

## Part A

### 1. *Contract*

#### 1.1 *Contract Formation*

- 1.1.1 The Victorian State Government (**'State'**) has issued a 'Request for Interest' to a number of bidders in Victoria regarding the construction of a new indoor Olympic sized swimming pool (**'pool'**). It has been indicated that a strict requirement of the FINA Facilities Rules stipulates that the pool must be fifty (**'50'**) meters long, twenty-five (**'25'**) meters wide and 'at least' two (**'2'**) meters deep.
- 1.1.2 The State has issued 'Request for Interests' regarding this 'construct only' project which you have responded too. While the specific details of the State's request have not been made available, such a request does not typically constitute a valid offer by the State but rather creates an invitation to treat and a mere provision of information as indicated in *State Transit Authority (NSW) v Australia Jockey Club*.<sup>1</sup> In this regard, it is assumed that your response is a conforming one.<sup>2</sup>
- 1.1.3 You have indicated that the State has entered into 'formal negotiations' regarding the building of the pool and on the 5<sup>th</sup> July 2010 you sent a facsimile to the State with an offer to construct the Pool for twenty-million (**'\$20 million'**) dollars on the basis of an 'amended AS2124 contract'. This action constitutes an offer by you to the State to evince an intention to create legal relations.
- 1.1.4 On the 6<sup>th</sup> July 2010, the State responded with a 'General AS2124 Contract' (**'contract'**) and requested that you 'sign and return' the contract. Such words may be construed to infer 'subject to contract' as stipulated in *Masters v Cameron*<sup>3</sup> such that no formal contract is in existence until the contract is signed. However, it is contended that the States response is a valid counter-offer as the key term of the Contract Sum has been revised to nineteen-point-five million (**'\$19.5 million'**) dollars and a 'date for Site access' has been included at 1<sup>st</sup> August 2010 in addition to the differing contract conditions.
- 1.1.5 On the 25<sup>th</sup> July 2010, you responded stating that you 'accept the revised Contract Sum' but you did not sign or return the States contract documents or provide your own amended AS2124. On this basis, it is advised that this infers that an agreement does exist as it is clear that both you and the State intend to be bound immediately. In *Baulkham Hills Private Hospital v G R Securities*,<sup>4</sup> it was provided that parties can be bound immediately on 'the terms of documents read in the light of the surrounding circumstances'<sup>5</sup> whilst expecting to make a further contract containing additional terms.

---

<sup>1</sup> *State Transit Authority (NSW) v Australia Jockey Club* [2003] NSWSC 726; see also *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151.

<sup>2</sup> *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469.

<sup>3</sup> *Masters v Cameron* (1954) 91 CLR 353.

<sup>4</sup> *Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd* (1986) 40 NSWLR 622 at 628.

<sup>5</sup> *Ibid* at 634.

1.1.6 Relevantly, in *Graham Evans Pty Ltd v Stencraft Pty Ltd* ('*Stencraft*')<sup>6</sup> it was contended that an agreement and acceptance had been reached despite the fact that a contract had not been formally signed. In this regard, it is advised that since you accepted the final contract price – which is an essential term of the contract – that you evinced an intention to be bound. As Dowsett J commented in *Stencraft*

‘there was no agreement as to the variations of AS2124 ... this is irrelevant because the parties agreed to be bound immediately, subject to the expectation that such an agreement would be superseded’<sup>7</sup>

1.1.7 Additionally, it is noted in *NSW v RT & Y E Falls Investments Pty Ltd*,<sup>8</sup> the Court stated that the larger the contract, the less likely it would be interpreted that only an informal exchange had taken place. In this regard, given the nature and financial value of the contract, that both parties evinced an intention to be bound and enter into an agreement.

## 1.2 *Battle of the forms*

1.2.1 In determining which terms of the agreement are in force, the Courts in Australia have favored an approach termed the ‘global approach’ derived from Lord Denning MR in *Butler Machine Tool Co Ltd v Ex-cell-O Corporation Ltd*<sup>9</sup> which attempts to extract a mutual manifestation of terms to which both parties intended to be bound.

