

**Comment:**

This decision is of considerable importance not merely because it declares that in certain circumstances a person not a party to a policy of insurance may nonetheless obtain indemnity under it but also because it is indicative of the dynamism of the present New South Wales Court of Appeal to declare and enforce common law doctrines where the particular circumstances have indicated an injustice of such significance as to demand judicial reform.

- GLEN MILLER QC

**17. NEW SAA SUPPLY CONTRACT**

In this article Phil Davenport explains the key features of the new SAA Supply Contract AS2987-1987. Mr Davenport is extremely well placed to do so, as he was the draftsman of AS2987-1987 and is responsible for its basic structure and concept, for many of its detailed concepts and for its clear and concise drafting style.

AS2987-1987 had a difficult genesis. The SAA Committee originally charged with the preparation of a new Supply Contract to replace the aging SAA Supply Contracts AS CZ20-1970 and AS CZ21-1973 was ultimately disbanded after some four to five years and two public review drafts, due to impasse within the committee as to the structure and approach to be taken in finalising the contract.

Approximately a year later, the SAA established a new committee under the chairmanship of David Bennett QC, author of the third edition of *Brooking On Building Contracts* and a partner with Freehill, Hollingdale + Page, Solicitors. It is a tribute to Mr Bennett that he was able to set a course for the committee which avoided the previous difficulties. It was decided that the concepts of a previous draft prepared by Mr Davenport should be used as a basis for the new contract, but that it should be amalgamated with the familiar language and structure of the previous SAA Supply Contracts. A further decision was made to coordinate its concepts and provisions, so far as appropriate, with the new AS2124-1986 General Conditions of Contract, in order to ensure that the new Supply Contract would form part of a "family" of SAA construction contracts.

AS2987-1987 is currently under consideration by the National Public Works Conference. It is understood that it is likely that NPWC will recommend that its members adopt AS2987-1987 with some special conditions of contract, which the NPWC Contracts Committee currently has under development.

AS2987-1987 is the Australian Standards Association's General Conditions of Contract For The Supply of Equipment With Or Without Installation. It is a revision and amalgamation of AS CZ20-1970 and AS CZ21-1973.

AS2987-1987 is the third in the new family of General Conditions published by the Standards Association. The first was AS2124-1986, General Conditions of Contract for architectural and engineering construction contracts. AS2545-1987 followed - Subcontract Conditions designed for use with AS2124-1986, but for on site construction, rather than supply of equipment or supply of equipment and installation of the equipment. That is where AS2987 fits into the family.

AS2987 can be used either as main contract or subcontract conditions. It has been designed to be compatible with AS2124 and AS2545, but it recognises the essential differences between supply of equipment and on site construction. The first 15 Clauses of AS2987 follow very closely AS2124, but without mention of bills of quantities.

Fourth in the family is AS3556-1988, General Conditions of Contract for the Supply of Equipment.

The four standards are a "family" of conditions, as similar language, layout and principles have been adopted. This is intended to avoid ambiguities and misinterpretations. AS3556 is an abbreviated version of AS2987 and covers supply only of equipment, which makes it particularly appropriate for off the shelf purchase of materials, plant or equipment. In AS3556, the provisions of AS2987 relating to the site, work on site, the role of the Engineer and nominated subcontractors (and the alternatives thereto) have been "stripped" out. Whilst AS2987 can be used for supply only, some people have difficulty in appreciating that, when AS2987 is used for supply only, the provisions of AS2987 relating to site installation have no application and hence do not have to be deleted or amended. This "misunderstanding" has caused difficulty in using supply contracts like AS2987 for international procurement, where no site works element is involved. The fourth standard removes that confusion.

**Program**

The most innovative aspect of AS2987 is the built in program. There are three contract dates:

1. The Earliest Date for Acceptance;
2. The Date for Delivery; and
3. The Date for Practical Completion.

The Contractor is entitled to deliver the Equipment on the Earliest Date for Acceptance and is entitled to damages, if the Purchaser prevents delivery on that date.

There are provisions for extensions of time for either or both of the dates 2. & 3. and there are liquidated damages for delay in achieving either date, but the Earliest Date for Acceptance cannot be altered without the consent of the Contractor.

