

September Newsletter, Issue #1

*Concurrent Delays:
Scholarly and Judicial
Interpretation*

This Newsletter will outline the current scholarly understanding of concurrent delays, and will examine how it has been addressed to a certain extent in standard form contracts like the AS 2124-1992 and the GC-21 Contract. Additionally, it analyses how Australian courts have tackled the issue of concurrency by implementing the doctrine of causation and the prevention principle in its interpretation.

Introduction

The terms “Concurrency” and “Concurrent Delay” remain a primary cause of contractual party disputes regarding neglected responsibility for extension of time claims, and the making of assessments related to liquidated damages. In short, “concurrent delay” has been described as the overlapping of two or more independent delays which are equally critical and would have caused delay to project completion. Therefore, the aim of this paper is twofold. The first part of the paper will examine the literary understanding of concurrency, and how it has been addressed to a certain extent in standard form contracts like the AS 2124-1992 and the GC-21 Contract. The second part of this paper will explore how the Australian Courts have construed concurrency with reference to causation and the prevention principal.

The Literary Understanding of Concurrency

As a first step, it is necessary to define what concurrency generally is.

Firstly, in the Australian Macquarie Dictionary “concurrent/concurrency” is denoted to mean the act of concurring, i.e. a simultaneous occurrence, occurring and existing side by side¹. This general definition does not significantly differ from its understanding in the building and construction context. As John Marin QC asserts “concurrent delay” means “a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency”². Additionally, His Honour Judge Richard Seymour QC proposed “concurrent delay” to denote a situation where “the Works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a relevant event, while the other is not”³.

Essentially, concurrent delay occurs when the effect of two or more independent delays impede project progress and overlap in time while each delay alone would have caused delay to project completion. More specifically, delays are concurrent if the owner-caused delay and contractor-caused delay affect the same activity or affect different activities on parallel activity paths which are equally critical, and as such, would each have delayed the completion date of the project⁴.

¹ Macquarie Australia's National Dictionary Revised Third Edition, pg. 405.

² Gordan Smith, 2015, ‘What Is the Malmaison Approach?’ pg. 5 [3].

³ Ibid, pg. 16 [5].

⁴ Richard Long, 2021 ‘Analysis of Concurrent Delay on Construction Claims’ Long International, pg. 3[1].

The Types of Concurrent Delay

Per the Society Of Construction Law's Delay and Design Protocol, the term 'concurrent delay' is classified two-fold, as 'true concurrent delay' and or a 'concurrent delay'. We define both below⁵:

- **True concurrent delay** is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time⁶. A time when true concurrent delay can occur is at the **commencement date (where for example, the Employer fails to give access to the site, but the Contractor has no resources mobilised to carry out any work)**⁷.
- Keith Pickavance gives us another example of true concurrency as follows: where D has deliberately adopted a **policy of leaving the release of information to C until C actually needs it, and where, as a result of this policy, such information is released later than originally planned in response to the culpable delay to C, for instance, there is a casual relationship between the two events and they are not independent of one another**⁸.
- In contrast, the common usage of the term 'Concurrent Delay' concerns the **situation where two or more delay events arise at different times, but the effects of them are felt at the same time**.⁹ Pickavance argues that the first delay to occur changes the critical path to completion so that, when the second event occurs (which would otherwise have been on the critical path), it will be found to take up the float created by the preceding delay to progress¹⁰. The position then is that whichever event was first initiated "caused" the completion date to be likely to be delayed¹¹.

Hence, the Construction Law Society and Pickavance make clear that the common ground between both "concurrent delay" and "true concurrent delay" is that each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion (not merely incidental to the Delay to Completion)¹². We define Employer and Contractor Risk Events as:

- **Contractor Risk Event**: An event, circumstance or cause which, under the contract, is at the risk or responsibility of the contractor. The Contractor will therefore not be entitled to additional time or money if the event/circumstance transpires.¹³
- **Employer risk event**: An event, circumstance or cause which, under the contract, is at the risk or responsibility of the employer¹⁴. If the event transpires, then the

⁵ SCL Delay and Disruption Protocol 2nd Edition: February 2017, 30 [10.3].

⁶ Ibid [10.4].

⁷ Ibid.