1.2.2 In *Goodman Fielder Consumer Foods Ltd v Cospak International Pty Ltd*,<sup>10</sup> Macready J stated that the Court looks to interpret the terms using the ‘global approach’ in such a manner

‘[s]o as to give a “harmonious result” when construed with a “commonsense and practical approach” which takes account of the “realities of commerce” ... and reflects the general trend of modern contract law generally.’<sup>11</sup>

1.2.3 Accordingly, it is contended that the ‘General AS2124’ contract is in force since it appears that such a contract can co-exist between both parties given the final response by you to the acceptance of price. Additionally, you never communicated the ‘amended AS2124’ to the State for review and nor did you reject their contract in your final price acceptance.

1.2.4 The final price of nineteen-point-five million (**\$19.5 million**) dollars is the price you have expressly accepted and this forms the final price of the contract. In *Hick v Ramond and Reid*<sup>12</sup> it was determined that where the time for completion is left blank, the Court will imply a term of completion within a reasonable time. The degree

---

<sup>6</sup> *Graham Evans Pty Ltd v Stencraft Pty Ltd* [1999] FCA 1670.

<sup>7</sup> *Ibid* at [64].

<sup>8</sup> *New South Wales v RT & Y E Falls Investments Pty Ltd* (2003) 57 NSWLR 1.

<sup>9</sup> *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation Ltd* [1972] 1 WLR 401.

<sup>10</sup> *Goodman Fielder Consumer Foods Ltd v Cospak International Pty Ltd* [2004] NSWSC 704 at [54]-[57].

<sup>11</sup> *Ibid* at [55] pp. (b).

<sup>12</sup> *Hick v Raymond and Reid* [1893] AC 22; see also *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 ER 260.

of reasonableness would generally be construed relevant to the nature of the works and a ‘recognized time in trade as a reasonable time’.<sup>13</sup>

1.2.5 Importantly, you have indicated that you ‘commenced work the next day’ on the 26<sup>th</sup> July 2010. This action has multiple implications as it infers that you have accepted, by conduct, the counter-offer made by the State. This was suggested in the English case of *Cubbitt Building & Interiors Ltd v Richardson Roofing Ltd*<sup>14</sup> where acceptance by conduct was deemed to be acceptance of the last offer.

1.2.6 Of note, you also commence work prior to the contracted start date of 1<sup>st</sup> August 2010 in breach of clause 27.1 of the contract in force. Unless further evidence is provided to the contrary indicating express permission by the State to start earlier, you have breached clause 27.3 of the contract and potentially also breached clause 21.1 relating to insurance. This may provide grounds for contract repudiation by the Principal and further information is required before advice is provided in this regard.<sup>15</sup>

### 1.3 No Contract Formation

1.3.1 In the event that the Court deems that no contract is formed, the law of restitution will typically aid a party in circumstances where another is unjustly enriched. The law of restitution provides where an enrichment has been conferred on a party at another’s expense, and the enrichment is unjust – then the conferring party has a basis for a restitution award.<sup>16</sup>

1.3.2 In *Pavey & Matthews Pty Ltd v Paul*<sup>17</sup> the High Court determined that in circumstances where a party has provided work or services, and has not received payment for such work or services, then this is an unjust enrichment by the other party. Importantly, Deane J indicated that adequate payment must constitute the fair and reasonable value – a *quantum meruit* basis – of the accepted benefit or enrichment, usually assessed by reference to market rates or prices<sup>18</sup> or at similar commercial rates.<sup>19</sup>

1.3.3 In this regard, it is contended that if a contract is not in force with the State then you are able to recover a fair and reasonable value at market prices for the work you have completed through an action of restitution for the constructed pool. Such a value would not represent the full value of the contract as the State has not accepted the final work as completed due to the defective length. Importantly, the law does not recognize or award both restitution and damages in order to prevent double recovery.<sup>20</sup>

---

<sup>13</sup> *Charnock v Liverpool Corp* [1968] 3 All ER 473 at 478.

<sup>14</sup> *Cubbitt Building & Interiors Ltd v Richardson Roofing (Industrial) Ltd*; see also *Brogden v Metropolitan Raiway Co* (1877) 2 App CSS.

