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Construction contracts and COVID-19 delays – solutions without statutory intervention?

Joel A Silver*

Barrister

Owen Dixon Chambers West

Level 9, 525 Lonsdale Street

Melbourne Vic 3000

DX 94 Melbourne Vic

P: 03 9225 6604

F: 03 9225 7907

jsilver@vicbar.com.au

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* LLB (Hons) (Melb), GDLP (Leo Cussen Institute), LLM (Melb). With thanks to Andrew Downie for his helpful feedback.

A. Overview

1. While COVID-19 has not closed the Australian building industry, it has caused serious disruption. This is a combination of global conditions (such as travel restrictions and supply chain disruptions) and local regulations (such as keeping 1.5m apart on-site).
2. This has caused delays in many projects.
3. However, COVID-19 (or rather, *the delays caused by COVID-19*) does not, without more, entitle a contractor under a construction contract to an extension of time.¹ That depends on the bargain struck, often reflecting the standard form used, and the events it lists as qualifying delay events
4. Some contracts may not entitle the contractor to claim, but the principal may use their discretion to extend time (called a ‘**reserve power**’).
5. Although such reserve powers are often said be for the principal's benefit alone, that is not always so.² This paper considers if those powers must be exercised to extend time for non-qualifying delays (including COVID-19).
6. I begin with a discussion of some common standard forms and review their receptivity to COVID-19 delays. I then consider, factors that may require a reserve power to be exercised, included potential implied terms,³ and other contractual duties.
7. I then conclude with a short delay case study from the Melbourne Metro Tunnel in Victoria.

¹ Hon Peter Vickery (8 May 2020), ‘Payments – No liquidated damages due to COVID-19’, page 7 <<http://www.scl.org.au/resources/payments-%E2%80%93-no-liquidated-damages-due-covid-19>>

² *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211, [79] (Hodgson JA); summary contained in *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* (2017) 95 NSWLR 82, 112-113 (McColl JA)

³ Of the nature discussed in *Codelfa Construction v State Rail Authority (NSW)* (1982) 149 CLR 337

B. Extension of time regimes in some common construction contracts

I. Domestic building contracts

8. Often, a contractor) is entitled to seek an extension of time to perform their obligations, if a qualifying delay event occurs. This made be done on notice.
9. COVID-19 presents a challenge, as many arrangements do not use descriptors such as ‘pandemic’, ‘disease’, ‘epidemic’, ‘government interference,’ ‘state of emergency’ or ‘government health directive’ in their list of qualifying delays.⁴
10. Despite this, particular COVID-19 delays may nevertheless fit within the language used by the parties.
11. In Victoria, many domestic building contracts (to construct and renovate homes) use the standard forms issued by the Housing Industry Association (‘HIA’) and Master Builders Association (‘MBA’).
12. The HIA suite (which requires notices of delay to be issued) allows for an extension of time in the following circumstances:⁵

*The date for **Commencement** is put back or the **Building Period** is extended if the carrying out of the **Building Works** is delayed due to [in addition to several specific scenarios] any other cause that is beyond the **Builder's** direct control.*

13. An event prompted by COVID-19 may be ‘beyond’ a contractor's control, although that event must have actually caused the delay for which an extension is claimed (as opposed to some other default).

⁴ Available at <https://www.tenders.vic.gov.au/contract/view?id=64353>

⁵ For example, *Victorian New Homes Contract – Plain English Contract for Domestic New Homes* (March 2014) cl 34; *Victorian Alterations, Additions & Renovations – Plain English Contract for Use on All Domestic Residential Alterations, Additions, Renovations and Restorations* (February 2014), cl 37; *Victorian Alterations, Additions and Renovations Contract* (January 2011) cl 37; *Victorian Cost Plus Contract* (April 2012), cl 33; *Victorian Alterations, Additions and Renovations Contract* (August 2017) cl 33.

14. Of course, as Vickery notes,⁶ it could also be contended that other provisions of the contract limit what ‘*beyond*’ the contractor's control is intended to mean, in the sense it might not apply to all delays.
15. The MBA forms contain a similar ‘beyond the control’ qualification, as well as a qualification for supply chain issues, which entitle the contractor (Builder) to a ‘*fair and reasonable extension of time*’ on advice to the principal (Owner):⁷

*If the progress of the **Works** is delayed by:*

...