⁸ Pickavance, K. 'Delay and Disruption in Construction Contracts' Third Edition, 623 [16.18].

⁹ SCL Delay and Disruption Protocol 2nd Edition: February 2017, 30 [10.4].

¹⁰ Pickavance, K. 'Delay and Disruption in Construction Contracts' Third Edition, 623 [16.16].

¹¹ Ibid, 623 [16.16].

¹² SCL Delay and Disruption Protocol 2nd Edition: February 2017, 30 [10.5].

¹³ Lexis Nexis (2024) 'Contractor Risk Event Definition' Construction Glossary <https://www.lexisnexis.co.uk/legal/glossary/contractor-risk-event>

¹⁴ LexisNexis (2024) 'Employer risk event definition' Construction Glossary, [https://www.lexisnexis.co.uk/legal/glossary/employer-risk-](https://www.lexisnexis.co.uk/legal/glossary/employer-risk-event#:~:text=What%20does%20Employer%20risk%20event,on%20what%20the%20contract%20says).)

[event#:~:text=What%20does%20Employer%20risk%20event,on%20what%20the%20contract%20says\).](https://www.lexisnexis.co.uk/legal/glossary/employer-risk-event#:~:text=What%20does%20Employer%20risk%20event,on%20what%20the%20contract%20says).)

contractor will be entitled to additional time and money¹⁵. An example would be a Variation direction.

What Is Concurrent Delay And Its Effect On Entitlement To EOT and Compensation?

Extension of Time

With reference to the discussion above, the Protocol explicitly asserts that “where Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor’s concurrent delay should not reduce any EOT due¹⁶. However, our (below) analysis of the concurrency clauses in the **GC-21** and the **AS 2142-1999** contracts suggests an extension of time entitlement is wholly revoked in instances of concurrency arising from Contractor’s mismanagement.

Compensation

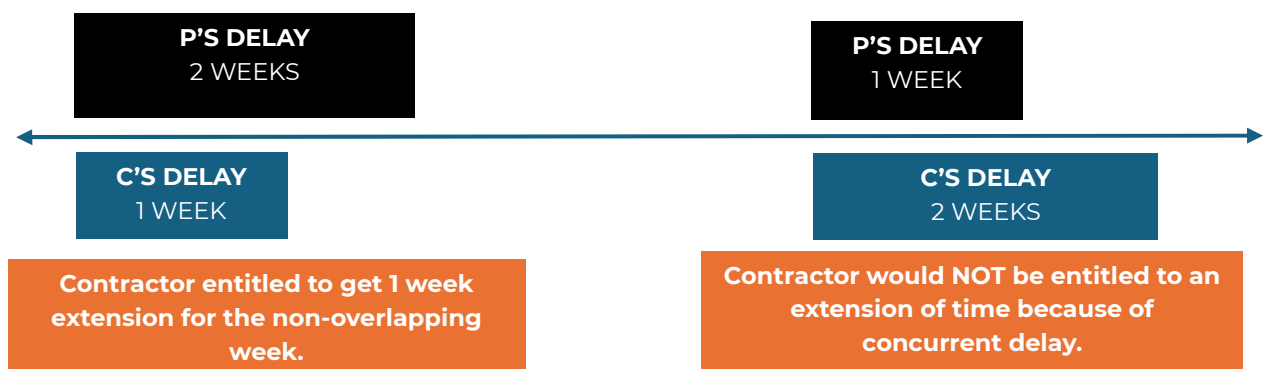
As for compensation for additional costs incurred in events of concurrent delay, the Protocol asserts that the Contractor may not recover compensation in respect of the Employer Risk Event unless it can separate the loss and/or expense that flows from the Employer Risk Event from that which flows from the Contractor Risk Event¹⁷.” Additionally, the Protocol states that “if it would have incurred the additional costs in any event as a result of Contractor Delay, the Contractor will not be entitled to recover these additional costs.¹⁸”

Visual Example of Concurrency

Below is an illustration of concurrency. A simplified example of concurrent delays is illustrated in Akhtar Surahyo’s book titled ‘Understanding Construction Contracts Canadian and International Conventions’ where he explained:

“if the **Contractor-caused delay** is **1 week** and **Principal-caused delay** is **2 weeks**, and they **overlap**, then the **Contractor is entitled to get 1 week extension for the non-overlapping week**”.