<sup>15</sup> Refer to clause 44.2(f) and 44.4(b) of the contract.

<sup>16</sup> *Moses v Macferlan* (1760) 2 Burr 1005 at 1012.

<sup>17</sup> *Pavey v Matthews Pty Ltd v Paul* [1987] HCA 5.

<sup>18</sup> *Ibid* at [24].

<sup>19</sup> *Laserbore v Morrison Biggs* (1993) CILL 896; other methodologies include expert opinion or prices agreed in prior unsuccessful contract negotiations per *Way v Latilla* [1937] 3 AER 759.

<sup>20</sup> *Baltic Shipping Co v Dillon* (1993) CLR at 378 per Deane and Dawson JJ.

## 2. *Delay Events*

- 2.1 Clause 35.5 of the contract provides that ‘anything’ which ‘may delay the work under the contract’ must be ‘promptly’ notified to the Superintendent in writing. Importantly, Clause 23 of the contract provides that the Superintendent must act ‘honestly and fairly’ and ‘within a reasonable time’ when no time is specified.<sup>21</sup> In *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd*,<sup>22</sup> Hodgson JA stated that the power to extend time must be exercised ‘honestly and impartially’ and ‘does not come to an end with the termination of the contract’.<sup>23</sup>
- 2.2 You have indicated that your multiple claims have not been processed as at February 2011 and it is advised that this provides grounds for dispute under clause 47 of the contract. Clause 35.5 of the contract provides that you must provide notification to the Superintendent in writing within 28 days ‘after the delay’ causing event occurs.<sup>24</sup> In this regard, your notification for each event was provided within requirements of this clause. It is possible to take action in this regard under Clause 47 as the Superintendent has breached their obligations under Clause 23 to respond ‘within a reasonable time’ and it may provide grounds for avoiding liquidated damages.
- 2.3 Importantly, it is unclear from the factual information whether you provided notice of the EOT and delay costs claims to the Superintendent or to the State. Clause 35 requires notice in writing to the Superintendent and unless specified it is assumed that you have provided valid notice in this regard.
- 2.4 *5 Meter Slab*
- 2.4.1 The contract you have entered with the State has specified that the slab depth was three (‘3’) meters deep and you have discovered that the slab is actually five (‘5’) meters deep. Relevantly, it is advised that the additional two (‘2’) meters of depth required to remove the concrete slab is a latent site condition defined under clause 12.1 of the contract. Relevantly, the depth of the concrete slab ‘differs materially from the physical conditions which should have reasonably been anticipated’ by you at the time of tendering for the project.<sup>25</sup>
- 2.4.2 In this regard, clause 12.3 in conjunction with clause 35.5 provides that a latent condition can justify an EOT under clause 35.5(b)(ii). If you did not notify the Superintendent before disturbing the latent condition then it may be separately possible to claim for an EOT under clause 35.5(b)(ii) which provides that where the quantities of work are greater than the quantities in the Bill of Quantities then this can provide basis for an EOT but more information is required as to what was contained in your EOT claim.

---

<sup>21</sup> See *Perini Corp v Commonwealth* [1969] 2 NSW 530 at 539 where Macfarlan J commented a superintendent must act within a ‘reasonable time’.

<sup>22</sup> *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211.

<sup>23</sup> *Ibid* at [79]-[80].

<sup>24</sup> *Queensland v Multiplex Constructions Pty Ltd* (1997) 14 BCL 329.

<sup>25</sup> Clause 12.2 provides the relevant steps it is assumed you have taken in notifying the Superintendent before disturbing the latent condition.

2.4.3 It is advised that this delay event is a ‘reasonable event causing delay’ and is expressly valid under clause 35.5(b) of the contract. As stated at 2.1 through 2.3, this delay event can be determined even after termination by the Superintendent to avoid liquidated damages under clause 35.6.

## 2.5 *Industrial Action*

2.5.1 You have indicated that industrial action took place between the 26<sup>th</sup> through 29<sup>th</sup> of September 2010 and you notified the State accordingly on the 30<sup>th</sup> September 2010.<sup>26</sup> As noted at 2.3, it is unclear whether you provided a copy of this email to both the State and the Superintendent and for the purposes of this advice it is assumed you have.