- *The general unavailability of any **Materials** necessary to carry out the **Works**; OR*
- ...
- *any other cause beyond the reasonable control of the **Builder** including any act or omission by any person engaged by the **Owner** relating to the **Works**.*

16. While neither of the HIA or MBA suites vests the principal (Owner) with a reserve power, it seems the contractor (Builder) has express entitlements to seek extensions

II. Australian Standards contracts

17. AS2124 and AS4000 (each titled ‘*General Conditions of Contract*’) are standard form contracts issued by SAI Global.
18. Additional forms, including AS4300 and AS4902 (each titled ‘*General Conditions of Contract for Design and Construct*’), are based on AS2124 and AS4000 respectively.⁸

⁶ Hon Peter Vickery (8 May 2020), ‘Payments – No liquidated damages due to COVID-19’, page 6 <<http://www.scl.org.au/resources/payments-%E2%80%93-no-liquidated-damages-due-covid-19>>

⁷ For example, *Victorian New Homes Contracts* (HC-6, Edition 1 –2007) cl 15; *Victorian New Homes Contracts* (HC-6, Edition 2 – 2014) cl 15; *Victorian New Homes Contracts* (HIC-5, Edition 1 – 2007) cl 15

⁸https://www.saiglobal.com/Information/Standards/Licensing/Contracts/SAI%20Global_Contract_Standards_Catalogue_2014.pdf

19. As can be seen, while the suites have different extension of time regimes, both vest the superintendent with a reserve power to extend time.

AS2124

20. In AS2124 itself, the events entitling a contractor to claim an extension, by notice, are listed in clause 35 (**‘Extension of Time for Practical Completion’**). The notice must contain *‘details of the possible delay and the cause.’*
21. The clause lists several events *‘occurring before, on or after’* practical completion – under *‘(b)’* – for which a contractor can claim an extension, including:
- (iii) *changes in the law;*
 - ...
 - (vii) *directions by municipal, public or statutory authorities but not where the direction arose from the failure of the Contractor to comply with a requirement referred to in Clause 14.1;⁹*
 - (viii) *delays by municipal, public or statutory authorities not caused by the Contractor*
22. The AS4300 form contains similar wording and identical numbering.
23. Does *‘directions by... authorities’* includes public health directions?
24. As states of emergency are fairly uncommon in Australia, *‘directions by... authorities’* would usually refer to the building and planning regulations referred to in clause 14, but the argument could be made that it is broader.
25. The same question may concern changes in the law, as while there have been changes in the law as a result of COVID-19, in the usual course this would mean changes in building regulations, not public health directives.

⁹ Clause 14 (**‘Statutory Requirements’**) requires the contractor to *‘comply with the requirements of’* (paraphrasing for efficiency) state and Commonwealth law, and of persons acting in the exercise of statutory powers that enables them to give directions affecting the work.

AS4000

26. Clause 34 (**‘Time and progress’**) of AS4000 takes a different approach to extensions of time. It states that a contractor is entitled to an extension of time if they will be delayed in reaching practical completion by a **‘qualifying cause of delay’**.¹⁰
27. *‘Qualifying cause of delay’* is defined in clause 1 (**‘Interpretation and construction of Contract’**) as follows:
- qualifying cause of delay means:***
- (a) *any act, default or omission of the Superintendent, the Principal or its consultants, agents or other contractors (not employed by the Contractor); or (my underline)*
- (b) *other than:*
- (i) *a breach or omission by the Contractor;*
- (ii) *industrial conditions or inclement weather occurring after the date for practical completion; and*
- (iii) *stated in Item 23.*¹¹
28. This same wording – including the grammatically confusing placement of **‘or’** before **‘other than’** – appears in AS4902.
29. Other analysis agrees this wording is unclear. One view (based on an official manual) contends that, as long as an event is not excluded, a claim can be made.¹² I am unsure this is correct.
30. On its face, contractors using an AS4000 contract may need to look for other means of extending time.

¹⁰ Earlier copies of AS4902 in my possession take a different approach.

¹¹ Named *‘Causes of delay for which EOTs will not be granted’*

¹² <https://www.nortonrosefulbright.com/en-pk/knowledge/publications/b971ed19/australia-relief-provisions-in-construction-contract-suites>

III. ABIC Major and Simple Works Contracts

31. The Australian Building Industry Contract Major Works (MW) and Simple Works (SW) contracts suites were most recently reissued in 2018.
32. The new edition made no significant change to the 2008 extension of time regimes, which are largely identical between the MW and SW forms. I have, in this discussion, referred to a SW-2008 Simple Works Contract.
33. While the ABIC contracts list several qualifying delay events, in sub-clauses L1 and L2 (**Adjustment of time**), as in other contracts, the list does not contain qualifying events that refer explicitly to COVID-19 or its consequences.

