**Construction Law**

**Part One**

**Basics of Contract Law**

AS-2124

1. Australian Standard Contract for Building Contract
   1. Most known and most detailed
   2. Standards Australia

**Formation of Contracts**

1. Contract is an enforceable bargain between parties
2. Risk of Disputes
3. Failure to comply with the law

**Risk in Construction**

1. Limitation of liability
2. Intellectual property
   1. Particularly in relation to design and architecture work
3. Insurance
   1. Public liability insurance
4. Preferred payment structure
   1. Right to be paid for work which is implied by law

**Contraction Formation**

1. Offer
2. Acceptance
3. Consideration
4. Intention to create legal relations
5. Capacity
   1. Sound mind
6. Privity
   1. Who are the parties
7. Terms
   1. Certainty of terms

**Offer**

1. Statement containing proposed contract terms
2. Demonstrates an intention be bound
   1. Intention to be bound
3. Made to an individual or the world?
4. Offer needs to be expressly clear in construction contracts – its vital to construction
5. *Falkin v Williams*
6. Unilateral
   1. Without a recipient party
7. Individual
   1. Two parties are bound by each other
8. *Carbolic Smoke Ball*
   1. No offer to a particular person
   2. If there was, Mrs Carlill had failed to notify her acceptance
   3. **Held:**
      1. Valid offer which had been acceptance
         1. ‘Why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward to perform the condition?’
      2. Critical that they deposited $1000 in bank – showed intention to be bound
9. Would a reasonable person in the position of the offeree think that the offer was intended and that it should be accepted?

**Invitation to Treat**

1. Example – **request for tender**
   1. Simply an invitation to treat
   2. Include express clause
      1. No offer
      2. Reserve right to bargain with you or competitors
      3. We will tell you whether there is an acceptance
2. A request for an offer – not an offer that is capable of being accepted
3. Auctions are an example

**Duration of Offers**

1. Generally, offers may be revoked prior to acceptance
2. Some exceptions
3. Must be communication of revocation
4. Offer terminated by rejection
5. Law of estoppels
   1. If they can show that they acted to their detriment on the basis of the representation then can be denied from revoking offer

**Acceptance**

1. Necessity for acceptance
   1. Acceptance must conform to the offer
   2. Acceptance can be inferred from conduct
2. Who may accept? Depends on form of offer
3. Acceptance must be unequivocal
   1. Can be inferred from the conduct of a party
4. *White Trucks v Riley*
   1. Held that an offeree had accepted an offer without signing it – by ordering the materials for the fulfilment of the contract

**Counter Offer**

1. Request for additional/different term is not acceptance (counter-offer)

*Battle of the Forms*

1. What is the battle of the forms?
   1. Uncertainty about who was making an offer and who was accepting it
2. Inconsistent methods adopted by the courts for resolving this

*Butler Machine Tool Co v Ex-Cell-O Corp*

1. Page 19 of Notes
   1. Butler selling machine. Would only accept order on its terms and conditions
   2. Buyer responded requesting purchase to be on their terms and conditions, which contained a tear off sheet
   3. Butler returned the tear-off sheet with letter re-iterating its own terms
   4. Butler attempted to rely on one of its own terms to obtain a price variation
   5. Dispute over payment
   6. Court. Buyers response with tear-off sheet was not an acceptance, but a counter offer
   7. **Held:** Butler accepted when it signed & returned tear-off sheet.
      1. Butlers letter merely incorporated price & identify of the machine that was to be sold, but none of Butlers terms
   8. Price adjustment was not part of the contract on this basis
2. **At subcontract level** – this happens all the time.
   1. Generators
   2. Fences, Cranes

**Battle of the Forms**

1. **‘Last shot’ approach** (*Butler Machine Tool*)
2. **‘Higher Status’ approach** (*Tranmotors v Robertson)*
   1. Document which has the ‘highest status’ will prevail
      1. Parties under numerous transactions in the past
      2. Just using suppliers invoice that both were familiar with
      3. Purchaser issued an order using its new terms
      4. Supplier responded with own terms
      5. What would an objective person say ?
3. **‘Synthesis’ approach** (*Vroon v Fosters)*
   1. Reasonable implications in all the circumstances
   2. Contract and some terms could be extracted where no acceptance of an offer could be established or even inferred
   3. Manifestation of mutual accent could be implied
      1. Intention to be bound
   4. **Held**: Court constructed contract themselves – by determining what the parties intentions were
4. No contract reached
   1. There was no intention to be bound at all
   2. Unless the evidence can establish this sufficiently
      1. Refer to letters
      2. Intention
      3. Why do they say you are committed?
      4. Why do you say you are not?
      5. Etc
5. *Goodman v Cospac*
   1. Meadow Lea ordered glass bottles from Cospac
   2. Cospac provided timetable with terms & conditions
   3. Meadow Lea placed an order containing its terms and conditions
   4. Later established that glass bottles faulty
   5. Meadow Lea terminated
   6. Cospac asserted that this was wrongful
   7. NSW Supreme Court applied ‘synthesis approach’
      1. **Seems that the ‘synthesis approach’ is preferred in Australia**
      2. Contract had been formed incorporated all of Cospac terms and conditions
      3. Meadow Lea had wrongful repudiated by terminating for production failure – not an event that would warrant or justify termination
         1. Repudiated – you attempted to renounce the contract improperly
6. *Cubitt Builders case*
   1. Page 26
   2. Acceptance by conduct
   3. Example of ‘last shot’ approach

**Consideration**

1. Consideration must be sufficient, but need not be adequate
2. Past consideration is no consideration
3. Promise to perform an existing legal duty
4. Consideration must move from the promise
5. *Quid pro quo*
   1. Something for something
6. Promise to Build and Promise to Pay = sufficiency of consideration
7. ‘Agreements to agree’ are not binding
   1. *Australis Media v Telstra*
      1. ‘a Joint Venture Agreement shall be entered into between the Joint Venturers regulating such matters as term, purpose, capital, contributions ... and other matters’

**Intention to create legal relations**

1. Must be a common intention to be ‘immediately bound’
2. May be express or implied
3. Deemed to exist in commercial situations
4. May be expressly excluded
5. If no intention to create an immediately binding agreement – there is no deal
6. Can be a binding contract where nothing signed – so long as the intention to be bound is evident

*Masters v Cameron*

1. Cases may belong to one of three classes
   1. Finality on all terms, intention to be bound, but want to re-state terms in fuller or more precise way
   2. Finality on all terms etc, but performance conditional on execution of a formal document
   3. No intention to make a concluded bargain until formal contract executed
2. *Baulkham Hills Private Hospital v G R Securities*
   1. ‘Fourth class of contract’
      1. Parties content to be bound immediately by their agreed terms, but also agree to make a further contract, in substitution for the first, containing additional terms
3. *Graham Evans v Stencraft* 
   1. Page 47
      1. Made an offer for a specified scope of work and time to build dockside for Stencraft
      2. Stencraft gave them a letter of acceptance – enclosed AS2124 – submit to further amendment
      3. Evans sent in an uncompetitive tender for another project.
      4. AS2124 – want to change risk allocation
      5. ‘Conditions on which the acceptance of your price was made’
      6. Page 56
         1. Para [38]
      7. **Held:** Graham Evans won
         1. **Similar as Exam questions**
         2. Baulkin Hills at [44]
4. From this case - Draft contract is now provided with tendered
   1. Well written tender
      1. “Tender must conform to tender documents however if you want to provide a non-complying tender then we reserve the right to comply with a non-complying tender’
5. *Case Study*
   1. Offer
      1. Formal instrument of agreement
      2. Price agreed
      3. Time agreed
   2. Acceptance
      1. Developer sends Builder a letter and confirm our acceptance
   3. Intention to create legal relations
      1. Yes
   4. Estoppel
      1. Possible

**Capacity and Privity**

1. >18
2. Sound Mind

**Capacity and Privity**

1. Doctrine of ‘Privity of contract’
   1. Only parties to a contract are legally bound by it
   2. Non-contractual doctrines available to third parties
   3. Purpose of Deeds of Collateral Warranty
      1. Contract between Victorian State Government and John Holland to build a railway
      2. John Holland sub-contract out work to specialist contractors
      3. JH are responsible for sub-contractors
      4. Sub-contractors must sign a separate deed by which it makes promises to us
      5. If JH disappears, then can directly sue Sub-Contractors and in this way can have a direct contractual relationship with sub-contractors

**Terms**

1. Must be certainty as to the essential terms
   1. Parties
   2. Subject matter
   3. Consideration/price
2. Other terms that may be considered essential
   1. Term/length of contract
   2. Governing law
   3. Limitation of liability for breach
3. Express terms can be ascertained from express written (or oral) agreement
4. Implied terms are incorporated by operation of law to supplement or mollify the bargain
   1. Statute
   2. Custom or usage
   3. Implication from fact
   4. Implied by law
5. Terms implied from fact must
   1. Be reasonable and equitable
   2. Be necessary to give ‘business efficacy’ to the contract
   3. Be so obvious that ‘it goes without saying’
   4. Not contradict any express term
      1. *B.P. Refinery (Westernport) v Shire of Hastings*
6. Terms implied at law
   1. Cannot hinder or prevent performance
   2. Must co-operate whenever reasonably necessary
   3. Must act honestly and in good faith
7. Terms implied by Statute
   1. Dorter & Sharkey
   2. S74 TPA
      1. Refer to handout
      2. S74(2) –
         1. Must do it with due care and skill
      3. **REFER to in EXAM**
8. Good Faith
   1. Courts (especially in NSW) have been prepared to find implied term of good faith
   2. *Renard Constructions v Minister for Public Works*
   3. *Aiton Australia v Transfield*
   4. *Hughes Aircraft Systems v Airservices Australia*
      1. Public Tenders
      2. Tender process contracts
      3. Implied term of good faith or fair dealing in all such contracts
         1. Subjective and ‘slippery’ idea
   5. *Esso Australia Resources v Southern Pacific Petroleum (VIC)*
      1. Commercial contracts do not have implied duty that parties will act in good faith
      2. Scope to imply on an ad hoc basis to protect vulnerable parties
9. Terms implied at law
   1. Contractor will perform work in proper and workmanlike manner
   2. Contractor will complete within reasonable time
      1. Cannot extend time – as outside of ‘reasonable’ is not a sufficient time.
10. Principal will pay a reasonable price
    1. *Horton v Jones*
11. Principal will provide sufficient access to Site (construction implied)
    1. *Commonwealth v Austin Australia*
12. Designer will exercise reasonable skill and care
    1. *Voli v Inglewood Shire Council*
       1. Architect is a professional and will exercise reasonable care and skill
       2. S74
13. Incorporated of terms and documents
    1. Several ways in which terms can be incorporated into a contract
       1. Signature
       2. Notice
       3. By Course of Dealing
       4. By Reference
          1. *Carob Industries v Simto*
             1. Terms and conditions of the head contract

**Interpretation of contracts**

1. Large body of law on interpreting contracts and terms
2. Ambiguities, inconsistencies, silence, mistake
3. Lawyers often asked to advice on interpretation of key interpretation
   1. If words are clear and unambiguous, then Court will not attempt to construe
4. Terms and words must be read in light of the contract as a whole
   1. *Expressio univs est exclusion alterius*
   2. *Ejusdem generis*
      1. Particular words are followed by general words
         1. ‘General fit out work including sanding, painting and joinery’
            1. i.e. particular words define general concept
         2. Unlocks ambiguity
   3. *Contra proferentem*
      1. Express term in a contract will be construed directly from the person relying on it
5. *Parole Evidence Rule*
   1. Extrinsic evidence of intention inadmissible
      1. *Except*
         1. Prior negotiations to explain ambiguity
         2. Oral evidence to attack written contract

**Breach of Contract**

1. Party who fails to comply with a contractual obligation will be in breach
2. If breach causes the other party to suffer a loss, it can recover damages
3. Innocent party must prove
   1. Duty – relevant term of the contract
   2. Breach – how the term was breached
   3. Causation – that the breach was the cause of the innocent partys loss and not something else
   4. Loss or damage
4. Causation
   1. It is a question of fact as to whether A’s breach caused Bs loss
   2. Court will usually ask whether the damage would not have occurred ‘but for A’s’ breach

**Damages**

1. Damages are ‘compensatory’, not punitive
   1. Damages are intended to putting the person back into the position they should have been
2. Intended to place innocent party in the same position as if breach had not occurred
3. The ruling principle
   1. *Robinson v Harman*
      1. The plaintiff is, so far as many can do it, to be placed in the same situation as if the contract had been performed’
   2. *Hadley v Baxendale*
      1. Award of damages should fall into one of the two categories
         1. *First Limb* - Damages that may fairly and reasonably be considered to arise naturally from the breach
         2. *Second Limb* - Damages that parties know or ought to have known, at time of entering contract, was likely result of a breach

**Damages for defective building work**

1. In cases of defective building work, innocent party entitled to damages to ‘demolish and replace’ but only if necessary and reasonable.
2. *Bellgrove v Eldridge*
   1. Contract for construction of a house
   2. Contractor claimed final payment
   3. Owner counterclaimed for damages – substantial departure from specifications – concrete foundations
   4. Contractor argued foundations could be ‘underpinned’
   5. **Held:** Court not satisfied that underpinning would be successful.
   6. Departure so substantial that only remedy was to place owner in same position as if contract had been performed
   7. That meant demolishing house & restricting
   8. High Court agreed
3. General presumption in favour of ‘reinstatement damages’. But must be
   1. Necessary to produce conformity; and
   2. A reasonable course to adopt
4. If not reasonable, the ‘true measure of damages will be’
   1. The diminution in value ... if any, product by the ... defective workmanship
      1. Example
         1. House has been built perfectively EXPECT instead of pink tiles they are black tiles
         2. Breach of contract
         3. Diminution in the value of your home – INSTEAD of the cost of ripping out the tiles and replacing them
5. *Ruxley Electronics v Forsyth*
   1. Contractor agreed to building swimming pool
   2. Specification: 7’6 deep at the deep end
   3. Finish pool was only 6’9 deep at the deep end
   4. Pool was perfect in all other respects
   5. Owner claimed damages equivalent to cost of demolishing and replacing
   6. Evidence
      1. No doubt that owner had made clear his requirement 7’9 deep
      2. No doubt that was very annoyed
   7. Demolition & reconstruction would cost $21K
   8. Diminution value was $0
   9. **Court**: Demo & reconstruction would be ‘wholly disproportionate’ to any benefit which would be obtained
      1. 2.5K for loss of amenity and $750 for general inconvenience
6. *Relevance* of the plaintiffs intention as to the proceeds of the judgement
   1. *Belgrove* – Irrelevant (Australia binding)
   2. *Ruxley* – Relevant. Principal has failed to prove any loss. (UK is not binding)
      1. *Cant be misrepresentation* – as no ‘intention’ to mislead or deceive
7. *Alucraft Pty Ltd v Grocon Ltd*
   1. Alucraft engaged by Grocon. Subcontract to supply & install aluminium windows & doors
   2. Grocon claimed for defective work
   3. Alucraft admitted defects but said ‘no damage’
   4. Four years since became aware. No retification work. Final certification. Suffered no loss.
   5. Evidence that Grocon had no intention of carrying out rectification work
   6. Court agreed there was breach of contract. Cited *Bellgrove v Eldridge*
   7. Risk that Grocon would be asked to rectify was remote
   8. Claimed costs of $35K discounted to produce damages figure of $5K
8. *Scott Carver Pty Ltd v SAS Trustee Corporation*
   1. Defects in a building which owner later sold
   2. Evidence that no diminution of value
   3. But also evidence that the purchase price was reduced by an amount said to be the cost of rectifying the defects (to preserve the owners cause of action against the builder, architect, suppliers)
   4. Trial judge awarded damages calculated by reference to cost of rectifying defects (*Bellgrove)*
   5. Appeal. Appellant argued cost of rectification not appropriate if evidence that no diminution in value and that work will not be carried out (no loss)
   6. Held: trial judges decision was correct

