Notification of Claims

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INTRODUCTION

This article reviews the provisions of the commonly used general conditions of contract relevant to the notification and management of claims.

The general conditions of contract NPWC Edition 3 (1981) ("NPWC3"), AS2124-1992, AS4300-1995, C21 Construction Contract Conditions ("C21") and the JCC buildings works contracts will be reviewed. AS2124-1992 is currently under review with a new edition to be published early in 1997. A draft of this revised contract, DR96319, was released in July 1996 and is similar, in many respects, to AS4300-1995. DR96319, in so far as it makes changes to AS2124-1992, also will be considered. On 6 November 1996 the Department of Public Works and Services released C21. The Department proposes to monitor the operation of the contract for 12 months and then publish a second edition. Industry comment is invited on any general issues regarding the contract, including its philosophy, content and presentation.

The versions of the JCC contracts considered are JCC-C 1994 With Quantities and JCC-D 1994 Without Quantities; and JCC-E With Quantities and with Staged Practical Completion and JCC-F without Quantities and with Staged Practical Completion.

MANAGEMENT OF CLAIMS

The dual themes of this article are that:

- the most efficient way to manage the claims process is for notice of claims to be submitted progressively and as soon as possible after the factual circumstances giving rise to the claim have occurred;
- recent decisions suggest that the Courts are prepared to strictly interpret and enforce notification clauses, making timely notification of claims imperative.

If it is accepted that progressive notification of claims represents the most efficient way of managing them, two principal issues need to be addressed:

- what is to be notified; and
- when.

TYPES OF CLAIMS

A claim concerning the work the subject of the contract may be based on:

1. an entitlement provided by the contract;
2. a breach of the contract;
3. rectification of or frustration of the contract;
4. a breach of a duty of care or in nuisance (tort);
5. a breach of a statute such as the *Trade Practices Act* or the *Fair Trading Act*;
6. restitution for unjust enrichment or other quantum meruit; or
7. estoppel.

Most of the general conditions of contract considered in this article do not include a definition of "claim". Although they all require notification of certain specific claims, i.e. claims for extension of the time for practical completion, generally - with the exception of AS4300-1995 and DR96319, they do not require notification of claims such as in tort, for unjust enrichment etc.

By way of example, clause 46.1 of AS2124-1992 provides:

> *"The Principal shall not be liable upon any claim by the Contractor in respect of or arising out of a breach of the Contract unless within 28 days after the first day upon which the Contractor could reasonably have been aware of the breach, the Contractor has given to the Superintendent the prescribed notice.*
>
> *The Principal shall not be liable upon any other claim by the Contractor for any extra cost or expense in respect of or arising out of any direction or approval by the Superintendent unless within 42 days after the first day upon which the Contractor could reasonably have been aware of the entitlement to make a claim, the Contractor has given to the Superintendent the prescribed notice."*

The Editor of the Australian Construction Law Newsletter, Mr J Tyrril, makes the comment, Issue #30 p.

13, that clause 46.1 of AS2124-1992 is unlikely to catch all claims which may be made. Mr Tyrril expresses the view that it is narrowly constructed to catch only breaches of contract and extra cost or expense arising out of directions by the Superintendent. It is his view that it would not catch all claims:

(a) under, arising out of, or in any connection with, the contract;
(b) in connection with the project the subject of the work under the Contract;
(c) in tort for negligence or otherwise, such as for negligent misrepresentation;
(d) otherwise at law including by statute and in equity including for restitution for unjust enrichment.

It appears the drafters of AS4300-1995 and DR96319 have recognised this. Clause 46.1 of AS4300-1995 requires notification of "*any claim in connection with the Contract or the subject matter thereof...*". Similarly, clause 41.1 of DR96319 requires notification of "*any claim in connection with the subject matter of the Contract*". In my opinion, because these clauses require notification of claims connected with the subject matter of the contract they encompass all of the kinds of claims identified by Mr Tyrril.

Further, both clause 46.1 of AS4300-1995 and clause 41.1 of DR96319 permit, as an alternative to the service of a prescribed notice, the service of a notice of dispute in relation to a claim. This allows the claimant to immediately invoke the dispute resolution procedures in these contracts. Notices of dispute in these contracts (clause 42.1 of DR96319 and clause 47.1 of AS4300-1995) are specified to include claims for torts, under statutes, for restitution based on unjust enrichment and for rectification or frustration of the contract. This represents a significant departure from the procedure detailed in clause 46.1 in AS2124-1992.

C21 is alone among the general conditions of contract in providing a definition of "*claim*". Clause 94.3 provides:

> *"Claim means a claimed entitlement (including an extension of time) of the Contractor under or arising out of or connected with the Contract, including for breach of Contract by the Principal or under any statute."*

On its face, this clause is narrower than the clauses in DR96319 and AS4300-1995, as it does not include claims "*in connection with the contract*" or "*the subject matter of the contract*". Does this definition include claims for torts, restitution or quantum meruit? Recent case law in Australia, England and Canada suggests that the words "*under or arising out of or connected with the Contract*" are likely to receive a broad interpretation. Most of the cases that discuss the interpretation of these words are in regard to arbitration clauses that are similarly worded.

In *Mir Brothers Developments Pty Ltd v Atlantic Constructions Pty Ltd* (1984) 1 BCL 80 ("*Mir Brothers*") the NSW Court of Appeal considered a contract which submitted to arbitration "*all disputes or differences arising out of the Contract or concerning the performance or non-performance by either party of his obligations under the contract*". The Court held that this clause did not include a claim for rectification of the contract, as the clause was too narrow to include such a claim.

The NSW Court of Appeal in *IBM v National Distribution Services Limited* (1991) 22 NSWLR 466 ("*IBM*") considered a dispute resolution clause in a contract which provided for the submission to arbitration of "*any controversy or claim arising out of or related to this agreement or the breach thereof*". In finding that this clause included claims in respect of the *Trade Practices Act* 1974 (Cth), the Court commented that such a clause:

> *"is not to be narrowly construed. It is sufficiently wide to include claims for rectification and for relief on the ground of misrepresentation or mistake."* (Per Kirby P at 477)

Other decisions have similarly construed arbitration clauses widely, permitting the submission to arbitration of claims such as whether a contract was void for fraud (*QH Tours v Ship Design and Management (Aust) Pty Limited* (1991) 105 ALR 371), and regarding termination of a contract (*Ferris v Plaister* (1994) 34 NSWLR 474).

The *IBM* decision was followed by the NSW Court of Appeal in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways ("Francis Travel")* (1996) 39 NSWLR 160. That case considered a contract providing for the submission to arbitration of disputes "*arising out of this Agreement*". Gleeson CJ stated:

> *"When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument."* (at 165)

In *Francis Travel* Gleeson CJ stated that the *Mir Brothers* decision should be confined to its special factual situation; instead his Honour applied with approval the decision of the Queens Bench division of the UK High Court in *Ethiopian Oilseeds and Pulses Export Corp v Rio Del Mar Foods Inc* [1990] 1 Lloyd's Rep 86 ("*Ethiopian Oilseeds*"), and held that "*arising out of the contract*" included rectification of the contract.

