

STATEMENT



Embargoed until 23 January 2015

AS 11000: General conditions of contract

Standards Australia (SA) Technical Committee MB-010, *General Conditions of Contract*, is currently revising the suite of Standards related to general conditions of contract, AS 2124: 1992 and AS 4000: 1997. Under the proposed revision, the two existing Standards are to be merged into a new suite of Standards, AS 11000: *General conditions of contract*. The proposed AS 11000 is meant to supersede AS 2124:1992 and AS 4000:1997.

The objective of AS 11000 is to provide general guidance for legal contracts in all sectors of industry, including construction, engineering, health, manufacturing and infrastructure. A summary of the main proposed changes in AS 11000 are listed in **Annex I**. Further technical details on the proposed changes may be found in the explanatory notes accompanying this statement at **Annex II**.

The draft AS 11000 was prepared by a drafting team comprising representatives from the Society of Construction Law, the Australian Procurement and Construction Council (APCC), Austroads, Australian Institute of Architects (AIA), Construction Industry Engineering Services Group (CIESG) and Civil Contractors Federation of Australia (CCF). The drafting team is part of Technical Committee MB-010, which comprises stakeholders from regulatory bodies, industry groups, law associations and public authorities.

The Technical Committee MB-010 is chaired by Professor Ian Bailey, who represents the Society of Construction Law and the Australasian Procurement and Construction Council.

Professor Ian Bailey said, "The proposed new general conditions of contract in AS 11000 provide a broadly balanced approach to risk allocation in language which is focused on brevity and certainty. They include a new early warning procedure based upon an express good faith obligation, which is intended to assist in the management and resolution of issues under contracts."

The Committee is also working on a proposed separate standard AS 11001 on dispute resolution and management in contracts, which will be a companion to AS 11000.

"The development in parallel of a new Standard setting out alternative procedures for efficient management and resolution of disputes, including a contract facilitation model, should provide benefits to industry and commerce by reducing the cost of management and administration of contracts," said Professor Bailey.

Dr Bronwyn Evans, Chief Executive Officer of Standards Australia, welcomes public feedback on the revised Standard.

“The Standard on General Conditions of Contract is used widely and underpins many major business and public contracts. It is timely to update the Standard to bring it in line with new legislation and changing business needs. As part of our open and transparent standards development process, we welcome public feedback on the revisions,” said Dr Bronwyn Evans.

Leading up to the current draft, Standards Australia held two forums in Sydney and Melbourne to gather input from a wide cross-section of industry on desired changes to be incorporated into the new Standard. Following these forums, four subcommittees and one working group were created to work on issues raised at the forums.

The subcommittees and working group dealt with the following issues:

- Risk allocation;
- Good faith;
- Programming;
- Extensions of time;
- Payment provisions;
- Impact of the various Security of Payment Acts on the General Conditions; and
- Dispute resolution.

Recommendations from the four subcommittees and working group have been fully considered by the Technical Committee and incorporated into the current draft where possible.

In accordance with Standards Australia’s standards development process, the proposed draft AS 11000 will be open for public comment starting Friday, 23 January 2015. The last day for public comment will be Friday, 27 March 2015.

All draft Standards for public comment and instructions on how to comment are listed at the following link:

<https://sapc.standards.org.au/sapc/public/listOpenCommentingPublication.action>

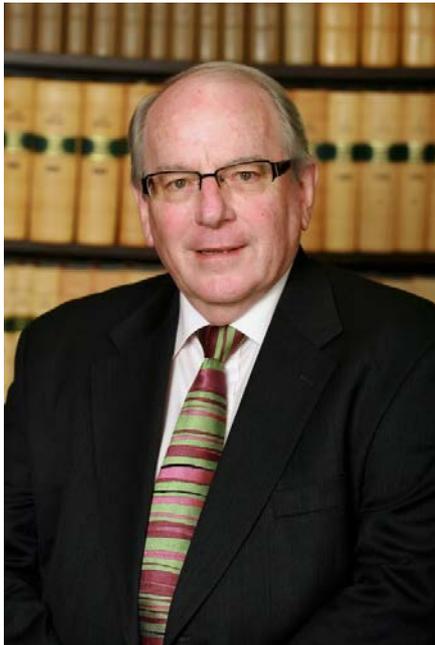
Standards Australia is conscious of the need for continued work on AS 11000 and remains committed to the openness and rigour of its standards development process.