L Adjustment of time

L1 Causes of delay which entitle making a claim for adjustment of time with costs

- .1 The contractor may make a claim for an adjustment to the date for **practical completion* and **adjustment of time costs* in respect of a delay affecting **working days*, caused by:
 - a loss of or damage to the **works*, or materials or equipment on the **site* that are intended to be incorporated in the **works*, or plant or equipment used on the **site*, provided that loss or damage was not caused by an act or omission of the contractor
 - b the owner failing to give possession of the **site* in accordance with **clause F1**
 - c an architect's instruction
 - d **relevant authorities*, including a private building surveyor, failing to **promptly* give approval for the **works* (except when the delay is caused by an act or omission of the contractor)
 - e a dispute with a nearby owner or occupier (except one caused by an act or omission of the contractor)
 - f the owner's consultants failing to **promptly* provide necessary information which is properly due to the contractor or which the contractor has specifically requested in writing
 - g widespread industrial unrest not limited to the **site* or to any other sites on which only the contractor or any of its subcontractors is working
 - h a suspension of the **necessary work* under **clause Q12**
 - i a breach of this contract by the owner
 - j an act of prevention by the owner not otherwise covered by this clause.
- .2 The contractor must take all reasonable steps to minimise the impact of the delay on the progress of the **works*.
- .3 A claim to adjust the date for **practical completion* with or without **adjustment of time costs* is a **claim to adjust the contract*.
- .4 The requirements for making a **claim to adjust the contract* and the procedures to be followed are stated in **section H**.

L2 Causes of delay which entitle making claim for adjustment of time without costs

- .1 The contractor may make a claim for an adjustment to the date for **practical completion* but not for **adjustment of time costs* caused by:
 - a disruptive weather conditions exceeding the allowance shown in **item 20 of schedule 1**
 - b any other circumstance exceeding the allowance shown in **item 21 of schedule 1**.
- .2 The requirements for making a **claim to adjust the contract* and the procedures to be followed are stated in **section H**.

34. This is not that COVID-19 might not cause an event, however, which does qualify, such as *'an architect's instruction'*, a failure to *'provide necessary information... due to the contractor or... specifically requested in writing'* or *'a breach of this contract by the owner.'*
35. Even if not, the ABIC contracts contain a reserve power. This creates additional possibilities.

IV. General comment – are listed grounds exhaustive?

36. As mentioned, each of the Australian Standard and ABIC Contracts list a number of qualifying delay events.
37. But are these grounds exhaustive? Can a contractor claim an extension of time despite the absence of a qualifying delay event? Can a superintendent award the claim in the absence of a qualifying delay event?
38. While each contract has its own wording, the express inclusion of qualifying events is likely to exclude all other events, even if there is no prohibition on the superintendent considering a non-complaint claim.
39. This is because an architect or superintendent, in the absence of power to do so, has no authority to waive compliance with contractual requirements.¹³ To do otherwise is an arguable breach of duty, and may expose the superintendent to a claim.
40. The presence of a reserve power, however, can change matters.

¹³ Dennys and Clay, *Hudson's Building and Engineering Contracts* (2015, 13th ed), page 322 [2-082]

C. Considerations in the exercise of reserve powers

I. Implied terms – extensions of time in specific circumstances

41. A reserve power to extend time is ‘*capable of being exercised in the interests both of the owner and the builder.*’¹⁴
42. This means that even though, on one hand, a contract states the exercise of the power is solely in the principal's discretion (or of the superintendent), other aspects of the contract may require the power to be exercised otherwise.
43. An unlikely (but possible scenario) is an implied term which specifies that, on the happening of a very specific event, time must be extended.
44. This was contended for in *Codelfa Construction v State Rail Authority (NSW)* (1982) 149 CLR 337, successfully until it reached the High Court. As Mason J's judgment reflects, the evidence must be convincing.
45. *Codelfa* arose from extensions to the Sydney Eastern Suburbs railway.
46. The parties presumed, based on state legislation, that the project was immune from suit in nuisance. The completion date was based on a non-stop work schedule, and also involved the use of explosives which propelled rock into the surrounding residential areas.
47. Despite the legislation (and the parties' expectations), an injunction was granted, with subsequent undertakings to cut back the work program.
48. Because of this, the contractor could not physically complete the program on-time, and a dispute arose as to their extension of time entitlements.

