

Construction Breakfast Seminar
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The Society of Construction Law
Delay and Disruption Protocol

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Delay and Disruption Protocol

1. Introduction

1.1 Background

The United Kingdom Society of Construction Law (the **Society**) published the Delay and Disruption Protocol in October 2002 (reprinted in March 2003) (the **Protocol**) to provide useful guidance on common issues that arise in relation to construction contracts. The Protocol aims to "provide a means by which the parties can resolve these matters and avoid unnecessary disputes".

The drafting of the Protocol was a large task, and although a committee of Society members were responsible for its drafting, a considerable number of invited consultees, including the RBIA and other major construction and civil engineering institutions, were involved in providing comments which were incorporated into the Protocol.

1.2 Structure of the Protocol

The Protocol contains core principles relating to delay and compensation, and guidance notes in four sections, in relation to:

- (a) the Protocol's position on core principles and on other matters relating to delay and compensation;
- (b) preparing and maintaining programmes and records;
- (c) extensions of time during the course of the project; and
- (d) dealing with disputed extension of time issues after completion of the project - retrospective delay analysis.

The Protocol provides a suggested approach to deal with a contractor's claims for extensions of time (**EOTs**) and compensation for delay events.

1.3 Use of the Protocol

The Protocol has been designed as a code of good practice to be used before a contract is entered into and during the administration of the contract, including for assessing claims and resolving disputes. The scheme provided by the Protocol for dealing with delay and disruption issues is intended to be balanced and viable. The Protocol recommends that the parties consider and agree on various procedures and entitlements while drafting a contract, to remove uncertainty and potential for a dispute, at a later stage.

It is not intended that the Protocol take precedence over the terms of a contract, however, the core principles of the Protocol may be expressly adopted in contracts. If the Protocol is to be incorporated, care should be taken to ensure compatibility with the remainder of the documents comprising the contract, and the contract may need to be modified so that the Protocol has proper application.

This paper will provide a summary and commentary of the core principles and guidance notes in the Protocol. It also considers the interpretation of relevant principles and impact of the Protocol in Australia.

2. Programme and records

2.1 Core Principle¹

- The contractor should:
 - prepare a programme showing the manner and sequence of the works (which programme should be accepted by the Contract Administrator (CA));
 - keep the programme up to date to record progress and EOTs.

2.2 Guidance²

The Protocol suggests that its recommendations, that a contractor should submit a programme as early as possible in the project of the manner and sequence in which the works are to be performed, should apply equally to smaller projects. The Protocol recommends that the parties reach an agreement on the programme, in particular to:

- the form of the programme;
- the interaction with the method statement (which describes how the Contractor intends to construct the works);
- the time within which the contractor should submit a draft programme for acceptance;
- a mechanism for obtaining the acceptance of the CA of the draft programme; and
- the requirements for updating and saving of the accepted programme.

The parties should also agree on the software to be used to produce the programme. The Protocol also recommends that the parties reach an agreement on the records to be kept to allow for delay analysis.

2.3 Commentary

Although it is generally considered good practice management to maintain up to date programmes and records, it may be time intensive to do so, and accordingly, this cost should be considered at the time the contract sum is priced. In relation to smaller projects, to which the Protocol recommends these practices apply equally, additional time spent on programming may not be required or be viable. The use of the same software may be difficult due to issues with intellectual property rights, or licensing arrangements, and the ability for the parties to make changes to the programme should be considered at the outset.

