Time and AS4300-1995

- **John L Pilley*, Executive Director, Construction Industry Engineering Services Ltd; Consultant, Minter Ellison, Solicitors, Melbourne.**

AS4300-1995 General Conditions of Contract for Design and Construct, which was published by Standards Australia last year, has previously been reviewed in this Journal (see (1995) ACLN #44, p17).

AS4300-1995, is of course, one of the suite of contracts based on AS2124-1992. As such, it follows the same broad philosophy of AS2124-1992, especially in relation to time. Given that Design and Construct is a different project procurement strategy to that for which AS2124-1992 might be appropriate, the OB/3 Committee of Standards Australia took the opportunity of reviewing the time provisions of the General Conditions to make them more appropriate for a Design and Construct Contract.

Like its parent, AS2124-1992, AS4300-1995 deals with the various issues concerning time in a number of clauses. These are:

Clause 27.1	-	Access to and Possession of the Site;
Clause 33	-	Progress and Programming of the Works;
Clause 34	-	Suspension of the Works;
Clause 35	-	Times for Commencement and Practical Completion; and
Clause 36	-	Delay or Disruption Costs.

There are other clauses in which the issue of time is important, such as Clauses 12, 37, 40.2 and 46.

The Scheme of Progress of the Works under AS4300-1995

In summary:

Clause 27.1 deals with Access to and Possession of the Site.

Clause 35.1 requires the Contractor to promptly commence work under the Contract.

Clause 33.1 requires the Contractor to proceed with the work under the Contract with due expedition and without delay and not to suspend the progress of the whole or any part of the work under the Contract except where the suspension is justified or is directed or approved by the Superintendent.

Clause 35.2 requires the Contractor to execute the work under the Contract to Practical Completion by the Date for Practical Completion and also provides that, upon the Date of Practical Completion, the Contractor shall give possession of the Site and the Works to the Principal.

Clause 35.6 regulates the situation where the Contractor fails to reach Practical Completion by the Date for Practical Completion in that the Principal will be entitled to liquidated damages at the specified rate for every day after the Date for Practical Completion to and including the Date of Practical Completion.

AS4300-1995 also allows the parties to agree to a bonus at the rate specified in the Annexure to be paid if the Contractor achieves Practical Completion before the Date for Practical Completion (Clause 35.8).

Clause 35.5 deals generally with the Contractor's entitlement to extensions of time for Practical Completion due to delays beyond the control of the Contractor.

Finally, Clause 36 deals with the entitlement of the Contractor to delay or disruption costs if the Contractor is delayed by an act or omission of the Principal or agreed events of delay.

Access to and Possession of the Site

Clause 27.1 introduces the dual concepts of "access" and "possession". This is because AS4300-1995 recognises that, in many cases, the Contractor will not need possession of the Site in order to carry out the Contractor's Design Obligations as defined in Clause 2 of the document. Clause 27.1 allows the parties to state in Item 35 of Annexure Part A the time by which access to the Site shall be given to the Contractor by the Principal. The effect of Clauses 27.1 and 27.3 means generally, that access to the site confers on the Contractor a right only to such use and control of the Site as is necessary to enable the Contractor to execute and complete the Contractor's Design Obligations.

AS4300-1995 anticipates that in projects such as the refurbishment of buildings utilising AS4300 or even on a "green field" site the Contractor will not need to have possession of the Site in order to prepare the design.

Clause 27.1 also deals with the issue of possession of the Site which usually will be a later date than the granting of access. It provides that the parties may, in Item 36 of

Annexure Part A, provide when the Contractor is to be granted possession of the Site for the purpose of carrying out the Contractor's remaining obligations to execute the work under the Contract. This will enable the Contractor to carry out the construction work. It follows that if the Contractor requires possession of the Site to carry the Design Obligations or to complete them after access has been initially given, then that will need to be dealt with specifically in Item 36.

AS4300-1995 continues giving the Principal the right to grant possession of only part of the Site initially but imposes an obligation on the Principal to give the Contractor possession of such further parts of the Site from time to time as may be necessary to enable the Contractor to execute the work under the Contract in accordance with the requirements of the Contract. Clause 27.1 requires the Principal to notify the Contractor in writing of the date or dates upon which the Site and each part thereof will be so made available to the Contractor.

The Principal has the right to refuse to give possession of the Site (but not access) whilst the Contractor is in breach of Clause 22.1 in relation to the taking out of any insurance under the Contract where the Contractor has an obligation to insure. The Contract, of course, provides for the option (as did AS2124-1992) of Contractor- controlled contract works insurance and public liability insurance, or Principal-controlled contract works and public liability insurance. The Contractor has however an absolute obligation to effect professional indemnity insurance under Clause 21 and to ensure that its Consultants engaged to effect the Design Obligations are likewise covered by professional indemnity insurance. The Contractor's failure to produce proof of any these Contractor-controlled insurances when required by the Principal will give the Principal (inter alia) the right to deny possession of the Site.

It is submitted that it might be prudent for a Principal to amend Clause 27.1 to give the Principal a right to refuse the Contractor access to the Site until the Contractor has complied with the requirements of Clause 22.1. This is so, especially as the proposed Subcontract to AS4300-1995 (AS4303-1996) allows the Contractor to deny its subcontractors access to the Site until the Subcontractor has complied with any insurance obligations under Clause 22.1. It seems anomalous that the Contractor does not have the same obligation under AS4300-1995 as the subcontractor has under the proposed Subcontract Conditions AS4303-1996.