¹⁴ *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211, [79] (Hodgson JA); summary contained in *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* (2017) 95 NSWLR 82, 112-113 (McColl JA)

49. The contractor contended for a specific implied term to the effect that, if an injunction was granted, the principal would grant a reasonable extension of time. The alternative (successful argument) was that the contract was frustrated.
50. In general, terms are implied to reflect the parties' **presumed intention**, where it can be found that the parties failed to consider a particular eventuality and did not make explicit provision for it in the contract, leaving a lacuna.¹⁵ In contrast, rectification is the remedy where actual intention is not reflected on the contract.
51. If there is evidence of the presumed intention, the criteria in *BP Refinery (Westernport) v Shire of Hastings* (1977) 180 CLR 266 are applied. The proposed term must—
- (1) be reasonable and equitable;
 - (2) be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
 - (3) be so obvious that “it goes without saying”;
 - (4) be capable of clear expression;
 - (5) not contradict any express term of the contract.
52. While Mason J agreed the term contended for had business efficacy, the other *BP Refinery* criteria were not met.¹⁶ In particular, his Honour found it did not “go without saying” that the parties would have agreed on the specific term contended for, as negotiations could have yielded a number of alternative provisions, each a reasonable solution. This was an ‘*insurmountable problem*’¹⁷
53. His Honour went onto observe that it is often—¹⁸

easier to say that the parties never agreed to be bound in a fundamentally different situation which has unexpectedly emerged than it is to assert that in a like situation the parties have impliedly agreed that the

¹⁵ *Codelfa Construction v State Rail Authority (NSW)* (1982) 149 CLR 337, 346 (Mason J)

¹⁶ *Ibid.* 355 (Mason J)

¹⁷ *Ibid.* 356 (Mason J)

¹⁸ *Ibid.*

contract is to remain on foot with a new provision, not adverted to by them, governing their rights and liabilities.

54. His Honour also noted the contract was not a negotiated contract, its terms having been determined in advance by the principal, who had looked to ‘*shoulder the responsibility for all risks not expressly provided for in the contract*’ on the contractor.¹⁹
55. This tends to indicate that, while possible, an implied term requiring an extension of time in response to a pandemic is unlikely, directly or indirectly. That said, it is entirely a matter of evidence. If the parties took into account certain matters when agreeing on the construction period, that could do it.

II. Duty to cooperate – beyond the prevention principle?

56. Another consideration in the exercise of a reserve power is the duty to cooperate, which is contained (expressly or implicitly) in all contracts.
57. The effect of this duty is that each party agrees to do all that is necessary to enable the other party to have the benefit of the contract.²⁰
58. The content of the duty, however, is difficult to define, although the prevention principle is described as a ‘*particular manifestation*’ of this duty.²¹
59. It is not a mechanism for alleviating the consequences of hard, harsh or unconscionable terms, and does not require parties to be nice or reasonable.²² As Mason J explained:²³

It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to

¹⁹ Ibid.

²⁰ *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (Secured Income Real Estate)* (1979) 144 CLR 596, 607–608 (Mason J), referring to *Butt v. M'Donald* (1896) 7 Q.L.J. 68, 70–71 (Griffith CJ)

²¹ *Spiers Earthworks v Landtec Projects (No 2)* (2012) 28 BCL 282, 298 (McLure P)

²² *Council of the City of Sydney v Goldspar Australia Ltd* [2006] FCA 472, [162] (Gyles J)

²³ *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607 (Mason J)

make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself.

60. In other words, the content of the duty depends on the evidence.
61. An illustration in the construction context is *Holland Hannen & Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation* (1981) 18 BLR 80.
62. The contract involved a hospital construction, with an implied term that the architect would do ‘*all things necessary on their part to enable [the contractor] to carry out and complete the works expeditiously, economically, and in accordance with the main contract.*’ The architect approved window assembly designs, but design failures subsequently emerged.
63. The Court held (amongst other things) that the architect was required to (but did not) issue a variation instruction, detailing changes designed to overcome those failures, and ought to have issued an extension of time, as it was the design failures in the approved drawings which caused the delay.
64. In another example, *Yorkshire Water Authority v Sir Alfred McAlpine & Son (Northern) Ltd* (1985) 32 BLR 114, the contractor was engaged in the construction of a reservoir.
65. The contract (an ICE Conditions of Contract form) provided that:
 - the contractor was not responsible for the design and specifications, which provided for upstream construction; and
 - was not required to perform work which was ‘*legally or physically impossible.*’The contractor contended that upstream construction was physically impossible, and proceeded to construct downstream.