Whilst all of these cases relate to the arbitrability of disputes arising under the *Trade Practices Act* (with the exception of the English authority of *Ethiopian Oilseeds,* which was applied in *Francis Travel),* it is considered that the wide interpretation given to "*under or arising out of or connected with*" means that it would catch other kinds

of disputes also.

It seems that the overriding test that a Court will apply in determining the scope of claims referable to arbitration will depend on the establishment of a close connection between the dispute and the contract: *Allergan Pharmaceuticals Inc v Bausch & Lomb Inc* (1987) 3 BCL 61.

The High Court of Australia held in *Codelfa Constructions v State Rail Authority (NSW)* (1982) 149 CLR 337 that a clause submitting to arbitration disputes "*arising out of the Contract*" is sufficient to ground the arbitrator's jurisdiction for disputes based in quantum meruit.

This also seems to be so for disputes relating to torts, so long as the tort has a sufficiently close nexus to the contract: *Commonwealth v Citra Constructions Ltd* (unreported, Queensland Supreme Court, McPherson J, OS 469 of 1982). This is also the law in England: see *Empresa Exportadora de Azucar v Industria Azucarer Nacional SA (The "Playa Larga")* (1983) 2 LLR 171 (UK CA) and *Ashville Investments Limited v Elmer Constructions Limited* (1987) 37 BLR 55 (UK CA). In the latter case it was held that the phrase "*arising ... in connection with*" the contract was wide enough to include a dispute regarding negligence. In Canada, clauses relating to the arbitration of disputes "*arising out of or in connection with*" the contract have been held to extend beyond rights created under the contract, to disputes that rely upon the existence of a contractual obligation, including tortious claims: *Kaverit Steel and Crane v Kone Corporation* (1992) 87 DLR(4th) 129.

A defamation claim has also been held to be within the ambit of a dispute that "*arises out of or in connection with the Contract*": *Sydney Water Corporation Limited v AquaClear Technology Pty Limited* (unreported, NSW Supreme Court, Rolfe J, 7 July 1995). This case concerned a dispute under AS2124-1986. Rolfe J held that it was a question of fact whether the defamation claim arose out of or in connection with the contract and this depended heavily on the precise terms of the alleged defamation (at page 29 of the judgment). Considering *Kaverit Steel and Crane v Kone Corporation, Allergan Pharmaceuticals Inc v Bausch & Lomb Inc* and other authority, Rolfe J determined that there was sufficient connection between the defamation and the agreement, and accordingly, this should be determined by the arbitrator.

Whilst these cases relate to the ambit of arbitration clauses, it is considered that they are relevant in deciding what claims are caught by contractual terms, such as clause 94.3 of C21 relating to the notification of claims. Clause 94.3 of C21 should be given a wide interpretation and would probably include claims relating to torts, restitution and quantum meruit, depending on there being sufficient closeness between the claims and the agreement.

Notification of Claims - Contractual Provisions

NPWC3

NPWC3 requires notification "*in writing*" to the Superintendent in regard to:

- discrepancies in documents constituting the contract (clause 8.1);
- where a party finds a document in variance with statutory requirements (clause 14.1); and
- in claims for extension of time (clause 35.4).

Further to this, there is a general notification clause:

Clause 48 provides:

> *"The Principal shall not be liable upon any claim by the Contractor in respect of any matter arising out of the Contract unless the claim ..., is lodged in writing ... or written notice of intention to make the claim is lodged ..."*

JCC

The JCC contracts require written notification by the Contractor to the Superintendent:

- regarding a finding of discrepancies in the contract documents (Clause 2.03.01);
- of differences in the site conditions (clause 3.02);
- of delays (Clause 9.01);
- of extension of time for carrying out variations (Clause 9.07); and
- relating to conditions precedent to the Builder's entitlement to recover damages or reimbursement of costs and expenses incurred as a result of delay in the progress of the works (Clause 10.12.04).

AS2124-1992

AS2124-1992 requires written notice to be given to the Superintendent of:

- latent conditions (Clause 12.2);
- delay to work under the contract (Clause 35.5, first paragraph);
- differences in site conditions (Clause 35.5, second paragraph);
- delay in reaching practical completion (Clause 35.5, third paragraph);
- claims for extension of time (Clause 35.5, seventh paragraph); and
- prescribed notices and of notices of dispute (clauses 46.2, 47.1).

Clause 40.2, relating to proposed variations, states *"... the Contractor shall advise the Superintendent whether the proposed variation can be effected."* Note there is no requirement in clause 40.2 that the advice given by the Contractor be in writing. This is in contrast with the corresponding clause in AS2124-1986, 40.1, which provides:

> *"Upon receipt of the notice the Contractor shall advise the Superintendent in writing whether the proposed direction can be effected ... "*

It is noted in an article in Issue #30 of the Australian

Construction Law Newsletter at p. 13, that clause 46.1 of AS2124-1992 does not require the claim itself to be made within the time limits but merely the giving of the "*prescribed notice*".

AS4300-1995

AS4300-1995 provides that the Contractor shall give to the Superintendent notice in writing:

- if anything may delay work under the contract (Clause 35.5, first paragraph);
- that he will be delayed in reaching practical completion (Clause 35.5, third paragraph);
- of claims for extension of time for practical completion (Clause 35.5, eighth paragraph).

Clause 35.5, third paragraph, states that if the Contractor is or will be delayed in reaching Practical Completion by a cause nominated in clause 35.5 and, *"the Contractor gives the Superintendent a written claim for an extension of time for Practical Completion"*, the Contractor shall be entitled to an extension of time for Practical Completion.

Clause 46.1 provides that:

"This Clause and Clauses 46.3, 46.4, and 46.5 shall not apply to any claim, including a claim for payment, the communication of which is required by another provision of the Contract."

Clause 46.1 also provides that as an alternative to the service of a prescribed notice a claimant may serve a notice of dispute under clause 47.1.

Clause 46.3 provides that the *"prescribed notice"* is a *"notice in writing"*.

Clause 46.4, relating to disputing a direction given by the Superintendent, requires a *"... notice of dispute in accordance with Clause 47.1 ..."* .

Clause 47.1 requires the notice of dispute to be *"... in writing ..."*.

When dealing with clause 46.1 of AS2124-1992, note that it requires the submission of the prescribed notice within a certain period but not the claim itself. Clause 46.4 of AS4300-1995 deals with this in the following way:

"If within 28 days of giving the prescribed notice the party giving the notice does not notify the other party and the Superintendent of particulars of the claim, the prescribed notice shall be deemed to be the claim."