Incidental to this right to access and possession of the Site, Clause 27.3 denies the Contractor the right to deliver materials to or to perform work on (other than that permitted by Clause 27.1 for executing or completing the Contractor's Design Obligations) until possession of the Site or part of the Site is given to the Contractor, unless the Superintendent otherwise approves in writing. This prohibition needs to be kept in mind if the Contractor wishes to commence construction before completing the design, as often will be the case where "fast-tracking" is required.

Progress of the Works

Clause 35.1 requires the Contractor to promptly commence the work under the Contract. The work under the Contract includes the Contractor's Design Obligations so the Contractor has an obligation to commence its design obligations promptly as well as to commence construction promptly once possession of the Site. Clause 33.1 requires the Contractor to proceed with the work under the Contract with due expedition and without delay and not to suspend the progress of the whole or any part of the work, except as permitted by the Superintendent or where the Contractor has the right to suspend due to a breach of the Contract by the Principal and the Contractor has availed itself of its rights under Clause 44.9.

Having proceeded with the work under the Contract with due expedition and without delay, the Contractor is required to execute the work under the Contract to Practical Completion by the Date for Practical Completion (Clause 35.2), and upon the Date of Practical Completion the Contractor is required to give possession of the Site and the Works to the Principal.

Practical Completion is defined in Clause 2 as being that stage in the execution of the work under the Contract when the Works are complete except for minor omissions and minor defects, which:

- do not prevent the Works from being reasonably capable of being used for their stated purpose;
- which the Superintendent determines on reasonable grounds do not need to be promptly rectified; and
- rectification of which will not prejudice the convenient use of the Works by the Principal.

In addition, an integral part of achieving Practical Completion is that any tests which are required by the Contract have been carried out and passed, and that documents and other information required by the Contract which are, in the opinion of the Superintendent, essential for the use, operation and maintenance of the Works, have been supplied by the Contractor.

The Date of Practical Completion is of course the date upon which the Contractor achieves completion as certified by the Superintendent. The Date for Practical Completion is the date on which the Contractor should have completed the Works, taking into account any extensions of time for Practical Completion granted by the Superintendent or allowed in any arbitration or litigation.

Item 9 of Annexure Part A permits the parties to specify a specific date or a period of time in order to specify the Date for Practical Completion. In regard to a specific period of time, Clause 2 provides that the last day of that period is the Date for Practical Completion. Thus, if the parties specify a period of time for Practical Completion, for instance 2 years, then by virtue of the definition in Clause 2 of the Date for Practical Completion, the actual Date for Practical Completion will be last day of that two year period (subject, of course, to any extensions of time granted by the Superintendent or allowed in an arbitration or litigation).

Failure to Achieve Practical Completion by the Date for Practical Completion

The consequences to the Contractor of failing to achieve Practical Completion by the Date for Practical Completion may result in the imposition of liquidated damages pursuant to Clause 35.6. Liquidated damages are required to be specified in Item 39 of Annexure Part A and must be specified as a rate per day. The parties have the option under Clause 35.7 to limit the liquidated damages payable to a specific sum and likewise the Contract provides an option for the parties to agree that a bonus will be paid to the Contractor for early Practical Completion, again at a daily rate. Under Clause 35.8, the parties may also limit the amount of the bonus to a specific sum.

In accordance with the usual practice of Conditions of Contract produced by Standards Australia, 'day' for the purposes of AS4300-1995 means calendar day and not working day.

Clause 33.1 which deals with the Contractor's rate of progress, also provides for the delivery of information by the Superintendent to the Contractor and the request for information by the Contractor from the Superintendent. It also gives the Superintendent power to order acceleration, but this aspect of this clause will be dealt with separately below under the evaluation of Clause 35.5.

In relation to the provisions of Clause 33.1, so far as they apply to the rate of progress, as already indicated, the Contractor is required to proceed with the work with due expedition and without delay and it is not permitted to suspend unjustifiably the progress of the whole or any part of the work under the Contract.

Clause 33.1 also gives the Principal the option of prescribing, in Item 37 of Annexure Part A, what information is to be given by the Superintendent during the course of the Contract as distinct from being provided in the tender documents prior to contract. Item 37 provides for two matters, what information, materials, documents or instructions may be provided and the time or periods of time by, or within which, the Superintendent is to furnish that information etc. If this option is exercised by the Principal, the Principal must ensure that the Superintendent does not delay the Contractor in providing this information. If delay occurs, this may be a breach of the Contract by the Principal and certainly would give the Contractor an entitlement to an extension of time if the delay in furnishing the information etc., was such as to justify an extension of time for Practical Completion.

Clause 33.1 continues to incorporate the principles of the case of *Glenlion Construction Company v Guinness Trust (1988)* 39 BLR 89 (UK). That case held the Principal was not obliged to furnish documents or information to enable the Contractor to complete the Works earlier than the completion date fixed by the Contract. Clause 33.1, fourth paragraph provides that the Contractor is required to give the Superintendent reasonable advance notice of when the Contractor requires any information, materials, documents or instructions from the Principal or the Superintendent (other than as specified in Item 39 of Annexure Part A), but the Principal is also not obliged to supply information, etc., earlier than the Principal could have reasonably anticipated at the Date of Acceptance of Tender, in effect, incorporating the *Glenlion* principle into AS4300- 1995.