¹ Core Principle 1

² Guidance Notes Section 2

3. Extensions of time

3.1 Core Principles

- (a) Purpose³
- An EOT relieves the contractor for liability for delay damages (such as LDs) for any period prior to the extended contract completion date.
- (b) Entitlement to extension of time⁴
- The contractor will potentially only be entitled to an EOT for those events in respect of which employer has assumed risk and responsibility (**Employer Risk Events**).
- (c) Procedure for granting extension of time⁵
- The EOT should be granted to the extent that the Employer Risk Event is predicted to prevent the works being completed by the then prevailing contract completion date.
 - The entitlement to an 'EOT should be based on the contract not on the question of whether or not the contractor needs an EOT in order not to be liable for liquidated damages.
- (d) Effect of delay⁶
- For an EOT to be granted, it is not necessary for the Employer Risk Event already to have begun to affect the contractor's progress with the works, or for the effect of the Employer Risk Event to have ended.
- (e) Incremental review of extension of time⁷
- Where the full effect of an Employer Risk Event cannot be predicted with certainty at the time of initial assessment by the CA, the CA should grant an EOT for the then predictable effect.
 - The EOT should be considered by the CA at intervals as the actual impact of the Employer Risk Event unfolds and the EOT increased (but not decreased, unless there are express contract terms permitting this) if appropriate.

³ Core Principle 2

⁴ Core Principle 3

⁵ Core Principle 4

⁶ Core Principle 5

⁷ Core Principle 6

3.2 Guidance⁸

The Protocol identifies that the main effect of an EOT is to relieve a contractor of its liability for liquidated damages during the period of the extension, not as often incorrectly believed, give rise to an automatic entitlement to compensation for prolongation costs. Some standard form contracts provide that specific delay events, at the employer's risk, will not entitle the contractor to prolongation costs, such as delay resulting from adverse weather conditions.

The Protocol suggests that although not all contracts require the contractor to give notice of the occurrence of an Employer Risk Event irrespective of whether it is likely to affect the contract completion date, notice should be given by the contractor to the CA of an Employer Delay as early as it is aware of any. The impact of such an event should be dealt with co-operatively by the parties.

Assessment of the EOT application, should be undertaken within one month of its receipt. The CA should not wait until the full effect of the Employer Risk Event is known before assessing the application for an EOT. The EOT should be granted on the most predictable effect, and increased at a later stage if appropriate.

A contract should allow a CA to determine that an EOT is due on his or her own initiative, whether or not the contractor has applied for one or provided sufficient information. The clause should also entitle the contractor to an EOT for an act of prevention or breach by the employer. Consideration by the CA of an EOT should also take into account the available float and concurrency.

3.3 Commentary

The procedure and time limits for an application for an EOT is generally governed by the contract, as it is contained in most standard form contracts⁹. The one month period for assessing the Contractor's entitlement to an EOT is consistent with Australian Standards contracts such as AS2124-1992 (clause 35) and AS4000- 1997 (clause 34.5).

4. Float

4.1 Core Principles

- (a) as it relates to time¹⁰
- Where there is remaining float in the programme at the time of an Employer Risk Event, an EOT should only be granted to the extent that the Employer Delay is predicted to reduce to below zero the total float on the activity paths affected by the Employer Delay.

⁸ Guidance Notes Paragraph 1.2

⁹ Rochester, M., *A Practical Approach to Managing Extension of Time Claims*, *The Arbitrator & Mediator* 22(2) (August 2003) 37

¹⁰ Core Principle 7

- (b) as it relates to compensation¹¹
- If as a result of an Employer Delay, the contractor is prevented from completing the works by the contractor's planned completion date (being a date earlier than the contract completion date), the contractor should in principle be entitled to be paid the costs directly caused by the Employer Delay, notwithstanding that there is no delay to the contract completion date (and therefore no entitlement to an EOT), provided also that at the time they enter into the contract, the employer is aware of the contractor's intention to complete the works prior to the contract completion date, and that intention is realistic and achievable.

4.2 Guidance¹²

The Protocol describes float as "the amount of time by which an activity or group of activities may be shifted in time without causing delay to a contract completion date". It strongly recommends that ownership of the float, which may ultimately determine entitlement to an EOT as a consequence of Employer Delay, should be adequately addressed in the contract.