**Rectification Damages**

1. Rectification damages can be recovered where the owner may or may not carry out the rectification, so long as it would be reasonable to do so.
2. However, if ‘substantial certainty’ that rectification will not happen, result may be different
3. Sale of the property does of itself not displace the *Bellgrove* measure of damages (upheld in *Director of War Service Homes v Harris*)
4. *Tarbcorp Holdings v Bowen Investments*
   1. Lessee – Tabcorp. Lessor - Bowen
   2. Re-statement of the Bellgrove principles
   3. Leased building
   4. Lessee did work on the foyer without permission
   5. Mrs Bergamin (owner) arrived for a meeting to discuss ‘proposed changes’
   6. Work already underway
   7. San Francisco green granite. Canberra grey granite. Sequence matched crown-cut American cherry!
   8. Owner Sue breach of the lease covenant
   9. Trial judge – reinstatement damages only if you can prove a special interest in reinstatement.
   10. Nominal damages only - $1000
   11. High Court disagreed - $1.38m
   12. TabCorp argument that ‘diminution in value’ was the appropriate measure dismissed.
   13. Bellgrove was the applicable principle.
       1. REFER pages 115, 118

**Where there is no contract**

1. Sometimes an existing commercial relationship may have no contract underpinning it at all.
2. Sometimes there may be a contract which is unenforceable
3. What recourse does a party have against the other if it suffers loss or damage on the strength of that relationship?
4. Law of restitution may come to the aid of such a party
5. *Pavey & Matthews Limited v Paul* relief where
   1. No valid and binding contract
   2. Party A conferred benefit on Party B and Party B has not been paid as agreed
   3. Benefit conferred was not conferred as a gift
   4. Benefit accepted by Part B at expense of Party A
6. **Mistake** - Where contract void due to mistake
7. Where contract exists but rendered unenforceable by statute
8. Absence of consideration
9. *Quantum meruit* – a fair price for the work that was done
10. Valuation can be difficult & no single method
    1. Commercial rates for similar work *(Laserbore v Morrison Biggs)*
    2. Prices agreed in unsuccessful contract negotitations (potentially a cap for bidders) *(Way v Latilla)*
    3. Prices in associated contracts *(Banque Paribas v Veneglass)*
    4. Export opinion
11. *Brenner v First Artists Management*
    1. Courts task is not to assess damages for breach of contract but to ascertain what is fair and reasonable compensation for the benefit of the services performed, and accepted actually or constructively by the recipient.
    2. Good discussion of the various ways in which a *quantum meruit* may be valued.
12. **Repudiation**
    1. Where contract exists, but wrongly repudiated by owner, builder has two alternative claims:
       1. A claim pursuant to the contract
       2. A restitutionary claim for a *quantum meruit*
          1. *Kane Constructions Pty Ltd v Sopov* 
             1. Para 865 of CJ Decision
    2. Can be windfall for a contractor
    3. Whereas ‘variations’ would have been valued pursuant to pre-agreed, competitive rates, a quantum meruit entitlement may be valued at (higher) rates.

**Part Two**

**Overview**

1. Dispute resolution
2. Litigation and arbitration
3. Enforceability of ADR clauses
4. Good faith

*Why do we need to talk about disputes in ‘Principles of Construction Law’?*

1. Construction projects = $
2. Disputes can spiral out of control quickly
3. Construction disputes common, complex
   1. *SMK Cabinets v Hili Modern Electrics* at 291

**Litigation**

1. Judge - binding on questions of fact and law.
2. Traditionally slowest, most formal & expensive

**Arbitration**

1. Arbitration agreements are binding
2. Can be less formal, faster & cheaper but not always
3. Usually a single clause in a building contract
4. Private arbitrator: can be non-lawyer
5. Ability dispense without a hearing
6. Traditionally less formal, cheaper and faster than litigation
7. Decision not public

**Mediation**

1. Confidential, quick and cheap
2. Right mediator = snapshot of trial
3. Careful preparation needed for complex dispute

**Expert Determination**

1. Can be binding on questions of fact
2. ‘Independent industry expert’

**Expert conclave**

1. Group of experts from both parties get together and try and reach a resolution
2. Can agree on a non-binding process
3. Good indication of how evidence will look at trial
4. Risk of admissions by inexperienced expert
5. Can be Court appointed as well

**Litigation & arbitration**

1. Two main forums referred to in AS2124
   1. Refer Volume 2 pp 194-200
2. Litigation
   1. Courts: usually judge without jury
   2. Exchange of pleadings
3. Discovery
4. Written reasons for decision (made public in litigation)
5. Historically slow and expensive

**AS2124**

1. Page 40 of AS2124
2. Dispute Resolution
   1. Standard Dispute Resolution – Notice of Dispute
      1. 47.1
   2. ‘Notwithstanding the existence of a dispute’
      1. Infers that must continuing work even when attempting to resolve a dispute
3. Breach of Clause 47 – results in a stay

**Recognise ‘Arbitration Agreement’**

1. Agreement to refer present or future disputes to arbitration
2. Usually in dispute resolution clause (such as Clause 47 in AS2124)
3. Court will ‘stay’ court proceedings if parties have agreed to arbitrate
   1. No jurisdiction to hear this dispute as it should be heard by an arbitrator
4. Party who wants a ‘stay’ of Court proceedings must act quickly – s53, *Commercial Arbitration Act 1984 (Vic)*

**Alternative Dispute Resolution (ADR) Procedures**

1. It is compulsory to follow dispute resolution procedure?
2. ADR
3. High Level Meeting
4. Negotiate ‘in good faith’
5. Mediation

Parties often tempted to skip these procedures and head straight to court or arbitration

Court wont order ‘specific performance’ of ADR because difficult to supervise.

*Elizabeth Bay Developments v Boral*

1. If wording of ADR clause specific enough to enable parties to follow the process, Court will stay proceedings to enforce clause
2. **Held**: ADR clause which is very difficult to enforce ‘attempt’ and ‘commit’
   1. Mediation agreement uncertain.

*Aiton Australia v Transfield*

1. ADR clause to be enforceable, it should be expressed as a condition precedent to formal proceedings.
2. Process must be certain, and not subject to agreement
3. Method for choosing & paying mediator should be clear
4. Clause should make clear when ADR process ended

**‘Good faith’ obligations**

1. Different views on whether requirement to negotiate ‘in good faith’ will be enforced
2. *Coal Cliff Collieries v Sijehama Pty Ltd*
   1. Court refused to enforce ‘negotiate in good faith requirement’
   2. No identifiable criteria to assess compliance
3. *Aiton Australia v Transfield*
   1. Although good faith is difficult to define, this alone is not a bar to enforcing such an agreement
      1. ‘courts should strive to give effect to the expressed agreements and expectations of notwithstanding ... areas of uncertainty and ... that particular terms have been omitted or not fully worked out’

**Best practice** – adhere to ADR clause where it is reasonably certain and capable of being followed.

1. Benefit of compliance: promotes early resolution

**Unit 3**

1. Risk on construction projects
   1. Time
   2. Cost
      1. Interest Rate Risk
      2. Market Movement Risk
   3. Poor performance
   4. Defective work
2. Time
   1. Late completion
      1. Builder – promised to complete by a fixed date and be liable in damages. Typically, liquidated to a fixed rate.
   2. Damages
   3. Delay costs
3. Cost
   1. Increased costs to complete
   2. Variations
4. Poor performance
   1. Risk of incompetence or insufficient resources
   2. Failing to proceed diligently
5. Defective work
   1. Patent (obvious) defects
   2. Latent (non-obvious) defects
6. Scoping
   1. Certainty of subject matter
   2. Incomplete drawings
   3. Inconsistency between drawings and specification
   4. Risk of poor scoping in fast-track projects
   5. Order of Preference
      1. Typically, can be problems because put specifications before contract etc

**Variations**

1. **What are ‘variations’?**
   1. Changes to agreed scope of work
   2. What about work not referred to expressly
      1. *Dorter & Sharkey* *‘necessary works’*
         1. Para [850] – who has responsibility where everything is not finalised perfectively
   3. *Walker v Randwick Municipal Council*
      1. Contract for construction of concrete retaining wall
      2. Contract required the builder – Walker – to do and perform ‘the whole of the works required’ on the wall
      3. Required removal of sandbank
      4. Plan showing that the sandbank was 6ft wide and was not incorporated in the contract and was not referred to expressly or widely
      5. Sandbank was 12ft wall and Randwick Municipal sued Walker for ‘whole of the works’
      6. Builder was stuck with extra cost of wall
   4. What if the plan had been incorporated into the Contract?
      1. Courts rarely conclude that the scope is defined exclusively in the technical contract documents. Reality is that this is uncommon.
   5. *Williams v Fitzmaurice*
      1. Specification didn’t refer to the floors of the house
      2. Mistake in the plans – builder said that floors were extra
      3. Court: Floors were ‘inferred’ in the contract and the ‘whole of the material mentioned or otherwise’
   6. **Courts will look for work that is indispensably necessary to achieve the contract result**
      1. ***Dorter & Sharkey***
   7. Lump sum contracts
      1. Fixed lump sum price specified in the documents
         1. ‘all work described here and shown in the Drawings, including but not limited to ...’
      2. Highly relevant in ‘design & construct’ contracts because contractor undertakes to produce a building that is fit for purpose
         1. ‘Fit for purpose in every possible way’
         2. Brief of requirements typically outlines what is required by principal
         3. ‘Design & construct’ – all risk is held with the builder
   8. AS 4300-1995
      1. Design & Construct project –
         1. Builder is to do both design & construct
         2. Greater risk about variation in design
      2. ‘shall ... produce the Design Documents to accord with the Principals Project Requirements ...’
      3. ‘shall ... complete the work under the Contract in accordance with the Design Documents so that the Works, when completed, shall be fit for the intended purpose’
2. **The Power to Vary**
   1. All standard from building contracts contain a power to vary the work
      1. Beware the contract that does not
   2. Standard form contracts normally give wide power
   3. Risk of no power to vary > power to vary since then no room to move
   4. Need a pricing control mechanism to determine what price is ‘reasonable’
   5. **AS2124 – Clause 40**
      1. [40.1] – Wide scoping power
         1. Contractor shall not vary the work under the Contract except as directed by the Superintendent
         2. Import aspect as cant rack up costs unless instructed
   6. Usually variations directed by Superintendent on behalf of Principal
   7. Often strict procedures and time bars
      1. ‘Contract shall not vary ... except in accordance with written instructions’
      2. ‘... no entitlement to payment whatsoever unless ... in accordance with this clause ...’
         1. Infers ‘must be in writing’ for the contract
   8. What if there is a disagreement about whether an item of work is a ‘variation’?
      1. Contractor must comply with directors
      2. Must proceed ‘regularly and diligently’ with the works
      3. Clause 33.1
         1. ‘due expectation and delay’
      4. Clause 47.1
         1. ‘notwithstanding existence of a dispute’
      5. Invidious position for contract –
         1. ‘Not pay’ but at the same time must ‘get on with the work’
      6. *Molloy v Liebe* – see p376-380
         1. Contract who was commissioned to build a theatre
         2. Disagreement as to whether requests had been made by the owner where ‘truly extras or variations’ or just ‘scope work’
         3. Contractor maintained they were ‘extras’ and expected to get paid
         4. Proceeded with the work – and then refused to give an instruction that this was a variation
         5. **Privy Council:** Implied promise to pay for the work when the work was truly needed.
            1. **Restitution –** in equity – provides payment.
   9. Limitations on the power to vary
      1. Express limitations can be found in standard form contracts
      2. Clause 40 – AS2124
      3. Some limitations implied at law
   10. Implied limitations
       1. ‘must bear some relationship to the work that is to be varied’ – *Blue Circle v Holland Dredging*
          1. Dredging of a channel in Scotland
          2. Contract required that sediment was to be decided later
          3. The sediment was to be used as a bird sanctuary
          4. This was a alleged by superintendent variation
          5. **Held:** Construction of the island was not a variation – it was completely outside the scope of the contract.
             1. **Value as *quantum meruit***
   11. Cannot omit to give work to others
       1. *Carr v Berriman*
   12. Confirmed in *Commissioner for Main Roads v Reid & Stuart*
       1. Contract for construction of Rawinga Roadway
       2. Underestimated amount of soil needed
       3. Had to import material from outside the site
          1. ‘If sufficient topsoil cannot be obtained within the right of way, then the engineer can direct the contractor in writing to obtain the topsoil in other locations’
       4. Superintendent though he could omit any part of the work under the contract – directed a variation – got another person to import
       5. **Held**: wrong the engineer to assume that another could import, original contractor should have this right
          1. **Cant deprive the other party of the benefit of the contract**
       6. Cannot omit so much as to deprive contractor of benefit of the contract
   13. Contracts often displace or alter the limitations implied at common law
       1. Typical contractual limitations
          1. Cannot vary works after practical completed
          2. AS2124 – Clause 40 – omissions
3. **Liability to pay for extra work**
   1. Often compliance with variation procedure is a ‘condition precedent’ to payment entitlement
      1. Unless Superintendent has directed a variation in writing prior to variation being executed, Contractor shall not be to claim EOT or payment ...
   2. Failure to obtain prior, written direction can mean invalid claim
   3. *Update Constructions v Rozelle Child Care Centre*
      1. ‘..the Builder shall forthwith notify the Proprietor and obtain his instructions before proceeding with any consequent variation for the Works shall be dealt with in accordance with Clause 8 of these Conditions’
      2. Architect (Principals Agent) authorised Contractor to carry out ‘extra’ work
      3. Builder did not deliver the notice under clause 16(e) but claimed payment for extra work
      4. Proprietor denied obligation to pay
      5. **Court**: Principal cannot without payment
         1. Contractors claim succeeded
         2. Proprietor was stopped
         3. Contractor was entitled to believe that he would be compensated
         4. Equitable remedy to a contract
   4. *Trimis v Mina*
      1. Contractor claimed for variations. Not in writing
      2. Contractor argued that, despite non-compliance, it should be paid
      3. *Quantum meruit* claim
         1. *Restituionary claim must prove certain things at v.*
      4. Court rejected Contractors claim
      5. Contractor failed to prove:
         1. Owners knew extra work was being done
         2. Extra work was outside Contract Price
         3. Contractor expected to be paid extra for the work
      6. Provisions of contract enforced
   5. When disagreement as to whether it is a variation or scope work, must the Contractor proceed?
   6. Contractor must comply with directions and must proceed ‘expeditiously to complete works
   7. Contract to does not forego the right to later claim payment
      1. *Molly v Liebe*
   8. Good discussion of ‘implied promise to pay’
      1. Keating – refer pg 218-221 of notes
   9. ‘Best Practice’ – reach written agreement up-front if possible
   10. AS2124 – Clause 40.5
       1. Principal shall pay or allow the Contractor ...
          1. Specific rate or prices stated in Contract
          2. Rates in BoQ or Schedule of Rates
          3. If neither (a) nor (b) applies, **reasonable rates or prices**
       2. Superintendent has the power to determine what is ‘reasonable’
       3. Example
          1. Contractor claims variation: extra excavation
          2. Contract: 100,000m3 @ $2.50/m3 - $250K
          3. Principal – 4 excavators x 10 working days x $200/hour = $80K
          4. Both parties argue that their rates and prices are ‘reasonable’
       4. UK courts have considered that a ‘fair valuation’ means Contractors actual and reasonable costs plus margin
       5. Deduction for proven inefficiency?
          1. If principal can show inefficiency, then can deduct
       6. *Brenner v First Artists Management*
          1. Where contract requires ‘reasonable rate’, contractor is to be reimbursed its ‘reasonable costs’
          2. Where no contract exists, Court will fix payment on basis of the ‘value of the benefit of contractors services’
          3. Doesn’t include opportunity costs – i.e. loss of other jobs
       7. *Costain & Tarmac v Zanen Dredging*
          1. Main contractor ordered subcontractor to do extra work
          2. Ordered as a variation
          3. Court found work was not within scope of subcontract so not a variation
          4. Payment on a *quantum meruit* basis
          5. Subcontractor paid its costs plus share of Main Contractors profits
       8. **Best Practice**: Up-front agreement on cost
       9. Where dispute arises, most likely outcome is
          1. ‘Cost plus margin’ where work is within general scope of contract and contractor is entitled to ‘reasonable rates or prices’
          2. Possibly a share of profit where work is so far removed from original scope that it is not a ‘variation’

**Payments**

1. **Payment in Construction Contracts**
   1. The right of payment
   2. Contract mechanisms
2. **Right to payment depends on**
   1. Contract Terms
   2. Statute (in the form of security of payment legislation)
   3. Parties are free to agree on their payment mechanism, although the usual mechanisms are:
      1. Lump sum contract
      2. Contracts other than a lump sum
         1. Schedule of rates
            1. Rates for each task
         2. Cost plus
            1. Paid what it actually costs to do the job, plus mark up of 5% or 10%

Problem – proving what it costs to do the work.