Contractor's Program

Important changes have been made to Clause 33.2 dealing with the program. As more fitting to a Design and Construct Contract, the title of the program has been changed to Contractor's Program as distinct from Construction Program as it is called in AS2124-1992. This change of title makes it quite clear that the program is in fact the Contractor's program, as the Contractor has the responsibility for progressing the Design Obligations as well as construction of the project. Furthermore, the definition of "Contractor's Program" has been expanded from the simple definition contained in Clause 33.2 of AS2124-1992 where the program is defined as:

> *"... a statement in writing showing the dates by which, or the times within which, the various stages or parts of the work under the Contract are to be executed or completed."*

In AS4300-1995 a "Contractor's Program" is defined as, for the purposes of Clause 33:

> *"a statement in writing showing the major activities in the work under the Contract, the dates by which, or the times within which, key decisions are to be made and information is to be provided (by the Contractor or by the Principal or Superintendent) and the dates by which or the times within which the various stages or parts of the work under the Contract are to be executed or completed."*

It is thus an expanded definition from that contained in AS2124-1992. The effect of Clause 33.2 in AS4300-1995 is (as in AS2124-1992) that the program binds the Contractor, but does not necessarily bind the Principal. It gives also the Superintendent wide powers to direct the Contractor to furnish a Contractor's Program within the time, and in the form directed by the Superintendent. The furnishing of a Contractor's Program or a further Contractor's Program will not relieve the Contractor of any obligations under the Contract, including the obligation not to depart without reasonable cause, from an earlier Contractor's Program.

A Contractor's Program does not affect rights or obligations contained in Clause 33.1 and to that extent it is subservient to the rights given to the parties and the obligations imposed on the parties by Clause 33.1. This is particularly important given that Clause 33.1 permits the Superintendent, in effect, to direct acceleration of the Works for any reason, and obliges the Contractor to accelerate if the Contractor can do so. This power to accelerate is intimately tied up with the provisions of Clause 35.5 and will be dealt with in more detail when that clause is being discussed in this article.

Extensions of Time for Practical Completion

Clause 35.5 remains one of the pivotal clauses in AS4300-1995 as it is in AS2124-1992. The clause has

been revised, but only in relatively minor respects to its parent clause in AS2124-1992. It continues to represent a code created by the Contract in respect to the procedures for extensions of time for Practical Completion. For this reason, it is intended in this article to expand in some detail on the provisions of this clause, and to explain how it codifies all matters concerning extensions of time for the purposes of the Standard.

Firstly, Clause 35.5 provides potentially for three separate notices to be given by the Contractor in relation to delay and the effects of delay to the work under the Contract.

The first paragraph of Clause 35.5 requires the Contractor to notify the Superintendent promptly if anything may delay the work under the Contract once that delay becomes evident to the Contractor. The obligation is absolute and includes all events which might delay the progress of the work. The paragraph specifically includes acts or omissions of the Principal, the Superintendent or those for whom the Principal is responsible, but it also extends to all causes of delay including those events caused by the Contractor or those for whom the Contractor is responsible. The obligation is to notify the Superintendent promptly and in writing and to provide details of the possible delay and the cause of the delay.

Secondly, Clause 35.5, third paragraph, imposes an obligation on the Contractor, if it wishes to claim an extension of time for Practical Completion, to notify the Superintendent accordingly by giving the Superintendent a written claim for an extension of time setting out the facts upon which the claim is based. The obligation to make application for an extension of time, if one is required, must be exercised by the Contractor within 28 days after the delay occurs. In the submission of the writer, a delay occurs for the purposes of AS4300-1995, when the Contractor first becomes aware of the delay and not when the delay ends. See below why this is so.

Thirdly, the eighth paragraph of Clause 35.5 (at line 56 on page 34 of the Standard), requires the Contractor to give the Superintendent written notice of the period of extension claimed.

It is submitted that the effect of the words **or as soon as practicable thereafter** in this eighth paragraph of Clause 35.5, must necessarily mean that the obligation to make the application for an extension of time must arise within 28 days of the Contractor becoming aware of the delay occurring. The obligation to give this further notice would never arise if the delay "occurred" when it ended as the Contractor would always know the period of extension he needed to claim and consequently the eighth paragraph would be superfluous.

It is this third requirement to notify the Superintendent of the period of extension claimed that triggers the time for response by the Superintendent.

The 9th paragraph of Clause 35.5 commencing at line 60 on page 34 of the Standard requires the Superintendent, within 28 days of receipt of the Contractor's notice claiming a period of extension of time, either to grant the extension of time claimed, or, if the Superintendent does not grant the full extension of time claimed or refuses to give any extension of time before the expiration of the 28 days from receipt of the Contractor's notice either to notify the Contractor of the reasons for the partial grant or the rejection of the claim for an extension of time.