2.5.2 Importantly, clause 35.5(a) provides that events which occur ‘on or before’ the date of practical competition (‘**DPC**’) and which are beyond the ‘reasonable control of the Contractor’ are entitled to an EOT. In this regard, clause 35.5(a) expressly provides for ‘industrial conditions’ which are the delay causing event in this regard.

2.5.3 It is noted that the State may claim that such an EOT is not ‘reasonably’ beyond your control since you are negotiating with the union. Clause 35.5 of the contract provides that the Superintendent can ‘have regard’ to ensuring that you have ‘taken all reasonable steps to preclude the occurrence of the cause and minimize the consequences of the delay’.

2.5.4 Further evidence may be required to prove such actions are beyond your ‘reasonable control’ before an EOT is provided. Importantly, you have claimed six calendar days in your EOT when only four calendar days are attributed to the delay causing event which may be disputed by the Superintendent as ‘unreasonable’.

2.5.5 On the basis that the industrial action is beyond your control you are entitled to claim an EOT appropriately. As stated at 2.1 through 2.3, this delay event can be determined even after termination by the Superintendent to avoid liquidated damages under clause 35.6.

## 2.6 *Design Error*

2.6.1 Clause 35.5(b)(ii) provides that any events which are ‘caused by’ the Principle or their contractors or agents is grounds for an EOT. Relevantly, you have agreed to a ‘construct only’ contract and as a result you are not responsible for design flaws which result in delay causing events.

2.6.2 The period of delay extends from the 13<sup>th</sup> October to the 25<sup>th</sup> October 2010 and is twelve (‘**12**’) calendar days. It is unclear whether this event is on the critical path – as the previous two claims at 2.4 and 2.5 are deemed to be – or whether the effect of this delay could have been overcome through the reprogramming of activities in order to save time.

---

<sup>26</sup> Clause 7 of the AS2124 provides that notice shall be deemed effective when it is received by the person to whom it is addressed. In this regard, s9 of the *Electronic Transactions Act 1999* provides that information and notice can be met in electronic form.

- 2.6.3 If this activity is not an activity on the critical path, then it is arguable that this event is not a critical activity which could reasonably cause delay to final completion. It is plausible that this delay may be overcome by the existence of float in the delayed activity or in some other succeeding activity.
- 2.6.4 On the assumption this event is on the critical path then your EOT claim is a reasonable one however it is advised that if it is not on the critical path it will most likely fail. As stated at 2.1 through 2.3, this delay event can be determined even after termination by the Superintendent to avoid liquidated damages under clause 35.6.

### 3. *Variation*

- 3.1 You have indicated that during the course of constructing the Pool, an employee of the State ‘verbally’ asked you to construct ‘an outdoor training pool adjacent to the Pool building’ and that the Superintendent ‘overheard’ this instruction. Evidently, such work is not ‘contemplated by the contract’<sup>27</sup> and it is fundamentally different to the scope of the contracted work.
- 3.2 Clause 40.1 of the contract expressly provides that works cannot be varied under the Contract except as directed by the Superintendent and approved in writing accordingly. You have indicated that only an oral exchange took place by an ‘employee of the state’ which was overheard by the Superintendent but which was not evinced in writing.
- 3.3 In *Liebe v Molly*<sup>28</sup> the High Court stated that where ‘[a] man does work for another without any express contract, an implied contract arises at its fair value’.<sup>29</sup> This was considered in *Update Constructions v Rozelle Child Care Centre*,<sup>30</sup> where Priestly JA commented on the High Court decision and noted that if

‘(i) the employer had actual knowledge of the extra works being done, (ii) knew that they were outside the contract and (iii) knew that the builder expected to be paid for them as extras then a contract could be implied.’<sup>31</sup>

- 3.4 Such rationale was also discussed in *Trimis v Mina*<sup>32</sup> where the NSW Supreme Court of Appeal provided that work ‘outside the scope of the contract’ and ‘not authorized in writing’<sup>33</sup> could only succeed on the basis of the principles outlined at 3.3. Accordingly, the application of such authority to the building of the ‘training pool’ clearly infers that an implied contract exists.
- 3.5 In this regard, *Update Constructions v Rozelle Child Care Centre*<sup>34</sup> provided that a contractor is entitled to a restitution claim against the Principal for work which was validly performed on a *quantum meruit* basis.<sup>35</sup> Such a claim would be similar to that

---

<sup>27</sup> *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) NSWLR 251 at 275.

