

Concurrent delay



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Introduction

The claiming and granting of extensions of time in large infrastructure projects is often a complicated and fractious process. One common reason for this is the issue of concurrent delay.

A concurrent delay occurs when two or more independent causes of delay overlap in time. Importantly, it is the causes of the delays, rather than the delays themselves, that must overlap. In our experience, this distinction is often not made in the drafting process, resulting in a lack of certainty and, in some instances, disputes. More problematic is when the contract is silent on the issue of concurrent delay and the parties assume that the silence operates to their benefit. As a result of conflicting case law in Australia (see below), it is difficult to determine who, in a particular fact scenario, is correct. This can also lead to protracted disputes and outcomes contrary to the intention of the parties.

This paper considers the significance of addressing the issue of concurrent delay in construction contracts and the various approaches that may be taken.

Significance of concurrent delay

Any complex project may involve a number of different causes of delay, whether they be caused by the Owner, the Contractor, or a neutral event beyond the control of either party. The most obvious causes of delay that may overlap with delay(s) caused by the Contractor are the acts or omissions of an Owner.

An Owner often has obligations to provide certain materials, equipment or infrastructure to enable the Contractor to complete its works. The timing for the provision of that material, equipment or infrastructure (and the consequences for failing to provide it) can be affected by a concurrent delay.

For example, on gas plant projects, an Owner often has a contractual obligation to ensure there is a pipeline available to connect to the plant by the time the Contractor is ready to commission the plant. Since the construction of a pipeline can be expensive, the Owner is likely to want to incur that expense as close as possible to the date that commissioning is due to commence (particularly where funded through debt finance). For this reason, if the Contractor is in delay, the Owner is likely to further delay incurring the expense of building the pipeline. In the absence of a concurrent delay clause, this action by the Owner in response to the Contractor's delay could entitle the Contractor to an extension of time.

Examples of conflicting case law

Although a detailed consideration of the relevant case law is beyond the scope of this article, it is worth noting at the outset that the law in Australia regarding the treatment of concurrent delay remains uncertain.

What is clear, however, is that (a) the fundamental issue for consideration is usually causation and (b) concurrent delay disputes give rise to a host of complex factual determinations about the cause, nature, extent and interrelationship of the overlapping causes of delays.

In the 1992 New South Wales Supreme Court decision of *Thiess Watkins White Construction Ltd v Commonwealth*¹ (**Thiess**), causation was illustrated by Giles J as the following:

To take a simple example, if an Owner-caused delay of 5 days commencing on day 15 means that a Contractor which would have commenced the works on day 20 still has 5 days work to do, and there is a neutral delay on day 23, I see no difficulty in concluding that the time based costs incurred on day 23 were caused by the original delay

¹ *Thiess Watkins White Construction Ltd v Commonwealth* (1992) 14 BCL 61.

Theiss is authority for the position that a Contractor should be granted an extension of time where the initial delay caused by the Owner is prolonged due to a neutral event. In 1994 the Supreme Court of Queensland came to the opposite conclusion in its decision *Armstrong Construction v Council of the Shire of Cook*². Here, the Contractor initially encountered a delay caused by a latent condition, this delay extended due to inclement weather. White J held that the Contractor was entitled to compensation for delay and disruption arising from encountering the latent condition, but not for the 'flow on effect' caused by the neutral event.

In light of the above contradicting authorities, it is difficult to confidently predict how a court will resolve disputes where one of the concurrent delays is attributable to a "neutral" event (ie one caused by a third party or an event beyond the control of either party) rather than attributable to the Owner or Contractor.

In any event, the case law indicates that a "common sense" approach (since the High Court decision of *March v E and MH Stramare*³) will be adopted when causation is in issue. In essence, this means that "causation" is a question of fact to be answered by reference to common sense and experience. Moreover, in the event of a concurrent delay dispute, the courts will favour an event-by-event approach, based on the relevant facts of each case.

As such, in the absence of express terms in a construction contract dealing with concurrent delay, parties face an inherently uncertain legal outcome if a dispute arises. That is one reason why international standard forms of contract have attempted to address this important issue.

Accordingly, it is critical, from both the Owner's and the Contractor's perspective, to include express terms in the contract which clearly articulate who bears the risk in circumstances where concurrent delays arise.