The liquidated damages applicable to each of dates 2. & 3. are separate and can be different amounts. Where this will be particularly useful is where there is to be a gap between delivery of equipment and its installation. For example, after delivery of equipment, tests may have to be conducted or work carried out by others before the Contractor commences installation.

**The Engineer**

The Purchaser under AS2987 is the equivalent of the Principal under AS2124 or the Main Contractor under AS2545. The Engineer under AS 2987 is the equivalent of the Superintendent under AS2124 or the Main Contractor's Representative under AS 2545.

The Engineer can appoint an "Engineer's Representative". Just as in AS2124 and AS2545, there are protections for the Engineer. Firstly, the issue by the Engineer of certificates, (in particular the Certificate of Acceptance under Clause 23.1, payment certificates under Clause 26.1 and the Final Payment Certificate under Clause 28) do not preclude claims by the Purchaser against the Contractor for damages for breach of contract or preclude the setting off by the Purchaser of amounts due by the Contractor to the Purchaser. Similarly, the Contractor can go beyond the Certificates and sue the Purchaser, if amounts

certified are less than a reasonable value, or certificates are not issued when they should be issued.

Under Clause 18.1, the Purchaser agrees to ensure that in the exercise of the functions of the Engineer under the Contract, the Engineer:

- (a) acts honestly and fairly;
- (b) acts within the time prescribed under the Contract or where no time is prescribed, within a reasonable time;
- (c) arrives at a reasonable measure or value of work, quantities or time.

The application of this provision is best illustrated by extensions of time for Delivery and Practical Completion. Constant concerns to any Engineer faced with a claim for an extension of time are the consequence of a delay by the Engineer in making a decision and the consequence of not granting a reasonable extension of time. Under most forms of general conditions, the consequence may be to set at large the time provisions of the Contract, with the result that liquidated damages cannot thereafter be applied.

AS2124, AS2545 and AS2987 all solve these concerns by firstly giving the Engineer a fixed time in which to make a decision (28 days in Clause 22 of AS2987). Secondly they all provide that a delay by the Purchaser or a failure by the Engineer to grant a reasonable extension of time shall not cause the time to be set at large (see penultimate paragraph of Clause 22). Thirdly, the Contractor's right to damages is preserved and the circle is completed by Clause 18.1 (or its equivalent in AS2124 and AS2545), which is the promise by the Purchaser to ensure that the Engineer acts within the 28 days allowed and arrives at a reasonable measure of time.

If the Contractor is dissatisfied with the failure of the Engineer to grant the extension of time claimed the Contractor makes a claim against the Purchaser for damages for breach by the Purchaser of Clause 18.1. All this may seem complicated, but the thing to remember is that if the Contractor is dissatisfied with any decision or lack of decision by the Engineer, the Contractor should make a claim against the Purchaser, not against the Engineer personally, and the claim should be for breach by the Purchaser of Clause 18.1.

The Engineer is appointed by the Purchaser to perform a number of functions on the Purchaser's behalf in the administration of the Contract. The main functions are:

**Clause 8.1**

In the event of an ambiguity or discrepancy in the documents forming part of the Contract, the Engineer must direct the Contractor as to the interpretation to be followed;

**Clause 8.4**

If the Contract provides that the Engineer's approval is required to drawings or other documents supplied by the Contractor, the Engineer must within 21 days give the approval unless the drawings or documents are not in accordance with the requirements of the Contract;

**Clause 10.4**

If the Contract includes Nominated Subcontract Work, the Engineer must direct the Contractor to subcontract the Nominated Subcontract Work to a particular Nominated Subcontractor;

**Clause 10.7**

If the Nominated Subcontract is terminated prematurely, the Engineer must renominate;

**Clause 17.2**

The Engineer can direct the Contractor to provide a contract program and under Clause 17.1 the Engineer can direct changes to the program;

**Clause 17.3**

The Engineer can in specified circumstances direct a suspension of work;

**Clause 20.1**

The Engineer can order variations to the work;

**Clause 22**

The Engineer can extend time for Delivery or for Practical Completion but cannot alter the Earliest Date for Acceptance;