Whilst, if a **Contractor-caused delay** is **2 weeks** and an **Principal-caused delay** is **1 week** and they do **overlap**, then the **Contractor would NOT be entitled to an extension of time because of concurrent delay**”.



¹⁵ Ibid.

¹⁶ SCL Delay and Disruption Protocol 2nd Edition: February 2017, [10].

¹⁷ SCL Delay and Disruption Protocol 2nd Edition: February 2017, [14.3].

¹⁸ SCL Delay and Disruption Protocol 2nd Edition: February 2017, [14]

Concurrency and Extensions of Time in the AS 2142-1999 and the GC-21 Contract

The term 'concurrent delay' has been addressed to a certain extent in standard form contracts like the AS 2124-1992 and the GC-21 Contract. In the table below, we highlight and colour-code the similarity in wording between the GC-21, the AS 2142-1992 on the topic of concurrency.

Both clauses stress that the contractor is not entitled to a extension of time as a result of their mismanagement. Therefore, a contractor when entering either of these Contracts accepts a significant risk in the event of a delay to the project.

AS 2124-1992	GC-21 Contract
<p>Clause 35.5</p> <p>Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not a cause referred to in the preceding paragraph (qualifying cause of delay) then to the extent that the delays are concurrent, the Contractor shall not be entitled to an extension of time for practical completion.</p>	<p>Clause 50.6</p> <p>When concurrent events cause a delay in achieving Completion and one or more of the events is not an event referred to in clause 50.1.1, then to the extent that the events are concurrent, the Contractor will not be entitled to an extension of time for Completion notwithstanding that another cause of the delay is such that the Contractor would have had an entitlement to an extension of time.</p>

AS 2124-1992 Contract

In effect, Clause 35.5 of the AS 2124-1992 **removes the contractor's entitlement to an extension of time** when there are two or more causes of delay and when **one of the delays, for which time extension (contractually) is not allowed, occurs concurrently with a delay for which time extension is allowed**¹⁹. Therefore, this clause's drafting is clearly in favour of the Principal.

GC-21 Contract

Alike the discussion in the above, clause 50.6 argues, that if another qualifying cause of delay (Delay #2) [Delay 2 – not in the Contractor's responsibility], has occurred on the same day as Delay #1 [Delay 1 – a mismanagement by the Contractor causing delay] then the Contractor is not entitled to claim for Delay #2 because of their mismanagement²⁰.

This is so even if Delay #2 is due to a cause that is eligible for an extension of time or if the event causing Delay #1 occurs after the cause for Delay #2 has arisen²¹.

¹⁹ Farrukh Arif, A and Ayman A. Morad (2013), Concurrent Delays in Construction: International Legal Perspective, Journal of Legal Affairs and Dispute Resolution in Engineering and Construction Volume 6, Issue 1, <https://ascelibrary-org.ezproxy.uws.edu.au/doi/epdf/10.1061/%28ASCE%29LA.1943-4170.0000134>.

²⁰ Procurement Practice Guide GC21 Edition 2 Clause Commentary, cl 50.6, page.88.

²¹ Ibid, page 88.

The Trade Procurement Guide's commentary on Clause 50.6 further suggests that if a delaying event is partially outside the Contractor's control, the Contractor's entitlement to extensions of time is reduced to the extent that the Contractor contributed to the delay²².

As to compensation, the Trade Procurement Guide's commentary on Clause 50.6 argues that "this Clause cannot be used to deny an entitlement where the Principal considers the Contractor should provide additional resources to carry out the Works in order to reach Completion on time"²³. This seems to agree with the Society's views on compensation (i.e. separating the loss and/or expense) in circumstances of concurrent delay.

How Do The Australian Courts View Concurrency?

Causation – Theiss (delay arising from the Principal)

Australian courts tend to rely on causation to discern whether a particular act, omission was so connected with the delay that as a matter of ordinary common sense and experience, it should be regarded as a cause of it²⁴.

In *Theiss Watkins White Construction Ltd v Commonwealth*, causation was applied as follows²⁵:

If an owner-caused delay of 5 days commencing on day 15 means that a contractor which would have completed 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.