<sup>28</sup> *Liebe v Molloy* (1906) 4 CLR 347.

<sup>29</sup> *Ibid* at 354 per Griffith CJ.

<sup>30</sup> *Ibid* 27 at 251.

<sup>31</sup> *Ibid* 27 at 271-275.

<sup>32</sup> *Trimis v Mina* [1999] NSWCA 140.

<sup>33</sup> *Ibid* at [64].

<sup>34</sup> *Ibid* 27 at 251.

<sup>35</sup> *Ibid* 27 at 272 Priestley JA noted that ‘the basis of such recovery would these days be referred to ideas of restitution rather than implied contract’.

outlined at 1.3 and would be for the fair and reasonable market value of the cost of constructing the training pool.

- 3.6 It is also noted that an action may also exist against the Superintendent due to their breach of clause 23 of the contract. The Superintendent failed to act 'honestly and fairly' in the discharge of their duties by not requesting the variation in writing on behalf of the State. The Superintendent may also be breaching their common law function to perform with the reasonable skill and care expected of an 'ordinarily competent superintendent'.<sup>36</sup>

#### 4. *Liability*

- 4.1 In February 2011, you indicated that you arrived at the DPC of the contracted works and requested final inspection of the pool. The State inspected the pool and noted that the pool was 'only 49 meters long' and was not in accordance with FINA's Facilities Rules 2009<sup>37</sup> rendering the pool ineligible for Olympic Games use.
- 4.2 The contract does not expressly define 'defect' in clause 2 or in any other clause and a definition must be sought from objective interpretation. The Macquarie Dictionary<sup>38</sup> defines 'defect' as 'a fault or imperfection' and 'defective' as 'faulty or imperfect'.<sup>39</sup> In *Qantas Airways Ltd v Joseland & Gilling*<sup>40</sup> work was considered defective where it fails to comply with the requirements of the contract.
- 4.3 Relevantly, you have engaged in a 'construct only' contract and the rectification of defects which stem from design faults are the State's responsibility under privity of contract between the State and the designer.<sup>41</sup> On that basis that the shortened pool length is due to your construction work, then clause 30.3 provides that the Superintendent can direct rectification of the defect.
- 4.4 You indicated that the State ordered you to 're-construct the pool' and 'refuses to make any further payments'. On the basis of clause 30.6, it is advised that rectification of the defect must occur as 'soon as practicable after the Superintendent becomes aware' of the defect. Further, the clause provides that even if the State refuses a 'progress payment, it will not prejudice the power of the Superintendent to give a direction under clause 30.3'. In the event you do not rectify the pool after receipt of valid notice, the State can rectify the defective work and have the work carried out by others and any cost incurred will be a debt due by you to the State under clause 30.3.
- 4.5 In respect to your claim of reaching DPC, clause 37 of the contract provides that the Defects Liability Period ('DLP') commences on the DPC but this has not yet been reached because the definition of DCP in clause 2 is not satisfied such that the works are not 'reasonably capable of being used for their intended purpose'.

---

<sup>36</sup> *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 121.

<sup>37</sup> FINA Facilities Rules 2009, *Facilities Rule 3 – Swimming Pools for Olympic Games and World Championships*, [http://www.fina.org/project/index.php?option=com\\_content&task=view&id=51&Itemid=119#fr3](http://www.fina.org/project/index.php?option=com_content&task=view&id=51&Itemid=119#fr3) viewed on 12<sup>th</sup> December 2009.

<sup>38</sup> *Macquarie Dictionary*, The Macquarie Library Pty Ltd, 4<sup>th</sup> Edition, 2006.

<sup>39</sup> *Ibid* at Page 378.

<sup>40</sup> *Qantas Airways Ltd v Joseland & Gilling* (1986) 6 NSWLR 327.