**Clause 23.1**

The Engineer must issue a Certificate of Acceptance or give reasons for non-acceptance;

**Clause 23.3**

The Engineer can accept Equipment notwithstanding that it is not in accordance with the Contract;

**Clause 24**

The Engineer can direct rectification of defects;

**Clause 25**

The Engineer can order tests;

**Clause 26.1**

The Engineer issues payment certificates;

**Clause 26.5 -**

The Engineer can direct the Contractor to establish that ownership of Equipment will pass to the Purchaser or to provide additional security;

**Clause 28**

The Engineer issues a Final Payment Certificate;

**Clause 31**

The Engineer must on request give a decision on disputes but the decision is not binding on either party.

Whilst these are the major functions of the Engineer, minor functions are found in Clauses 2 (definition of Practical Completion), 5.7 (reduction of retention moneys or security after issue of the Certificate of Acceptance), 9.2 (approval of subcontracting), 10.3 (approval of Contractor's list of Selected Subcontractors), 10.4 (direction to use particular Nominated Subcontract conditions), 10.5 (direction to Contractor to carry out Designated, Selected or Nominated Subcontract work), 12.2 (direction to provide further information on a latent condition), 17.5 (direction to recommence work), 17.8 (notice to Contractor of names of other persons simultaneously performing work), 21.4 (creation of Separable Portions), 30.6 (ascertaining the cost incurred by the Purchaser when on default of the Contractor, the Purchaser completes the work).

If at any time there is no Engineer then the Purchaser is deemed to be the Engineer (Clause 18.2). The Engineer can under Clause 18.2 appoint individuals to exercise all or any functions of the Engineer, but not more than one Engineer's Representative can be delegated the same function at the same time.

Some of the Engineer's directions must be in writing, but any which under AS 2987 are not in the first instance required to be

in writing must be confirmed in writing as soon as practicable (see Clause 18.1). Clause 18.1 gives the word "direction" a broad meaning. It includes an approval, an explanation or mere permission. The failure of the Contractor to comply with a direction, which the Contract authorises the Engineer to give, is a breach by the Contractor of Clause 18.1. The breach would entitle the Purchaser to recover from the Contractor any damages which the breach causes but, if the breach is so serious that damages would not be an adequate remedy, the Purchaser can give the Contractor a "show cause notice" and if the Contractor fails to "show cause" the Purchaser can terminate the Contract under Clause 30.

### Terminology

The following is a summary of terms used in AS 2987. It is not a complete restatement of definitions and AS 2987 must be examined for the full text of each definition.

The goods to be supplied by the Contractor are the "Equipment". However things such as tools, scaffolding, cranes and testing equipment which are used to install the Equipment are not part of the Equipment but are "Temporary Works". The Equipment is those things which are handed over to the Purchaser.

The Equipment must be delivered to the Purchaser by the "Date for Delivery". This is a date or period stated in the Annexure. If an extension of time is granted, then the "Date for Delivery" is the date resulting from the extension.

If the Contractor has not only to deliver the Equipment but also to install it for the Purchaser, then there is a separate time for doing this work. It must be completed by the "Date for Practical Completion". This date is similarly stated in the Annexure and is not a fixed date, but one which can be extended.

It is in the Annexure to the General Conditions that the party drawing up the tender documents inserts dates and other matters which are necessary to make the General Conditions work.

The third date to be inserted in the Annexure is the "Earliest Date for Acceptance". That date is referred to in Clause 21.1 and is not defined in Clause 2. It is not necessary to have a date prior to which the Contractor shall not deliver the Equipment, but often delivery earlier than expected may be inconvenient for the Purchaser and it is wise to have an Earliest Date for Acceptance of the Equipment. That date cannot be changed by the Engineer, but can be changed by the agreement of the parties to the Contract.

If there are portions of the Equipment which can conveniently be delivered or installed separately, there can be defined "Separable Portions". If there are to be Separable Portions then p.31 of AS2987 must be used and there will be separate dates for Acceptance, Delivery and Practical Completion for each Separable Portion. The use of Separable Portions is a method of giving "teeth" to a program because there are liquidated damages at each stage.