A contractor should not be automatically entitled to an EOT merely because an Employer Delay to Progress takes away the contractor's float for a particular activity. The Protocol's position is that an Employer Delay should only result in an EOT if it is predicted to reduce the total float on the activity paths affected by the delay to below zero ie: The Project/Principal owns the float.

The Protocol again urges the importance of programming and the updating of programmes to enable accurate identification of the float and the consequences of Employer Delay (or Concurrent Delay) on the float.

The Protocol also recognises that there may be an entitlement to compensation for Employer Delay notwithstanding that an EOT has not been granted because of the availability of the float. This may be the case because the parties have recognised, contractually, that the loss of float may have cost consequences for the Contractor alternatively because at the time the Contract is entered into the Employer is aware of the Contractor's intention to complete works on a date prior to the Contract Completion Date.

The Protocol recommends that the contracting parties address both the issues of the relationship between float and an entitlement to an EOT and the entitlement to compensation for loss of float even where there is no entitlement to an EOT to avoid uncertainty in such circumstances.

4.3 Commentary

Float is not usually dealt with in standard form contracts, and the Protocol sensibly aims to overcome this. It has been suggested that this recommendation could lead to avoidance of disputes in circumstances where a principal uses the whole of the float and the contractor

¹¹ Core Principle 8

¹² Guidance Notes Paragraphs 1.3 and 1.12

becomes liable for liquidated damages at the end of the project.¹³ However, given that these recommendations are in some respects inconsistent with a leading UK decision¹⁴, it remains to be seen whether the courts will accept this approach.

5. Concurrent delay

5.1 Core Principles

- (a) its effect on entitlement to extension of time¹⁵:
- Where Contractor Delay to Completion occurs or has effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due.
- (b) its effect on entitlement to compensation for prolongation¹⁶:
- If the Contractor incurs additional costs that are caused both by Employer Delay and concurrent Contractor Delay, then the Contractor should only recover compensation to the extent it is able to separately identify the additional costs caused by the Employer Delay from those caused by the Contractor Delay.
 - If it would have incurred the additional costs in any event as a result of Contractor Delays, the Contractor will not be entitled to recover those additional costs.
- (c) identification of float and concurrency¹⁷:
- Accurate identification of float and concurrency is only possible with the benefit of a proper programme, properly updated.

5.2 Guidance¹⁸

The Protocol aims to provide an agreed manner in which issues of concurrency can be resolved. Where an event of Employer Risk and Contractor Risk occur at the same time, the contractor should nevertheless be entitled to an EOT for the delay to completion. Risk events which occur sequentially, but the effects are concurrent, should also not reduce the amount of an EOT due to the Contractor as a result of Employer Delay. To accurately identify concurrency, an up to date programme is required.

The Protocol's position on concurrency prevents an employer or CA taking advantage of the contractor's delay after the contract completion date to issue instructions and make

¹³ Maxwell-Smith, S., *United Kingdom EOT Protocol update*, ACLB, Vol 14 No. 9, November 2002, page 103

¹⁴ *Glenion Constructions Ltd v The Guinness Trust* (1987) 39 BLR 89 as cited in Burr, A., Lane, N., *The SCL Delay and Disruption Protocol: Hunting Snarks*, (UK) Contr. L.J. 2003, 19(3), 135-143

¹⁵ Core Principle 9

¹⁶ Core Principle 10

¹⁷ Core Principle 11

¹⁸ Guidance Notes Paragraphs 1.4 and 1.10

changes without giving an EOT. That is, if the Employer's new instructions further extend the period of the works and the Contract Completion Date that delay will be concurrent.

5.3 Commentary

The "dominant" cause approach, which is frequently adopted to determine whether a contractor should be entitled to an EOT in circumstances of concurrent events of delay, has not been applied by the Protocol. Given that disputes often arise due to conflicting arguments over cause of or contribution to delay the Protocol attempts to move away from the apportionment of blame for the delay and reduction of the EOT¹⁹.