* 1. Claim for reasonable amount/*quantum meruit*

1. **Lump Sum Contracts**
   1. A lump sum contract is a contract to complete the whole of the work for a lump sum
      1. *Example* – Contract to build house for $200K
         1. If completed in every detail, then paid $200K
   2. What if the work is incomplete?
      1. Entire Contracts
      2. Substantial Performance
2. **Doctrine of Entire Contracts**
   1. Doctrine – entire performance by one party is a condition precedent to the liability of the other party to pay
   2. Contracts right to payment depends on the complete performance
   3. *Cutter v Powell*
      1. Sailor worked for entire voyage and died at very end of voyage
      2. Estate sued for payment of wages
      3. **Held**: Entire contract because it was not performed, not payment to Estate
   4. Questions of constructions of works of contract
   5. Clear words
   6. Lump sum = ‘an entire contract?’
   7. If right to instalments = not ‘entire contract’
   8. Security of Payments now creates such a right – a right to monthly progress payments (even if the contract doesn’t say so)
3. **Payment by Instalment**
   1. Where there is an enforceable right to instalments – not an entire contract
   2. Due to the importance of cash flow, most lump sum contracts require payment in instalments
   3. Almost all ‘construction contracts’ are now instalment contracts due to the effect of Security of Payment legislation
4. **Substantial Performance**
   1. What is substantial performance?
   2. Where completion achieved for all ‘practical purposes’ but is not absolute
      1. AS2124 – definition of ‘practical completion’
         1. Page 6 – AS2124 –
            1. At 15
      2. Discussion and cases – *Dorter & Sharkey*
         1. [9-590]
   3. **Doctrine:** Principal may not refuse to pay lump sum because there are only minor defects and omissions
      1. Where substantial completion has occurred the Principal must pay contract price subject to deduction by way of set-off/CounterClaim for defective work
         1. *Hoenig v Isaacs*
5. **Quantum Meruit**
   1. Reasonable amount may be payable in some circumstances, although not if contract prescribed an agreed amount
   2. Circumstances where quantum meruit may be payable
      1. Agreement to pay a reasonable sum
      2. No price fixed
      3. Work outside of the contract
      4. Work under a void/unenforceable contract
      5. Where contract repudiated
   3. *Kane v Sopov*
6. **Typical payment mechanism**
   1. AS2124 –
      1. Clause 3 – Nature of Contract
      2. Clause 4 – Bill of Quantities
      3. Clause 42 – Certificates and Payment
   2. Preconditions to claiming
      1. AS2124 – Clause 42.1
         1. Superintendent obligation to certify only where evidence and information provided
7. **Set-off**
   1. What is set-off?
      1. Common law right to ‘even the ledger’
      2. Can be altered by contract
      3. Set-off in practice
   2. AS2124 – Clause 42.10
      1. Limits the right of set-off
      2. Often amended
      3. 2nd para = certificate
      4. 4th para = obligation to pay
   3. Overlap with Security of Payment legislation
   4. Courts have been careful to enforce a provision which discloses intention that certificate be paid in full
   5. No right to set-off unless contract makes it clear
   6. **Notes:** Refer to page 228 regarding *Witholding against Certificates*
   7. *Blue Chip Pty Ltd v Concrete Constructions Group Pty Ltd*
      1. Contractor delivered progress claim
      2. Certified in full
      3. Principal later sought to deduct or set-off an amount for liquidated damages
      4. No express or implied term allowing the Principal to do this
      5. What is certified is intended to be paid?
      6. What should the principal have done?
      7. Discussion in Rodighiero article

**Defects**

1. **Defective Work**
   1. Contractor obliged to carry out work free of defects
   2. Failure to do so constitutes breach of contract
   3. Implied obligation to perform work in ‘proper and workmanlike manner’
   4. Usually express obligations
      1. Clause 30.3 – AS2124
         1. Suing for debt is easier
      2. Clause 4.1(e) – AS4300
         1. ‘... execute and complete the works ... so that ... when completed ... shall
            1. Be fit for their stated purposes
            2. Comply with all requirements of the Contract
2. **What is a defect?**
   1. Standards Australia contracts do not define ‘defect’
   2. Objective considerations
      1. ‘a shortcoming or failure; a fault, blemish, flaw, imperfection in a person or thing’
   3. Must also have regard to nature and purpose of contract
   4. Example
      1. ‘...any defect, shrinkage outside the tolerances permitted in the Project Brief, omission or fault or failure to confirm with the requirement of the drawings and specifications and design documentation’
   5. Fertile ground for disputes
   6. Must be determined in the circumstances of the specific contract/project
3. **Classification of Defects**
   1. Construction/workmanship defects
      1. Failure to construct in accordance with plans and specification
   2. Design defects
      1. Failure to design the Works in the manner required by the Principal
      2. Failure to achieve ‘fitness for purpose’ obligation?
4. **Contractual Procedures**
   1. AS2124 – Clause 30.3
      1. Superintendent has power to direct:
         1. Remove from site
         2. Demolish
         3. Reconstruct
         4. Not to deliver material or work to Site
   2. Principal may have work carried out by others
   3. May direct a variation due to the defective work or material
      1. May result in ‘negative’ adjustment to Contract price
      2. May ‘accept’ defective work with negative adjustment
      3. Superintendent determines what is ‘reasonable’
   4. Defects Liability Period (DLP)
      1. Commences at Practical Completion
      2. Usually ranges from 3 to 24 months depending on the project
      3. AS2124 – Clause 37
         1. Page 30 – positive obligation ‘shall rectify’
            1. Superintendent has the power to rectify defects
      4. Contractor must rectify defects or omissions ‘soon as possible after Practical Completion’
      5. Superintendent may direct Contractor rectify before expiry of DLP
      6. If not rectified within time stipulated, Principal may rectify and recover costs as debt
      7. Superintendent often has discretion to fix new DLP for specific defects
      8. Expiry of DLP does not mean Contractor ‘off the hook’
      9. Final Certificate issues after expiry of DLP
         1. Final certificate is works are on the record
      10. AS2124 – Clause 42.8
          1. (b) – provides ‘pro-contractor’ clause for patent defects but doesn’t cover latent defects.
      11. ‘Evidence’ that Works have been completed in accordance with contract except in the case of
          1. Fraud
          2. Any defect not apparent at end of the DLP or could not have been disclosed upon reasonable inspection
   5. Limitation of actions
      1. *Limitations of Actions Act (1958) Vic*
         1. Breach of Contract – 6 years from date of breach; or
         2. For negligence – 6 years from when ‘damage known or manifested’
      2. S134 – *Building Act 1993 (Vic)*
         1. Occupancy Permanency is achieved at Practical Completion
         2. ‘Despite anything to the contract in the LA Act ... building action cannot be brought more than ten years after the date of issue of the occupancy permit in respect of the building work ...’
            1. 10 years is the maximum ‘long stop’ period. i.e. restricts to 10 years.
      3. *Gutterage Hatchage and Davidson* v Someone (look up supreme Court case) – GHD case
         1. Explains concept of ‘manifest’
      4. *Second Reading Speech*
         1. This will provide property owners with additional protection in terms of years beyond the very short number of years that now exists.
      5. *Thurston v Campbell*
         1. ‘long stop’ theory does less violence to plain English
         2. But ‘replacement theory’ the ‘correct one’ because of second reading speech
      6. *Paget v JLT Workers Compensation Services Pty Ltd*
         1. Workers compensation legislation – always identical issue arose – Supreme Court of Victoria
            1. ‘Despite anything to the contrary’ additional restriction which applies.
5. **Remedy for defective work**
   1. Construction defects
      1. Breach of contract
      2. Damages
   2. Damages compensatory. Place claimant in same position as if breach had never occurred.
   3. Usual measure of damages is the amount necessary to rectify to give Principal the building it bargained for unless it is not a ‘reasonable course’ to adopt
      1. *Bellgrove Eldridge*
6. **Duty to Warn**
   1. Designer and builder have duty to warn Principal of design defects if they become apparent during construction
      1. *Equitable Debenture v William Moss*
   2. Requires more than ‘mere doubt’ about correctness, but not actual knowledge of errors
      1. *Vic Univ of Manchester v Wilson & Womersley*
   3. *CGA Brown Limited v Carr & Anor*
      1. Builder was given designs by Owner
      2. Called for ‘new flat roof’ across home extension
      3. Insufficient ‘fall’ in the roof
      4. Builder only discovered after completing construction
      5. **Court:** designer negligent. But builder also negligent for failing to detect inadequate design.
         1. Depends on ‘obviousness’ realistically
         2. ‘if required’ – i.e. perhaps argument that this infers ‘told’

**Superintendent**

1. **Introduction**
   1. Most contracts for large or sophisticated projects have a ‘superintendent’
   2. Responsible for
      1. Issuing instructions on behalf of principal
      2. Assessing and certifying claims for payment
   3. Difficult job
      1. Paid by Principal
      2. Required to act ‘honest & fairly’ or ‘reasonably’ when assessing Contractor claims
2. **Status of Superintendent**
   1. Not a party to the contract – a ‘creature of the contract’
   2. Status determined by the contract
      1. Agent of the Principal
      2. Independent certifier
   3. What is the difference?
      1. Position in UK
         1. It has not been settled ... that an architect acting under the ordinary building contract is the employers agent throughout notwithstanding that in the administration of the contract he has to act in a fair and professional manner
      2. Position in Australia
         1. Such an architect may be an agent of his or her client to some extent but will also virtually by definition, bring to bear a professional skill a hallmark of which is independence of action and independence of judgement
            1. *Abigroup v Peninsula Balmain*
3. **Specific Responsibilities**
   1. Certifying paying claims
   2. Directing variations
   3. Assessing and valuing variations
   4. Assessing ‘latent conditions’ claims
   5. Assessing quantities in ‘rates’ contracts
   6. Certifying ‘practical completion’
   7. Approval of subcontractors
   8. Directing ‘provisional sum’ work
   9. Assessing extension of time claims
4. **The major standard form contracts**
   1. AS2124 – page 21 – Clause 23
   2. AS4000 – pg 237 of Notes
   3. ABIC MW-1 2003
5. **The major standard form contracts** 
   1. **PC-1 – clause 3.1**
      1. ‘The Contract Administrator will carry out all its other functions under the Contract as the agent of the Owner (and not as an independent certifier, assessor or valuer)
6. **Obligations as independent certifier**
   1. ‘Discretion must be governed by interests of each party as it appears from the terms of the contract’
      1. *Perini v Cth*
   2. ‘Exercising some skill or function in independent way and not as employers agent’
      1. *Abigroup v Peninsula Balmain*
   3. Must have regard to aims of contract
   4. Only exercise powers given by contract
   5. Must exercise discretion in the interests of both parties

1. **Interference with Superintendent**
   1. *Perini Corp v Cth of Australia*
      1. Superintendent employee of Govt dept
      2. Contractors EOT claims rejected on departmental policy grounds
         1. ‘...vested with duties which oblige him to act fairly and justly and with skill to both parties..’
      3. **Held:** Implied term that Commonwealth would not interfere when exercising role as certifier
   2. *Abigroup v Peninsula Balmain*
      1. Principal engaged external consultant as Superintendent
      2. Consultancy agreement required Superintendent to act as a Principals agent ‘in all matters related to the project’
      3. Abigroup (builder) engaged under AS2124
      4. Abigroup disputed Superintendents assessments of its claims. Said there had been ‘misrepresentation’
      5. An architect will ‘bring to bear a professional skill a hallmark of which is independence of action and ... judgement’
      6. **Held:** The ‘agency’ relationship required Superintendent to act in best interests of Principal
         1. Abigroup would never have entered into the Contract had it known the true nature of the relationship
   3. *Kane Constructions v Sopov*
      1. Contractor claimed Principal had interfered with Superintendents assessments
      2. Superintendent prevaricated and delayed – hoping that disputes would resolves themselves
      3. **Held:** Superintendent had failed to act ‘competently or independently’
   4. Some ‘indicia of interference’
      1. Allows judgement to be influenced
      2. Is directed by one party
      3. Acts as ‘mediator’
      4. Considers principals assent necessary
2. **Liability of Superintendent**
   1. To Principal:
      1. Consulting professionals owe duty to use ‘reasonable care and skill’
      2. Terms of consultancy agreement
      3. Employee Superintendents may exceed authority
   2. To Contractor:
      1. No ‘Privity of contract’
      2. Contractors cause of action is usually against Principal
      3. Court or arbitrator may substitute decision
      4. *John Holland v Majorca Projects*
         1. No duty of care owed by the superintendent to the contractor
   3. Creating a contractual liability
      1. Tripartite deeds
      2. Undertakes contractual obligations to both parties
      3. Can be sued for breach
      4. Difficult to prove breach