If part of the Equipment has been delivered or part of the work has reached Practical Completion, the parties can by agreement create Separable Portions or the Engineer can create Separable Portions (see Clause 21.4 and Clause 1).

There can be:

1. A Date for Delivery only;
2. A Date for Practical Completion only; or
3. A Date for Delivery and a Date for Practical Completion.

"Practical Completion" is when the Equipment is installed and capable of being used even though there are minor omissions or defects. The definition in full is in Clause 2. The Engineer must within 28 days issue a "Certificate of Acceptance". There is no certificate of Practical Completion as in AS2124 or certificate of Substantial Completion as in AS2545. The Certificate of Acceptance under Clause 23.1 of AS2987 serves the same purpose.

Where there is a Date for Delivery only, the Certificate of Acceptance issues within 28 days after delivery to the Purchaser of the Equipment. Clause 23 deals with the position when the Equipment delivered or installed is not substantially in accordance with the requirements of the Contract. There is provision for an "Advice of Non-Acceptance" to be issued by the Engineer and subsequently a "Notice of Rejection" may be issued by the Engineer.

The tender price may be:

1. a lump sum only;
2. a lump sum and rates; or
3. rates only.

If rates are tendered then the "Schedule of Rates" is the document showing the rate or rates. It may include lump sums (including provisional sums) and quantities. The "Contract Sum" is the total of lump sums and the products of rates and quantities, if any, in the Schedule of Rates, accepted by the Purchaser. If there are rates only, and no quantities there will be no Contract Sum. However, this is of little consequence. The term is used in item (a) of the Annexure entry on p.29 for "Retention Moneys". If there is no Contract Sum then there is only one ceiling on retention moneys under item (a). The term is also used in the Annexure entry on p.29 for Limitation of Liability. An amount in dollars can be substituted.

The term "provisional sum" means an amount included in the Contract, but which is not itself payable by the Purchaser (see Clauses 2 and 11). It may be an estimate by the Purchaser of the cost of variations, contingencies, Designated or Nominated Subcontract Work, or anything else. The Purchaser does not have to state why the provisional sum is included.

"Nominated Subcontractors" are persons (including companies) to whom the Contractor must subcontract certain work when so directed by the Engineer (see Clauses 10.1 and 10.4). When the subcontractor is chosen jointly by the Purchaser and the Contractor, or is named in the Contract rather than later nominated by the Engineer, the subcontractor is called a "Designated Subcontractor". The only difference between a Nominated Subcontractor and a Designated Subcontractor is that, in the case of a Designated Subcontractor, the Contractor has no right of reasonable objection to the person to whom the Contractor must subcontract (which is appropriate given the joint selection, but subject to any tender qualifications if the subcontractor is named in the Contract).

A "Selected Subcontractor" is one selected by the Contractor from an approved list.

There are no "Works" as defined in AS2124 or AS2545. The "Equipment" is the nearest equivalent. There is "work under the Contract", which is defined in Clause 2 to mean everything which the Contractor must do or provide including the "Equipment".

The "contract program" defined in Clause 17.2 is the equivalent of the "construction program" in AS2124 and AS2545. The



term "variation" should be confined to changes to the work directed or permitted under Clause 20.1, as distinct from changes to the program or times for performance of work directed or permitted under Clause 17. Both types of changes are valued in the same manner under Clause 20.2.

The "Defects Liability Period" is defined in Clause 24. It is not a "maintenance period" in the sense that the Contractor must maintain equipment during the period. It relates to correction of defects or omissions as distinct from maintenance. The actual duration of the Defects Liability Period is stated in Annexure. The General Conditions do not provide that after the expiration of the Defects Liability Period the Contractor is no longer liable for defects or omissions. To achieve this, Clause 32.3 must be used. That is a general limitation of liability clause.

Clause 26 provides for "Payment Claims" and "Payment Certificates". There are progress payments. Clause 28 provides for a "Final Payment Claim" and a "Final Payment Certificate". After the expiration of the period for making the Final Payment Claim (28 days after the end of the Defects Liability Period) further claims by the Contractor for payment are barred (see 3rd paragraph of Clause 28).