The Protocol is in one sense contractor friendly in adopting the position that the contractor gets an EOT notwithstanding concurrent contractor delay. This is a position which has been adopted in the UK in two recent cases *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR32 and in *Royal Brompton Hospital NHS Trust v Hammond & Ors (No 7)* [2001] 76 Con LR148. It appears that the Protocol approach is becoming the preferred approach in the UK.

There is some balance in that the contractor must still prove that he has incurred additional costs as a consequence of the employer delay, beyond costs due to the contractor's concurrent cause of delay, before the contractor is entitled to compensation notwithstanding that there may be an entitlement to an extension of time.

6. After the event delay analysis

6.1 Core Principle²⁰

- The adjudicator, judge or arbitrator should so far as practicable, put him/herself in the position of the CA at the time the Employer Risk Event occurred.

6.2 Guidance²¹

The person assessing whether the contractor is entitled to an EOT should use an updated programme to establish the status of the works for the period over which an EOT is claimed, to determine whether the entitlement should have been recognised by the CA at that time.

6.3 Commentary

The Protocol's view is correct in principle but in practical terms it is nevertheless difficult to assess the amount of information that a CA would have had at the time he or she assessed the claim.

¹⁹ Burr, A., Lane, N., *The SCL Delay and Disruption Protocol: Hunting Snarks*, (UK) Contr. L.J. 2003, 19(3), 135-143

²⁰ Core Principle 12

²¹ Guidance Notes Paragraph 4.19

7. Mitigation of delay and loss

7.1 Core Principle²²

- Subject to the Contract, the duty to mitigate loss does not extend to requiring the contractor to add extra resources or to work outside its planned working hours.
- The contractor must not take unreasonable steps that increase its loss.

7.2 Guidance²³

The Protocol considers that the contractor's duty to mitigate its loss has two limbs:

- (a) the contractor must take reasonable steps to minimise its loss; and
- (b) the contractor must not take unreasonable steps that increase its loss.

The contractor is usually required in construction contracts to do all it can to avoid, overcome or reduce delay. This duty does not extend to carrying out any change in scope any more efficiently than the original scope, spend more money in order to negate the effect an Employer Risk Event, for example adding extra resources by working outside its planned working hours or otherwise. The employer should pay the contractor the costs of taking such measures to mitigate the loss if it requires the contractor to do so. The method, speed and timing of the activities under the contract are generally at the contractor's discretion subject to any agreed programme or method.

7.3 Commentary

The Protocol is consistent with the common law principles in relation to a contractor's duty to mitigate loss.

8. Link between extension of time and compensation

8.1 Core Principle²⁴

- An entitlement to an EOT does not automatically lead to an entitlement to compensation.

8.2 Guidance²⁵

The Protocol rejects the common misconception that there is an automatic entitlement for compensation for additional time required to complete the contract. The Protocol concludes:

"There is thus no absolute linkage between entitlement to an EOT and the entitlement to compensation for the additional time spent on completing the contract"²⁶.

²² Core Principle 13

²³ Guidance Notes Paragraph 1.13

²⁴ Core Principle 14

²⁵ Guidance Notes Paragraph 1.6

8.3 Commentary

This is consistent with most standard forms of contracts that require the contractor to claim an entitlement to an EOT and compensation for prolongation separately.

9. Valuation of variations

9.1 Core Principle²⁷

- The total likely effect of variations should be pre-agreed between the employer/CA and the Contractor to arrive if possible at a fixed price of a variation, including direct costs (labour, plant and materials) and time related costs, an agreed EOT and the necessary revisions to the programme.

9.2 Guidance²⁸

The Protocol considers that it is essential to have a list of rates and prices to be used in the event of change in the employer's requirements. Reasonable direct costs plus a reasonable allowance for overheads and profits should be included within the rates. The Protocol states:

"It is not good practice to compensate separately at the end of the contract, the prolongation and disruption element of a number of different variations and or changes. This is likely to result in the Contractor presenting a global claim, which is a practice that is to be discouraged"²⁹.