66. The Court held the contractor was entitled to a variation from the principal, as downstream construction was otherwise than in accordance with the contract (the case does not indicate if an extension of time was involved, though assumedly cost was).
67. Both cases, however, involve elements of prevention (although neither refers to it), and do not involve non-prevention cooperation (in which the principal is innocent).
68. I would suggest cooperation is unlikely to *directly* require extensions of time because of COVID-19. However, it may require it *indirectly*, if the contract requires something from the principal, although this is not necessarily separate from the prevention principle.

III. Implied duty of good faith?

69. It has been held that, where a superintendent must fulfil their role honestly and fairly – or honestly and impartially – they may need to exercise a reserve power in the interests of the contractor (not just the principal).²⁴
70. This has regard to the underlying rationale of the prevention principle.²⁵
71. However, in *Probuild Constructions (Aust) v DDI Group*, McColl JA expressed an alternate requirement to exercise the reserve power—²⁶

because there is an implied duty of good faith in exercising the discretion.

72. Her Honour referred to earlier decisions in New South Wales, in particular the decision in *Alcatel*, recognising that good faith is implied in some contracts, meaning ‘good faith in performing obligations and exercising rights.’²⁷ In the United States, there is a similar concept of ‘good faith and fair dealing.’

²⁴ *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211, [79] (Hodgson JA)

²⁵ *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* (2017) 95 NSWLR 82, 113 (McColl JA)

²⁶ *Ibid.*

²⁷ *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 369 (Sheller JA), referring to *Hughes Bros Pty Ltd v Trustees of Roman Catholic Church (Archdiocese of Sydney)* (1993) 31 NSWLR 91 and *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234

73. *Alcatel* summarises a significant body of case law on good faith, including a lecture given by Sir Anthony Mason in 1993,²⁸ in which his Honour said it was probable that good faith embraced no less than three related notions:
- (1) an obligation on the parties to co-operate in achieving the contractual objects (loyalty to the promise itself);
 - (2) compliance with honest standards of conduct; and
 - (3) compliance with standards of contract which are reasonable having regard to the interests of the parties.
74. Unlike *Alcatel*, *Probuild* does not include such detailed analysis. The mention of good faith is all there is, and its inclusion in *Probuild* could also be read as motivated by the underlying rationale of the prevention principle, as opposed to other notions of fairness.
75. There is nothing to confirm that, as a general rule, good faith would require a principal to grant an extension for a particular, unforeseen delay (such as COVID-19), that does not otherwise qualify for an extension. However, as I have commented in other respects, the facts may indicate otherwise.

²⁸ *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 367 (Sheller JA)

D. The problem illustrated (Melbourne Metro Tunnel case study)

76. What does a COVID-19 delay look like? How do the above principles apply?
77. The 11 April 2020 edition of *The Age* contained a report titled 'Metro Tunnel faces 'coronavirus delays' and costs, advisers warn.'
78. Prior to COVID-19, a construction lift into a new underground station was permitted to carry 15 people. Because of social distancing laws, this was reduced to 4 people. The consequence is that "*if you need 400 people to get up, it takes three times as long.*"
79. The article does not tell the reader who imposed these limitations, meaning we cannot say who shoulders the delay risks and costs:
- if directed by the principal (in this case, the State of Victoria), the resulting delay would be attributable to it, entitling the contractor (the Cross Yarra Partnership) to an extension of time by virtue of the prevention principle;²⁹ however
 - if the change in method was the contractor's choice (even if prompted by government health regulations), the delay would be borne by the contractor, **unless** the contract provided some other basis for an extension of time (such as *force majeure*).
80. The Melbourne Metro Tunnel contract provides that defined "*force majeure*" events entitle the contractor to an extension of time.³⁰ Those events, however, do not include pandemic, or government intervention, or other grounds that describe COVID-19 itself.
81. However, the principal does hold a reserve power.
82. The State of Victoria, as the principal, is not (at least in the traditional sense) engaged in an act of prevention, because while government regulations require the workers to distance, that is unrelated to its responsibilities in contract. In that sense, it is unlikely that the duty to cooperate requires an extension (although there is something persuasive in the

²⁹ *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1976) 1 BLR 111

³⁰ Available at <https://www.tenders.vic.gov.au/contract/view?id=64353>

argument that, where government regulation causes delays in a government contract, the prevention principle should be extended).

83. There may be evidence to suggest that, in the event of a pandemic, the Cross Yarra Partnership (the contractor) would receive an extension of time, although the evidence would need to be clearer than in *Codelfa*. Such evidence may also influence any requirement to act in good faith.