Approaches for dealing with concurrent delays

The issue of concurrent delay is dealt with differently in the various international standard forms of contract. Importantly, it is not possible to argue that one approach is definitely "right"; instead, the preferred approach for each project will depend on a number of factors, such as which side of the table you are sitting and the extent to which the project will be financed through limited or non-recourse project financing (where Lenders require greater outcome certainty in terms of the time and price to complete the works).

In general, there are three main approaches for dealing with the issue of concurrent delay. They are:

Option One: Contractor has no entitlement to an extension of time if a concurrent delay occurs.

Option Two: Contractor has an entitlement to an extension of time if a concurrent delay occurs.

Option Three: Causes of delay are apportioned between the parties and the Contractor receives an extension of time equal to the apportionment (for example, if the concurrent causes of a 10-day delay are apportioned 60:40 Owner: Contractor, the Contractor would receive a six-day extension of time).

Each of these approaches is discussed in more detail below.

Option One: Contractor not entitled to an extension of time for concurrent delays

A common, Owner-friendly, concurrent delay clause for Option One is the following:

If more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is a cause of delay which would not entitle the Contractor to an extension of time under [EOT Clause], then to the extent of the concurrency, the Contractor will not be entitled to an extension of time.

We have bolded the most relevant words.

² *JW Armstrong Constructions Pty Ltd v Council of the Shire of Cook* (unreported, Supreme Court of Queensland, White J, 25 February 1994).

³ *March v E and MH Stramare* (1991) 171 CLR 506.

Nothing in the clause prevents the Contractor from claiming an extension of time pursuant to the general extension of time clause, and, from an Owner's perspective, express terms addressing the Prevention Principle must also be included in the contract. What the clause does do, however, is remove the Contractor's entitlement to an extension of time when there are two or more causes of delay and at least one of those causes would not entitle the Contractor to an extension of time under the general extension of time clause.

For example, if the Contractor's personnel were on strike and, during that strike, the Owner failed to approve drawings, then, in accordance with the contractual provisions, the Contractor would not be entitled to an extension of time for the delay caused by the Owner's failure to approve the drawings.

The operation of this concurrent delay clause is best illustrated diagrammatically using the following three examples

Example 1: No overlap and Contractor entitled to an extension of time for Owner-caused delay



In this example, the two-week Contractor-caused delay and the one-week Owner-caused delay do not overlap, so the Contractor would only be entitled to a one-week extension of time for the non-concurrent, Owner-caused delay. Therefore, at the end of the Owner Delay Event, the Contractor will remain in two weeks' delay (assuming the Contractor has not, at its own cost and expense, accelerated the works to mitigate the impact of the delay).

Example 2: Overlap but Contractor not entitled to an extension of time for Owner-caused delay



In this example, the Contractor would not be entitled to an extension of time because of the Owner-caused delay and the Contractor-caused delay overlap. This is where the concurrent delay clause comes into operation. Under the example clause above, the Contractor is not entitled to an extension of time to the extent of the concurrency. As a result, at the end of the Contractor Delay Event, the Contractor would be in two weeks' delay (again, assuming no action is taken by the Contractor to accelerate the works to mitigate the delay).

Example 3: Overlap and Contractor entitled to an extension of time for a part of the Owner-caused delay



In this example, the Contractor would be entitled to a one-week extension of time because the delays only overlap for one week. Therefore, the Contractor is entitled to an extension of time for the period when they do not overlap (ie when the extent of the concurrency is zero). As a result, after receiving the one week extension of

time, the Contractor would be in one week's delay, again, assuming no action is taken by the Contractor to accelerate the works to mitigate the delay).

From an Owner's perspective, Option One seems both logical and fair. For example, if the Owner Delay Event was a delay in the approval of drawings and the Contractor Delay Event was the entire workforce being on strike, arguably the Contractor should not receive an extension of time. The delay in approving drawings does not actually delay the works because the Contractor could not have used the drawings given that its workforce was on strike. In this example, the Contractor would suffer no real detriment from the Owner-caused delay. Conversely, if the Contractor did receive an extension of time it would effectively receive a windfall gain.

However, the suitability or fairness of this option will obviously depend on which side of the table you are sitting. In the above example, a Contractor may argue that it should receive an extension of time on the basis that, regardless of the strike, the Contractor could not have completed the works in the specified time due to the Owner's failure to approve the drawings. The opposing argument that the Owner would raise is that the Contractor should not be entitled to an extension of time in these circumstances as it could not, in any event, have complied with its obligation to complete the works by the specified time.