Attention is drawn to the fact that there appears a drafting error in these two paragraphs. The obligation in the 8th paragraph for the Contractor to give notice of the **period of extension** claimed is not matched by a corresponding obligation on the Superintendent in the 9th paragraph. The Superintendent's obligation is to deal with the extension of time within 28 days of receipt of the notice of **the number of days** extension claimed as distinct from the **period** of extension claimed. This drafting error has come about due to the change that was made to the corresponding paragraphs in AS2124-1992. The corresponding paragraph in AS2124-1992 to the 8th paragraph in AS4300-1995 is the 7th paragraph at line 28 on page 29 of AS2124-1992). There, the obligation on the Contractor is to notify the number of days extension claimed. This was matched by a corresponding obligation on the Superintendent within 28 days of receipt of the number of days extension claimed to deal with the application. A change was made in AS4300-1995 because it was recognised that the application by the Contractor may not necessarily be an application seeking a number of days extension but may be hours or some other period of time. Unfortunately AS4300-1995 was not changed in the 9th paragraph to make the corresponding response by the Superintendent related to the receipt of the period of extension claimed. The effect of this drafting anomaly will mean that the Contractor should always claim a number of days extension when notifying the period of extension claimed so as to ensure the Superintendent is obliged to respond because, it is submitted, it is only when the Superintendent has received notice of the number of days extension claimed that the obligation to respond within 28 days under that 9th paragraph of Clause 35.5 arises.

AS2124-1992 introduced the concept of the Principal being required to notify the Superintendent if anything that the Principal had to provide or do under the Contract was delayed with a corresponding obligation on the Superintendent to notify the Contractor accordingly. This was introduced into AS2124-1992 as a result of the recommendations in No *Dispute - Strategies for Improvement in the Australian Construction and Building Industry,* May 1990, which in effect recommended that the obligation to notify should apply to both parties in order to improve the efficiency of the construction process.

The 2nd paragraph of Clause 35.5 in AS4300-1995 has not only retained this concept, but strengthened it, as the provision has been amended to ensure that the Principal's obligation to notify, must be given promptly to the Superintendent who in turn has an obligation to promptly notify the Contractor accordingly. Notwithstanding the fact that this notice might be given to the Contractor, the Contractor is still obliged to notify a delay if the progress of the work is delayed as a result of that delay by the Principal. Consequently the Contractor will still be obliged under the 1st paragraph of Clause 35.5 to notify that delay and to apply for the appropriate extension of time under the

3rd paragraph within 28 days of the delay occurring.

Clause 35.5, in the 4th paragraph in AS4300-1995, and in particular subclauses (a) and (b), involves an issue of risk allocation as to the grounds for which an extension of time might be granted to the Contractor.

Subclause (a) deals with specific causes listed in Clause 35.5 (a)(i) to (iii) inclusive, which occur on or before the Date for Practical Completion, whereas a cause of delay listed in Clause 35.5 (b) may be one which occurs before, on or **after** the Date for Practical Completion. The effect of these two provisions is that the Contractor will not get an extension of time, where the delaying event is caused by one of the events listed in Clause 35.5(a), if that delaying event occurs **after** the Date for Practical Completion, whereas if the delaying event is one of those listed in Clause 35.5 (b)(i) to (x) inclusive then the Contractor may be entitled to an extension of time even if the delay occurs after the Date for Practical Completion.

The logic for this risk allocation is that in relation to those causes dealt with in Clause 35.5(a), the Contractor should not have been on Site after the Date for Practical Completion, and would not thereby have been delayed due to the event listed in that clause.

Clause 35.5(a) requires as a precondition for the application for an extension of time being granted, that the delaying event be beyond the reasonable control of the Contractor. Three causes are listed, industrial conditions, inclement weather and any other cause (which of course includes those listed in Clause 35.5 (b)). As some of these other causes are listed in Clause 35.5(b) the effect of Clause 35.5(a) means that if a cause which is not specifically listed in Clause 35.5(b)(i) to (x) is not the cause of delay then the Contractor will not get an extension of time if delayed after the Date for Practical Completion by that other cause not so listed in Clause 35.5(b).

In addition, it was felt appropriate in relation to a Design and Construct project procurement strategy, that the parties might negotiate that the Contractor will not get an extension of time at all if delayed by either or both of industrial conditions (Clause 35.5(a)(i)) or inclement weather (Clause 35.5(a)(ii)). These two subclauses are marked with a dagger and the footnote at the foot of page 33 of the Standard draws attention to Item 38 of Annexure Part A. Item 38 requires the parties either to delete the word "Applicable" or the words "Not Applicable", as the case may be. If the word Applicable is deleted against either industrial conditions or inclement weather, then the Contractor will not be entitled to an extension of time where delay is caused by that cause. The second last paragraph of Clause 1 is also relevant here. This provides that if in Annexure Part A, an Item (Item 39 of Annexure Part A) relevant to a clause prefixed with a dagger, that neither of the expressions "Applicable" or "Not Applicable" are (sic) deleted, then the clause shall apply. This caters for the case where the parties might omit to delete anything in Item 39. If nothing is deleted then the Contractor will be entitled to an extension of time if delayed by that cause of delay.