ANNEX I



Summary of proposed changes in AS 11000: General Conditions of Contract

- a. Structural changes: AS 11000 is to replace AS 2124:1992 and AS 4000:1997. Companion standards will bear numbers AS 11000 to AS 11020.
- b. Clauses requiring each party to act in good faith and to initiate an early warning procedure should issues arise under the Contract;
- c. Additional options in dispute resolution procedures;
- d. Provisions included to enable compliance with the "Security of Payment" Acts of the States and Territories;
- e. Amendments to the payment clause to comply with the "Security of Payment" Acts;
- f. A clause requiring any bill submitted to be priced, and a separate clause on Schedule of Rates;
- g. Service of notice by email is now catered for;
- h. Main contractors are now required to use AS 11002 on subcontract conditions;
- i. The term 'excepted risks' has been re-titled 'Principal's risks';
- j. Changes to the Principal's obligations with respect to the role of the Superintendent;
- k. In relation to quality, the Contractor is now under a specific obligation upon becoming aware of work that does not comply with the Contract to rectify such work without being given direction;
- l. Extensions of time are now measured in working days;
- m. Changes to strengthen the programming provisions and to give the Superintendent power to accelerate the Works;
- n. Specific obligation on a party to notify delays promptly within 5 business days by giving written notice;
- o. Clarifications on the causes of delay and the basis of assessment for extensions of time;
- p. Differentiation between 'delay damages' and 'delay costs';
- q. Changes to the 'variation' clause on appropriate responses to 'direction' and 'variation' of contract;
- r. Prices and rates generally are to include allowance for overheads and profit;
- s. If the relevant "Security of Payment" Act applies, then the Superintendent has the authority to act as the Principal's agent in receiving payment claims and issuing payment schedules;
- t. The dual certificate regime of AS 4000 has been replaced with only one certificate required for the amount payable;
- u. Major change to the regime of pre-payment for unfixed items to include two alternatives;
- v. Language on the clauses on notification of claims and liability of failure to communicate;
- w. Clarification and improvements to Annexure Part A of the Standard.



Professor Ian Bailey
Chair of Standards Australia Technical Committee MB-010



Dr Bronwyn Evans
Chief Executive Officer of Standards Australia

About Standards Australia

Founded in 1922, Standards Australia is an independent, not-for-profit organisation, recognised by the Commonwealth Government as the peak non-government Standards development body in Australia. It is charged by the Commonwealth Government to meet Australia's need for contemporary, internationally-aligned Standards and related services. The work of Standards Australia enhances the nation's economic efficiency, international competitiveness and contributes to community demand for a safe and sustainable environment. Visit <http://www.standards.org.au>

ANNEX II



Explanatory notes on proposed AS 11000: General Conditions of Contract

Introduction

Standards Australia has made a commitment to revising AS 4000:1997 and AS 2124:1992, the suite of Australian standards related to General Conditions of Contract. The Technical Committee MB-010 was constituted late 2013 and draft development began in January 2014. The proposed result of this review is the publication of only one document on General Conditions of Contract, and the discontinuation of the two current suites of Contracts based on AS 2124:1992 and AS 4000:1997.

A wide range of stakeholders were identified as having an interest in the revision of the General Conditions. These stakeholders include:

- Australasian Procurement and Construction Council
- Australian Institute of Architects
- Australian Land Development Engineers
- Australian Constructors Association
- Australian Consulting Architects
- Australian Industry Group
- Australasian Health Infrastructure Alliance
- Australian Institute of Project Managers
- Australian Institute of Building
- AUSTROADS
- Civil Contractors Federation
- Construction Industry Engineering Services Group
- Consult Australia

- Dispute Resolution Board of Australia
- Engineers Australia
- Housing Industry Association
- Master Builders Association
- Public Transport Authority, Western Australia

In principle, it was agreed that a new standard should ideally be adopted by all sectors of the industry. A drafting team from the technical committee began work on the draft of AS 11000 in January 2014. The technical committee also adopted the Abrahamson Principles of risk allocation recommended by the National Building Council (NBCC) and the National Public Works Council (NPWC) in a May 1990 report entitled 'No Dispute - Strategies for improvement in the Australian building and construction industry'. The Abrahamson Principles set out that:

"A Principal should not ask a Contractor to price an unquantifiable risk which is within the control of the Principal."

Given the fundamental structural changes of the proposed new standard, Standards Australia agreed to redesignate the Standard as AS 11000, and for its associated suite of Standards to be numbered up to AS 11020. The technical committee has worked continuously for the past 8 months to finalise the current draft, which is being issued for public comment to enable the industry to have input to the Standard.