DR96319

Clause 41.1 provides:

"This sub-clause and sub-clause 41.3 shall not apply to any claim, including a claim for payment, the communication of which is required by another provision of the Contract."

Similarly to clause 46.1 of AS4300-1995, clause 41.1 also provides that as an alternative to the service of a prescribed notice a claimant may serve a notice of dispute under clause 42.1.

Clause 41.3 provides:

"If within 28 days of giving the Prescribed Notice the party giving it does not notify the other party and the Superintendent of the particulars of the claim, the Prescribed Notice shall be deemed to be the claim."

C21

Clause 78.2 states that "*The Contractor must make Claims using the procedure and within the time specified in the relevant provision of the Contract.*" Such procedures include:

- giving the Principal *"written notice of ... delay"* (clause 66.2.1); and
- specifying to the Principal *"in a separate written notice ... the extension of time claimed"* (clause 66.2.2).

Notwithstanding that the contract may be silent as to the mode of notification of a claim I suggest that it should always be in writing so that proper evidence exists that the claim was made and of the nature and extent of the claim.

In regard to Ambiguities in contractual documents, clause 18 provides:

".2 The Contractor, in addition to any responsibility to check Principal's Documents under clause 43, must check the Contract Documents and inform the Principal of any ambiguities, inconsistencies and discrepancies at least 21 days before the Contractor proposes to use them for construction (including procurement, manufacture or fabrication of any part of the Works) or for other Contract purposes.

.3 If the Contractor fails to take the steps required in clause 18.2 above, and a Variation is instructed by the Principal due to an ambiguity, inconsistency or discrepancy, the Contractor is not entitled to costs for delay nor the cost of any aborted work (including design) resulting from the Variation."

Forms and Particulars of Notification of Claim - Contractual Provisions

NPWC3

Clause 8.1 requires *"Any ambiguity, discrepancy or inconsistency"* to be referred to the Superintendent. Obviously any notification of claim would need to identify any ambiguity, discrepancy or inconsistency.

Clause 14.1 provides that the notice to be given by the Contractor relating to differences between the documents forming the contract and statutory requirements shall specify, *"the departure from such provisions which he considers necessary to comply with such requirements and the reasons therefor, and applying for instruction*

thereon."

Clause 35.4 provides that in relation to a claim for extension of time the Contractor should give notice in writing of the claim, *"together with a statement of the facts on which he bases his claim."*

Clause 48 provides that the Contractor should lodge the claim, *"together with full particulars thereof ..."*

The written notice of intention to make the claim should specify, *"... the nature of the claim ..."*

JCC

Obviously any notification given pursuant to clause 2.03.01 would need to identify the alleged ambiguity, error, omission etc.

As regards clause 3.02, the Builder is required to identify those conditions or characteristics which:

"3.02.01 Differ from the conditions and characteristics shown or described in this Agreement; or

3.02.02 give reasonable cause for the Builder to consider that the Works require to be varied."

As regards the notification of delay, clause 9.01 provides that the notice in writing shall state, *"the affected Stage or Stages ... the nature, the cause and, where possible, the extent of that delay ..."*

Clause 9.07 requires notification of, *"... the extent or likely extent of that delay ... "*

Clause 10.12.04 requires notification of, *"the nature of the claim"*.

AS2124-1992

Clause 12.2 does not detail specific matters which must be contained in any notification of a latent condition. However, clause 12.2 does provide:

"If required by the Superintendent, the Contractor shall provide to the Superintendent a statement in writing specifying -

(a) the Latent Condition encountered and in what respects it differs materially;

(b) the additional work and additional resources which the Contractor estimates to be necessary to deal with the Latent Condition;

(c) the time the Contractor anticipates will be required to deal with the Latent Condition and the expected delay in achieving Practical Completion;

(d) the Contractor's estimate of the cost of the measures necessary to deal with the Latent Condition; and

(e) other details reasonably required by the Superintendent."

Clause 35.5:

(i) First paragraph - *"... with details of the possible delay and the cause."*

(ii) Second paragraph - *"... extent of the likely delay"*.

(iii) Third paragraph - *"... setting out the facts on which the claim is based ..."*.

(iv) Seventh paragraph provides that for claims for practical completion, *"the number of days extension claimed"* will be detailed.

Clause 40.2 provides that the Contractor shall:

"(a) advise the Superintendent of the effect which the Contractor anticipates that the variation will have on the construction programme and time for Practical Completion; and

(b) provide an estimate of the cost (including delay costs, if any) of the proposed variation."

Clause 46.1 provides that the prescribed notice shall include the following particulars:

"(a) the breach, act, omission, direction, approval or circumstances on which the claim is or will be based;

(b) the provision of the Contract or other basis for the claim or proposed claim; and

(c) the quantum or likely quantum of the claim."

Clause 46.2 requires the service of a notice of dispute *"... adequately identifying and providing details of the dispute"*: see clause 47.1.

AS4300-1995

Clause 12.2 is in the same terms as clause 12.2 of AS2124-1992.

Clause 35.5:

Eighth paragraph provides that for claims for practical completion, *"the period of extension claimed"* will be detailed.

Clause 40.2 provides that the Contractor shall:

"(a) notify the Superintendent of the effect which the Contractor anticipates that the variation will have on the Contractor's Program and time for Practical Completion; and

(b) provide an estimate of the cost (including delay costs, if any, and the cost or effect on any applicable warranty) of the proposed variation."

Clause 46.3 specifies that the Prescribed Notice is to include:

"(a) an outline of the basis of the claim or proposed claim; and

(b) the quantum or likely quantum of the proposed claim."

DR96319

The statement of particulars in Clause 25.2 (see Clause 12.2 of AS2124-1992) need only be provided if requested by the Superintendent within 3 days of the giving of original notice.

Clause 34.3 provides that the contractor is entitled to an EOT provided that, in part, he provides a *"written*

claim ... evidencing the facts of causation and of the delay to WUC (including extent)."

Clause 36.2 (Clause 40.2 of AS2124-1992) is materially the same as the current standard contract except that the draft provides in addition that:

> *"The Superintendent may direct the Contractor to give a detailed quotation for the proposed variation supported by measurements or other evidence of cost."*

Clause 41.1 provides:

> *"The Prescribed Notice is a written notice of the general basis and quantum of the claim."*

Clause 41.2 provides that the failure to comply with this "*or to communicate a claim in accordance with the relevant provision of the Contract shall, inter alia, entitle the other party to damages for breach of contract but shall neither bar nor invalidate the claim.*"

Clause 41.3 provides that:

> *"If within 28 days of giving the Prescribed Notice the party giving it does not notify the other party and the Superintendent particulars of the Claim, the Prescribed Notice shall be deemed to be the claim".*

Further under this clause, both parties must give a Notice of Dispute within 28 days of the Superintendent's decision, the Superintendent shall certify the amount of that assessment to be moneys then due and payable.