Clause 35.5(b) deals with other causes not listed in (a) which occur before, on or after the Date for Practical Completion. In the main, these delays are caused by the Principal or those for whom the Principal is responsible, or are delays over which the Principal might have some control. The Superintendent is therefore empowered to grant an extension of time, even after the Date for Practical Completion:

- if delay or disruption is caused by the Principal, the Superintendent or any person for whom either of those are responsible (Clause 35.5(b)(i));
- for a breach of the contract by the Principal (Clause 35.5(b)(ix));
- a variation (Clause 35.5(d)(iv);
- a claim referred to in Clause 17.1(iv) (this refers to claims in respect of the right of the Principal to have the work under the Contract carried out) (Clause 35.5(d)(viii)),

all of which are directly controlled by the Principal. The Contractor may also be entitled to an extension of time if delayed after the Date for Practical Completion by other delays such as:

- the actual qualities of work being greater than quantities in the Schedule of Rates determined by the reference the upper limit of accuracy applicable to Clause 3.3(d) and stated in Item 12 of Annexure Part A (otherwise than by a reason of a variation) (Clause 35.5(b)(ii);
- a latent condition under Clause 12 (Clause 35.5(b)(iii));
- a change in Legislative Requirements (as defined in Clause 2 - see also Clause 14, (Clause 35.5 (d)(v));
- a direction by a municipal, public or statutory authority, but not where the direction arose from the Contractor's failure to comply with a Legislative Requirement (Clause 35.5(b)(vi));
- a delay by a municipal, public or statutory authority not caused by the Contractor (Clause 35.5(d)(vii)); or
- any other cause which is expressly stated in the Contract to be a cause for an extension of time for Practical Completion (Clause 35.5(b)(x)).

Concurrent Delays

AS2124-1992 introduced the new concept that the Contractor is not entitled to an extension of time if the Contractor, in effect, concurrently delayed the progress of the Works. In fact, the effect of the clause (contained in the 5th paragraph of AS2124-1992 and similarly in the 5th paragraph of AS4300-1995), is that the Contractor is not entitled to an extension of time if the concurrent delay is a delay **for which the Contractor is not entitled to an extension of time.** Technically, therefore, it extends further than just being a delay caused by the Contractor, but is any delay for which, under the Contract, the Contractor is not entitled to an extension of time, where that concurrent delay occurs at the same time as a delay for which the Contractor is entitled to an extension of time.

This clause was primarily negotiated into AS2124-1992 in order to minimise the effect on Principals of changes that were made to Clause 36 in AS2124-1992.

Both of these changes were a direct result of the

recommendations of the *No Dispute* Report (op. cit), and in particular the general overriding principle in *No Dispute* Paper No. 1 - Risk Allocation, that a party who controls a risk should bear that risk (in *No Dispute* called the "Abrahamson Principles" after well-known construction lawyer Max Abrahamson). Those familiar with AS2124-1986 will remember, firstly, that Clause 36 was an optional clause, being marked with an asterisk and, secondly, only gave the Contractor a right to "compensation" for delays which had to be negotiated into the Contract. One of those delays which had to be negotiated into the Contract was delay to which Clause 35.5(b)(i) applied, i.e. delay caused by the Principal, the Superintendent or anyone for whom they were responsible (where the delay was not a breach of contract by the Principal). Rarely, if ever, was this cause of delay negotiated into the Contract as being an event for which the Contractor was entitled to compensation, and indeed more often than not Clause 36 was deleted, as the fact that it was an optional clause encouraged Principals to delete it in the invitation to tender documents.

As a result of *No Dispute* and the influence of the *Abrahamson Principle* that a party should bear a risk where that risk is within that party's control, Clause 36 of AS2124-1992 was firstly altered from being an optional clause and secondly, acts or omissions of the Principal, etc, to which Clause 35.5(b)(i) applied, automatically entitled the Contractor to delay costs (extra costs - the same formula as used in NPWC3), if the Contractor was thereby delayed in reaching Practical Completion. Clause 36 also retained the option of the parties negotiating other events of delay for which extra costs might be payable.

To alleviate a fear by Principals that they might still be required to pay delay costs under Clause 36 if only one of the causes of the delay was a delay caused by the Principal for which an extension of time should be granted, Clause 35.5 of AS2124-1992 introduced the concept of "concurrent delay". This provision (contained in 5th paragraph of Clause 35.5 of AS4300-1995 (lines 38-41 on page 34)) means that once a delaying event occurred for which the Contractor was not entitled to an extension of time, then the concurrent delay clause precluded the Contractor from recovering extension of time, even though another concurrent delaying event might entitle the Contractor to an extension of time. This avoided, for the Principal, a situation of the Principal having to pay delay costs under Clause 36, even though the Contractor was concurrently delaying the work at the same time as the Principal.

In AS4300-1995, the clause is likely to have even more potency for Contractors, especially if the parties have negotiated out of the Contract Clause 35.5(a)(i) or Clause 35.5 (a)(ii) or both, as causes of delay for which an extension of time might be granted to the Contractor. Thus, for instance, if the Contractor and the Principal agree in the Contract that the Contractor will not get an extension of time for industrial conditions, then whenever there is delay caused by an industrial condition, the Contractor will be prevented from getting an extension of time, even if other causes of delay for which he might be entitled to an extension of time are concurrently occurring. It also means that the Principal escapes liability to pay delay costs if one of those other causes of delay happens to be an act or omission of the Principal or is a breach of contract by the Principal.