The view in *Theiss* suggests that an extension of time claimed by the contractor should be allowed for the full period of 6 days, although for 1 day of that period, there operated a second concurrent neutral cause of delay²⁶. Therefore, *Theiss* is authority where an initial delay caused by the Principal is prolonged because of a neutral event²⁷. However, *Theiss* may not be useful where the concurrent cause of the delay is attributable to the contractor rather than a neutral event²⁸.

Causation in Armstrong (delay arising from the Contractor)

In *Armstrong Construction v Council of the Shire of Cook*, the Court considered a delay arising from the Contractor's fault prolonged by a neutral event. Here the contractor initially encountered a delay caused by a latent condition and thereafter further delay owing to wet weather. The court said that the contractor was entitled to compensation for delay and disruption arising from the encountering of the latent condition but not for the "flow on effect" caused by the neutral event²⁹.

²² Ibid, page, 89.

²³ Ibid, page.88.

²⁴ Jim Doyle Dip (2014) 'Concurrent Delays in Contracts' Doyles Construction Lawyers, page 2.

²⁵ Ibid, page 2.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid, page 2.

The Prevention Principle and its Relationship with Concurrency

What is the Prevention Principal?

Additionally, Australian courts have tended to the “prevention principle” in situations of concurrent delay attributable to both the owner and the contractor³⁰. In essence, the prevention principle asserts that a party cannot insist on the performance of a contractual obligation by the other party if it itself is the cause of the other party's non-performance³¹. In *Turner v Co-ordinated Industries Pty Ltd*, the judge considered that the “prevention principle” should apply only in circumstances in which the owner had caused the actual delay and there is presence of sufficient evidence³².

The Effect of the Prevention Principal in Circumstances of Concurrency?

In support of the proposition considered in *Turner Corp*, Pickavance argues that if the work is expanded so as to require more time, C must be given that time otherwise D cannot rely upon its right to liquidated damages because one of the causes of delay to completion, at least, will have arisen as a result of an event for which D takes the risk³³.

Similarly, the Society Protocol says the ‘prevention principle’ ensures that an Employer cannot take advantage of the non-fulfilment of a condition (for example, to complete the works by a certain date), the performance of which the Employer has hindered³⁴.

However, it should be noted that a contractor who has been prevented from fulfilling its contractual obligation by the conduct of the owner cannot rely upon the failure by the owner if the contractor itself could not have complied with its contractual obligation in any event³⁵.

Conclusion

In summary, concurrent delay occurs when the effect of two or more independent delays impedes project progress and overlap in time while each delay alone would have caused delay to project completion. The issue of concurrency has been addressed in the GC-21 and the 2124-1992 contracts whereby both revoke the contractor's entitlement to an extension of time when there are two or more causes of delay and when one of the delays, for which time extension (contractually) is allowed, occurs concurrently with a delay caused by Contractor management. Additionally, Australian courts have pursuant to the issue of

³⁰ Farrukh Arif, A and Ayman A. Morad (2013), *Concurrent Delays in Construction: International Legal Perspective*, Journal of Legal Affairs and Dispute Resolution in Engineering and Construction Volume 6, Issue 1, <https://ascelibrary-org.ezproxy.uws.edu.au/doi/epdf/10.1061/%28ASCE%29LA.1943-4170.0000134>.

³¹ Richard Long, 2021 ‘Analysis of Concurrent Delay on Construction Claims’ Long International, pg. 14

³² Jim Doyle Dip (2014) ‘Concurrent Delays in Contracts’ Doyles Construction Lawyers, pg.3.

³³ Pickavance ‘Delay and Disruption in Construction Contracts’ Third Edition, 624 [16.21].

³⁴ SCL Delay and Disruption Protocol 2nd Edition: February 2017, Pg 31 [10.16].

³⁵ Jim Doyle Dip (2014) ‘Concurrent Delays in Contracts’ Doyles Construction Lawyers, pg 3.

causation tended to ascertain whether a particular act, omission was so connected with the delay that as a matter of ordinary common sense and experience, it should be regarded as a cause of it. As for the prevention principal, the Courts have adopted it in situations where the owner had caused the actual delay and there is presence of sufficient evidence of it.

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