C21

Clause 66.2.1 provides that the "*cause of delay and the circumstances of the delay*" must be provided in the notice of delay, whist the "*extension of time claimed, together with any information sufficient to justify the Contractor's entitlement to an extension*" must be provided in a separate notice under clause 66.2.2.

Clause 78.5 provides:

> *"Claims (excluding Progress Claims) must include their legal and factual basis and detailed quantification, or an estimated quantification if the Principal agrees that the Claim cannot then be quantified."*

Forms and Particulars of Notification of Claim - Common Law

The provisions referred to in the previous section of this article refer, of course, to the particulars to be included in a notice required by a specific term of the contracts. What particulars should be included in the notification of a claim where the contract is silent on this issue?

In *Diploma Constructions Pty Ltd v Rhodgkin Pty Ltd* (unreported, Supreme Court of Western Australia, Commissioner Anderson QC, 20 July 1990) ("*Diploma Constructions*") Commissioner Anderson QC, decided that a notice "*to the architects setting out the cause of delay and stating a fair and reasonable period ...*" did not require a statement of precisely what period of delay was attributable to each separate cause and that such a construction of the particularity required would not be conducive to a business like administration of the contract.

> *"It would not be very practical to require that no claim should be allowed unless there was, or could be, a definitive allocation of separate cause to each moment of delay. In my opinion, all that is required by clause 24(c) is that the cause(s) of the alleged delay be fairly identified to the architect."*

Commissioner Anderson referred to written correspondence between the Contractor and the Contract Administrator and his consultants which referred to industrial stoppages, bans, the late selection of colours, inclement weather and held that, "*in the context of the totality of the communications between the parties, [they] were sufficient notification of the causes of the claimed delay of 29 days*" (at pp. 9 & 10). Notification of the time lost and the exact days claimed which was given within a document labelled "*authority for variations to contract*" was held to constitute sufficient notification in the light of the previous correspondence.

The claim needs to identify the alleged entitlement to payment or extra time, whether such entitlement is pursuant to a provision of the contract or based upon a breach of the contract, negligence etc.

Manner of Service of Written Notification

This is usually stipulated in the contract. Examples are prepaid post, registered post, by hand, etc. In *NM Superannuation Pty Ltd v Hughes* (1992) 27 NSWLR 26 Cohen J of the Supreme Court of NSW held that the service of a notice by facsimile was effective: p. 36.

C21 provides specifically that notification of claims may be by facsimile and electronic mail (clause 12.2).

Time for Giving Notification

NPWC3

8.1	No time prescribed.
14.1	No time prescribed.
35.4	*"... not later than twenty eight days after the cause of delay arose ..."*
48	Claim - *"... not later than twenty-eight days after the date of the occurrence of the events or circumstances on which the claim is based ..."* Notice of Intention to make a claim - Notice of intention to be lodged not later than twenty-eight days after the date of the occurrence of the events or circumstances on which the claim is based. The claim, together with full particulars thereof is required to be lodged with the Principal, *"... before the issue of the Final Certificate."*

JCC

2.03.01 *"promptly".*

3.02 *"promptly".*

9.01 *"... as soon as practicable and in any event not later than twenty (20) days after the cause of delay arose ..."*

9.07 *"... prior to commencing the execution of that Variation or as soon as the likelihood of delay becomes or should reasonably have become evident to the Builder ..."*

10.12.04 *"... as soon as practicable after commencement of the delay giving rise to the claim and at a time when those details are capable of being adequately checked by the Architect, such details being given progressively where necessary: ..."*

Clause 14.04 should also be noted:
"Where by virtue of any provision of this Agreement the Architect or either party to this Agreement shall be required or empowered to give any notice and no time for the giving thereof is prescribed such notice shall be given as soon as practicable."

AS2124-1992

12.2 *"... forthwith and where possible before the Latent Condition is disturbed ..."*

35.5 First paragraph - *"promptly"* upon the cause of the delay becoming evident to the Contractor.

Third Paragraph - *"... within 28 days after the delay occurs ..."* See also the seventh paragraph which provides that notice of the number of days extension claimed should be given, *"With any claim ..." or "... as soon as practicable thereafter ..."*

40.2 *"Upon receipt of a notice in writing from the Superintendent ..."*

46.1 First paragraph - *"within 28 days after the first day upon which the Contractor could reasonably have been aware of the breach ..."*

Second paragraph - *"... within 42 after the first day upon which the Contractor could reasonably have been aware of the entitlement to make the claim ..."*

46.2 *"... within 56 days after the date of service on that party of the notice pursuant to Clause 46.2(b)."* The Notice under clause 46.2(b) is served by the Superintendent and informs each party that if it wishes to dispute a direction it must do so under clause 47.

AS4300-1995

All the provisions are the same as AS2124-1992, detailed above, except for the following.

Clause 46.1 *"As soon as practicable after a party could reasonably have been aware of any claim in connection with the Contract ..."*

Deletion of the second paragraph of clause 46.1 AS2124-1992 which provides:
"The Principal shall not be liable upon any other claim by the Contractor for any extra cost or expense in respect of or arising out of any direction or approval by the Superintendent unless within 42 days after the first day upon which the Contractor could reasonably have been aware of the entitlement to make the claim, the Contractor has given to the Superintendent the prescribed notice."

DR96319

25.2 *"promptly, and where possible before the Latent Condition is disturbed".*

34.3(b) *"within 28 days of when the Contractor should reasonably have become aware of that causation occurring".*

" promptly giving the Superintendent a written claim ..."

36.2 *"as soon as practicable notify the Superintendent".*

41.1 *"As soon as practicable after a party could reasonably have been aware of any claim ..."*

The second paragraph of Clause 46.1 of AS2124 has been omitted from DR96319.

41.3
(i) paragraph 1 provides that the Contractor has *"28 days after the giving of the Prescribed Notice"* to provide particulars, after which *"the prescribed Notice shall be deemed to be the claim".*
(ii) paragraph 2 provides that a party has 28 days after notification of the decision to give a notice of dispute.

C21

66.2.1 *"no later than 7 days after the delay first occurred".*

66.2.2 *"no later than 21 days after the delay ended".*

77.1 *"The Contractor must submit a Final Payment Claim for any entitlement not previously submitted, and which is then permitted under the Contract or which might otherwise be brought in relation to the subject matter of the Contract, within 14 days of the end of the Contract Period (the Final Claim Period)."*

78.3 *"Before the date of the second Progress Claim after the event giving rise to the Claim occurs or begins, or should have become known to the Contractor with reasonable diligence on its part (where applicable)."*

79.5 *"If a Claim is rejected, the Contractor may notify the Principal that it disputes the rejection within 14 days of the Principal's notice of rejection, or otherwise the Claim is barred."*

Clause 78.3 could create problems for a number of reasons. Firstly, what happens concerning notification of claims when there are not two progress claims remaining to be made? It is suggested that such claims would have to be made within a reasonable time. Secondly, it is unclear from what moment the time requirement is measured. Is it from the time that "*the event giving rise to the Claim occurs or begins*" or is it measured from when such an event becomes "*known to the Contractor with reasonable diligence on his part*"? These requirements appear as alternatives in the contract but it does not specify on what basis one time is to be preferred over the other.