**Time**

1. **Concept of ‘time’ is fundamental in building projects**
   1. Principal wants projected completed
   2. Contractor wants to work unimpeded and finish asap
   3. Implied Term: completion with a ‘reasonable time’
   4. Usually express provision for an actual date or period for completion
2. **Terminology**
   1. Practical Completion
   2. Date for Practical Completion
   3. Date of Practical Completion
   4. Liquidated Damages (LD)
   5. Extension of Time (EOT)
3. **Late completion**
   1. What are a Principals remedies for late completion?
      1. Breach of contract
      2. Damages
   2. If contract silent – ‘general’ or ‘unliquidated’ damages
      1. Principal has to prove them
   3. A principals damages for late completion can be difficult to prove
      1. Loss of rent
      2. Finance costs
      3. Interests
      4. Damages ‘up the line’ (*example)*
      5. Claims from proposed tenants
      6. *Hadley v Baxendale*
         1. *Limb 2 - Breach in reasonable contemplation of the parties*
   4. Proving that loss was incurred is difficult
   5. Thus, contracts usually provide for ‘liquidated damages’
      1. Agreed rate up front
      2. Usually an amount per day
   6. Must be a ‘genuine pre-estimate’ of loss
      1. Damages must not ‘punish’ – that is – they must only be compensatory
   7. *Commencement*
      1. Specific date or mechanism for calculating period by which Practical Completion to be achieved
      2. Provides certainty re-time for completion
      3. AS2124 – Clause 35.1
   8. *Progress*
      1. Contractor must ‘proceed’ with the work ‘regularly and diligently’
      2. AS2124 – Clause 3.1, 33.1
      3. Separate and distinct from obligation to *complete the work*
      4. *Substantial Breach*
         1. Failure is a substantial breach entitling Principal to terminate
         2. Clause 44.2
   9. *Programming*
      1. Sophisticated discipline
      2. Gantt Chart – example
      3. Sometimes program is a ‘contract document’
      4. Clause 33.2
         1. May direct the furnishing of a program to superintendent
         2. Risk of ‘departure’ – obligation not to do so
   10. *Obligation to Complete*
       1. Express obligation to bring the work to ‘Practical Completion’ by the Date for Practical Completion
       2. AS2124 – Clause 35.2
   11. *Liquidated Damages for late completion*
       1. Contractor undertakes to pay agreed or ‘liquidated’ sum for any period
       2. Usually a daily or weekly rate
       3. Incentive for contractor to complete when it promised it would
       4. Compensation to principal
       5. Sometimes LD’s are ‘capped’
       6. **AS2124 – Clauses 35.6 & 35.7**
       7. LD’s regime usually exhaustive
       8. *Cellulose Acetate v Widnes Foundry*
          1. Rate of $20 per week over 30 weeks
          2. Upheld by a Court – even though actual damages – were far in excess
       9. *Temloc v Errill*
          1. Had “$ nil”
          2. Mutual intention nothing payable for late completion
       10. *Silent Vector Pty Ltd v Squarcini*
           1. If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor shall be indebted to the Principal for liquidated at the rate stated in the Annexure for every day...’ – per day N/A
           2. **Held**: Clause would not apply at all
   12. Deduction/payment of LD’s in practice
       1. ‘shall pay or allow’
       2. ‘shall be included ...’
       3. Superintendent may include allowance for LD’s in a payment certificate
       4. Sometimes principal has right of ‘set-off’
   13. Not all delays are the Contractor’s ‘fault’
       1. Principal – caused delays
       2. Contractor – caused delays
       3. ‘Neutral’ delays
   14. Not all delays are the Contractors ‘Fault’
       1. Principal – caused delays
          1. Late provision of information
          2. Access to site
          3. Other contractors
          4. Variations
          5. Late instructions
          6. Delays by Superintendent and others for whom Principal responsible
       2. Contractor – caused delays
          1. Late commencement
          2. Slow progress
          3. Poor co-ordination of subcontractors
          4. Rectification of sub-standard or defective work
       3. ‘Neutral’ delays
          1. Inclement weather
          2. Industrial action
          3. ‘Latent’ site conditions
          4. Changes in law
          5. Changes in quantities
          6. Supply of goods
   15. Risk of delay allocated between Principal & Contractor
       1. Risk allocation will have impact on:
          1. Price
          2. Time for completion
       2. Contractors price increases if asked to assume risk of delays
       3. Why? Because contractor must pay LD’s if late completion
   16. Contractor entitled to ‘extension of time’ for qualifying causes of delay
   17. Extension of time = relief from liquidated
   18. (Timeline Example)
   19. Need mechanism for extending time
       1. Extensions of time are a contractual mechanism
          1. Qualifying cause of delay
          2. Notice of delay
          3. EOT application
          4. Superintendent assessment
          5. EOT/no EOT
          6. Adjusted Date for Practical Completion?
   20. AS2124 – **35.5**
       1. Delaying event
       2. Notice
       3. Claim
       4. Assessment occurs the Contractor
   21. Superintendents discretion
       1. Time bar –
          1. AS2124 – Clause 35.5
          2. ... and within 28 days ‘after the delay’ occurs the Contractor gives the Superintendent a written claim for an extension of time.
             1. ‘occurs’ – objective. The Contractor must have known.

Or a test of reasonable person

* + 1. *QLD v Multiplex*
  1. Avoiding liquidated damages
     1. Late completion can mean heavy financial loss for Contractors
     2. Contractors wont hesitate to challenge application of LD’s
     3. Two avenues:
        1. Using contractual mechanisms to extend time
        2. Attacking validity of the clause itself
  2. Contractual mechanisms
     1. Delivery of EOT claims on time
     2. EOT claims wrongly assessed (or not at all)
     3. Practical Completion certified too late
     4. Example
  3. Attacking the LD’s clause
     1. Contractors have often argued that the LD’s clause itself is void for uncertainty or unenforceable as a ‘penalty’
     2. However, Courts reluctant to interfere:
        1. Freedom of contract
        2. Approve ‘agreed procedures’
  4. LD clauses are construed strictly
     1. *Contra proferentem*
        1. Against the party
  5. Where the clause is a penalty?
     1. LDs must be a ‘genuine pre-estimate’ of loss likely to flow from late completion
     2. Judge at date of contract
     3. *Dunlop Pneumatic Tyre Co v New Garage Co*
        1. Description is not conclusive
        2. Penalty – payment ‘in terrorem’
           1. Imposed as a deterrent
        3. Depends on construction of contract in context of each case
        4. Penalty if ‘extravagant and unconscionable’ in comparison with greatest loss that could conceivably be proved to have followed the breach
        5. Presumption of penalty if single lump sum payable for one or more event, where some are ‘serious’ and others ‘trifling’
        6. May still be a genuine pre-estimate even if precise pre-estimation impossible.
     4. *Philips Hong Kong v Attorney General of Hong Kong*
        1. Contract ITservices
        2. ‘Key dates’ to enable other contractors to continue unimpeded
        3. LD’s if late on any ‘key date’
        4. Additional, LD’s if whole services not complete by specified date.
        5. Philips asked the Court to order clause a ‘penalty’
        6. Offered several hypothetical ‘scenarios’ in which LD’s could exceed the Governments likely actual damages
        7. Possibly of ‘double-compensation’
        8. **Court**: ‘no oppression’. Different losses arose from different failures.
     5. *Ringrow v BP Australia*
        1. If its merely ‘lacking in proportion’ this does not amount to a penalty
        2. The damages must be ‘so unconscionable or oppressive that their nature is penal rather than compensatory’
        3. Degree of disproportion maybe relevant
        4. Nature of relationships may be relevant to ‘unconscionability’
     6. *Tasmania v Leighton Contractors*
        1. Leighton constructing roads for the State
        2. Delays. LDs of $8,000 per day
        3. Leighton argued ‘penalty’
           1. State received Cth funding
           2. Not exposed to capital costs
           3. Essentially, no real loss
        4. **Court:** Primary judge agreed. ‘Totally disproportionate to the likely actual costs anticipated to be incurred’
           1. **Full Court disagreed.**
           2. Penalty argument first raised on Day 1 of trial
           3. Needs to be judged objectively looking at all circumstances, bargaining position, etc
           4. Potentially incurred costs, public utility, loss of amenity, diversion of resources, future dealings with Commonwealth
           5. Leightons argument that State could have suffered ‘no loss’ was rejected

Public utility does not itself disentitle the State or public authority from seeking ... compensation for loss of components of which are incalculable ...’

* 1. Where there has been an ‘act of prevention’
     1. Why do we have liquidated damages clauses?
     2. Where Principal itself *prevents* Contractor from completing on time, it
     3. cannot benefit from its own breach of contract
  2. *Peak Construction (Liverpool) v McKinney Foundation* 
     1. Peak was head contractor. Engaged McKinney to construct foundations
     2. Delays in sub-contract work caused by defects in foundations
     3. No power to extend time
     4. This caused delay under head contract
     5. **Court:** part of delay caused by Principal and there was *no power to Superintendent in the contract to extend time from Principal – caused delay*
     6. **If no contractual mechanism for extending the date for practical completion due to Principal-caused delays, a LD’s mechanism cannot operation because impossible to establish the date from LD’s should be calculated**
  3. ‘Peak principle’
     1. Became known as the ‘Peak principle’ or ‘prevention principle’
     2. Where it applies, Date for Practical Completion inoperable
     3. No liquidated damages
     4. Obligation to complete within ‘reasonable time’
  4. Prevention principle now rare in practice. Catered for in most contracts
     1. AS2124, Clause 35.5(b)
  5. Superintendent has the power to grant EOT Contractor has the power to apply the EOT
  6. *Turner Corporation v Co-ordinated Industries Pty Ltd*
     1. ‘the fact that principal may have caused the delay simply means that an allowance should, therefore, be made in accordance with EOT’ mechanism
     2. EOT clause contained a time bar
     3. Principal-caused delays belays but Contractor time-barred from claiming EOT
     4. Contract argued prevention principle
     5. Court: disagreed
  7. *Gaymark Investments v Walter Construction*
     1. Clause 35.4 – give the Superintendent a unilateral power to extend time was deleted from the standard form contract
     2. Replaced with Special Condition
        1. Strict time bar on delivering on EOT claim. Also, Contractors entitlement conditional on it having submitted a timely claim.
        2. But no express power given to the Superintendent to grant an EOT. Only a right given to Wlater to claim an EOT
        3. Walter was delayed, but time-barred from delivering an EOT claim
        4. Gaymark sought to apply LDs for late completion
        5. Walter relied on the ‘prevention principle’. Delays were caused by Principal. No express power given to the Superintendent to extend time for these delays.
        6. Gaymark argued ‘Walter could have applied for EOT but it failed to. There is no room for the prevention principle here
           1. *Turner v Austotel*
        7. **Court:** In the absence of strict compliance with Special Condition 19 and where Walter has been actually delayed by an act, omission or breach for which Gaymark is responsible there is no provision for an extension of time because clause 35.4 which contains a provision which would allow for this has been deleted
           1. An award of LDs in favour of Gaymark would be ‘unmeritorious’
           2. Decision criticised in Australia and UK
           3. Adrian Baran article – pg 296 notes
           4. Hamish Lal – p281
  8. Avoiding the ‘time-bar’
     1. *Peninsula Balmain v Abigroup*
        1. AS2124
        2. Referee found that Superintendent should acting honestly and fairly have granted ROTs unilaterally
        3. Also relevant: Evidence that notice requirements were ‘on hold’ for relevant period
        4. **Court:** Unilateral power to extend time is one capable of being exercised in the interests both of the owner and the builder
        5. If no timely claim made & time has elapsed, may be reason for refusing to exercise discretion. Not the casse here.
        6. **CAppeal**:
           1. **‘unilateral power** ... capable of being exercised in the interests of both owner and builder ...’
     2. *Herbery Bay (JD)Pty Ltd v Civil Mining and Construction Pty Ltd*
        1. Clause giving Superintendent a unilateral power to extend time was deleted. Contract instead provided
           1. 35.5A

Refer Notes

* + - * 1. 35.5B

Refer notes

* + - 1. **Court:**
         1. In this contract however, the parties have substituted different terms and the express intention was to confer on a power the Superintendent without imposing any obligation as to the exercise of that power ... the relevant clauses appear to have been drafted with *peninsula Balmain* in mind. In my view, there is no tenable construction of cl 35.5A by which the Superintendent could be said to be under any obligation and in particular an obligation to extend time if it would be fair to do so.
         2. See Notes Pg 350
  1. Where clause invalid for uncertainty
     1. Incapable of being given meaning
     2. Leads to imprecise result, many results, or no result
     3. *Kemp v Rose*
  2. **Summary**
     1. Penalty
     2. Act of prevention
     3. Avoiding the time bar
     4. Void for uncertainty
  3. Principal remedy where LD’s unenforceable?
     1. General damages
     2. Finola O’Farrell – Notes page 243
     3. If penalty, general damages may be ‘capped’ at LDs rate
     4. If act of prevention – position may well be same
     5. If void for uncertainty – general damages unlimited

1. **Delay Costs**
   1. Time = money
   2. Contractors lose money when delayed
   3. Onsite-overheads
      1. She/fence/bin
      2. Site manger
      3. Foreman
      4. Scaffolding
   4. Delay caused by Principal
      1. Breach of contract
      2. Damages
      3. Variation Costs
   5. Neutral Delays
      1. Usually contractors risk
   6. Risk often allocated in written contracts
   7. Codify Contractors right and limit Principals exposure to damages claim
   8. AS2124
      1. Distinguishes between Principal-caused delay and others
      2. Requires EOT to have been granted
   9. Principal-caused =’such extra costs’
   10. Other delays = liquidated amount
   11. Sometime flat rate agreed for all delays
2. **Float**
   1. Period of time in a construction program between the date when the contractor expects to complete the Works and the date by which it must complete the works
   2. Who owns the float?
      1. *Glenlion Construction Limited v Guinness Trust*
         1. No positive duty upon the Principal to assist the Contractor to complete earlier than the contractual completion date
         2. Australian position – Nicholas Brown articles (notes p.246)
         3. ‘Contract owns the float’?
         4. Example – AS2124-1992 – clause 35.5
   3. Clause 35.5 – Float
      1. Entitlement to ‘float’ or that part of the contractors program which might be some spare time.
   4. **\*\*\*\*WILL BE ON EXAM\*\*\*\***

**Notices and Time Bars**

**Overview**

1. Notices
2. Method for giving notices
3. Remedies for non-compliance
4. Time bars
5. Defences to time bars

**Notices**

1. Common notices under most contracts
   1. Variations
      1. Clause 40
   2. EOTs
   3. Latent conditions
   4. Disputes
      1. Clause 47
   5. ‘show cause’ and termination
      1. Clause 46
   6. Claims
2. Notices can determine rights and liabilities

**Method for giving Notices**

1. Most contracts stipulate manner for giving notices
2. Critical to understand contractual requirements
3. Failure to comply may mean invalid notice
4. AS2124 – Clause 7
5. Care should be taken when choosing method for service of notices in a contract
   1. When is service effective?
   2. What if recipient away?
   3. Is email practical or risky?

**Remedies for non-compliance**

1. What is principals remember if Contractor fails to give required notice?
   1. AS2124 – Clause 12.2 (latent conditions)
      1. Not a good example of a time bar clause
2. Require to serve a notice
   1. Fail to service a notice

**Notices under AS Contracts**

1. Clause 46
   1. Notice requirement
   2. Must be given within 28 days of ‘reasonable awareness’
   3. ‘Shall not be liable’
      1. Telling you the position that will be if the notice is not served
2. Failure to notify invalidates the claim
   1. ‘Time bar’

**Time bar**

1. Failure to notify invalidates the claim
2. *Jennings Constructions v Birt*
   1. Contractor shall not be liable upon any claim by Sub-contractor ... unless ... lodged in writing ... not later than 14 days after ... occurrence of events ...
   2. Birt submitted late claim
   3. **Court**: Compliance mandatory. Claim failed.
      1. Considered ‘condition precedent’
3. Time bars render a late claim invalid
   1. *Queensland v Multiplex*
      1. ‘if the contractor is ... delayed ... and **within 28 days after the delay occurs** the contractors gives ... a written claim for an extension of time ... shall be entitled to an extension of time ...’
   2. **1st Instance** – Trial judge agreed at first instance that was not time barred
   3. **Court of Appeal**:
      1. ‘After the delay’ occurs means ‘after the delay **first** occurs’
      2. Multiplex was time-barred
   4. Similar results in other cases
4. *Rise and Rise of Timebar Clauses* – Refer to the Notes
5. **\*\*\*\*TIMEBAR ON EXAM\*\*\*\***

**Defences to Timebars**

1. *Peninsula Balmain v Abigroup*
   1. Notes pg 45
   2. Similar EOT clause to Multiplex case
   3. Also a clause permitting Superintendent o grant EOT ‘for any reason’
   4. Contractor failed to claim EOT in time
   5. **Court:** Superintendent acting ‘honestly and fairly’ should have exercised power to grant EOT
2. **Waiver**
   1. Party may waive right to rely on strict observance by other party not notice provisions
   2. Waiver can be express or inferred
   3. Beware ‘no waiver’ clauses
3. **Estoppel**
   1. Defence – not as common as waiver
   2. Kind of secondary argument in a claim
   3. Principal waived rights in relation to time provisions
   4. Some representation made and the other party relies on it to their detriment
      1. Principal may represent to Contractor that strict compliance with notice provisions required. Representation may be express or inferred from conduct
      2. Contractor relies on representation to its detriments (i.e. submits or continues to submit late claims)
         1. Then Principal seeks to rely on ‘time-bar’ to stop them
      3. Principal can be ‘estopped’ from relying on its contractual rights
4. ***BGD v VicUrban***
   1. Both waiver and estoppel

**Security for performance**

**Terminology**

1. Performance bonds
2. Performance guarantees
3. Retention monies
4. On demand guarantees
5. Letters of credit
   1. A document issued by a bank at the buyer's request in favor of the seller, promising to pay an agreed amount of money upon receipt by the bank of conforming documents with a specified time.

