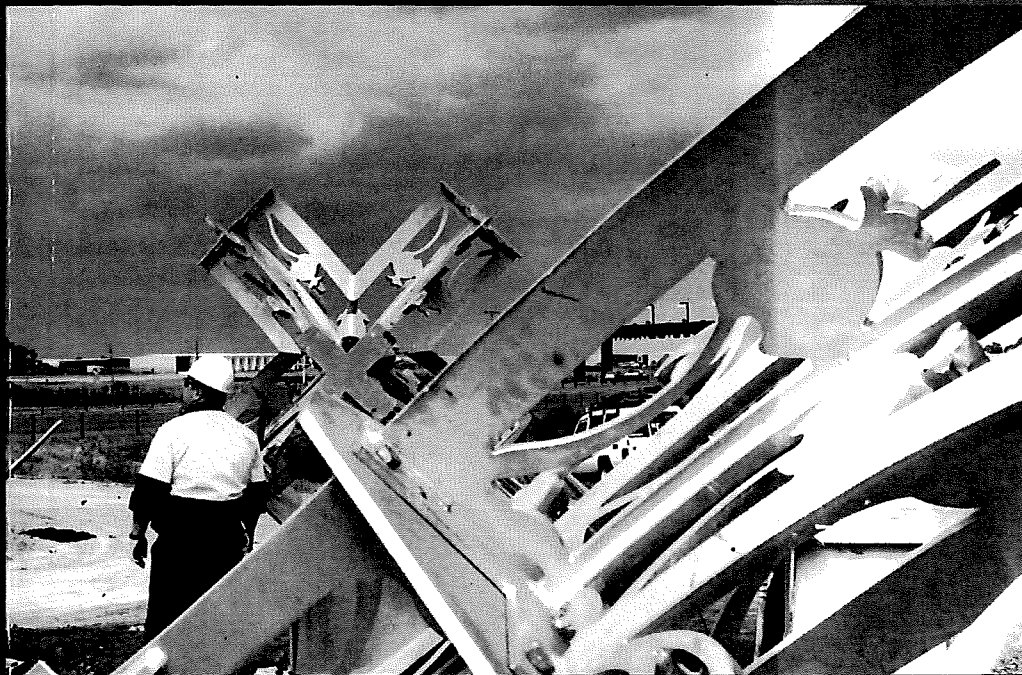


UNDERSTANDING AUSTRALIAN
**CONSTRUCTION
CONTRACTS**

IAN BAILEY • MATTHEW BELL



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PRINCIPAL'S REPRESENTATIVE/ SUPERINTENDENT

The obligations and responsibilities of the Principal referred to in Ch 3 generally do not, under the standard forms, require active participation on the Principal's part in the conduct of the Contract. The interests and rights of the Principal are in many respects subsumed into the procedure for administration of these contracts.

All the major standard form contracts provide for the administration of the Contract by an entity named in the Contract and variously referred to as the "Superintendent", "Contract Administrator", "Engineer" or "Architect" (historically, such roles have been fulfilled by persons trained as architects or engineers). The extent to which this administrator is independent of both parties (especially the Principal) varies.

The role of the administrator has two aspects which are often misunderstood and rarely defined with precision. The first is as the agent of the Principal when decisions are made and directions given about the extent of work and expenditure; and the second is as an assessor, valuer or certifier. The administrator will more often be an independent professional but may be an employee of the Principal, in which case the second aspect of the role (as certifier) may, on occasions, be somewhat fraught in practice.

AS 2124-1992

Clause 2 and Annexure Part A: The Superintendent is the person named in Annexure Part A or such other person as is appointed by the Principal in writing from time to time.

Clause 22: Contemplates that the Principal or the Superintendent may appoint a Clerk of Works.

Clause 23: The Principal is to ensure that at all times there is a Superintendent and that such person in exercising the functions as such acts honestly and fairly, within the prescribed time limits (or, where there is no prescription, within a reasonable time) and arrives at a reasonable measure or value of work, quantities or time.

The Superintendent may give directions "pursuant to a provision of the Contract", and the Contractor is to comply with such directions. They may, subject to the Contract, be given orally or in writing.

Clause 24: The Superintendent may appoint a representative to perform specified functions under the Contract, subject to the Contractor's reasonable objection.

AS 4000-1997

Clause 1 and Annexure Part A: The Superintendent is the person named in Item 5 of Part A of the Annexure or such other person as is appointed by the Principal in writing from time to time.

Clause 20: The Principal is bound to ensure that the Superintendent acts reasonably and in good faith. Oral directions are to be confirmed as soon as practicable. Where the Contractor requests such confirmation, it is not bound to comply with the direction until the Superintendent provides the confirmation.

Clause 21 (Superintendent's Representative): As for clause 24 of AS 2124.

ABIC MW-1 2003

Introduction: The name, contact details and Architect's Registration Number of the "Architect" are set out here.

Clause A2.1, point 5: The Contractor is to comply with any instruction issued under the Contract by the Architect.

