



The Importance of Strictly Complying with Notice Requirements on Australian Projects

IN SHORT

The Situation: Australian courts have regularly maintained that contractors must strictly comply with any express conditions for extra time or money under construction contracts, including conditions requiring written notice of an event (known as a "time bar"). A question commonly raised is whether the actions of a principal or principal's representative can amount to a waiver of the requirement.

The Development: In *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd*, the Supreme Court of Queensland provided useful guidance on waiver, finding that CMC's claims were not precluded because WICET, via a "principal's representative", had waived the requirement for strict compliance.

Looking Ahead: Principals need to make sure that they, or their agents, do not act inconsistently with the contractual requirements for contractors to strictly comply with notice provisions.

In Australia, courts have consistently held that contractors must strictly comply with any express conditions for extra time or money under construction contracts. This includes any condition requiring written notice of an event (known as a "time bar"). As a general rule, this strict approach is applied regardless of how onerous those requirements may be. Crucially, under Australian law, a failure to comply can operate as a complete bar to recovery under the contract.

This strict policy gave rise to the question of whether the actions of a principal or principal's representative can amount to a waiver of the requirement for a contractor to strictly comply with such contractual notification provisions.

Guidance from the Supreme Court of Queensland

Recently, the Supreme Court of Queensland provided useful guidance regarding situations where a waiver may succeed.

Background

Civil Mining & Construction Pty Ltd ("CMC") entered into a contract with Wiggins Island Coal Export Terminal Pty Ltd ("WICET") for bulk earthworks at the Wiggins Island Coal Export Terminal. Individuals from WorleyParsons were nominated under the contract as WICET's "principal's representative". CMC brought claims against WICET alleging that a series of directions from WorleyParsons gave rise to entitlements for variations and extensions of time.

Decision

Flanagan J found that CMC's claims were not precluded because WICET, via WorleyParsons, had waived the requirement for strict compliance with clause 35.5.

The court applied a long line of authority describing waiver as "an intentional act done with knowledge whereby a person abandons a right by acting in a manner inconsistent with that right" (*Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 406-407). In deciding that the notification requirements had been waived, Flanagan J cited Hammerschlag J's decision in *Corbett Court Pty Ltd v Quasar Constructions (NSW) Pty Ltd*, where the principal's conduct had "waived a right to insist on strict performance of the conditions of the Contract with respect to the making of claims generally which included waiving its right to

insist on performance of the particular formal requirements in respect of the delay claim".

Importantly, his Honour also found that WICET could not rely on a generic "no waiver" clause in the contract because that clause could itself be (and had been) waived by WICET's conduct. His Honour noted that any requirement for a waiver to be in writing "is subject to the exception that a waiver may arise at law or in equity".

Critical Elements

Contractors

Despite there being an effective waiver in this case, the case is no silver bullet and the decision serves as a timely reminder for contractors that the default position under Australian law maintains that strict compliance with contractual notice requirements of this kind (time bars) is a prerequisite to bringing a claim. Time bars are the single biggest weapon that can be deployed against contractors in any dispute and only in some limited circumstances will a waiver exist.

Contractors must ensure that they have systems in place to generate and store detailed contemporaneous project records, and that they comply with mandatory notice requirements under any construction contract. Failure to do so, even to a trivial degree, can completely relieve the principal from liability for what would otherwise be a valid claim for time or costs.

Contractors often complain that it is not "reasonable" to comply with onerous notification requirements under a construction contract, or that doing so would jeopardise the client relationship. Remember:

- It is invariably the client's contract and it is the client who requires the notices to be given, so you are just delivering what the client has asked for;
- By giving the notices, the contractor is providing the client with up-to-date information about the client's project which allows the client to make informed decisions (such as claiming "up the chain"); and
- If the client complains that it no longer wants notices to be issued, contractors ought simply ask for that request to be made in writing before it complies.

Principals

This case serves as a wake-up call. Principals must ensure that they, or their agents, do not act inconsistently with the contractual requirements for contractors to strictly comply with notice provisions. The "no waiver clause" backstop might not save you. If a principal or principal's representative intends to grant an extension of time that has been made out of time, then you must ensure that the claim is granted expressly without prejudice to the principal requiring and reserving its right to require strict compliance for all other claims.

TWO KEY TAKEAWAYS

1. The case should remind contractors that the default position under Australian law is that strict compliance with contractual notice requirements is a prerequisite to bringing any claim. Contractors ought to have systems in place to generate and store project records and comply with mandatory notice requirements under construction contracts.
2. Principals must be careful not to grant what would otherwise be time-barred claims for time or cost without expressly reserving their rights to insist upon strict compliance with such notice requirements.



Time bars are the single biggest weapon that can be deployed against contractors in any dispute and only in some limited circumstances will a waiver exist.



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