The Committee responsible for drafting AS4300-1995 was also conscious of the effect of "acts of prevention", especially where they might occur after the Date for Practical Completion. As a result, an additional sixth paragraph has been added to AS4300-1995 dealing with concurrent delays which occur after the Date for Practical Completion. Without this additional provision the preceding concurrent delay provision could have had the effect, (if one of those causes of delay was caused by the Principal), of being, in effect, an act of prevention by the Principal which would thereby set time "at large", or as better expressed, mean that the Date for Practical Completion was no longer valid and that instead the Contractor had a reasonable time to complete. An important consequence if this occurred would be that the Contractor would avoid liability to pay any liquidated damages if one of those concurrent delaying events was caused by the Principal. Consequently a new 7th paragraph (at page 34, lines 43 to 45) does not preclude the Contractor from getting an extension of time if one of the causes of delay is a delay directly caused by the Principal under:

- Clause 35.5(b)(i) (delay or disruption caused by the Principal, Superintendent or any one for whom either is responsible);
- Clause 35.5(b)(iv) (a variation for which an extension of time is granted);
- Clause 35.5(b)(viii) (a claim referred to in Clause 17.1 (iv)); or
- Clause 35.5(b(ix) (a breach of the Contract by the Principal).

Who Owns the Float?

The eighth paragraph of AS4300-1995 has the effect that the float in any program is the property of the Contractor.

The effect of the Contractor owning the float in the program is to some extent ameliorated by the expanded definition of "Contractor's Program" in Clause 33.2 and the provision that the Contractor must proceed with due expedition and without delay as required by Clause 33.1. Secondly, the provision that in determining whether the Contractor is or will be delayed in reaching Practical Completion, regard should not be had to whether the Contractor can by committing extra resources or incurring extra expenditure make up the time lost, (i.e. the Contractor is not obliged to accelerate), is subject to the power of the Superintendent to order acceleration, which it is submitted, is contained in the penultimate paragraph of Clause 33.1 commencing at line 33 on page 31 of the Standard. This clause provides:

> *"The Superintendent may direct in what order and at what time the various stages or parts of the work under the Contract shall be performed. If the Contractor can reasonably comply with the direction, the Contractor shall do so. If the Contractor cannot reasonably comply, the Contractor shall notify the Superintendent in writing, giving reasons."*

It is submitted this enables the Superintendent to order acceleration even if the cause of the Contractor's failure to achieve Practical Completion or the potential consequence of not reaching Practical Completion by the Date for Practical Completion is due to the Contractor's own delays. It is, of course, subject to the Contractor being able to comply with the Superintendent's direction to accelerate and that in turn is subject to the Contractor notifying the Superintendent accordingly, giving reasons.

This power to order acceleration under this penultimate paragraph of Clause 33.1 has the consequence for the Principal that, if the direction to accelerate results in the Contractor incurring more or less cost than otherwise would have been incurred had the Contractor not been given the direction, then the Contractor is entitled to the adjustment of the sum payable pursuant to the Contract, the adjustment being valued under Clause 40.5.

It is, in the writer's view, significant that the last paragraph of Clause 33.1, provides that compliance with a direction may cause the Contractor to incur (inter alia **less** cost. It is the writer's view that this provision gives power to the Superintendent to take into account any **saving** in liquidated damages that might be received by the Contractor by reason of the order to accelerate. In effect, the Contractor would be paid the costs of the acceleration but the Superintendent may, when valuing the cost of his direction to accelerate, off-set any saving that the Contractor might have achieved because the Contractor's liability to pay liquidated damages under Clause 35.6 is reduced.

In practice, this valuation will be difficult for the Superintendent because frequently the order to accelerate will be given during the course of the project, and it will be, to some extent, dependent on whether the Contractor will or will not in any event, be able to make up time in order to avoid liquidated damages. In a Design and Construct Contract, the capacity for the Contractor to accelerate its construction work (even while continuing to effect design work) is likely to be greater and consequently the power of the Superintendent to accurately assess whether or not the Contractor will incur less cost will be difficult.

This power is likely to be of most benefit when the Date for Practical Completion is fast approaching and it is obvious the Contractor will not finish on time. In these circumstances the Superintendent should be able to make a more accurate estimate of whether the direction to accelerate will in fact result in the Contractor incurring less cost by way of minimising liability to pay liquidated damages. It is likely, in any event, that the direction to accelerate is more likely to be given at a late stage in the construction work.

The Superintendent's Determination of an Extension of Time

Reference has already been made to the fact that the Superintendent has an obligation within 28 days of a claim for an extension of time which claims a specific period, to deal with that claim within 28 days, either by granting the application, or only partly granting it, or refusing it, and in these latter two cases, within those 28 days giving reasons why the application has either been refused or granted only in part. This obligation, of course, on the Superintendent, is a certifying function, and to this extent Clause 23(c) is relevant. This clause provides that:

> *"in the exercise of the functions of the Superintendent under the Contract, the Superintendent shall*
>
> ...
>
> *(c) arrive at a reasonable measure or value of... time"*

Failure by the Superintendent to do so will be a breach of contract by the Principal.