The contract seeks to encourage progressive notification of claims by barring claims not notified within the time period. In describing this feature of the contract, it has been stated that:

> *"... the Contract provides for timely management of claims through an escalating process which promotes open communication between the parties ..."* ("C21 Conditions of Contract", ACLN #51)

It has clearly become the policy of the Department of Public Works and Services to contractually enforce timely notification of claims, as indicated in the "*No Dispute*" Report published by the Department in 1990, which states that:

> *"Successful claim administration ... requires ... Contractor and Principal emphasis on claims administration concurrently with construction administration ..."* (p 164)

The report also states:

> *"Notification of a problem arising should be made in writing within 7 days of identification of the problem, stating the broad contractual basis of the claim ...*
>
> *In the event that either of the contracting parties fail to notify a claim within that period, then its entitlement to recover costs in respect of that claim should be reduced by the amount of costs which the other party can demonstrate would not have been incurred had the required notice been given and they had been able to take action to overcome the problem or reduce the delay.*
>
> *Counter-claims for this denied opportunity to mitigate or record costs can be as difficult to handle as the more common forms of claim."*(p169-170)

Notwithstanding that one may accept that progressive notification of claims is advantageous, some of the clauses highlighted in this paper present potential practical difficulties. Although they purport to require the progressive notification of claims it is sometimes difficult to know when the period, within which notification must be made, commences. An example is the third paragraph of clause 35.5 of AS2124-1992 which requires notification *"... within 28 days after the delay occurs ..."* Does this mean when the delay commenced or when it concluded?

DR96319 approaches this problem in a different way. As noted above, clause 34.3 (b), relating to claims for extension of time, requires the Contractor to give notice to the Superintendent *"... within 28 days of when the Contractor should reasonably have become aware of that causation occurring ..."*

In addition, clause 34.3 provides that if a further delay results from a Qualifying Cause of Delay, as defined in the contract, evidenced in a claim under paragraph (b) the Contractor shall claim an extension of time for such delay *"... by promptly giving the Superintendent a written claim ..."*.

Contrast this provision with the following clause, concerning notification of claims, from the Department of Defence contract referred to earlier:

"48. Notification of Claims

48.3 *Subject to any other provision of this Contract which provides a time limit in which to bring a Claim, in which case the specific time limit in that clause shall prevail, the Contractor shall not have any right to make any Claim unless:*

(a) the Contractor has given to the Project Manager notice in writing not later than twenty-eight (28) days after the first occurrence of the events or circumstances on which the Claim is based that it intends to make a Claim;

(b) the Contractor within twenty-eight (28) days after giving the notice in writing pursuant to subparagraph (a) provides the Project Manager with detailed particulars concerning the events or circumstances on which the Claim will be based and how they have effected the Contractor;

(c) *if the events or circumstances on which the Claim is to be based or the effects resulting from them continue for a period in excess of twenty-eight (28) days after the notice under subparagraph (a) was given, the Contractor continues to submit the detailed particulars required by subparagraph (b) every twenty-eight (28) days until the events or circumstances or the effects resulting from them have ended; and*

(d) *within twenty-eight (28) days after the events or circumstances or the effects resulting from them have ended, the Contractor lodges its Claim in a form that complies with subclause 48.2."*

In the matter of the Rules of the Supreme Court and In the matter of an application pursuant to O. 64 thereof by *The Corporation of Trustees of the Order of the Sisters of Mercy in Queensland v Wormald International (Aust.) Pty Ltd* (1989) 5 BCL 77, Connolly J of the Supreme Court of Queensland considered a clause in a contract which required claims to be lodged within one month *"after the date of the occurrence of the events or circumstances on which the claim is based"*. This is the form of words adopted in clause 48 of NPWC3. His Honour is reported to have said, at p. 80 of the report:

> *"These events and circumstances must include not merely the act or event from which loss is said to flow but the events and circumstances which constitute the loss ... Any claim is based on a breach of contract or duty or a contractual provision on the one hand and the detriment which actually occurred on the other. For the reasons I have given above, this strengthens the view that time runs under special condition 16 from the date when the complete loss attributable to the occurrence or happening has materialised, a date at which it is possible to start assembling the full details of the claim which must be lodged with the manager ..."*

Again, contrast this with clause 48.3 of the Department of Defence contract conditions referred to above.

Definitions of Time Phrases

Listed below are some definitions of the phrases used in the clauses referred to above.

"forthwith"

> *"I agree that the word 'forthwith' is not to receive a strict construction like the word 'immediately', so that whatever follows, must be done immediately after that which has been done before ... it seems that whatever is to be done ... ought to be done without any unreasonable delay. I think the word 'forthwith' there used, must be considered as having that meaning."* (*R v Worcestershire JJ* (1839) 7 Dowl 789 at 790 per Coleridge J.)

> *"Promised to do an act forthwith does not mean that it is to be done instanter. Sometimes ... the word may be treated as practically synonymous for some purposes ... with 'within a reasonable time'."* (*Measures v McFadyen* (1910) 11 CLR 723 at 729, per Griffith CJ)

> *"The word forthwith has different meanings in different contexts but generally it means 'as soon as possible in the circumstances, the nature of the act to be done being taken into account.' "* (*Netage v Cantley* (1985) IPR 200 at 214 per Young J, citing *Re Venetoulis; ex parte Casil Ltd* (1976) 13 ALR at 627 per Riley J.)

> *"In my view this amounts to a limitation of the time within which the relevant acts are to be performed. It is not a limitation which expires at a precise time, but is nonetheless a clear and intelligible restriction on the time which may be taken to perform the acts in question. Within a short time the period allowed does expire."* (*Re Garliandi* (1984) 57 ALR 718 at 725 per Woodward J)

> *"in my view, the word [forthwith] means 'as soon as practicably possible' rather than 'within a reasonable time'."* (*In the marriage of Rubie* (1991) 104 FLR 426 per Nygh J at 428.)

"Promptly"

The English Uniform *Laws on International Sales Act* 1967, Schedule 1, states that *"where ... an act is required to be performed 'promptly', it shall be performed within a short a period as possible, in the circumstances, from the moment when the act could reasonably be performed."*

"Within ... days"

See *Reynolds v Reynolds, Morton v Hampson* referred to under *"Within a reasonable time"*.