In our experience, the greater the number of obligations the Owner has under the contract, the greater the risk of concurrent delays and the more reluctant the Contractor will likely be to accept Option One. Therefore, it may not be appropriate for all projects.

It is also worth noting that the selection of Option One may ultimately be influenced by project finance considerations, such as the Lender's requirements for time and price certainty.

Option Two: Contractor entitled to an extension of time for concurrent delays

Essentially, Option Two is the opposite of Option One and is the position in many Contractor-friendly standard and bespoke forms of contract. These contracts also commonly include extension of time provisions to the effect that the Contractor is entitled to an extension of time for any cause beyond its reasonable control (including *force majeure* events), which, in effect, means there is no need for a concurrent delay clause.

As with Option One, the suitability of this option depends on which side of the table you are sitting. This option is less common than Option One, particularly on project finance transactions, but is nonetheless sometimes adopted (when the Contractor has a superior bargaining position vis-à-vis the Owner or when the Owner has extensive obligations under the contract and is not prepared to pay the risk premiums sought by the Contractor to take the corresponding concurrent delay risk). Where an Owner agrees to adopt this option, it is often on the basis that the Contractor will not be entitled to receive delay costs for the concurrent delay.

Option Three: Responsibility for concurrent delays is apportioned between the parties

Option Three, the apportionment approach, is a middle-ground position that has been adopted in some of the standard-form contracts. For example, the Australian Standards construction contracts (AS4000 and AS4902) adopt the apportionment approach. The AS4000 clause states:

34.4 Assessment

When both non-qualifying and qualifying causes of delay overlap, the Superintendent shall apportion the resulting delay to WUC according to the respective causes' contribution.

In assessing each EOT the Superintendent shall disregard questions of whether:

- a) WUC can nevertheless reach practical completion without an EOT; or*
- b) the Contractor can accelerate,*

but shall have regard to what prevention and mitigation of the delay has not been effected by the Contractor.

We appreciate the intention behind the clause and the desire for both parties to share responsibility for the delays they cause. However, we have some concerns about this clause and the practicality of the apportionment

approach in general. It is easiest to demonstrate our concerns with an extreme example: what if the "qualifying" cause of delay was the Owner's inability to provide access to the site and the "non-qualifying" cause of delay was the Contractor's inability to commence the works because it had been black-banned by the unions? How should the causes be apportioned between the Owner – and Contractor-caused delays? In this example, it is easy to conceive either cause as 100% responsible for the delay.

In our view, such an example (where both parties are at fault) has two possible outcomes. Either:

- the delay is split down the middle and the Contractor receives 50% of the delay as an extension of time; or
- the delay is apportioned 100% to the Owner and the Contractor therefore receives 100% of the time claimed as an extension of time.

The delay is unlikely to be apportioned 100% to the Contractor because a judge or arbitrator will likely feel that such an apportionment is "unfair", especially where there is a potential for significant liquidated damages liability. We appreciate that the above is not particularly rigorous legal reasoning; however, the apportionment approach does not lend itself to rigorous analysis. The inherent difficulty with Option Three lies in an attempt to find a commercial, "common sense" solution to the apportionment approach in general. Without additional express terms in the contract which clearly articulate who bears the risk of particular foreseeable delays, Option Three may fail to provide necessary certainty to either contracting party. Where the project is funded through limited or non-recourse project financing, the Lenders are also unlikely to accept the apportionment approach due to their desire for time and price certainty.

In addition, Option Three is only likely to be suitable if the party undertaking the apportionment is independent from both the Owner and the Contractor. Increasingly, this is not the case on large-scale infrastructure projects. Each party also needs to ensure it has the necessary technical and programming expertise and records throughout the performance of the works to support its position in terms of arguing how the "respective causes contribution" should be apportioned under Option Three.

Conclusion

A concurrent delay clause should be included in all construction contracts. Remaining silent on the issue may lead to disputes. Which option is adopted will depend on a number of factors including (a) the size and nature of the project, (b) the extent of the Owner's involvement in delivery of the works and its corresponding obligations under the contract, (c) the requirements of Lenders for project finance transactions and (d) the relative bargaining positions of the contracting parties.

Consideration should also be given to the Contractor's entitlement (if any) to delay costs or whether the parties should bear their own costs, in circumstances where the parties agree the Contractor will be entitled to an extension of time for concurrent delays.

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