Leading up to the current draft, SA arranged two forums in Sydney and Melbourne to gather input from a wide cross-section of industry on desired changes to be incorporated into the new Standard. Following these forums, SA created four subcommittees and one working group to further develop issues raised at the forums. These Subcommittees and working group dealt with the following issues:

- Risk allocation;
- Good faith;
- Programming;
- Extensions of time;
- Payment provisions;

- Impact of the various Security of Payment Acts on the General Conditions; and
- Dispute resolution, in particular whether advanced forms of dispute resolution procedures such as Facilitation and Dispute Resolution Boards should be incorporated into the General Conditions.

Recommendations from these subcommittees and working group have been fully considered by the MB-010 technical committee and have been incorporated into the current draft as far as possible.

Proposed changes to structure and content

The following sections give further details on the main proposed changes in AS 11000. All changes and revisions are only proposed at this point and may be subject to further modification after the public comment process.

A. Structural changes

1. AS 11000 Standard Conditions of Contract is the first Standard in a proposed suite of Contract Conditions intended to replace AS 2124-1992 and its suite of Contracts, and AS 4000-1997 and its suite of Contracts. It has been given the designation of AS 11000-(year of publication). Companion Standards in the new suite will bear numbers AS 11000 to AS 11020.
2. AS 11000's numbering style differs from its predecessors. Each paragraph is now separately numbered. This is intended to eliminate repetition of subparagraph numbers (a), (b), (c) etc., within a clause, which currently exists in both the AS 2124 suite and the AS 4000 suite.
3. The acronyms *WUC* (*work under the Contract*) and *EOT* (extension of time), previously in AS 4000, are discontinued as substitutes for those two phrases.
4. Defined terms remain italicised to enable easy reference in the text.
5. The current draft of AS 11000 is drafted so as to observe the same principles of risk allocation (the Abrahamson Principles – set out in the document “No

Dispute”) which underlie the basis of risk allocation in both AS 2124-1992 and AS 4000-1997 and their respective suites of Contracts.

6. Standards Australia is exploring product delivery in a form which is more appropriate for standard form contracts. It is anticipated that the standard will be available in a form which meets the contemporary needs of users on publication.

B. Proposed Major changes in content

1. Clause 2 contains two basic obligations on the parties. Subclause 2.1 requires each party to act in **good faith** towards the other and sub clauses 2.2 to 2.5 initiate an **early warning procedure** whereby events and circumstances, which may become an issue under the Contract, are required to be notified by either party or by the Superintendent to attempt prompt resolution of the issue by the parties and the Superintendent.
2. Coupled with the *early warning procedure* above, are more flexible dispute resolution procedures in clause 45. Proposed is an option for the parties to choose to resolve disputes either by a conference followed by arbitration, or by a conference followed by expert determination. Other forms of dispute resolution procedures such as Facilitation and Dispute Resolution Board are referred to in clause 45 and a separate Standard, at this stage, anticipated to be numbered AS 11001, is foreshadowed to enable the parties to utilise these alternative forms of dispute resolution procedures if the nature of the project lends itself to either of those more formalised forms of Contract management procedures throughout a project.
3. Provisions have been included to enable compliance with the various “Security of Payment” Acts of the States and Territories. In particular, time in the proposed Standard is to be calculated in *business days*. The General Conditions incorporate into the Contract a definition of *business day* as defined in the relevant Security of Payment Act of the jurisdiction of a State or Territory, and where a Security of Payment Act does not define a *business day*, (for instance in Western Australia and Northern Territory) the *business day* definition set out in subclause 1.2(b) of the proposed Standard will apply.

4. Amendments to the payment clause (40) will facilitate the administration of the Contract by giving the Superintendent power to receive and issue documents on behalf of the Principal so as to comply with the relevant SOP Act, where the relevant Act requires such documents to be received or issued by the Principal rather than the Superintendent.
5. Clause 4 deals specifically with Bills of Quantities and requires any Bill submitted, whether or not it is to form part of the Contract, to be priced. A separate clause 5 deals with Schedule of Rates.
6. In respect of "Service of Notices", service by email is now catered for.
7. In clause 12, it is proposed that the Main Contractor will be required to use AS 11002 subcontract conditions, containing no other amendments or additions to those subcontract conditions except those necessary to reflect the Contract between the Principal and the Contractor. Failure to comply with this requirement is proposed to be a substantial breach by the Contractor.
8. In clause 17, Care of the work and reinstatement of damage, the "*excepted risks*" have now been re-titled as "*Principal's risks*".
9. Substantial proposed changes have been made to the Principal's obligations with respect to the role of the Superintendent. A return to and clarification of the regime of AS 2124 in this regard is proposed in the new Standard, in particular, where the Superintendent is required to certify, assess, price, measure or value work qualities of time, or to act reasonably, the Superintendent must act impartially, otherwise the Superintendent acts as agent for the Principal.
10. In relation to quality in subclause 32.1, the Contractor is now under a specific obligation upon becoming aware of work that does not comply with the Contract to rectify such work without the necessity for the Superintendent to give a direction to do so.