"Not later than ... days"

> *"... not later than one month ... should be interpreted as requiring that the period of one month there mentioned (which means a calendar month) shall be a "clear" month or a "full" month ..."* (*Forster v Jodex Australia Pty Ltd* (1972) 127 CLR 421 at 429 per Walsh J.)

> *"This period must be a whole period or clear period so that its first day is wholly after the occurrence of the making of the application for extension of time and its last day wholly before he occurrence of the expiration ..."* (*Forster v Jodex Australia Pty Ltd* (1972) 127 CLR 421 at 448 per Stephen J.)

"As soon as practicable"

> *"The phrase as soon as practicable is one which defies definition...(it) is to be determined in the light of all the circumstances. It is not one to be determined on some mathematical basis of adding together periods of time taken in relation to various steps in the process ..."* (*Creely v Ingles* [1969] VR 732 at 734 per Little J.)

In *Will v Whiteside ex parte Wills* [1987] 2 Qd R 284 it was held that within the meaning of the Traffic Act 1949 (Qld) "*as soon as practicable*" was not to be taken to mean "*as soon as possible*", but rather meant *"as soon as reasonably practicable"*. This period was determinable with regard to all of the evidence placed before the Court.

Where a notice of an accident was to be given "*as soon as practicable*" (*Workers' Compensation Act* 1925 Section 14 (England)), a delay of 17 days was held too much (*Shearer v Miller* 37 SLR 80). (See also *Hayward v Westleigh Colliery Co* [1915] AC 530; *Burril v Vickers* [1916]1 KB 180; *Albison v Newroyd Mill Limited* 134 LT 171; *Day v Bernades* 131 LT 397; *Lee v Nursery Furnishings Limited* [1945] 1 All ER 387.)

A delay of 46 days between the alleged provision of a notice to claim an extension of time and the provision of notice of a fair and reasonable period for which practical completion should be extended was well after it had become practicable to provide that notice: *Diploma Constructions* at p. 15.

"*Practicable*" has been held to mean feasible (*Singh v Post Office* [1973] 1 ICR 437).

JCC standard conditions of contract provide, by clause 14.04, that where the contract does not specify a period for the giving of notice it should be given *"as soon as practicable"*. The other standard conditions do not include a similar provision. The author submits that where a contract is silent as to the period within which notification or advice should be given, see clause 40.2 of AS2124-1992, the law will require the notification or advice to be given "*within a reasonable time*".

"Within a reasonable time"

> *"What is reasonable must necessarily be affected by external events. Thus the quality of a period of time must be influenced by what occurs as it elapses. To determine it when time starts to run would be to exclude considerations of major importance."*: *Rudi's Enterprises Pty Ltd v Jay* (1987) 10 NSWLR 568, per Samuels J at 576.

> *The word 'within' in relation to a period of time does not usually mean 'during' or 'throughout the whole of it'; it is more frequently used to limit a period 'inside which' certain events may happen.": Reynolds v Reynolds* [1941] VLR 249 at 252 per O'Bryan J.

> *The modern rule in relation to a period of time fixed by statute 'within' which an act is to be done after a specified event is at the day of the event is to be excluded; the next day is that first day of the stipulated period and the time expires on the last day of the period, counting from and of course including the first day.": Morton v Hampson* [1962] VR 364 at 365, per Cur.

> *"Where anything is limited to be done within a 'reasonable time', the question what is a reasonable time must necessarily depend on the circumstances, and is therefore a question of fact. If a contract is silent as to time for performance of an act, the law implies that it is to be done within a reasonable time, and what period is reasonable is a question of fact."* (45 Halsbury's Laws (4th Edition) paragraph 1147)

It is noteworthy that each of the time phrases "*forthwith*", "*promptly*" and "a*s soon as practicable*" are used in AS2124-1992, AS4300-1995 and DR96319. These terms can be compared with the more precise phrases "*within ... days*" and "*not later than ... days*". As such it can be seen that clauses of this kind are more precise and hence should be preferred.

Is Compliance with provisions relating to Notification of Claims a Condition Precedent to entitlement to payment ?

In some contracts the consequences of non-compliance with a provision are expressed in the contract, eg: clause 48 if NPWC3 and clause 18.3 of C21. In others the consequences of non-compliance are not expressed and an examination of the purpose and intent of the clause is required. The clause must be examined as to its purpose with regard to the intention of the parties to the agreement.

Where it is alleged that failure to observe a provision in a contract operates as a bar to a substantive right the general principle is that the clause is to be construed contra proferentum. Consequently, any "*bar*" will need to be drawn in express and clear language so that no ambiguity exists as to its operation. In *Port Jackson Stevedoring Pty Limited v Salmond and Spraggon (Aust) Pty Limited* (1978) 139 CLR 231 at pp. 238-239 the Court considered a clause which contained both a time provision and an exemption in the following terms:

> *"Shall be discharged from all liability in respect of ... unless suit is brought within one year after."*

Both the Privy Council and the High Court of Australia held that the clause meant what it said but Barwick CJ confirmed that exemption clauses:

> *"... are of course enforceable according to their terms unless their application according to those terms should lead to an absurdity or defeat the main object of the contract or, for some other reason, justify the cutting down of their scope."*

In *Jennings Construction Limited v Q H & M Birt Pty Limited* (1987) 3 BCL 189 *(Jennings v Birt)* Smart J considered the application of clause 47 of SCNPWC3,

which, for practical purposes, is in identical terms to clause 48 of NPWC3.

Jennings entered into a contract (the head contract) with the Commissioner for Main Roads for the construction of a section of the Federal Highway near Goulburn, New South Wales. Birt, as Sub Contractor, entered into a Schedule of Rates Contract with Jennings for certain subgrade preparation and earthworks.

Jennings submitted that on the basis of the wording of clause 47 it was not liable upon any claim in respect of any matter arising out of the contract, including progress claims. Clause 47 is in the following terms:

> *"47. The Contractor shall not be liable upon any claim by the Subcontractor in respect of any matter arising out of this Contract unless the claim, together with full particulars thereof, is lodged in writing with the Contractor not later than fourteen (14) days after the date of the occurrence of events or circumstances on which the claim is based or written notice of intention to make the claim specifying the nature of the claim is lodged with the Contractor within that time and the claim, together with full particulars thereof, is lodged in writing with the Contractor not later than fourteen (14) days before the issue of the Final Certificate under the Head Contract."*

Smart J considered various provisions of the contract to ascertain the extent of the application of clause 47 to claims made by Birt. His Honour held that the clause did not apply to progress claims or to claims relating to work which could be categorised as "*Work which must be done under the contract if optimum conditions prevail*".