<sup>41</sup> Importantly, if such a defect was obvious then both you and the designer may be liable for negligence per *CGA Brown Limited v Carr & Anor* [2006] EWCA Civ 785.

- 4.6 Additionally, if you refuse entirely to rectify the defect – you will be in breach of contract accordingly and liable for damages. It is noted that the common law position in Australia is reflected in *Bellgrove v Eldridge*,<sup>42</sup> where the Court stated that remedial work must be ‘be necessary to produce conformity and it must be a reasonable course to adopt’.<sup>43</sup>
- 4.7 In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*<sup>44</sup> the High Court upheld the principle that the purpose of damages for a breach of contract is to place the injured party in the same position as if the contract had been performed.<sup>45</sup> In this regard, damages would be assessed at ‘restoring the State to their original position’ although a dispute must firstly be lodged under clause 47 before litigation is commenced.

**Word Count – 2,658**

---

<sup>42</sup> *Bellgrove v Eldridge* (1954) 90 CLR 613.

<sup>43</sup> *Ibid* at 618.

<sup>44</sup> *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 9.

<sup>45</sup> *Ibid* at [13].

## **Part B**

The realistic assessment and capture of risk is a critical component of cost mitigation and is essential to the achievement of success in construction contracts generally. The Standards Australia standard on risk management has defined risk management as ‘the culture, processes and structures that are directed towards realizing potential opportunities whilst managing adverse effects’.<sup>46</sup> Evidently, the concept of risk mitigation in construction projects is embodied in actions which are taken in order to lessen the probability of an event occurring and which reduce the impact on the project in the event that they do emerge. These principles have been broadly characterized by Professor Max Abrahamson and have been dubbed the ‘Abrahamson Principles’<sup>47</sup> to risk allocation which provides that ‘a party to a contract should bear a risk where that risk is within that party’s control’. The ‘No Dispute’ working party report was the primary catalyst for the incorporation of these principles into AS2124-1992 and summarized them largely through three statements

1. Each party should bear risk most appropriate to that party.
2. The Principal should not ask the Contractor to price unquantifiable risks within the control of the Principal.
3. The Principal can request that the Contractor manage and control neutral risks.<sup>48</sup>

Evidently, such statements are primarily guidelines and there is clear legal scope to argue their interpretation in either party’s favor which emphasizes the importance of clarifying each parties risk from the outset in order to lessen the likelihood of disputes. As a result, key risks must be differentiated and outlined between all respective parties in pre-contractual negotiations if the Abrahamson Principles are to be adhered too. The primary basis for this is evidenced through a determination of whether or not a party should bear a risk in respect to whether such a risk is within the party’s control. In the event that a poor risk allocation decision is made, such that a particular party has borne a risk which it either has no control over or which it is inadequately compensated for, then time-consuming litigation ensues and the project may be delayed while the dispute is resolved. In this regard, the essentiality for the Abraham principles to be largely adopted and for risk allocation to be correctly identified from project inception is critical to ensuring project success.

Accordingly, AS2124-1992 has attempted to codify the majority of the Abrahamson Principles into a number of its standard clauses to eliminate the majority of risks for parties adopting the standard industry contract. However, it is contended that despite the attempted codification of the majority of the principles, the allocation of risk by AS2124 still creates some ambiguities for each contracting party which have not yet been resolved in any associated redrafting of the standard contract. For example, clause 12 of AS2124 allocates multiple risks onto the Principal in relation to latent site conditions such that the finding of a latent site defect could

1. Frustrate the contract;
2. Require that a variation to the works ‘as specified’ is required;
3. Require that a variation to the ‘proposed method of working’ is required;
4. Require that an extension of time is required to complete the work.

---

<sup>46</sup> AS/NZS 4360:2004, *Risk Management Guidelines Companion to AS/NZS 4360:2004*, Standards Australia & Standards New Zealand, 1.3.21, 1.3.22 at Page 4-5.

<sup>47</sup> NPWC/NBCC Report, *No Dispute — Strategies for Improvement in the Building and Construction Industry*, 1990, p 6.

<sup>48</sup> *Ibid* at p 6 - 7.