The parties should try to agree the total amount payable as a consequence of the variations as soon as possible after the variations have been completed. The Protocol also encourages provisions that provide that where a variation affects unvaried work, the affected unvaried work may be treated as varied.

9.3 Commentary

Although the Protocol's suggested approach in respect of agreeing to the amount payable for variations based on a schedule of rates makes commercial sense, this may not be practical or reasonable in practice, particularly for contracts of long duration.

²⁶ Guidance Notes Paragraph 1.6.3

²⁷ Core Principle 15

²⁸ Guidance Notes Paragraph 1.7

²⁹ Guidance Notes Paragraph 1.7.7

10. Compensation

10.1 Core Principles

- (a) Basis of calculation of compensation for prolongation³⁰
- Compensation for prolongation should not be paid for anything other than work actually done, time actually taken up or loss and/or expense actually suffered.
 - The objective is to put the contractor in the same financial position it would have been if the Employer Risk Event had not occurred.
- (b) Relevance of tender allowances³¹
- The tender allowances have limited relevance for the evaluation of prolongation and disruption caused by breach of contract or any other cause that requires the evaluation of additional costs.
- (c) Period for evaluation of compensation³²
- The evaluation of a sum due is made by reference to the period when the effect of the Employer Risk Event was felt.

10.2 Guidance³³

The recoverability of compensation for prolongation depends on the terms of the contract and the event of delay that caused prolongation, depending on whether the event is at the risk of the contractor or employer. A contractor must demonstrate that it has suffered loss and/or expense before it becomes entitled to compensation unless the contract states otherwise. An agreed contractual amount per day for prolongation costs can reduce arguments over the proof of such loss. A form of reverse liquidated damages.

The Protocol suggests that if a contractor has made no or inadequate allowance for site overheads in its tender, it is not necessarily disentitled to compensation for prolongation and or disruption on the basis of recovery of actual costs incurred. For compensation based on actual loss and or expense, the tender allowances will not be relevant. However, the tender allowances may be a useful reference point for the valuation of prolongation and disruption caused by a variation, and could be used by the parties as a rough guide for the agreement of such costs to assess the value of varied work if that is what the parties wish to do.

10.3 Commentary

The Protocol recommends that a contractor should be entitled to compensation for prolongation for concurrent events that cause it delay, if the contractor can prove that its

³⁰ Core Principle 16

³¹ Core Principle 17

³² Core Principle 18

³³ Guidance Notes Paragraph 1.8, 1.9 and 1.11

losses result from Employer Delay. However, if a Employer Risk Event and a Contractor Risk Event have a concurrent effect, the contractor will not be entitled to recover compensation unless separate loss and or expense flows from the Employer Risk Event, such as the period by which the Employer Delay exceeds the duration of the Contractor Delay. This may give rise to controversy where the period for which **the effect** of concurrent events is unclear.

11. Global claims

11.1 Core Principle³⁴

- The not uncommon practice of contractors making composite or global claims without substantiating cause and effect is discouraged.

11.2 Guidance³⁵

Paragraphs 1.14.2 and 1.14.3 of the Protocol strongly discourages global claims that do not substantiate the cause and effect of delay.

11.3 Commentary

This approach to global or composite claims should ideally be followed, but in some cases may be too onerous for contractors to comply with, especially in relation to smaller projects. Although this is consistent with the courts' general reluctance to accept global claims, courts will in appropriate circumstances still consider such claims. In *John Holland Pty Ltd v Hunter Valley Earthmoving Co Pty Ltd*³⁶, McClellan J considered that it was irrelevant that the claim was described as a "global claim". His Honour held that "a plaintiff who has a claim will not be denied the opportunity to prosecute that claim only because there may be difficulty in identifying with precision each individual element of the claim"³⁷. The global claim for delay costs could be accepted as there was sufficient evidence to establish that the plaintiff suffered a quantifiable loss and it was open to the tribunal to determine the appropriate sum to which the plaintiff was entitled.