#### Rise and Fall

Clause 14 makes limited provision for adjustments of the price when changes in the law or the requirements of a person exercising statutory powers cause changes in costs. There are other provisions for adjustments such as latent conditions (Clause 12) and interest (Clause 27), but there is no general rise and fall provision for currency fluctuation or changes in import duties or taxes. The National Cost Adjustment Provision (NCAP2) published jointly by the National Building and Construction Council and the National Public Works Conference is suitable for use with AS2987.

#### Time Bars

Time bars are contained in Clause 12.4 (28 days for notifying a latent condition), Clause 22 (28 days for claiming an extension of time) and Clause 28 (28 days for making a final claim). It is also possible that in completing the Annexure entry to Clause 32.3 (General Limitations of Liability) further time bars may be created.

#### Limitation of Liability

Of particular concern to manufacturers is the ability in AS2987 to limit liability in the event of a defect in the product. Numerous clauses have over the years been drafted in an attempt to achieve this goal. Clauses 32.2 and 32.3 are more comprehensive than most clauses, but they can be omitted without making consequential amendments to AS2987. Many manufacturers will prefer to substitute their own limitation clauses. Care should be taken not to inadvertently omit Clause 32.1. If that Clause is to be omitted, it is important to include provision to stipulate when risk passes from the Contractor to the Purchaser.

The Annexure entries in the right hand column on p.29, namely: "unlimited", "\$1.00" and "The Contract Sum" are only suggestions and different amounts or words can be inserted instead.

As limitations of liability are ultimately a question of the commercial bargaining power of the parties and the provisions of Clause 32 may be repugnant to many Purchasers, or at odds with their own obligations under a head construction contract, these provisions are asterisked indicating that they can be deleted.

Whilst manufacturers are very conscious of the need to limit

liability, Purchasers should be equally so. AS2987 has space for the Purchaser to limit liability by, for example, inserting in the appropriate Annexure entry for Clause 32.3:

If the Purchaser delays the Contractor and the Contractor is entitled to be compensated for the delay, the Purchaser's liability will be limited to \$1,000.00 for each day's delay and a proportional part of \$1,000.00 for each part of a day that the Purchaser delays the Contractor.

It is important to consider the last paragraph of Clause 22 to ensure that there is no conflict. This is avoided by making the compensation per day equal to the limit of liability per day. The Annexure entry could state as the limit a lump sum rather than a rate per day.

- Philip Davenport

## 18. PRODUCT LIABILITY

### - What you need to know about Product Liability.

This article from Australian Business has been included in the Newsletter, due to the importance of products, plant and equipment to the industry and the consequent relevance of laws relating to product liability.

It should be noted that the Australian Law Reform Commission's product liability proposals have encountered heavy opposition. The Confederation of Australian Industry has argued that the US system of strict liability is the "worst possible model for Australia to follow". CAI has stated that there is no justification in moving from the current "fault based" system to a system where manufacturers are strictly liable for damage, loss or injury. The CAI points out that the manufacturer would be presumed liable, unless it could prove otherwise, whereas the plaintiff would only have to prove the existence of loss or damage and that the goods have a "particular characteristic" which caused the loss or damage. CAI argues that the proposals would increase prices because of higher liability insurance, compliance and legal costs; stifle development of new products; and threaten the viability of some businesses. CAI has made a submission to the Attorney General totally rejecting the product liability proposals.

The Law Reform Commission is set to make importers and manufacturers more responsible for flawed or unsafe products. Brent Davis looks at the implications.

The Australian Law Reform Commission (ALRC) is pressing the Federal Government to stiffen Australia's product liability laws which, it sees, are ineffectual in providing compensation for consumers injured by defective products.

If the ALRC gets its way, the breadth and extent of product liability will be widened considerably; the defences available to manufacturers, importers and suppliers will also narrow. The legal presumption will change to favour the consumer in product liability cases. In legal terms product liability will shift from the current fault-based system under the laws of contract and tort to one of strict liability under statute.

"Liability would be imposed not only when goods do not meet the particular requirement of safety but when they do not meet the more general standard of 'acceptable quality'," says ALRC lawyer Pauline Kearney.

"This standard would supersede the current standards of 'merchantable quality' and 'fitness for purpose' implied by