Smart J said at pp. 193 and 194:

> *"It (clause 47) requires notice to be given where work is authorised under the contract if it should be necessary and events or circumstances occur making it necessary. The requirement of giving notice must be met if payment is to be obtained for the extra work done as a result of the occurrence of the events or circumstances. The clause does not focus upon whether the work is covered by the express or implied terms of the contract, but upon the occurrence of events or circumstances necessitating the work."*

In *GR Mailman and Associates Pty Ltd v Wormald Australia* (1991) 24 NSWLR 80 ("*Mailman*") the NSW Court of Appeal considered a provision in a lease that permitted the lessee a specified time to dispute the lessor's re-assessment of the market value of the rent. The Court held that the time clause was of the essence; if the lessee did not appeal the rent within the specified time then he was bound by it.

The Court in *Mailman* considered the decision of *United Scientific Holdings v Burnley Borough Council* [1978] AC 904, in which Lord Simon of Glaisdale stated:

> *"Time will not be considered of the essence unless:*
>
> *(1) the parties expressly stipulate that conditions as to time must be strictly complied with; or*
>
> *(2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence."*

The Court held that the clause in the lease fell within the second exception, as the fact that there was a default rent (i.e. if there was not an appeal the rent as set by the lessor was binding) was indicative of time being of the essence (per Samuels J at 94). This view is contrary to English authority, but was approved in obiter dicta (at p5) by Cole JA (with whom Clarke and Sheller JJA agreed) in *526 Olive Street Pty Limited v Westpac Banking Corporation* (unreported, NSW Court of Appeal, 13/11/96).

Dorter & Sharkey, "Building and Construction Contracts in Australia - Law and Practice 2nd Edition", The Law Book Company Limited, Sydney, 1990, express the opinion (at [14.120], page 7083) that where the purpose of the clause is not a general limitation as to the time within which a notice is to be submitted *"but rather a constructive or deemed variation such as by way of a latent condition, the above principles will prefer* [an] *... interpretation and construction which results in non-compliance being a bar. For example, the failure of the contractor to give the required notices about the likely prevention, prejudice or other effect of proposed variations will deny him or her an entitlement"*: see *Wormald Engineering Pty Limited v Resources Conservations Co International* (1992) 8 BCL 158 (*Wormald Engineering*), which concerned an interpretation of clause 40 of AS2124-1978.

In *Wormald Engineering,* Rogers CJ Comm.D., of the Supreme Court of NSW, considered whether the Contractor's compliance with the following paragraph of clause 40.2 of AS2124-1978, relating to variations, was a condition precedent to obtaining payment:

> *"If, in the opinion of the Contractor, compliance with the Superintendent's order, pursuant to this subclause, is likely to prevent him from or prejudice him in fulfilling any of his obligations (including guarantees) under the Contract, he shall forthwith notify the Superintendent thereof in writing, and the Superintendent shall as speedily as is practicable determine whether or not his order shall be complied with."*

The Contractor was paid the cost of the actual work done in relation to variations but had not made a claim for disruption caused to the carrying out of the contract works.

His Honour noted the purpose of clause 40.2 was:

> *"... to provide the respondent, through the superintendent, prior to the implementation of the variation orders, with information as to their likely effect so as to allow the respondent to make an informed assessment as to whether or not the variation orders should be confirmed."*

Rogers J held that compliance with clause 40.2, by the Contractor, was a condition precedent to payment.

In *Friend & Brooker Pty Limited v Council of the Shire of Eurobodalla* (unreported, Supreme Court of NSW, Cole J, 1 June 1993) both parties made application to the Supreme Court for leave to appeal from the award in an arbitration. The award was delivered by the Arbitrator on 19 March 1993.

In the application for leave to appeal Friend & Brooker alleged that the Arbitrator held that clause 48 of NPWC3 did not apply to:

(a) variation claims;
(b) progress claims;
(c) claims for damages.

As regards the application of clause 48, Cole J said at p. 13:

> *"Subsequently the arbitrator considered each particular claim and any contention that clause 48 operated as a bar to that claim. The conceptual approach adopted by the arbitrator, namely, that it was to (sic) necessary to consider the circumstances relating to the nature of each individual claim, the circumstances in which it was made, the responses by the superintendent and principal, and whether conduct either relating to that particular claim or more generally operated to deny the right of the Council to rely upon clause 48, is correct in principle. The consequence is that there is no general finding by the arbitrator as a matter of law that clause 48 did not apply to variation claims, progress claims or claims for damages. Each claim was considered individually. As part of that consideration regard was had to whether clause 48 applied."*

The Council contended that each time a claim was amended it constituted a fresh claim for the purposes of clause 48. Cole J answered this contention as follows (p14):

> *"In my view, mere amendment of a claim does not constitute a new claim for the purposes of clauses 45 and 48."*

In *Hughes Bros Pty Ltd v The Minister for Public Works* (unreported, Supreme Court of NSW, Rolfe J, 17 August 1994) Rolfe J held that a referee had correctly taken *Jennings v Birt* as authority for the fact that clause 48 of NPWC3 did not apply to extensions of time because clause 35 of NPWC3 contained its own notice requirement. However, clause 48 did apply to claims for compensation arising out of a claim for extension of time as the contract did not contain a specific notice provision in relation to such claims for compensation.

It should be noted that clause 46.1 of AS2124-1992 adopts the phrase *"The Principal shall not be liable upon any claim by the Contractor"* which, in essence, is the same as the opening words of clause 47 of SCNPWC3, considered in *Jennings v Birt.* DR96319 has omitted this provision, and it is not contained within AS4300-1995.

In *Opat Decorating Service (Aust) Pty Ltd v Hansen Yuncken (SA) Pty Ltd* (1995) 11 BCL 360 the Full Court of South Australia considered circumstances where the subcontractor had failed to give notice within the time period prescribed by clauses 31(b) and 47 of SCNPWC-3. Adopting the reasons of Bollen J, the Court (Prior J and Duggan J) agreed with the findings of the arbitrator and the judge at first instance that this failure to comply with the notice provisions in clause 31(b) resulted in its claims for extensions of time and prolongation costs being barred. In chief, the decision involved three principles:

- clause 47 can be seen as a "reminder" clause and is not as significant as clause 31(b), a specific notice provision;
- the notice provisions of clause 47 are mandatory; and
- the notice provisions of clause 31(b) are mandatory.

As to the first principle, this reinforces the position held in *Jennings v Birt,* that clause 47 will be applicable only where there is no *"specific procedural provisions in other clauses"* (at 193).

As to the second principle, clause 47 is mandatory to the claims to which it applies. It is clear from the provision that the *"Contractor shall not be liable"* that if not complied with the Principal will have no liability in respect of the claim.

It is the third principle, that clause 31(b) is mandatory, which is, perhaps, most noteworthy. Clause 31(b) does not provide that the Principal will not be liable if its provisions are not complied with, yet the Full Court held that the Contractor's failure to comply with it had this result.