12. Acceleration

12.1 Core Principle³⁸

- If the contract provides for acceleration, payment should be based on the terms of the contract. If the contract makes no provision, the parties should agree the basis of payment before acceleration is commenced. In the absence of agreement, steps should be taken by either party to have the dispute or difference about

³⁴ Core Principle 19

³⁵ Guidance Notes Paragraph 1.14

³⁶ [2002] NSWSC 131

³⁷ Ibid at 15

³⁸ Core Principle 20

entitlement to EOT resolved in accordance with the contract's dispute resolution procedures.

12.2 Guidance³⁹

Where acceleration is agreed, the contractor is not entitled to claim prolongation costs for any period of Employer Delay avoided by acceleration. Where a contractor accelerates of its own accord, it is not entitled to compensation. It is important therefore to apply the contract alternatively reach agreement on acceleration alternatively resolve any dispute on entitlement to EOT before taking accelerative measures.

12.3 Commentary

The Protocol's suggested approach in respect of agreeing to whether acceleration is necessary, following the procedures for claiming an EOT, may be unrealistic in practice, where there is an urgent need to overcome the effect of delays⁴⁰.

13. Disruption

13.1 Core Principle⁴¹

- If disruption is caused by the employer, it may give rise to a right to compensation either under the contract or as a breach of contract.

13.2 Guidance⁴²

The Protocol states that disruption has a different meaning to delay. In the context of a construction contract, disruption is the loss of productivity, disturbance, hindrance or interruption to the progress of a contractor. Unlike delay, the disruption may not lead to late completion of the work. Generally, the contractor is only able to recover disruption compensation to the extent that the employer causes the disruption. Although many standard contracts do not deal expressly with disruption, a contractor should maintain good site records to assist the CA to make proper assessments of disruption.

13.3 Commentary

The Protocol does not provide that a contractor should be compensated for disruption, it states only that a contractor may be compensated. From a contractor's perspective, this principle does not provide a firm basis upon which to claim compensation. Further, the Protocol's position that float is not for the exclusive use of the employer or the contractor and that the contractor is only entitled to an EOT if the Employer Delay is critical to achieving completion by the completion date., has been criticised for having the effect that

³⁹ Guidance Notes Paragraph 1.18

⁴⁰ Rochester, N., *An Introduction to the Delay and Disruption Protocol*, ACLB No. 89 March /April 2003 18

⁴¹ Core Principle 21

⁴² Guidance Notes Paragraph 1.19

a contractor will not be entitled to an EOT for an Employer Risk Event that delays its progress or prevents it from completing the work earlier than the completion date⁴³.

14. Other Guidelines

14.1 Extension of time procedure⁴⁴

The Protocol sets out a recommended procedure to be followed to allow for the assessment of extension of time applications. The Protocol recommends that the programme is used as the primary tool to be used by the CA in determining the amount of the EOT. A programme should be used in conjunction with contemporary evidence to ensure that the resulting EOT is fair and reasonable.

14.2 Disputed EOT after completion⁴⁵

The Protocol suggests that the analysis of the impact of events can be carried out retrospectively if the principles of the Protocol and programme management recommendations have been followed during the course of the works. If the Protocol principles and guidance have not been adopted, the method to analyse and assess delay and prolongation will largely depend upon:

- (a) the relevant conditions of contract;
- (b) the nature of the causative events;
- (c) the value of the dispute;
- (d) the time available;
- (e) the records available;
- (f) the programme information available; and
- (g) the programmers skill level and familiarity with the project.

The Protocol considers that adjudicators, judges or arbitrators should, so far as practicable, put themselves in the position of the CA at the time the Employer Risk Event occurred in determining whether the contractor is entitled to an EOT.