AS2124-1992 introduced a further provision to assist the Superintendent make this determination and this clause has been replicated in AS4300-1995. The third last paragraph, Clause 35.5, states:

> *"In determining a reasonable extension of time for an event causing delay, the Superintendent shall have regard to whether the Contractor has taken all reasonable steps to preclude the occurrence of the cause and minimise the consequences of the delay."*

This, in effect, incorporates what was probably implied at law but the provision does now give specific authority to the Superintendent to have regard to whether the Contractor has taken all reasonable steps to preclude the occurrence of the cause and minimise the consequence of the delay. In a Design and Construct Contract it is likely that this power will be of considerable assistance to the Superintendent in determining whether a reasonable extension of time should be granted to the Contractor.

The final two paragraphs of Clause 35.5 are important powers for the Superintendent. The penultimate paragraph of Clause 35.5 has been amended to correct what was perceived to be a possible anomaly in the corresponding clause in AS2124-1992. It now commences:

> *"Notwithstanding that the Contractor is not entitled to* ***or has not claimed*** *an extension of time etc."* (Emphasis added).

The words **or has not claimed** ensured that a situation cannot arise where the Contractor is entitled to an extension of time but has not applied for an extension of time, and could thereby argue that the Superintendent does not have the power to extend time unilaterally. This provision, of course, is specifically in the Contract in order to overcome the effect of *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111, which held that the power of the Superintendent to extend time was in effect a creature of the Contract, and if the Superintendent did not have power to extend time unless an extension of time was applied for by the Contractor, then the Superintendent's power to extend time unilaterally did not exist. The paragraph referred to above ensures that the Superintendent does have jurisdiction to extend time even if the Contractor either is not entitled to an extension of time (because, for instance, it has failed to apply within 28 days of the delay occurring) or has not applied for an extension of time (even

though in the circumstances the Contractor is entitled to an extension of time because, for instance, the Principal has committed an act of prevention).

The last paragraph of Clause 35.5 also minimises the effect of any act of prevention by the Principal, either because the Principal has itself delayed the Contractor, or because the Superintendent has failed to deal with a claim for an extension of time in accordance with the Contract. A delay by the Principal or a failure by the Superintendent to deal with the claim for an extension of time will not set the Date for Practical Completion "at large", but gives the Contractor a right to damages only. An act of prevention by the Principal may, in the absence of such a clause, have had the effect of setting aside the Date for Practical Completion and allow instead the Contractor a reasonable time to complete. Especially in a Design and Construct Contract, the effect of an act of prevention by the Principal might have a disastrous effect on liquidated damages the Principal might be entitled to claim, and therefore, this clause, is of even more importance in a Design and Construct context.

Delay or Disruption Costs

To accord with the amendments made to Clause 35.5(b)(i) which now make it quite clear that delay or disruption caused by the Principal, Superintendent etc., will be a ground for an extension of time, Clause 36 has the effect that if the Contractor is in fact delayed by delay or disruption caused by the Principal or the Superintendent or anyone for whom either of them is responsible, then the Contractor will be entitled to delay costs for that delay or disruption. The clause uses the NPWC3 formula of "extra costs". Clause 36 requires that these extra costs must be necessarily incurred by the Contractor by reason of the delay, which is an important restriction to the right to the Contractor to recover costs - they must be specifically related to the delay caused by the Principal or the Superintendent etc.

This is obviously not the time or place to launch into a long dissertation about what "extra costs" means, but suffice to say the ambit of extra costs is, generally speaking, confined to the direct costs incurred by the Contractor as a result of the delay, excluding such things as loss of profit, head office overhead costs, etc. It is certainly much less expansive than "damages" and will mean that the Contractor will only recover costs caused by the delay which are directly attributable to the delay either on Site or when the Contractor can prove that the specific head office costs were directly incurred in respect to the project. For instance, if the Contractor was employing a designer or a programmer full-time on the project at head office, then the cost of that person might well be claimable under the "extra costs" formula of Clause 36.

Clause 36 preserves the option of the parties negotiating other events of delay for which delay costs (extra costs) might be payable by the Principal if the delay is caused by that other event. This other event is required to be specified in Item 43 of Annexure Part A and, once specified, the extra costs caused by that delaying event can be claimed by the Contractor.

Clause 36(a) provides that the Principal will not be obliged to pay twice for the same delaying event. The Principal's liability for damages for breach of contract is also not limited by the Clause. In the writer's view, the effects of the amendments to Clause 36 whereby the Principal pays extra costs for delay to the Contractor due to acts or omissions of the Principal or Superintendent have been beneficial to both parties. Under Clause 36 of AS2124-1986, where there was no specific right given to the Contractor to recover extra costs for delay caused by the Principal or Superintendent, the Contractor was in effect required to assert that the delay by the Principal was a breach of Contract in order to receive any recompense for delay caused by the Principal. *No Dispute* recognised that such a clause was not conducive to a harmonious contractual relationship. The amendments to Clause 36 in AS2124-1992 removed this need to assert a breach every time the Principal or Superintendent was responsible for the delay.

Liquidated Damages

Clauses 35.6 and 35.7 deal with the issue of liquidated damages. The liability for the Contractor to pay liquidated damages is dependent upon the Contractor's failure to reach Practical Completion by the Date for Practical Completion. Clause 35.6 raises a debt when liquidated damages are incurred. The Superintendent thus has power when, for instance, issuing a Certificate of Practical Completion to set-off any liquidated damages against moneys due to the Contractor in that Certificate. The liquidated damages in Item 39 of Annexure Part A must be expressed as a rate per day. The Annexure Item provides insufficient space to write the rate of liquidated damages in words and care must be taken when completing Item 39 that the words per day are added when the amount is expressed in words to minimise any possibility of the Contractor arguing that the amount as expressed in words is not "a rate".