**The Autonomy Principle**

1. A surety’s obligation under a performance bond is independent of the underlying contract between a grantor and beneficiary
   1. *Wood Hall Pty Ltd v Pipeline Authority*
2. Virtually promissory notes payable on demand
   1. A promissory note, referred to as a note payable in accounting, is a contract where one party (the maker or issuer) makes an unconditional promise in writing to pay a sum of money to the other (the payee), either at a fixed or determinable future time or on demand of the payee, under specific ...
3. ‘hands off’ approach by the Courts
4. Giving effect to unconditional obligation in a performance bond which is independent of the underlying contract between the grantor and beneficiary

**Exceptions**

1. Negative stipulations (or covenants)
2. Fraud
3. Statutory Unconscionability

**Negative Stipulations**

1. The NSW Position
   1. *Pearson Bridge v SRA*
      1. *‘If the principal becomes entitled to exercise all or any of its rights under the contract in respect of the security, the principal may convert the security*’
2. The Victorian Position
   1. *Bachmann v BHP*
      1. ‘A party shall not convert into money security that does not consist of money until the party becomes entitled to exercise a right under the Contract in respect of this security.’
         1. Clause 5.5 of the Contract – not dissimilar to *Pearson Bridge*
      2. ‘The Purchaser may deduct from monies otherwise due to the Supplier, any monies from the Supplier to the Purchase and if those monies are insufficient, the Purchase can have recourse to the security under the Contract’
         1. Clause 22.4 – principal has security and can take that security.
         2. Court – its clear this was contemplated and allowed it

**An irreconcilable divide?**

1. *Ultra Refurbishing & Construction Pty Ltd v John Goubran & Associates Pty Ltd*
   1. Similar clause to *Pearson Bridge* –
   2. Distinguish between use of ‘whenever’ instead of ‘if’ as avoid finding a negative stipulation
2. *Hughes Bros Pty Ltd v Telede Pty Ltd*
   1. *‘whenever .. may be entitled’* is not the same as ‘is entitled’
3. *Reed Construction Services Pty Ltd v Kheng Seng (Australia) Pty Ltd*
   1. *‘shall be entitled’* required more than ‘*may be entitled*’

**One for Victorians**

1. Approach in *Bachmann* is focussed on giving effect to the intention of the parties
   1. *‘may be entitled’* interpreted as *‘is entitled*’
2. **Who should be out of pocket in the event of a dispute?**
   1. Parties have agreed under contract as to who is out of pocket as to a dispute.
   2. Principal is entitled to call on the security before the dispute is resolved
   3. If found against them, then must pay it back.
      1. Contractor usually providing security for contractor obligations under the contract

**Entitlement**

1. *Fletcher Construction v Vansdorf*
   1. Contextual construction process
   2. ‘unconditional’ nature of performance bonds
   3. Trade usage
   4. Intended risk allocation
   5. Distinction between rights against a beneficiary versus rights against the surety
   6. *‘It is likely the parties intended that the security should be available to meet any bona fide claim by the owner. If they intended that the availability of the security should be deferred until final resolution ... they should have so provided ... no implication may be made which is inconsistent with an agreed allocation of risk’*

**The fraud exception in the USA**

1. *Sztejn*
   1. Intentional fraud – either as to the performance bond or in the underlying contract
   2. Egregious or gross fraud

**The fraud exception in the UK**

1. *Bolivinter Royal SA v Chase Manhatten Bank*
   1. Narrower reading than the USA
   2. Beneficiarys fraudulent presentation of a performance bond to the surety
   3. Surety cannot be injuncted unless it is aware of the fraud

**Fraud in Australia**

1. *Hortico Australia Pty Ltd v Engery Equipment Co* 
   1. Need to show intent by the beneficiary to the obtain money by deceit
   2. Recognition of ‘gross unconscionability’ as a fatuehr exception to the Autonomy Principle

**Statutory unconscionability – \*\*\*\*&IN EXAM, DISCUSS THESE CASES\*\*\*\***

1. *Olex Focas v Skodaexport*
   1. No equitable notion of unconscionability short of fraud
   2. As the majority of the monies advanced under the mobilization guarantee had been repaid to Skodaexport and the contract provided a mechanism for partial repayment, call on the whole sum was unconscionable
   3. Call on performance guarantees were allowed –even though deliberately contributed to unduly pressure Olex into accepting lower payment
   4. Intent was for Olex to be out of pocket in the event of a dispute giving rise to calls on the performance guarantees
   5. **Court:** If there is unconscionable is so bad, effects contractors entitlement to have recourse to the performance bond.
      1. ***It’s moved further than this – this was only recognised in this case. Refer 2 later cases.***
2. *Boral Formwork v Actionmakers*
   1. Boral and Action Makers in contract for supply of *scaffolding* equipment
   2. Boral provided irrevocable letter of credit to Action
      1. Action called on letter of credit in circumstances where it was aware that the sum sough was in excess of its entitlements as a result of its defective works
      2. Held this was ‘sufficiently special’ circumstances to bar the call on the security – much more than merely attempting to apply commercial pressure
         1. The autonomy Principle was over-ridden by s51AC of the TPA
3. *Clough Engineering v Oil and Natural*
   1. More restrictive construction of unconscionability
   2. ONG able to call on performance bonds even if there were ongoing disputes
   3. Clough clearly intended to be out of pocket if a dispute arose
      1. Reiterated the importance of bonds in international trade

**Statutory Unconscionability**

1. Increasing important now the monetary threshold under the TPA for unconscionability have been removed
2. Decisions such as *Clough* have reinforced reluctance by the Courts to extend notions of unconscionability beyond cases tantamount to fraud
3. What should be the standard ?
   1. A flexible standard – vulnerability?
   2. Actual fraud?

**Drafting and Standard Forms**

1. Entitlement to call on a performance bond
2. Recourse to detail with monties from that call
3. Immediate right to call
4. Notice as a condition precedent
5. What happens on termination
6. Contractors DO want notice
7. Owners DO NOT want notice

**AS2124**

1. Unamended
   1. Includes express preconditions to having recourse to security including notice of intention to call
   2. Security held on trust unless beneficiary is government body

**PC-1**

1. No express preconditions to a call
2. Intended that there is no negative covenants

**Further Reading**

1. Refer notes

**Termination - \*\*\*\* ON EXAM \*\*\*\***

**What is termination?**

1. Where on party brings a contract to an end
2. Common law right to terminate
3. Often, contract will modify or expand the common law right to terminate
4. Relevant in context of construction
5. Consequences of *wrongful termination/repudation* severe
6. Can give a contractor the right to claim payment on a *quantum meruit* basis
7. A right not exercised lightly
8. Breach of a ‘condition’
   1. Warranty
   2. Condition
9. Condition = where precise or literal compliance necessary or where substantial performance essential
   1. *Oscar Chess v Williams*

**Common law right to terminate**

1. Distinction between conditions & warranties unsatisfactory
2. Use of the word ‘condition’ in a contract not determinative
3. High Court of Australia developed test of ‘essentiality’
4. *Tramways Advertising v Luna Park*
   1. Contract required Tramways to put trams with advertisement boards on tracks for 8 hours per day
   2. ‘we guarantee’ boards for at least 8 hours per day
   3. Contract also referred to trams being on track for an average of 8 hours per day
   4. Luna park complained that boards were not on tracks at least 8 hours per day
   5. Said it was not bound by the contract because of Tramways failure to perform
   6. Tramways argued that performance satisfactory if boards were on tracks for average of 8 hours per day
   7. **Court:** displaying boards for only an average of 8 hours per day was serious breach that justified termination by Luna Park
   8. **The ‘guarantee’ clause was a condition (not a warranty) breach of which entitled Luna Park to terminate**
5. Example
   1. Principal believes contractor breaches via repudiation when hasn’t
   2. Wrongful termination – its terminated regardless
      1. Payment on a *quantum meruit* basis
6. Essentiality of term depends on **intention of parties objectively ascertained**
7. Would A have entered into contract except on B’s assurance of strict compliance?
8. *Koompahtoo Local Aboriginal Council v Sanpine Pty Ltd*
   1. High Court confirmed correctness of approach in *Tramways*
   2. Essential terms
   3. Intermediate Term – sufficiently serious breach may give rise
   4. Non-essential – breach not repudiation
9. **Generally:**
   1. Being late does not amount to serious breach to allow termination
   2. Only where ‘time is of the essence’
   3. Question of degree

**Termination for failure to make progress payments**

1. Termination for failure to make progress payments
   1. Breach of an instalment obligation not sufficient – *Maple Flock v Universal Furniture*
      1. Need to establish frequency of breach in context of contract

**Repudiation**

1. Where A repudiates contractual obligations, B may terminate
2. Evincing an intention no longer to be bound by obligations
3. Can arise in a number of ways
   1. Party says it will not perform
   2. Party demonstrates that it cannot perform
   3. Maintains an erroneous interpretation of contract
   4. Commits many, constant breaches with cumulative effect
4. If you evince and intention to not be bound, and have no grounds for doing it – you yourself have repudiated and are liable for wrongful termination.

**Doctrine of Election and waiver**

1. Innocent party always has the election – continue or bring to an end
2. May elect to treat conduct as repudiatory and bring it to an end
3. May, by behaviour, treat contract as valid and on foot

**Willing and able to perform**

1. Innocent party must be ‘ready, willing and able to perform’
   1. *Foran v Wight*
2. Equity – ‘clean hands’

**Contractors remedy for repudiation**

1. Sue for damages (and all that which entails)
2. Claim on a *quantum meruit* basis

**Frustration**

1. No fault termination
2. *Taylor v Caldwell*
   1. Contract for hire of a hall
   2. Hall burnt down
   3. Contract ‘frustrated’ and at an end
   4. Parties absolved from performance
3. An event which excuse parties form performance or makes performance impossible
4. Not an event which is a type of risk that is contemplated expressly or impliedly

**Contractual Rights to Terminate**

1. AS2124 – Clauses 44.2 and 44.7
2. Termination for convenience
   1. Consequences
3. Following the contractual procedure may be critical

**Consequences of Termination**

1. Contract is at an end from moment of termination
2. Rights and obligations that have accrued and binding
3. Future rights and obligations discharged
4. Doctrine of ‘survival’
   1. Clauses that were intended to ‘survive’ a termination will survive
   2. Disputes resolution clauses
   3. Intellectual property (designs etc)

**Construction Risk Allocation in Contracts**

**Successful Project Outlines**

1. A successful project is one which:
   1. Meets budget and timing requirements
   2. Meeting project specific requirements
   3. Satisfies statutory/probity/accountability requirements
   4. Obtains the best outcome for the Principal and the stakeholders
   5. The Contractor makes money
   6. Reduces risk

**Tools for successful construction project**

1. Properly scope the project
2. Prepare suitable documentation
3. Choose the appropriate delivery method
4. Determinate appropriate project/construction risk allocation
5. Clearly set out the parties rights and responsibilities

**Constraints on achieving a successful project**

1. Funding
2. Internal resourcing
3. Late consideration of project delivery issues
4. Rushing to commence work when documentation not complete
5. Inadequate consideration of risk
6. Political pressures

**Consequences of a poor construction project**

1. Project over budget (effectively become ‘cost plus’)
2. Project late
3. Defective works/poor quality
4. Disputes

**Risk and Risk allocation**

*What is Risk?*

1. *Risk is the chance of an event occurring which would cause actual project circumstances to differ from those assumed when forecasting project benefit and cost.*
2. Page 2.45, Page 23 – Vol 1

*Approaches to Risk Allocation*

1. Theoretical Approach
   1. A party should bear a construction risk where
      1. The risk is within the partys control
      2. The party can transfer the risk e.g. through insurance, and it is most economically beneficial to deal with the risk in this fashion
      3. The preponderant economic benefit of controlling the risk lies with the party in question
      4. To place the risk upon the party in question is in the interests of efficiency, including planning, incentive and innovation
      5. If the risk eventuates, the loss falls on that party in the first instance and itis not practicable, or there is no reason under the above principles to cause expense and uncertainty by attempting to transfer the loss to another.
2. The ‘No Dispute’ Report
   1. The principal should not ask a contractor to price an unquantifiable risk that is in control of the Principal
   2. The Principal may ask the contractor to manage and control a neutral risk
   3. Clear identification of the obligation and/or risk is essential in any method of risk allocation. This then lessens the likelihood of disputes.
3. Risk allocation is driven by:
   1. Client philosophy
   2. Contractors philosophy
   3. Market
   4. Financiers
   5. Lawyers

*Risk allocation considerations*

1. Retained risk
2. Risk ‘take back’ – intentional and unintentional
3. Risks over which no party has no control
4. Risk sharing
5. Risk mitigation strategies
6. Role of insurance

*Phases of Risk*

1. Tender
2. Negotiation
3. Construction
4. Operations
5. Transfer of asset

**Risk and AS2124**

*Latent conditions*

1. Parties share risk
2. Danger of TPA claims relating to geotechnical and other site reports

*Time/delays*

1. Extensions of time – Clause 35
   1. Notice requirements
   2. Actual delay
2. Unilateral power to extend time
3. Concurrent delays

*Liquidated Damages*

1. Liquidated damages (LDs) – Clause 35.5
   1. Liquidated damages or penalty
   2. Genuine pre-estimate of loss
   3. Implications of LDs being a penalty

*Delay costs*

1. Delay Costs – Clause 36
   1. Entitlement to costs?
   2. No complete code

*Inadequate design*

1. Clause 8.1
   1. What is inadequate design documentation?
   2. Lump Sum Construction Contract – Principal bears all risk
   3. Risk of discrepancies shared
   4. Inadequate design exposes the Principal to:
      1. Additional costs
      2. Damage for misleading or deceptive conduct

*Bill of quantities inaccurate*

1. Bill of quantities – Clause 4
   1. Difference between Bill of Quantities and Schedule of Rates
   2. The principal takes risk of errors in Bill of Quantities
2. *Bill of Quantities* – Calculate the quantities of building materials and priced per volume etc.