Clause 46.1 of AS2124-1992, specifically, does not apply to all claims made. It does not have any application to:

> *"(i) any claim for payment to the Contractor of an amount or amounts forming part of the Contract Sum or any part thereof;*
> *(ii) any claim for payment for a variation directed by the Superintendent or to be made pursuant to Clause 12.3;*
> *(iii) any claim for an extension of time for Practical Completion; or*
> *(iv) the provisions of Clause 46.2."*

However, in respect of those claims to which it does apply, the author believes compliance with clause 46.1 will be a condition precedent to the Contractor's entitlement to payment.

In *Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd & Ors* (unreported, Supreme Court of NSW, Giles J, 30 January 1996), the contract considered contained a provision which read:

> *"4.4.1 If the company is delayed at any time in the progress of the Project by any cause whatsoever beyond the control of the Company ... then the date*

for Practical Completion shall be extended by a period equal to the extent of such delay to the Company.

Within 30 days of when the Company reasonably believes that delay has occurred within the meaning of this clause, it shall notify the Developer of the time of commencement and actual or estimated termination of the delay, the cause thereof and the manner in which he progress of the Project has been or will be delayed and the Developer shall determine the time by which the Date for Practical Completion shall be extended."

It was submitted that White was not entitled to extension of the date for practical completion if it had not given the notification called for by this clause. Giles J, at page 47, after considering *Jenning v Birt, Wormald Engineering Pty Ltd v Resources Conservations, Hughes Bros v Minister for Public Works* and *Opat Decorating Service (Aust) Pty Ltd v Hansen Yuncken (SA) Pty Ltd* held (at page 47-48):

- that as the extended date for practical completion was to be determined by ADC, it was necessary that ADC be in a position to rationally assess the cause of delay, whether the cause was of a specified kind and whether it was beyond the control of ADC and what the extent of the delay was;
- the notification requirement in clause 4.4.1 was a "*deliberate and important part*" of the mechanism for determining the time by which the date for practical completion was to be extended; and
- the failure of timely notification as specified in clause 4.4.1 barred the claim for extension of time.

His Honour also stated:
"to give ADC no more than an action for damages if timely notification was not given would not be satisfactory - it would leave difficulties of proving what ADC would or might have done had timely notification been received and quantifying the damage suffered, which the parties are likely to have intended." (at page 47)

These comments are of particular importance in light of provisions in AS4300-1995 and in the draft DR96319 to the effect that the breach of the general (residual) notification clauses only entitle the other party to sue for breach of contract, and will not bar or invalidate a claim (see clause 46.2 of AS4300-1995 and clause 41.2 of DR96319). As noted by Giles J, the damages arising from such a breach will be particularly difficult to calculate. The fact that the clauses in these contracts only specify a "*reasonable time*", wherein the clause in the above mentioned case specified an exact time period, will surely further compound the problem of determining damages in the event that the issue of notification of claims is raised.

C21 states that where a claim is not made within the relevant time, the Contractor is not entitled to interest for the period before the claim is made (clause 78.4). By implication then, claims are not invalidated or barred by failure to notify within the time specified. However, it should be noted that clause 79.5 of C21 states that where the Principal rejects a claim, the Contractor must dispute the rejection within 14 days, otherwise the claim is barred. This clause should be adhered to, as the recent case law discussed here suggests that such a clause would be strictly enforced.

In *526 Olive Street Pty Limited v Westpac Banking Corporation* the NSW Court of Appeal considered a clause in a contract providing for the review of determinations made pursuant to the contract. The contract provided:

"If any party to this agreement disagrees with any determination of the Manager referred to in clause 24.1 then that party may, within 15 Business Days of its receipt of notice of that determination, have the determination referred to a member of the Association of Consulting Actuaries (or its successor) appointed by its President for the time being."

At page 5, Cole JA, (with whom Clarke and Sheller JJA agreed) said:

"Where parties provide in a commercial agreement that to exercise a right, here to appeal a determination, a party must give a notice within a nominated time, at common law that time provision is regarded as essential in the sense that failure to give the notice within that time denies the capacity to exercise the right. As Samuels JA made clear in GR Mailman & Associates v Wormald (Aust) Pty Limited, a contractual provision means what it says. Here that means that a party dissatisfied with the Manager's decision was required to give the notice to the President of the Association of Actuaries requiring him to appoint a member as an expert within fifteen days. If that was not done, the right to challenge the determination was lost. In that sense, the fulfilling of that requirement by a dissatisfied party within fifteen days was essential." (at p5 per Cole JA)

Whilst this decision is not concerned with a building contract, it is considered that the approach of Cole JA reflects the trend of the courts to keep commercial parties strictly to their agreement in relation to time clauses.

In the author's view, the decisions of the Full Court in *Opat Decorating Service (Aust) Pty Ltd v Hansen Yuncken (SA) Pty Ltd,* the decision of Giles J in *Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd & Ors,* and the orbiter dicta of Cole JA in *526 Olive Street Pty Limited v Westpac Banking Corporation* are examples of a continuing trend, particularly in New South Wales, of the Courts - to hold parties to commercial contracts to their bargain.

The proper management of the claims process, by ensuring the progressive notification of claims, may be lost if the Principal does not insist on the Contractor complying with the terms of the contract. A case illustrative of this is the decision in *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990-1991) 20 NSWLR 251.

The NSW Court of Appeal considered whether Update was entitled to payment in respect of variation work. Rozelle asserted Update was not and relied, in part, on the fact that Update failed to lodge its claims in writing as required by the contract.

The Court of Appeal held that having regard to its conduct, in not insisting on claims being notified in writing, Rozelle was estopped from relying upon the requirement for written notice as an answer to Update's claims under the contract.

Update v Rozelle highlights that a Principal may lose the benefit of a contractual provision where by its conduct it has represented to the other party that compliance with the contractual provision will not be insisted on.

CONCLUSION

The fact that a claimant is not required to give notification in respect of all types of claims is likely to make management of the claims process extremely inefficient. The Principal will not know what claims will be made or when. If the claim is notified a considerable time after the facts giving rise to it have occurred both the Principal and the Contractor are likely to be disadvantaged in dealing with it as relevant evidence may no longer be available or not easily accessible and critical personnel may be unavailable.

It is clear that in recent cases the Courts, particularly in NSW, have demonstrated an intention to enforce timely notification of claims through strict interpretation of notification clauses, and the enforcement of bars to claims which have not been notified in accordance with such clauses. In recognition of this trend, contract drafters have recently included clauses that prevent claims not made within specified time limits from being barred. It is noted that this currently applies only to AS4300-1995 and, apparently, to C21. It is likely to apply to the revised edition of AS2124-1992, to be published in 1997. Consequently, while these contracts may constitute exceptions (because of their specific provisions) it is likely that provisions in contracts providing for the notification of claims will be construed strictly by the Courts. A contracting party which ignores those provisions is likely to do so at its peril.