11. Extensions of time are now measured in *working days*. A *working day* is now a defined term in subclause 1.1, whilst with the giving of notices however, time is always calculated in *business days*.
12. In clause 35, substantial changes have been proposed to strengthen the programming provisions of clause 35 and in addition to the three specific programming requirements in subclause 35.5, the parties can also agree to additional requirements as set out in Annexure Part E. Subclause 35.10 also gives the Superintendent power to accelerate the Works. The existing power to change the sequence and order of work remains in subclause 35.4.
13. There is now a specific obligation in subclause 37.2 on a party to notify delays promptly and in any event within 5 *business days* by giving the Superintendent and the other party written notice of the cause and estimated delay. The subclause also requires the Contractor to state in its notice of delay whether the Contractor anticipates it will be claiming an extension of time in respect of such cause of delay.
14. The causes of delay have now been clarified further in these Contract Conditions in subclause 37.4. For events beyond the reasonable control of the Contractor which cause delay and which occur before the *date for practical completion*, the Contractor is entitled to an extension of time if *practical completion* is or may be delayed, whilst delays occurring after the date of *practical completion* either by a *variation* or by a Principal's *act of prevention* (which no longer includes a variation as it did in AS4000) are separate grounds for an extensions of time.
15. Subclause 37.6 clarifies overlapping delays in that where a delay occurs which would otherwise enable the Contractor to be entitled to an extension of time, and that delay overlaps a delay for which the Contractor is not entitled to an extension of time, the clause allows the Contractor an extension of time but no delay damages even if another overlapping cause of delay is an *act of prevention* by the Principal.

16. Substantial proposed changes have been made to the assessment of extensions of time. The Superintendent now has an option in subclause 37.9 either to assess and direct an extension of time within 20 *business days* or to give a notice within that time notifying the Contractor that the Superintendent requires more information to enable an assessment of extension of time. If the Contractor complies with the written direction to provide such additional information within the stated time, the Superintendent has a further 20 *business days* to assess the extension of time. Failure by the Superintendent to do so within the time required will entitle the Contractor to an extension of time as claimed as though the Superintendent had assessed the same, provided the *early warning procedure* has not in the meantime, been invoked by a party or the Superintendent.
17. Subclauses 37.22 now allows delay damages only for delay to practical completion by a Principal's *act of prevention* whilst delay costs are now payable for delays to *practical completion* due to a *variation*. There is now a differentiation between "delay damages" and "delay costs".
18. A substantial change has been proposed to the *variation* clause 39. In particular subclauses 39.3 and 39.4 introduce a new regime that if the Contractor considers a *direction* to be a *variation*, the Contractor, within 5 *business days* of receipt of the *direction*, may notify the Superintendent that the effect of the *direction* constitutes a *variation* and the Superintendent is then required within 5 *business days* to respond. If the Superintendent disagrees that it is a *variation* then the *early warning procedure* contained in subclauses 2.2 to 2.5 can be invoked.
19. In relation to pricing *variations*, rates and prices generally are to include allowance for overheads and profit unless otherwise stated, whilst there is a specific right to recover delay costs for delays caused by a *variation* if not already priced as part of the *variation* under subclause 39.2.
20. Subclause 40.1 provides, if the relevant SOP act applies, that the Superintendent has the authority to act as the Principal's agent in receiving payment claims and issuing payment schedules under the relevant SOP act.

21. The dual certificate regime of AS 4000 has been abandoned and the Superintendent now issues only one certificate for the amount payable to a party, thus enabling the certificate to comply with the relevant SOP Act as a payment schedule under that Act.
22. Also, a major change has been proposed to the regime of pre-payment for unfixed items. Subclause 40.10 contains two Alternatives, the first of which provides that the Contractor is not entitled to pre-payment for unfixed items whilst the second Alternative allows pre-payment subject to the conditions set out in subclauses 40.12 and 40.13 being satisfied by the Contractor.
23. Notification of claims clause 44 retains the same procedures and effect as clause 41 of AS 4000, save and accept that the clause dealing with liability of failure to communicate a claim is now placed at the end of the clause rather than the middle of it.
24. An updated Annexure Part A has been included in the document to clarify, where appropriate, the options that are given to the parties in relation to the formation of the Contract.

ENDS.