Clause A4.2: The Owner must appoint an "architect" to administer the Contract. This reference, along with the provision for insertion of the Registration Number in the Introduction, apparently reflects an expectation by the publishers of the ABIC form (which, as noted on p xli, include the Royal Australian Institute of Architects) that the Contract would normally be administered by a registered architect.

Clause A6.2: The Architect administers the Contract on behalf of the Owner. He or she is the Owner's agent for giving instructions to

the Contractor but acts independently (not as agent) when acting as assessor, valuer or certifier.

Clause A6.3: The Owner must ensure that the Architect, in acting as assessor, valuer or certifier, complies with the Contract and acts fairly and impartially, having regard to the interests of both the Owner and Contractor. The Owner is not to compromise the Architect's independence in acting as assessor, valuer or certifier. The Contract gives no express guidance as to which functions of the Architect are applied as assessor, valuer or certifier.

Clauses A6.5-A6.7: Deals with replacement of the Architect (upon their resignation, incapacity or termination of their engagement), including the requirement for the Owner to provide notice of the proposed replacement to the Contractor and that the replacement is conditional upon the Contractor not making reasonable objection to appointment of the person nominated.

Clause A7.1: The Architect may issue an instruction at any time provided it is in writing. The Contractor is, in turn, required to comply with instructions by *clause A2.1, point 5*.

Clauses A7.2-A7.4: The Architect may issue an "Urgent Instruction" in certain specified circumstances. These may be given orally provided that written confirmation is provided within 24 hours. The Contractor is required immediately to comply with such Urgent Instructions by *clause A2.1, point 9*.

Clause A8: Sets out the procedure applicable where the Contractor wishes to dispute a certificate, notice, written decision or written assessment of the Architect (or failure to issue). See Ch 28.

Clause A9: Failure by the Architect to issue a certificate etc in respect of a claim does not mean that the claim has been accepted or is valid.

PC-1 1998

Clause 1.1: The Contract Administrator is the person nominated in the Contract Particulars or a replacement under *clause 3.2*.

Clause 3.1: The Contract Administrator gives directions and carries out its other functions as agent of the Owner and not as independent certifier, assessor or valuer. There is no explicit duty on the Owner in relation to the Contract Administrator of the type set out in clause 23 of AS 2124, clause 20 of AS 4000 or clause A6.3 of ABIC MW-1.

The Contractor must comply with any direction of the Contract Administrator given or purported to be given under the Contract. Directions may be given orally, but the Contract Administrator must confirm such directions in writing as soon as practicable.

Clause 3.4: The Contract Administrator may, by notice to the Contractor, appoint representatives to carry out any of the Contract Administrator's functions.

Clauses 15.2-15.10: Disputes arising from directions of the Contract Administrator under one of the clauses referred to in the Contract Particulars will be referred to expert determination prior to other avenues of dispute resolution (see Ch 32).

Comparative table of key aspects

Table 4. (This table should be read in conjunction with the discussion above)

Issue	AS 21 24	AS 4000	ABIC MW-1	PC-1
Superintendent acts as certifier for certain functions	✓ (cl 23)	✓ (cl 20)	✓ (cl A6.3)	X (cl 3.1) (Contract Administrator expressly agent for all functions – but see note above and Ch 32 as to relevance of certifier/agent distinction in respect of dispute resolution)
Principal to ensure Superintendent acts in a certain way	✓ "Honestly and fairly" (cl 23)	✓ "Reasonably and in good faith" (cl 20)	✓ "Fairly and impartially, having regard to the interests of both the [parties]" when acting as assessor, valuer or certifier (cl A6.3)	X No such express obligation

Further reading

(The full publication details for the following texts can be found on pp xxxv-xxxvii.)

Books

- Bailey (1998) pp 110-111
Cremean et al (2004) Ch 9 (especially pp 134-137) and Ch 17
Cooke (2001) pp 75-76
Davenport (2006) pp 18-19, 56 and 67
Jones (1996) pp 155-157

Looseleaf/online service

Dorter and Sharkey at [1.400], [7.80]-[7.730] and [7.410]-[7.700]

Articles

Mead P, "Liability of the Superintendent for Wrongfully Certifying" (1999) 15 BCL 81 (includes Appendix setting out functions of the superintendent as certifier under AS 2124-1992 and AS 4000-1997)

Cases

Abigroup Contractors Pty Ltd v Peninsula Balmain Pty Ltd (No 2) (2002) 18 BCL 15, applied in *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 2)* [2006] VSC 491 (inter-relationship of AS 2124 power to extend time unilaterally under clause 35.5 with Superintendent's duties under clause 23), discussed in (among others):

- Baron A, "The Superintendent's Discretion to Extend Time: A Long Story Must be Told to Satisfy 'The Earnest Inquirer'" (2007) 23 BCL 410;
- Goldstein D and Miechel B, "Fairness and Extensions of Time in Construction Contracts" (2007) 2(4) *Construction Law International* 19; and
- Ritchie J, "The Superintendent's Power to Extend Time in the Absence of a Complying EOT Claim" (2007) 19(1) ACLB 1.

Kane Constructions Pty Ltd v Sopov (2006) 22 BCL 92 (meaning of "honestly and fairly" under clause 23 of AS 2124-1992)