*Statutory requirements change*

1. Clause 14
   1. Contractor must comply with statutory requirements
   2. The Principal takes risk of statutory requirements altering after date of tender

*Care of works*

1. Contractor responsible for works until 4pm on Date of Practical Completion
2. Contractor must reinstate damage except where ‘Expected Risk’

**Delivery Methods – \*\*\*\*EXAM – COMMENT ON MOST APPROPRIATE DELIVERY METHOD\*\*\*\***

**Determining the right project delivery method**

1. Timing
   1. Is there time to fully design?
   2. Are there early works required?
   3. Does the contractor need to be involved in the documentation?
2. Scope
   1. Is there certainty of scope?
   2. Is the contractor taking maintenance/operations obligations?
   3. Novel engineer solution required
3. Complexity
   1. Works on other persons land
   2. Planning issues
   3. Native title
   4. Compulsory acquisition
   5. Unknown site conditions
4. Payment
   1. Lump sum
   2. GMP/WMP
      1. Guaranteed maximum price
   3. Cost Plus
   4. Incentive
   5. Pain share/gain share

**Methods of procurement**

1. Consultancy agreements
2. Construct Only Contracts
3. Design and Construct Contracts
4. Construction management contract
5. Managing contractor contracts
6. PPP – Public/Private Partnerships
7. BOO/BOOT
   1. BOO – Build, Own, Operate
   2. BOOT – Build, Own, Operate, Transfer
8. Design, Build, Finance, Operate/Maintain
9. EPC/EPCM
   1. EPC – Engineer, Procure & Construct
      1. Engineering/Design/Procure of Equipment/Construct
      2. Usually a plant
   2. EPCM – Engineer, Procure, Construct & Manage
10. Partnering/Alliancing
11. Development agreements

**‘Construct Only’ contracts – SEE DIAGRAM**

1. Separate contract with consultants
2. Designer engaged before contractor
3. Contractor constructs in accordance with plans and specifications
4. The principal responsible for design

*Advantages*

Nd volume of documentation

1. Design progressed: Contractor can tender more accurately
2. Tendering costs reduced
3. Larger tender pool: more competitive
4. Risk of variations should be reduced
5. Principal retains control of design
6. Principal retains control of quality

*Disadvantages*

1. Required and ‘lead time’ can delay the project
2. Complexity and volume of documentation can lead to errors/omissions
3. Contractor and Designer blame one another
4. Prescriptive design can lessen opportunity for innovation and efficiences

**Design & Construct – REFER DIAGRAM**

1. If engaged before contractor, designer novated to contractor
   1. Novated – delegate responsibility to another party
2. Contractor responsible for developing design

*Advantages*

1. Single point responsibility
2. Ability to ‘fast track’ the project

*Disadvantages*

1. The principal has little control over the evolution of the design
2. Smaller pool of Contractors
   1. Perhaps higher cost?

**PPP/BOOTS– REFER DIAGRAM (not examinable)**

1. Public/Private Partnerships
   1. Model for private sector involvement in development public infrastructure
   2. Use of private sector funding/expertise/management to deliver public sector projects
   3. SPV – Special Purpose Vehicle
2. Basis in privatisation policies
   1. UK under Thatcher
   2. NCP in Australia
3. Distinguish PPP’s from traditional approach
4. Traditional – public sector responsible for design, construction, financing, operation/maintenance
5. PPP – responsibility/risk for design, construction finance, operation/maintenance on private sector

*Advantages*

1. Earlier project delivery
2. Risk transfer to private sector
3. Enhanced efficiency through competition
4. Whole of life approach
5. Enhancing private sector innovation

*Disadvantages*

1. Costs of bids
   1. Advisers
   2. Cost of time
   3. Particularly high in an immature market
2. Lack of deal flow in immature market restricts interest
3. Length of procurement process

**Lump Sum Contract – or not?**

1. Fixed Lump Sum Contracts
   1. Can use both as re-measurement contracts
   2. Often used a lump sum contracts
   3. In theory, contractor takes the risk of ultimate price, however.
2. Potential cost adjustments
   1. Errors in Bill – Clause 3.3 of AS2124
   2. Discrepancies in contract documents – Clause 8.1 of AS2124
   3. Provisional Sums – Clause 11 of AS2124
3. Latent Conditions – Clause 12 of AS2124
4. Change in Law – Clause 14 of AS2124
5. Minerals, fossils and relics – Clause 27.5 of AS2124
6. Survey marks/setting out – Clause 28 of AS2124
7. Defective materials or clause – Clause 30 of AS2124
8. Cost of testing – Clause 31.7 of AS2124
9. Direction re order of works – Clause 33.1 of AS2124
10. Costs of suspension – Clause 34.4 of AS2124
11. Delay Costs – Clause 36 of AS2124
12. Variations – Clause 40 of AS2124
13. Damages for breach of contract
14. Damages under Statute

**Formation of Construction Contracts**

**Contract Documents & Terminology**

*Parties*

1. Principal/Employer
2. Contractor
3. Architect
4. Engineer
5. Superintendent
6. Quantity surveyor
7. Consultants
8. Project manager
9. Clerk of works
10. Principals/employers agents/representative – appoint a representative
11. Subcontractors
12. Suppliers

*Documents*

1. AS2124 – Not a complete contract
   1. Also need an instrument of agreement specifying the parties, what constitutes the contract, entire understanding clause, execution clause
2. Tender/invitation to tender
3. Agreement/instrument of agreement
4. Conditions of Contract
5. Plans/drawings
6. Bill of quantities
7. Specifications
8. Schedule of Rates

**What is a tender?**

1. An invitation to tender is an ‘invitation to treat’
2. The response to the tender invitation constitutes the ‘offer’
3. Acceptance of the tender constitutes a binding contract
4. **Tender -** The Contractors offer to carry out works is called a tender. It must be definite and unambiguous in its terms if its acceptance is to conclude an agreement enforceable by the law as a contract.
5. **Request for Tender (RFT)**

**Ambiguous acceptance**

1. *Peter Lind & Co Ltd v Mersey Docks & Harbour Board*
   1. Contractor submitted alternative tenders for construction of freight terminal – one ‘fixed price’ and one was a ‘cost plus’
   2. Board purported ‘your tender’ but did not specify which one
   3. Contractor did work and claimed on quantum meruit
   4. Held no concluded contract and entitled to payment on quantum meruit

**Tenders and Estimates**

1. Construction industry – contracts, subcontractors suppliers, consultants
2. Quotations and estimates are common
3. Normally, an estimate will be held to be firm offer *Crowshaw v Pritchard and Renwick*

**What is not a tender?**

1. Expression of interest
   1. Not an offer
   2. Mere provision of information

**Costs of tendering**

1. Costs of tendering generally borne by contractor
2. Possible exceptions
   1. Additional services at employers request
   2. Substantial preparatory work at employers request

**Can tender process be a contract?**

1. Normally **no contract before tender is accepted** but in some circumstances invitation to tender (and response) may create contractual obligations.
   1. *Blackpool (English C of A – 1990)*
   2. *Hughes Aircraft (FC of Appeal – 1997)*

**Blackpool case**

1. *Blackpool and Flyde Aero Club Ltd v Blackpool Borough Council*
   1. Tendered submitted tender that complied with RFT in all respects
   2. Council mistakenly thought tender received late
   3. **Held:** Pre-tender contractual obligation to at least consider the tender despite express term that Council is not bound to accept any part of any tender
   4. Council standing orders on tenders would become part of the contract
   5. Analogous to VGPB or internal policies
   6. Court held that contractual obligation to consider the tender.

**Hughes Aircraft Case**

1. *Hughes Aircraft System International v Airservices Australia*
   1. Two tenderers for air traffic control system
   2. RFT contained 4 weighted critera
      1. Price (2nd most important)
      2. Australian industry (4th most important)
   3. Hughes – Cheapest price
   4. Thompson – most Australian content
   5. Thompson won
   6. There was a pre-tender process contract (participation in the tender process was the consideration) which:
      1. Required the evaluations of tenders in accordance with the methodology prescribed in the Request for Tender
      2. Pre-contractual obligation owed to fairly accept and asses tender documents
      3. Implied a term of ‘fair dealing’ – that tender evaluation would be conducted fairly and in a manner that afforded equal opportunity for Hughes and Thompson
   7. **Held:** breached term of fair dealing because it:
      1. Took account of Thompson material submitted after date (including price reduction). Hughes not provided with same opportunity.
      2. Failed to ensure strict confidential of tender documents (permitted disclosure of Hughes tender info to Thompson)
      3. Allowed a board member to have improper interests in Thomson and the Thomson bid
   8. Implication of term of fair dealing is consistent with behaviour expected of a public body using public funds

**What is a Tender Process Contract?**

1. A contract governing the manner in which the tender is conducted, as distinct from the ultimate contract for which tenders are being sought
2. The principal terms of the process contract are contained in the Request for Tender
3. Courts have historically sympathised with tenderer. May be gradual shift towards outcomes which favour the invitee.

**When will a TPC arise?**

1. Not automatically
2. Depends on intention of parties
   1. Express or intention may be inferred
   2. Can be contracted out of
   3. Inconsistent RFT

***Cubic Transportation Systems v NSW***

1. Tender process for selection of ticketing system supplier for Sydney public transport system
2. Followed *Hughes* case
3. Despite NSW Government reserving broad powers to vary RFT:
   1. Changed term of specifications in RFT during the tender process so one tendered disadvantaged – this may be breach of process contract
   2. Could not exercise unfairly
4. **Held:** Implied term of good faith requires that invitee take into account interest of tenderers
   1. Procedural Fairness ensure that each party has equal opportunity and that there is no bias
   2. Court disagreed with policy basis for implying a term of fair dealing in Hughes – policy argument may not apply in commercial situation

***Pratt Contractors v Transit NZ***

1. Pratt submitted tender to Transit for road contract
2. Transit had internal manuals for tender evaluation – consistent with Competitive pricing Procedures required by *Transit NZ Act 1989 (NZ)*
3. Tender considered both price and non-price attributes (e.g. relevant experience, technical skills, resources)
4. Tender evaluated by Tender Evaluation Team (TET) of 3 members – 2 had been involved with Pratt’s previous failed projects
5. Terms of Request for Tender
   1. Lowest tender won’t necessarily be accepted
   2. Tender shall be valued according to Competitive Pricing Principles
6. In first rounder of tender evaluations:
   1. Pratt had lowest price but failed on technical skills and ‘resources’ – being ‘financial’ resources
   2. Transit rejected all tenders and re-advertised
   3. Final report of TET included reference to Pratt’s past reputation
7. Second round of tender evaluation:
   1. Pratt submitted higher price (to deflect concerns re-low balling)
   2. Financials were not included in considering ‘resources’ criteria
   3. Pratt passed on technical skills but failed on relevant experience
   4. Pratt Lost Tender
8. **Held:** RFT gave rise to pre-award process contract
   1. RFT didn’t incorporate internal manuals – these were for administrative purposes only – Transit could consider Pratts financials as part of ‘resources’ criteria
   2. Found implied duty of good faith
   3. TET can consist of people who have had previous dealings with Pratt – can give honest evaluation based on experience. No conflict of interest
   4. No breach of express or implied terms of process contract. Even if there was breach – this would not have caused Pratts failure.

***State Transit Authority of NSW v Aust Jockey Club***

1. STA initiated tender process for sale of land used as busway at Royal Randwick racecourse
2. Minister authorised STA to negotiate with AJC on conditions that AJC continue to use busway for racecourse purposes
3. Negotiation unsuccessful. STA entered agreement with third party tendered.
4. No contract arises till tender is accepted
5. Unsuccessful tendered not entitled to redress
6. Offeror had absolute discretion to accept/reject, extend closing date, negotiate with any tenderer at any time.
7. **Held**: No pre-award process contract. Merely invitation to treat
   1. Tight drafting of conditions ensured invitee was ‘master of situation’ and had no obligation to follow nay process

**Case law developments**

1. No ‘trade custom’ that the lowest bid must be accepted (*Elgin Constructions*)
2. Council cannot make decision based on un-stated selection criteria (*Chinook, Kencor*)
3. Incorporation of manuals
4. May avoid creating pre-award process contract through careful drafting of RFT
5. Process contract may require assessment of tender in accordance with RFT
6. RFT unlikely to incorporate internal procedural manuals, but probably includes procedures or policies referred to
7. Duty of good faith by invitee may be implied
8. Duty of good faith requires each tenderer to be afford equal opportunity

**Possible action by tenders**

1. *Estoppel*
   1. Promise made pre-tender may give rise to loss
   2. Reliance on terms of the tender to detriment
   3. Courts may intervene to stop
2. *Negligence*
   1. Failure to properly empty the Tender Box
   2. Accidentally considering tender submitted after closing
   3. Providing information that is deficient or defective – requiring re-tendering
   4. Not independently considering price and non-price attributes when RFT requires this
   5. Courts may be reluctant to extend a duty of care given the possible impact on trade and commerce
   6. Tenderers vulnerability remains crucial for claims of pure economic loss. Has P carried out sufficient due diligence? How large an investment is the project for tendere? (*Woolcock v CDG*)
3. *Trade Practices Act 1974*
   1. S52 of TPA prohibits conduct that is misleading and deceptive or is likely to mislead or deceive
   2. *Hughes –* fats supported claim for misleading and deceptive conduct
   3. Representation was that the tender would be run in accordance with stated process
   4. Reality – operated in quite a different way

**Tenderers remedies**

1. Injunction to stop invitee entering contract with successful tenderer *(Cubic)*
2. Damages
   1. Cost of tender process
   2. Loss of profit for the life of the project

**How to minimise risk**

1. Contract Drafting
   1. Tight drafting of RFT
2. Document Trial
   1. Have a clear, transparent trial – tender documentation may be accessible via discovery
3. Be wary of pre-contractual representations
4. Comply with evaluation criteria
   1. Make criteria objective if possible
   2. Consider advisability of weight criteria
5. Precision and *contra proferentum* (against the party)

**Tendering and the *Local Government Act 1989***

1. Statutory Requirements
   1. S186(1) – Before a Council enters into a contract for the purchase of goods or services or for the carrying out of works, to the value of $100,000 ... or more, it must –
      1. (a) give public notice of the purpose of the contract and invite tenders from any person wishing to undertake the contract; or
      2. Give public notice of the purpose of the contract or the project to which the contract relates and invite expressions of interest from any person interested in undertaking the contract or all, or any part of, the project.
   2. When s186(1) does not apply – section s186(5)
   3. ‘public notice’ defined in section 3

**Incorporation of Documents**

1. Reference in a contractual document being subject to conditions ‘available on request’ and brought to notice of other party sufficient to incorporate
   1. Specific general conditions of contract *Smith v South Wales Switchgear Ltd*
2. Terms of standard form contracts can be incorporated by reference
   1. E.g. exchange of letters between **parties** incorporating JCT form *Killby & Gayford ltd v Selincourt Ltd*
   2. Terms can be incorporated by a course of dealing or on basis of common understanding
      1. *British Crane High Ltd v Ipswich Plant Hire*

**Letters of Intent**

1. Letter of Intent
2. Letter of Comfort
3. Terms Sheet
4. Early Works Agreement

*Outline*

1. Parties negotiating/tendering for a contract
2. Parties wish to use a document that is not a contract on its face
3. Document may contain detailed undertakings
4. Risk for Contractor and Principal

*Why use one?*

1. Principal not willing/able to enter into a formal contract
2. Early works need to be undertaken
3. ‘Fast-track’ projects

*Preferred Position*

1. Preferred position is always to have a formal contract which provides
   1. Certainty of price/responsibilities
   2. Comprehensive scope of works
   3. Provisions for dispute resolution/termination

*Risks of Entering letter of Intent*

1. Risk of Principal in issuing letter of intent
   1. Less incentive for contractor to finalise negotiations for contract
   2. Uncertainty as to whether letter is binding at all
   3. May bind Principal to appoint Contractor formally
   4. May be regarded as unlimited authority to Contractor

*Issues arising out of letters of Intent*

1. Has contract been formed?
2. Is there an ancillary/preliminary contract to perform works until subsequent execution of the contract?
3. What are the contractors right if the Principal declines to proceed?

