agree by the Principal and the Contractor.

(c) The Expert shall be appointed by letter of appointment in the form set out in Annexure SC2 hereto.

(d) The parties shall be bound by the Rules of the Expert Determination.

(e) Process set out in Annexure SC3 hereto.

(f) The parties agree that the Expert shall be bound by the Code of Conduct for an Expert set out in Annexure SC4 hereto.

(g) The Expert shall be deemed not to act as an Arbitrator and the determination of the dispute in accordance with the Process set out in the Rules for the Expert Determination Process is not a process of arbitration within the meaning of the Commercial Arbitration Act 1984 (NSW).

Monies that are or become due and payable by the Principal in respect of work carried out under the Contract and which are not subject to a dispute shall not be withheld because of the Process but the Principal may, at the Principal's discretion, and pending determination by the Expert withhold payment of monies in respect of the matter that is the subject of the Process.

Without limiting the Principal's rights under any other provision in the Contract, the Principal may deduct from monies payable to the Contractor as a result of a determination of an Expert, any monies payable to the Principal from the Contractor under or in connection with the Contract including, without limitation, liquidated damages.

Notwithstanding Clause 42.9, The Expert may determine whatever interest the Expert considers reasonable.

If one party has overpaid the other, whether pursuant to a Superintendent's certificate or not and whether under a mistake of law or fact, the Expert may determine that repayment together with interest shall be made.

**46.4 Arbitration**

Where the Principal or the Contractor is entitled, pursuant to Clause 46.2, to give notice requiring a dispute to be referred to arbitration, such notice shall:

(a) be given in writing to the other party not later than twenty eight days after the expert has given the decision; and

(b) if given by the Contractor, be signed by a director of the Contractor;

(c) if given by the Principal, be signed by the authorised delegate of the Principal; and

(d) specify with detailed particulars the matter at issue, including the contractural basis of the claim;

("Notice") and thereupon the dispute shall be determined by arbitration.

If, however, a party does not, within the said period of twenty eight days, give the Notice to the other party, the determination of the Expert shall not be subject to arbitration.

Arbitration shall be effected:

(a) by an Arbitrator agreed upon in writing by the parties within twenty eight days after the Notice is received by the party to whom it is directed; or

(b) in the absence of that agreement, either party may request the person specified in the

Annexure to nominate a single Arbitrator. If a person is not specified in the Annexure, the person to nominate an Arbitrator shall be the Secretary General of the Australian Commercial Disputes Centre Limited at Sydney. The request shall indicate that the nominee shall not be an employee of the Principal or the Contractor, a person who has been connected with the work under the Contract or a person in respect of whom there has been a failure to agree by the Principal and the Contractor; or

(c) in the absence of that selection, by an Arbitrator appointed in accordance with the provisions of the laws relating to arbitration in force in the State or Territory named in the Annexure hereto.

The parties shall be entitled to be represented in any arbitration by a duly qualified legal practitioner.

The party who received the Notice may raise any matter by way of claim or counter claim in any such arbitration where such matter arises out of the Contract or concerns the performance or the non-performance by the other party of their obligations under the Contract.

A reference to arbitration under this Clause shall be deemed to be a reference to arbitration within the meaning of the laws relating to arbitration in force in the State or Territory named in the Annexure hereto and the arbitration proceedings shall be conducted in that State or Territory. The Arbitrator shall have all the powers conferred by those laws and it shall be competent for the Arbitrator to enter upon the reference without any further or more formal submission than is contained in this Clause.

Notwithstanding Clause 42.9, the Arbitrator may award whatever interest the Arbitrator considers reasonable.

If one party has overpaid the other, whether pursuant to a Superintendent's certificate or not and whether under a mistake or law or fact, the Arbitrator may order repayment together with interest.

Monies that are or become due and payable by the Principal in respect of work carried out under the Contract and which are not subject to a dispute shall not be withheld because of arbitration proceedings but the Principal may, at the Principal's discretion, and pending the award of the arbitrator, withhold payment of monies in respect of any matter that is the subject of arbitration proceedings.

# JOURNAL ADVISORY COMMITTEE

Mr Ronald D Fitch A.M. Past President has retired from the Journal Advisory Committee on which he served since its formation in 1982 under the Chairmanship of Mr SML Guilfoyle, Past President and more recently under the chairmanship of Mr F.J. Shelton. The Committee meets on a regular basis to consider articles for possible publication, production issues and the management of the publication. Ron Fitch's contribution over the years has been substantial and is reflected in the standard which the publication has achieved.

Dr CE Croft, Barrister of Melbourne who is also a practicing arbitrator and respected author of numerous legal publications has been appointed to the Committee.