15. An Australian Approach to Apportionment for Delay⁴⁶

More recently there have been moves in the Australian courts to temper the rather draconian effect of the "prevention principle" in circumstances where there has been concurrent contribution to delay by both principal and contractor. The courts now seem prepared to contemplate that a party to a contract who has been prevented from fulfilling its contractual obligations by the conduct of the other party, cannot rely upon the failure by that other party if it could not have complied with its

⁴³ Rochester, N., *An Introduction to the Delay and Disruption Protocol*, ACLB No. 89 March /April 2003 18

⁴⁴ Guidance Notes Section 3

⁴⁵ Guidance Notes Section 4

⁴⁶ Dorter & Sharkey, *Building and Construction Contracts in Australia* (2nd Ed) Chapter 9 at 4746

contractual obligation in any event.⁴⁷ In Australia, the Courts have made an attempt to list the relevant principles in relation to the concept of prevention in relation to delay in construction contracts:

- (a) given an extension of time clause applicable to principal's culpable delay, together with a contractual regime or mechanism therefor, actual principal's delay has the effect that an extension of time should be granted and time is not put "at large";
- (b) such principal's delay must be actual, rather than potential;
- (c) similarly, there must be actual causation of delay; and
- (d) the overall impact of the principal's delay must be ascertained as an issue of fact.

per Rolfe J in *Turner Corp Ltd (in provisional liquidation) v Co-ordinated Industries Pty Ltd* (1995) 11 BCL 202 and on appeal (1996) 12 BCL 33; followed in *Australian Development Corp v White Constructions* (1996) 12 BCL 317. In the decision in *Turner*, his Honour considered that the "prevention principle" should apply only in circumstances in which the principal has caused actual delay, and that it was not sufficient that the principal potentially caused delay to completion of the work. The principal's delay must be "judged in all the circumstances of the case" and may allow some relief to the contractor.

16. Impact of the Protocol

As the Protocol is intended to be used as a guide for the interpretation of delay and disruption provisions contained in standard form building contracts, the Protocol has been criticised for not conforming with provisions in standard contracts. However, the Protocol was not intended to be consistent with the usual approach, rather provide for "the way things should work in the future"⁴⁸. Changes which have subsequently been made to some standard form contracts include:

- (a) clarification of time and cost risks to be borne by the principal;
- (b) increased flexibility to vary the way the work is managed;
- (c) detailed specification for the provision of programmes, method statements and historical progress records; and
- (d) an ability to vary the resources, method or sequence of the works.

Another criticism of the Protocol has been that it should have been drafted as a protocol rather than guidance tool⁴⁹. If the Protocol had been a more prescriptive document, its application would be more consistent. The increased costs of programming, record keeping and administration is another consideration which may deter widespread adoption of the Protocol.

Two years after the Protocol was first published, the Protocol could not be described as "common-place" in Australia, and it is likely that the recognition of the Protocol will take longer than it has in the United Kingdom. It may yet be too early to evaluate the effectiveness of the Protocol, as the

⁴⁷ *Turner Corp Ltd (in provisional liquidation) v Co-ordinated Industries Pty Ltd* (1995) 11 BCL 202

⁴⁸ Pickavance, K., *Putting the Protocol into Practice*, Hong Kong Society of Construction Law, March 2004

⁴⁹ Burr, A., Lane, N., *The SCL Delay and Disruption Protocol: Hunting Snarks*, (UK) Contr. L.J. 2003, 19(3), 135-143

continued usage of the Protocol by the construction industry, nationally and internationally, will lead to increasing familiarity with the mechanisms recommended by the Protocol.

It is, however, clear that the Protocol is a useful guide for administering a contract, and resolving disputes. The underlying principles in the Protocol, the need for clarification and pre-agreement between the parties on a range of issues which frequently give rise to disputation, before a contract is entered into, or at the time the contract is varied, is likely to have its desired effect to reduce the amount of disputes in relation to delay and disruption.