*Do letters of intent have contractual effect?*

1. Common scenario: One party considers the document to contain binding obligations, the other denies this
2. Whether a letter of intent has contractual force will be ascertained by determining the objective intentions of the parties

**Completion of Contract**

1. Must agree on all essential terms
2. Can be a contract even if one important clause to be discussed and agreed
   1. *Mitsui Babock Energy Ltd v John Browning Engineering Ltd*
3. Will not be complete if ‘Subject to Contract’
4. But a tender and acceptance may amount to a contract event if acceptance refers to formal contract to be drawn up
5. Where work commenced before contract concluded but parties agree later, agreed terms will have retrospective effect
   1. *Trollope Colls Ltd v Atomic Power Construction Ltd*

**Standard Form Contracts**

**Introduction to Standard Form**

1. Wide use of standard form contracts
2. Long history of usage – UK and Australia
3. Standard forms used widely around the world

**Standard Form Contracts**

1. Standards Australia
   1. AS2124 Construct
   2. AS4300
   3. AS4000 Design
   4. AS4902
      1. Design & Construct
   5. AS4122 Consultant
2. RAIA and MBA – ABIC
   1. MW-1 – Major works
   2. SWB – 2 – Simple Building Works
3. FIDIC – Red book, yellow book, silver book
4. MBA and HIA – DBC Act compliant domestic building contract

**‘Bespoke’ construction contracts**

1. Where no standard form available e.g. managing contractor, EPC
2. Where standard form unsuitable
3. ‘Pass down’ of terms of ‘upstream’ contract
   1. BOOT, Concession DBFM
4. Preference of Principal or contractor

**Performance of the Contract**

1. **Design**
   1. Materials and workmanship – Clause 30
      1. *Kable v Hutchinson*
         1. Design & Construct
         2. Risk Takeback
         3. Allocate risk for design to the contractor
            1. Contractor risk
         4. Risk changed back to Principal – risk take-back – by the conduct and behaviour of the parties
            1. ‘Risk take-back’ example
   2. AS2124 – Nothing in contract refers to design
      1. Clause 8.1 – ambiguities under that
         1. Principal takes the risk
2. **Progress and completion** 
   1. Clause 33 and 35 –
      1. Implied warranty
   2. Clause 33
3. **Indemnities and insurance**
   1. Clauses 17
      1. Contractor could cause some loss to principal
      2. Contractor is indemnifying the principal for a range of things
      3. When not standard form, indemnities go further than that
   2. Clause 18, 19, 20 & 21
   3. Clause 18
      1. Making good faulty design
         1. *Manfactuers Mutual v Queensland Government Railway*
      2. Insurance Joint names in Principal and Contractor
      3. Amount of the Insurance
   4. Public Liability Insurance
      1. Claims from Third parties
      2. Per event policy
      3. Principal must approve the policy
   5. Clause 19 Principal responsible for the Policy
      1. Responsible to pay the insurance
   6. Clause 20
      1. Insurance of employees
      2. Most meet statutory and common law requirements
   7. Clause 21
      1. More procedural
      2. One party have to provide evidence of insurance to other party
4. **Defects Liability**
   1. Clause 30 & 37
   2. Defects liability period –
      1. If there is omission – practical completion – this is just an obligation in the contract.
      2. Other Remedy - statute of limitations – *Limitations of Actions Act* – 12 month defect liability – 6 years from the date of the cause
      3. Starts on the date of practical completion
      4. Up to the parties to agree
      5. 12 Months for larger contractors
      6. Principal has the right to has the right to get the work carried out by others – debt due – draw on security, Clause 5
      7. Any works or rectification by the contractor – cannot intrude on people living their
   3. Clause 30 – Materials of works
      1. Certain areas where the superintendent has variation notices etc
      2. Notify that they accept the works
      3. Clause 30 is a more general power
5. **Security and Retention**
   1. Clause 5.5 –
      1. Principal can called on the security
      2. 20 Days
      3. In order for the principal to call upon the security – they must have an entitlement to call on the security
         1. i.e. Clause 42.10 – ‘may deduct from moneys due to from the Contractor any money due from the Contractor to the Principal otherwise than under the Contract and if those moneys are inefficient, the Principal, may subject to Clause 5.5, have recourse to rention moneys and if they are insufficient, then to security
         2. Clause 30.3 –
            1. Same as above
      4. Don’t need to express refer to security but need to join multiple clauses
   2. If a defect occurs 5 years after the final certificate the only recourse is to sue for breach of contract.
      1. Must provide contractor opportunity to remedy the defect otherwise can get another contractor to fix and then sue original contractor for breach

**Procurement of Construction Projects**

**What is ‘Tort’?**

1. Breach of duty imposed by law
   1. Contrast breach of duty imposed by agreement
2. Breach gives right to sue for unliquidated damages

**Types of Tort**

1. Negligence
2. Trespass
3. Nuisance
4. Procuring a breach of contract
   1. Sue a third party to breach
   2. 2 people in a contract – principal and head contractor
      1. Financier behind the scenes to principal
      2. Financier can terminate the right to the principal and this would breach the principals contract
5. Tortuous Interference
6. Defamation
7. Deceit/Fraud

**Elements**

1. Elements
   1. D owed P a duty to take reasonable care
   2. D breached that duty by failing to take reasonable care
   3. D’s breach caused P injury or damage
   4. The injury/damage was not ‘too remote’ a consequence of the breach of duty

**What is a duty of care?**

1. Control mechanism
   1. Controls the circumstances in which a person can be held liable for own careless actions

**Contract and Tort**

1. Duty of care can be owed in
   1. Tort
   2. Contract
2. Suing in both Tort & Contract per *Astley v Austrust Ltd*
3. Differences between contract and tort
   1. Elements
   2. Limitation periods
      1. Contract – date of contract breach
      2. Tort – date suffered the damage
      3. Can be timebarred under the contract but then sue in Tort
         1. i.e. cracked walls appear 7 years after building. Contract expired, but can sue in Tort
   3. Tests for remoteness
   4. Defence
4. Existence of duty in contract does not preclude duty in tort
   1. Terms of the contract exclude or modify a contract
   2. Limitation of liability clause
      1. By contract, limiting liability through all other aspects
      2. Contracts can limit tortuous duty
5. Terms of contract can exclude/modify tortuous duty
   1. Limitation of liability
6. Liability of nominated subcontractors to the Principal
   1. *Junior Books v Veitchi*
7. Liability of subcontractors generally to the Principal
   1. *Murphy v Brentwood District Council*
      1. Must be nominated subcontractor by the principal – if not then there is not a duty to the principal
      2. Clause 10 AS2124
8. Liability of the Superintendent to the head contractor
   1. *John Holland v Majorca Projects Pty Ltd*
      1. Principal is liable to head contractor and not that of superintendent
      2. Head Contractor should be suing Principal and superintendent
9. Pleading causes of action
   1. *Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd*
      1. Dont come to Court wasting time by pleading different causes of action

**Type of Damage**

1. Importance of distinguishing between:
   1. Physical loss/damage/injury
   2. Pure economic loss

**Pure Economic Loss**

1. Defect rectification costs
2. Additional maintenance costs
3. Loss of profit
4. Diminution in market value
5. Recognised in *Hedley Bryne v Heller*

*English Approach*

1. *Anns v Merton London Borrough Council*
   1. 2 stage test
      1. Proximity
      2. No policy reasons why there shouldn’t be a duty
2. *Caparo Industries Plc v Doickman*
   1. 3 stage test
      1. Harm must be reasonably foreseeable
      2. Relationship of proximity
      3. Fair, just and reasonable in all of the circumstances

*Australian Approach*

1. Proximity
2. Incremental approach
3. Salient features
   1. Vulnerability
      1. Was the plaintiff vulnerable to your actions ?
      2. Could they have done anything to protect themselves ?
   2. Control
   3. Assumption of risk/known reliance
   4. Degree of foreseeability
   5. Knowledge
4. Policy Factors
   1. Indeterminate liability
      1. *Ultramares Corp v Touche*
   2. Autonomy of the individual
      1. Regulate your own behaviour and deals and we Court dose not want to interfere

***Bryan v Maloney***

1. Residential premises
2. Subsequent purchaser sued builder because there were cracks in foundations
3. Latent defects: cracking
4. Court found that there was a duty of care
5. Damage was foreseeable and the relationship between the builder and subsequent purchaser possess similar proximity to the relationship between builder and first owner
6. Principal & Subcontract
   1. Clause 9.4 – Head contractor responsible for sub-contractors

**Woolcock**

1. Building was constructed in 1987. The Plaintiff brought it in 1992 and noticed defects in 1994. Plaintiff sued the engineers for pure economic loss.
2. The majority distinguished *Bryan v Maloney* and held there was no duty of care
3. P not vulnerable because:
   1. Could have sought warranty that building was free from defects
   2. Could have required assignment of rights against third parties
   3. Could have undertaken detailed investigations into conditions of foundations
      1. *Realistic? Probably not*

**As it stands...**

1. Residential – there probably is a duty of care *– Bryan v Maloney*
2. Commercial – probably not a duty of care – *Woolcock*
3. Proportionate Liability – Part IVAA of Wrongs Act
   1. Allocate liability as to what is just

**Trespass**

1. The Contractor without permission
   1. Causes part of the Works to intrude on adjoining land
      1. *LPJ Investments Pty Ltd v Howard Chia Investments*
         1. Building scaffolding which went into building next to it ‘airspace’
         2. **Held**: Trespass
   2. Causes crane to trespass in adjoining airspace
      1. *Bendal Pty Ltd v Mirvac Project Pty Ltd*
         1. Going into premises of adjoining building airspace
         2. **Held**: Trespass
   3. Placing rock anchors under adjoining property
      1. *Di Napoli v New Breach Apartments Pty Ltd*
         1. Going into underground of nearby building
         2. **Held**: Trespass

**Trespass and Protection Work**

1. *Building Act 1993 (Vic)*
   1. S84 – Serve notice on adjoining landowner
   2. S84 – Adjoining owner may disagree
   3. S87 – Building surveyor makes determination
      1. *Prima Facie* trespass which is covered under statute
   4. S98 – Owner must compensate adjoining owner
2. *Building Regulations 2006 (Vic)*
   1. Regulation 602: Building surveyor can require the performance of protection work at any time
   2. Regulation 603: Exceptions

**Procurement of Construction Contracts**

**Background to legislation**

1. Payment disputes – endemic in construction industry
2. Pay when/if paid clauses
3. Delayed payment – abuse of contract
4. Insolvency of subcontractors

**United Kingdom**

1. 1983 – Review of procurement & contractual arrangements in construction industry
2. 1994 – Sir Michael Latham releases the ‘Latham Report’
3. 1996 – *Housing Grants Construction and Regeneration Act 1996 (UK)*

**Australia**

1. *Building and Construction Industry Security of Payment Act 1999 (NSW)*
2. *Building and Construction Industry Security of Payment Act 2002 (Vic)*
3. NSW amending Act 2002
4. Victoria amending Act 2006
5. Legislation in most other States

**Security of Payment in Victoria**

1. Purpose of the Act
   1. ‘... to provide for entitlements to progress payments for .. construction work or ... related goods and services’
2. Prohibition of ‘pay when paid’ clause
3. ‘fast and dirty’ dispute resolution process
   1. Adjudication
4. ‘Pay now ... fight later’ regime

**What is a construction contract?**

1. Construction
2. Fit-out
3. Maintenance
4. Painting
5. Demolition
6. Engineering
7. Landscaping
8. Electrical
9. Hire of plant and equipment
10. Design, architecture etc

*Excluded Contracts*

1. Works outside Victoria
2. A domestic building contract, other than where the owner is in the business of building residences
   1. **DOESNT** apply to Mum and Dad developers
3. Consideration payable calculated otherwise then by reference to value of the work carried out
4. Oil, gas and mining contracts

**Who can claim under the Act?**

1. The following parties to ‘construction contracts’ can make progress claims under the Act:
   1. Contractors against Principal
   2. Architects/engineers against Principal
   3. Subcontractors against head contractors
   4. Suppliers of materials against purchasers

**Payment Claims**

1. Payment claims must:
   1. Identify the construction work
   2. Indicate claimed amount
   3. State that it is made under the Act
      1. ‘This is a claim made under the *Building and Construction Industry Security of Payment Act 2002 (Vic)*
2. Right to progress payment ‘on and from each reference date
3. Reference date determined by contract or every 20 business days
   1. *Leighton v Campbelltown Catholic Club*

**Three month time limit**

1. Payment claim for a progress payment may be served only within
   1. The period determined by contract; or
   2. The period of 3 months after the ‘reference date’

**Excluded Amount**

1. An ‘excluded amount’ must not be ‘taken into account’ when calculating the amount the claimant is entitled to
2. Excluded amounts are amounts relating to:
   1. Variations that not ‘claimable variations’
   2. Latent conditions
   3. Time-related costs
   4. Changes in regulatory requirements
   5. Claims for damages
   6. Claims arising at law other than under the contract
3. What are ‘claimable variations’?
   1. Very convoluted mechanism
   2. Two different classes of claimable variations
   3. **First Class**: Parties agree that variation carried out, method for valuation, claimant entitled to be paid etc but for some reason are in dispute
   4. **Second Class:**
      1. Work has been carried out
      2. The respondent (Principal) must have requested/directed work the respondent and claimant disagree on:
         1. Whether work constitutes a variation or
         2. Claimant is entitled to payment or
         3. Time for payment
      3. AND
         1. Financial requirements are met
   5. Financial requirements: contract sum at the date of the contract is signed:
      1. <150K; or
      2. >$150K and < $5,000,000 AND the total amount of claims for such variations does not exceed 10%
      3. > $5 mil AND contract does not contain a dispute mechanism

**Hypothetical Example (refer notes)**

***Subcontractor 1***

1. Final Payment Claim of Subcontractor 1
   1. Includes $260K for dispute variations
   2. $3.26 mil
2. Last payment claim for $1 million comprising
   1. Value of work during payment period: $760K
   2. Disputed variation rechanges to window glazing: $20K
   3. Disputed variation rechanges to titles: $19K
   4. Damages for breach of contract in that Superintendent failed to grant a ‘reasonable’ extension of time due to inclement weather $201K
3. **>$150K and <$5 Mil**
   1. **$299** for dipuste is $300K. 10% of Subcontract Sum is $300K. **Permissible.**
   2. Subcontractor 1, cannot however, claim $201K since it is an ‘excluded amount’ due to
      1. Time-related cost; and
      2. Damages for breach of contract

***Subcontractor 2***

1. Previously claimed for $2.5 mil
   1. No claims for disputed variations
2. Last payment claim for $88K comprising:
   1. Value of work during payment period: $0.5
   2. Disputed variation re cladding: $310K
   3. Variation to insert rainwater tanks to comply with legal requirement introduced half-way through the project - $75K
3. **>$150K and $<5 Mil**
   1. Cannot claim disputed variation for $310K because this is over 10% of the Subcontract Sum
   2. May not be able to claim second variation if the Head Contractor does not agree that it is entitled to payment

