The complicated circumstances leading to the refusal of the arbitrator to make the costs order sought are beyond the scope of this short note.

The decision is of importance for the reiteration of the principles which must be applied by an arbitrator in dealing with the question of costs:-

- The general principle that costs follow the event applies to arbitration proceedings just as to Court proceedings.
- The arbitrator has a general discretion as to costs.
- This discretion must be exercised judicially and so there must be some grounds for its exercise adverse to a successful party.

In His Honour's opinion there was clearly a question of law involved as required by Section 38 (2) of the *Commercial Arbitration Act* – does an arbitrator have power to deal with an application with respect to costs in respect of an issue raised prior to the preliminary hearing but withdrawn at the preliminary hearing.

His Honour allowed the appeal. Pursuant to Section 38(3)(a), His Honour varied the arbitrator's award and made a costs order in favour of the appellants.

LETTER TO THE EDITOR

Dear Sir,

I refer the excellent article "When does an Arbitration Commence" by Karen Mealey printed in "The Arbitrator" May 1994 edition page 35.

I agree with all of Karen's comments concerning, in particular, the effect of the Industry Standard Dispute Clauses on which she comments at pages 42 to 44 of her article.

She correctly points out (at page 43) "the advent of the conciliation process via the Standard Form of Contract Clauses (Clause 47 of AS2124-1992 and Section 13 of JCC-A and B 1993) 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 Sections 25 and 26 of the (Commercial Arbitration) Act will become more common as a result".

I agree that it is virtually impossible to draft a standard set of contract clauses which deal with this issue and accordingly parties issuing a Notice of Dispute must therefore be careful to ensure, if it is intended that the Notice of Dispute will cover all disputes then extant between the parties then the Notice of Dispute must be wide enough to cover those disputes.

This highlights the need for particularity and care when drafting Notices of Dispute. This has always been necessary but I believe that it is even more necessary now under the new standard forms.

I am a member of the OB/3 Standards Committee which drafted AS2124-1992 and a representative of CIESG Ltd., which is one of the

members of the Joint Contracts Committee which revised JCC leading to the JCC-C and D Editions. It was the intention of both Standards and JCC to ensure that arguments about whether the clause was an agreement to arbitrate or not should be avoided by making it quite clear that the clause was not an agreement to arbitrate.

Each clause was drafted also in the way that it is because of the desire by OB/3 and by the Joint Contracts Committee to avoid practical problems as to which method of dispute resolution procedure was more appropriate in a particular jurisdiction. As both contract conditions are used Australia wide, it was felt that to prefer arbitration over litigation or vice-versa was inappropriate given that in some jurisdictions arbitration is the preferred method of dispute resolution whilst in others litigation is the preferred method. Each body was also cognisant of the fact that at least in New South Wales and Victoria the use of referees in litigation is becoming increasingly common and therefore arbitration and litigation could be said to be converging in practice rather than diverging

I have only one minor quibble with Karen's excellent article and that is on the top of page 44 where she states "It is now law in New South Wales that Clause 13 of the JCC Standard Form Contract constitutes an agreement to arbitrate" for the purpose of Section 53 of the Act. She cites as authority for this proposition, Turner Corporation Limited -v- Austotel Pty. Ltd. (1992) 27NSWLR 592. This of course is quite correct insofar as the JCC-A and B Standard Forms are concerned but it is not now the case that such law applies to the new Standard forms JCC-C and D 1993. Nor will it apply to the soon to be published JCC-C and D 1994 which will be a second edition of the 1993 editions. JCC is being re-printed in order to create separate documents where there is Staged Practical Completion. Where there is Staged Practical Completion the documents will be known as JCC-E and F 1994 and where there is no Staged Practical Completion they will be called JCC-C and D 1994).

In conclusion, I also believe that both AS2124-1992 and JCC-C and D (and JCC-E and F) recognise the need for the parties to invoke alternative dispute resolution procedures into contract dispute resolution and it is for this reason that the "conciliation" process has been interposed before a party can proceed either to litigate or arbitrate a dispute. Each, in effect, gives the parties the opportunity of attempting to resolve the dispute by other means including ADR procedures, without binding the parties to follow detailed prescriptive ADR procedures which must be adhered to rigidly. To this extent, the two contracts provide flexibility unlike, for instance, other contract forms such as the Department of Defence Head Contract which sets out a complicated and detailed dispute resolution procedure which is both costly and time consuming.

Yours faithfully,
John L Pilley
Executive Director
Construction Industry Engineering Services Group Limited
26 May 1994