AS2124 primarily requires that the principal bears the risk of a latent site conditions. However, some risk is still borne by a contractor through clause 40.5(f) which requires the contractor to exclude profit and loss of profit in respect of 'delay or disruption'. The difficulty in this regard, is that while a latent site condition is clearly a 'risk' in respect of the contract, there is no simple and straight forward manner in which the risk can be allocated to one party. While the Abrahamson Principles suggest that a 'preponderant economic benefit' of risk can be determined in each and every instance, it is difficult to encompass all risks in the current design of clause 12 in AS2124. In this regard, it may be more appropriate to create a list of plausible events and allocate risk to each respective party and specify their resulting liability if the event is triggered. Such a table could be easily edited and would clearly identify the extent of relief the contractor would be entitled to receive if an event occurred which would inherently simplify the drafting process. In *Thiess Services Pty Ltd v Mirvac Queensland Pty Ltd*<sup>49</sup> the Queensland Court of Appeal highlighted that importance of clause 12 and demonstrated that a contractor who intends to limit risks in respect of obligations regarding latent site conditions must state them 'plainly and unambiguous to the point where they prevail over vague references to the "objective" or "intent" of the contract'.<sup>50</sup>

While it is clear that clause 12 of AS2124 confuses risk allocation in respect of latent site conditions, clause 16 provides more clarification in respect to Care of Works in line with Abrahamson's risk principles. Clause 16 clearly allocates risk entirely to the contractor who is responsible for works on the site 'from the date of commencement of work or possession of the Site up to 4 pm on the Date of Practical Completion'. It is evident that the contractor should be liable for such risks since the risk is within their control and 'preponderant economic benefit' lies with the contractor.<sup>51</sup> Importantly, AS2124 provides that the risk is mitigated for the contractor where the risk is an excepted risk and clause 16.3 expressly states the expected risks and specifies them for the Principal. Similarly, clause 14 allocates and distributes the risks between the Contractor and the Principal for statutory compliance. A contractor is required under clause 14.1 to bear the cost of complying with statutory change 'whether they existed at the time of tendering or not'. A Principal bears the risk allocation of statutory changes after the date of tender which must be reimbursed to the Contractor accordingly. Such transfer of risk is evidently the most 'economically beneficial' for the parties and represents their obligations in line with Abrahamson risk principles.

The importance of risk allocation in construction projects is fundamental to the coherent operation of the project and their adequate and prudent management is directly correlated to the project's success. Whilst the preceding clauses represents only a small cross-section of all of the available clauses listed in AS2124, it is evident that Australian Standards drafted the standard contract with risk allocation principles in mind. Evidently, deficiencies and ambiguities still remain in some clauses of AS2124 which require further refinement and improvement in order to more adequately define and apportion risk. However, the onus rests on the parties in pre-contractual negotiations to ensure that an accurate identification of risks occurs and an appropriate assessment of the probability of such risks occurring is considered from the outset. A detailed assessment of the relevant cost implications of each of the risks then allows the respective parties to allocate and apportion each risk most appropriately.

---

<sup>49</sup> *Thiess Services Pty Ltd v Mirvac Queensland Pty Ltd* [2005] QSC 364.

<sup>50</sup> *Thiess Services Pty Ltd v Mirvac Queensland Pty Ltd* [2006] QCA 50 at [24].

<sup>51</sup> Patrick Mead, *Conducting an effective and accurate assessment of project risk*, Australian Construction Law Bulletin (newsletter), Vol. 18, No. 7, 2006.

While it is accepted that adoption of such a risk strategy will not avoid all risks during contract performance, it attempts to reduce the number of unforeseen risks which impact, or which are likely to impact, the project moving forward. In this regard, it is clear that the concepts which Professor Abrahamson put forward in attempting to frame a set of risk mitigation principles for simplifying construction contracts are interlaced within AS2124, and an attempt to consider risk allocation in respect to all contracting parties is evident throughout the contract clauses. Evidently, continuous development and refinement of AS2124 in the future will ensure that risk allocation is further improved upon and a greater level of construction projects will achieve successful outcomes without dispute.

**Word Count – 1,112**