***Subcontractor 3***

1. Previously claimed $2 mil
   1. Includes $200K for disputed variations
2. Last payment claim is for $2.4 comprising
   1. Value of work during payment period is $1.2 mil
   2. 4 claims at $30K
3. **>$150K and <$5Mil**
   1. Can claim 3 of the 4 disputed variations, but the 4th disputed variations will take it over 10% of the Contract Sum – since $200K for disputed variations had previously been claimed

***Implications for Head Contractor***

1. Subcontractor 1 can claim $299K
2. Subcontractor 3 can claim $290K
3. Head Contractor has a contract valued over $5million – which contains a dispute resolution clause so it cannot claim $589K in disputed variations under its final statutory payment claim

**Statutory Right to Payment**

1. The Respondent must issue ‘payment schedule’
   1. Within 10 business days after claim is served
   2. Which identifies the claim to which it relates
   3. Which indicates the ‘scheduled amount’
   4. (if the ‘scheduled amount’ is less than the ‘claimed amount’) which sets out the respondent reasons for withholding payment; and
   5. Which identifies any amount the respondent alleges is an ‘excluded amount’
2. If the Respondent fails to issue payment schedule within 10 Business Days, it becomes liable to pay the full ‘claimed amount’
3. Statutory right exists alongside contractual payment mechanism
4. Claimant can go to adjudication if ‘scheduled amount’ is less than the ‘claimed amount’

**Adjudication**

1. What is adjudication?
   1. Statutory form of dispute resolution – doesn’t override contract - complements it
   2. The Act provides for adjudication when the **scheduled amount** is **disputed** or **not paid**
   3. Alternative process to going to court
   4. Third party (Adjudicator) appointed to determine the dispute
   5. Dealt with ‘on the papers’
   6. Most common issues of set off, variations
2. Process
   1. Claimant Claim – 5 days for claim
   2. Payment Schedule
   3. Adjudication Application
   4. Adjudication Response (respondent response) – 5 days
   5. Binding Decision – within 10 days
3. Claimant may apply for adjudication within 5 days of payment schedule
4. Application to be made to ‘authorised nominating authority’
5. *Dualcorp v Remo Constructions Pty Ltd*
   1. Cant keep adjudicating the same claims over and over
   2. If don’t like the decision, tough
6. Adjudicator issues notice of acceptance
7. Respondent may lodge adjudication response within earlier of 5 business days of application/2 business days of adjudicators acceptance
8. A late response will not be considered
9. Written decision ‘expeditiously’
10. Adjudicator may:
    1. Request further submissions
    2. Set deadlines
    3. Call a conference
    4. Carry out an inspection
    5. Correct a mistake
11. Adjudicator must determine amount of progress (if any) and date on which it was due
12. May only consider
    1. The Act
    2. The Contract
    3. The claim, schedule & submissions

**Review Procedure**

1. Right to review an adjudicators determination where:
   1. Initial adjudicators determination exceed $100K
   2. It is alleged that the initial adjudicator wrongly determined whether an amount was an ‘excluded amount’
   3. Undisputed amounts have been paid; and
   4. Disputed amounts have been paid into trust.
2. Claimant can suspend the Works (After giving 3 days business notice) where the respondent fails to:
   1. Issue payment schedule within time and fails to pay claimed amount;
   2. Pay the claimant in accordance with the payment schedule; or
   3. Pay any adjudicated amount
3. Legislation doesn’t contemplate that there are third parties
   1. *Recent cases*
   2. *Grocon Constructors v Planit Cocciardi Joint Venture (No 2)*
      1. Contractor had a payment claim directly to principal
      2. Principal didn’t respond within 10 days
      3. Bad luck
   3. *Bitannia v Parkline*
      1. Implied given notice to principal
      2. Hadn’t actually done this
      3. S52 of TPA represented to Principal had made claim to superintendent
      4. Misleading and Deceptive – security of payment is a state act
      5. Conflict – Commonwealth act prevails
      6. Can allege misleading and deceptive.

**Building Industry Regulation in Victoria – Building Act & Regulation**

**Overview**

1. Legislative Powers
2. Legislation governing the building industry in Victoria
3. Bodies created by Building Act and Powers and Functions
4. Building Standards
5. Building Surveyors & building permits
6. Protection of adjoining property
7. Building practitioner registration and disciplinary powers
8. Enforcement
9. Requirements for domestic building contracts
10. Building industry security of payment

**Legislative powers in relation to the building industry**

1. Powers of Victorian Parliament
   1. Residual Power
2. Powers of Federal Parliament
   1. Regulations in relation to commonwealth places
      1. Airports etc

**Victorian Statute/Rules**

1. *Building Act 1993*
2. *Building Regulations 2006*
3. *Domestic Building Contracts Act 1995*
4. *Building and Construction Industry Security of Payment Act 2002*
5. *Architects Act*
6. *Construction Industry Long Service Leave Act*

**Building Act**

1. Developed from Model Building Act
2. Purpose and objects (section 1 & 4)
3. Standards for Construction
   1. Object of the Act
4. Enhance amenity/protect health & safety
5. Building and occupancy permits
6. Regulate building practitioners

**Bodies established by Building Act**

1. Building Commission – s193 (see s196 for function)
2. Plumbing Industry Commission – see s221ZZR
3. Building Practitioners Board – s183
   1. If representing a builder – must be registered.
4. Building Appeals Board – s166
5. Building Advisory Council – s206
6. Building Regulation Advisory Committee – s209 (see s211 for function)

**Structure of the Building Act**

1. Parts and Divisions
2. Schedules
   1. Regulation making powers
   2. Procedures for building and occupancy permits
   3. Membership and procedure of boards
   4. Transitional provisions
3. Regulations are made under Act – see 7 and Schedule 1
4. Made by Executive/Governor-in-Council
5. All regulations ‘sunset’ every 10 years (sunset clause)
   1. Subordinate Legislative Act 1984
6. Technical standards are contained in Building Code of Australia

**Adoption of BCA**

1. Building Code of Australia produced by Australia Building Codes Board
2. Not, by itself, legislation
3. Must be adopted into State and Territory legislation
4. S9 *Building Act* allows incorporation by reference in Regulations
5. Regulation s109 *Building Regulations* adopts BCA – forms part of Regulations
6. Most national – some State variations remain
7. S217 – Expressly binds the Crown

**Building Code**

1. Performance bad
2. Can choose to comply with deemed-to-satisfy provisions
3. Application of provisions – Part AO

**Ministerial Orders and Guidelines**

1. Have legislative character
2. Ministers insurance orders
   1. Building practitioner insurance – s135
   2. Insurance for domestic building work – s137AA
3. Ministers Guidelines
   1. Fees and building survey functions – s188
   2. Design & string – s188A

**Building Surveyors – Part 6**

1. Act provides for private building surveyors and municipal building surveyors
2. Appointment of PBS – s76
3. Application for building permit to municipal or private building surveyor – s17
   1. See definition of ‘municipal’ and ‘private building surveyor’
4. Must be satisfied building work will comply – s24(1)

**Building Permits**

1. Section 16
2. Permits required before commencement of work
3. Work must comply
4. 5 possible offences
5. Exempted work (under $5K & not structural and not heritage), some fences, small class 10a buildings, installation of smoke alarms
   1. Go to Regulations to find relevant exemptions

**Function of building permits**

1. Compliance with minimum building standards – s16(1)
2. Consistency with planning permits – s24(1)
3. Consumer protection
   1. Ensure registered building practitioners or certified owner-builder
   2. Last resort insurance for >$12K

**Information for building permits**

1. Application for building permit
   1. Include name & details for building practitioners engaged or to be engaged in work (prescribed information – Form 1)
2. Drawings, specifications, allotment details, statements of use – regulation 301, 302
3. Building permit levy – s201

**Inspection of building works**

1. Notification of RBS after completion of each mandatory notification stage – s33
2. RBS must cause work to be inspected and may inspect at any time – s34 & 35
3. Inspection powers & directions

**Occupancy permits and certificates of final inspection**

1. Occupancy permit if required by building permit – s39
2. Must not issue unless ‘suitable for occupation’ – not evidence of compliance – s44 & s46
3. Certificate of final inspection of OP not required – s38

**Certificate of compliance**

1. RBS may rely on certificate by a prescribed registered building practitioner that proposed building work or building work complies – s238, regulation 15.5
2. RBS immunity – s128

**Legal obligations of building surveyors**

1. *Toomey v Solaros Concrete Construction Pty Ltd*
   1. Page 607 – Facts on 612

**Duty of care owned by building surveyors/councils**

1. *Moorabool Shire Council v Taitapanui Vic*
   1. Notes - Page 625
   2. Builder owed a duty of are to a subsequent purchaser
   3. Applied *Maloney* principle and did owe a duty of care to the subsequent purchaser

**Protection of adjoining property**

1. Part 7 changes common law position – trespass, nuisance, negligence
2. ‘Protection work’ before and during carry out building work if required
3. Notice to adjoining owner – s84
4. Adjoining owners obligation to respond – s85

**Time limit on building actions**

1. Latent defect claims & 6 year limit
   1. Defect which is not ‘discoverable’ have up to 10 years to sue
   2. If find a latent defect 9 ½ years after building constructed, then have ½ year otherwise loose action.
2. S134 – 10 year long stop date
   1. Date of which the damage ‘ was or should have been discovered’
3. Definition of ‘building action’ and ‘building work’

**Building practitioner registration**

1. Act applies to categories of ‘building practitioner’ as defined in s3
   1. Regulation prescribe classes
2. Only ‘natural persons’ can be registered s169(1)
   1. No companies
3. Corporations and partnerships – s176(e) and (4)
4. Offences in s176 underpin requirement for registration – s176(2)

**BPB Functions**

1. Administer registration system
2. Supervise and monitor conduct and ability to practice of RBPs
3. Issue owner builder certificates
4. Make recommendations on qualifications – s183

**BPB disciplinary powers**

1. Board may hold inquiries into conduct and ability to practice – s179 & 180
2. Grounds for inquiry are board – s179(1)
3. Fines, suspension or cancellation of registration

**Enforcement**

1. Notice and orders by MDS/RBS
   1. Emergency order – s102/103
   2. ‘Show cause’ notice – s106
   3. Building order – s111
   4. Stop work order – s112
2. Offence not to comply – s118

**Enforcement**

1. Proceedings for offences – s241
2. Offences under Act and Regulations
3. Infringement notices – s225
4. Powers of entry, auditing and search warrants

**Building Appeals Board**

1. Functions and jurisdiction of Board – Part 10
   1. Building and occupancy permits
   2. Protection work
   3. Notice & orders appeals from BPB
   4. Building regulations

**Domestic Building Contracts Act**

**Domestic Building Contract Acts**

1. History – consumer protection
2. Purpose – section 1
   1. Regulate contracts for the carrying out of domestic building work
   2. Resolution of domestic disputes
   3. Require builders to be covered by insurance
   4. Phase out HGF
3. Objections – s4
4. Compels builders to comply

**Key Terms**

1. Domestic build contract
   1. ‘means a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor.
2. Major Domestic Building Contract – contract price > $5,000
3. Domestic building work means any work referred to in section 5 that is not excluded from the operation of this Act by section 6
4. Section 5 – Building work to which Act applies
   1. S5(1) – ‘water supply and drainage to the home’
5. **Home** - ‘home means any residential premises’
   1. Includes homes attached to shops etc etc

**Coverage of Act**

1. Erection or construction of homes – houses, flats, apartments
2. Any associated works
3. High-rise residential apartments (Except insurance > 3 storey)
4. Renovations, alterations, extensions, improvements
5. Certain works carried out in conjunctions
6. Site work and plans

*Winslow Constructors Pty Ltd v Mt Holden Estates Pty Ltd*

1. Developer entered in contract with Winslow Constructors AS2124
2. Constructing housing estate
3. Only infrastructure and not houses
4. Mt Holden Estates wanted to get out of contract by stating it didn’t comply with Domestic building requirements
5. Deputy President held – that under s5 –
   1. ‘the work being carried out’ was domestic building work
   2. The contract did need to comply
   3. VCAT had jurisdiction to hear the dispute
6. Appealed to Supreme Court of Appeal
   1. Interpretation was incorrect
   2. Operation of Domestic Contracts Act didn’t apply
      1. Was not a sufficient nexus to that being built on the land
   3. Held: Winslow succeed

**Domestic Building Contract Requirements**

1. Will be a ‘domestic building contract’ even if non-compliance with Act
2. Requirements of Act apply to any ‘domestic building contract’ or ‘major domestic building contract’

**Statutory Warranties**

1. Warranties concerning all domestic building work – s8
2. Warranties run with building – subsequent purchasers have benefit – s9
   1. Owner can sue for breach of warranties
   2. If off the plan –
      1. Its between builder and developer
         1. i.e. Central Equity and Multiplex
         2. Consumer buys from Central Equity
         3. Sues Central Equity
3. Provisions purporting to contract out void – s10

**Major domestic building contract**

1. Builder must be registered – s29
   1. Not registration cannot be a company
   2. So instead gets around this by stating – ‘a director of company’ or ‘partner in partnership etc’
2. Builder must provide foundations data – s30
3. Contract must in writing and include
   1. Full terms
   2. Detailed descriptions
   3. Names & Addresses
   4. Registration number
   5. Start & Finish Date
   6. Insurance details
   7. Warranties – s31

**Major Domestic Building Contract**

1. Cooling-off period – s34 & 35
2. Allowance for delays – weekends, holidays, RDO’s, etc – s32
3. Details of primes cost items & provisional – s22 & 23
4. Limits on deposits – s11
   1. 5% <$20K
5. Restrictions on cost plus contract – s13
6. Variations – s37 & s38
7. Limits on progress payments – s40

**Domestic Building Disputes**

1. Arbitration prohibited – s14
2. Actions in Supreme Court, Country Court, Magistrates Court must be stayed – s57
3. VCAT responsible for disputes
4. Domestic building disputes – s53
5. Powers of the Tribunal – s53
6. Insurance claim disputes – s59A-62
   1. VCATs jurisdiction

**Building Industry Regulation in Victoria**

**Insurance – requirement for registration**

1. Application by natural person for registration
2. If applicant required to have insurance, requires proof that
   1. Applicant is covered; or
   2. Builder engaged in domestic building work, applicant is eligible to be covered

**Builders – domestic building work**

1. Ministers power to make insurance order – s135 Building Act
2. Additional powers for orders for domestic building work – s137A
3. Insurance must be by a designated insurer – s137AA
4. Offences
   1. Carry out domestic building work without insurance – s136(2)
   2. Claim to be insured when not insured – s137

**Domestic Building Insurance Ministerial Order**

1. Applies when contract price >$12K
2. Must indemnify for loss or damage – clause 8
   1. Non-completion
   2. Defective work
   3. Breach of statutory warranties
   4. Quality below required
   5. Breaches of TP act
   6. Additional cover – see clause 9

**Domestic Building Insurance Ministerial Order**

1. BUT policy may provide that indemnities only apply if builder DIES, BECOMES INSOLVENT OR DISAPPEARS
2. Policy to Cover
   1. Acts and omissions of all persons engaged by builder – clause 10
   2. Subsequent purchases – clause 11
   3. Non-structural defects for 2 years
   4. All other loss or damage for 6 years – clause 12
3. Exemption for multi-storey residential – regulation 1808

**Other building practitioners**

1. Building surveyor, inspector, quality, surveyor, engineer, draftsperson
   1. Professional indemnity insurance
   2. $1 million / $1.5 million for any one claim
   3. Can be a policy held by company or partnership

**Commercial Builders**

1. Structural defects insurance with limitations
2. Limit of cover – lesser of
   1. Twice the turnover of insured for commercial building work or $1 million; or
   2. $10 million