Clause 35.6 also provides that if the Contractor has paid liquidated damages or liquidated damages have been deducted in any Payment Certificate, and the time for Practical Completion is subsequently extended, either by the Superintendent or by an arbitrator or court, then the Principal is obliged to repay the liquidated damages paid or deducted for the appropriate period of time.

Clause 35.7, which is asterisked and is thus an optional clause which can be removed from the Contract without affecting other parts of the Contract, allows for an upper monetary limit to be imposed on any liquidated damages payable by the Contractor. It is probably strictly unnecessary for this clause to be asterisked because the clause can only apply if an amount is actually stated in Item 40 of Annexure Part A.

Likewise Clause 35.8, Bonus for Early Practical Completion, is an optional clause and again it is unnecessary for it to be deleted because the bonus will apply only if Item 41 of Annexure Part A is completed. The clause also provides for the option of an upper monetary limit on the bonus and this again applies only if the limit on the bonus is stated in Item 42 of Annexure Part A.

Notification of Claims

It is perhaps important to refer to the changes which have been made to Clause 46 of AS4300-1995 compared with the corresponding clause in AS2124-1992. Clause 46 is no longer a barring clause, but is confined only to notification of claims. Its effect has been expanded from Clause 46 in AS2124-1992 in that all claims made either by the Contractor **or by the Principal** have to be notified as soon as practicable after a party could reasonably have become aware of the claim. Consequently, if the Principal wants to claim liquidated damages, then it is required to give a prescribed notice under Clause 46 to the Superintendent and the Contractor, otherwise it may be met with an argument by the Contractor that the Contractor has suffered damages as a result of the late notification of the intention of the Principal to claim liquidated damages. Similar considerations apply for any claim made by the Contractor. Claims, for instance, pursuant to Clause 36 for extra costs for delay now must be notified pursuant to Clause 46.

Latent Conditions

AS4300-1995 retains Clause 12 dealing with Latent Conditions. There are important time consequences here for the Contractor in that if a claim for a Latent Condition is to be made, the discovery of the Latent Condition must be notified to the Superintendent **forthwith** and where possible, before the Latent Condition is disturbed.

The effect of notification "forthwith" was considered by White J in *J.W. Armstrong Constructions Pty Ltd v Council of the Shire of Cook* (Queensland Supreme Court) where Her Honour held that failure to notify forthwith meant the Contractor was barred from recovering either an extension of time or extra cost resulting from the Latent Condition.

Although the Contract Conditions were AS2124-1986, Clause 12 of AS4300-1995 is, to all intents and purposes, the same as Clause 12 of AS2124-1986, and consequently Contractors need to be vigilant to notify a Latent Condition immediately it is discovered. This is so, especially in Queensland where the decision in *Armstrong is* binding.

Counting of Days

AS4300-1995 also corrects a deficiency in AS2124-1992 in respect to the calculation of time under the Contract. Clause 2 now provides:

> *"If the time for giving any notice, issuing any certificate, making any payment or doing any other act required or permitted by the Contract, falls on a Saturday, Sunday or Statutory or Public Holiday, then the time for giving the notice, issuing the certificate, making the payment or doing the other act shall be deemed to be on the day next following which is not a Saturday, Sunday or Statutory or Public Holiday. "*

This overcomes difficulties when something required to be done falls on a Saturday, Sunday, Statutory or Public Holiday. Previously the parties had to apply the particular State legislation, usually contained in the particular State's Acts *Interpretation Act* to resolve such difficulties.

In addition to the paragraph in Clause 2 quoted above, regard needs to be had to Clause 42.1, second paragraph which provides:

> *"If the time for any payment claim under the preceding paragraph fails due on a day which is Saturday, Sunday, Statutory or Public Holiday the Contractor shall submit the claim either on the day before or next following that date which itself is not a Saturday, Sunday Statutory or Public Holiday. "*

This gives an option to the Contractor to submit a payment claim either the day **before** or the day **after** a Saturday, Sunday, Statutory or Public Holiday. However, the time for processing the claim and issuing the Certificate by the Superintendent remains the same as though the claim was lodged on the correct day. If, for instance, the Contractor's claim falls due to be lodged on a Saturday and the Contractor takes advantage of Clause 42.1 and lodges the claim with the Superintendent on the Friday, the day before, then a Payment Certificate is still due to be issued on a Saturday (14 days hence) and due to the effect of Clause 2, last paragraph, the Superintendent's Certificate may be issued on the Monday following that Saturday. Payment by the Principal will likewise fall due on Saturday fortnight following the Certificate and can also be deferred until the following Monday.

Conclusion

Understanding the time requirements for AS4300-1995 is vital for all concerned. This is especially so, given that the written summary or outline of the objectives that the Principal may include in the Principal's Project Requirements, as defined in Clause 2, is the Principal's timing objectives for the Work under AS4300-1995.

* **Mr Pilley was a member of the Standards Australia OB/3 committee responsible for the preparation of AS4300-1995.**