



CONQUERING CONCURRENCY

Part 1: What is concurrent delay?

Assessing concurrent delay in relation to extensions of time and delay damages is often a problematic and complicated issue.

Not only is it necessary to identify the causes of delay, but depending on the terms of the contract and/or the jurisdiction (and hence the applicable law), it may also be necessary to apportion liability when there has been contribution to the delay by both the employer and the contractor. At the same time, neutral events, such as force majeure and parallel critical paths, together with contractor acceleration and/or mitigation measures may need to be considered.

In this two-part series on concurrent delay, we cover the following:

Part 1 - Gives an introduction to concurrent delay and explores what it is and is not; and

Part 2 - Explores the clauses on concurrent delay in relation to both time and money in standard form contracts in common use across Australia.

The preferred approach for assessing extensions of time and delay damages where there is concurrent delay is uncertain. This is partly attributable to the uncertainty and confusion as to how concurrent delay is defined and categorised in construction contracts. The standard form contracts differ in their apportionment of risk and in defining what concurrent delay actually is. Further, as we will see in Part 2, contract provisions either contain ambiguities and/or provide very little, if any, guidance on how extensions of time are to be assessed where there is concurrent delay.

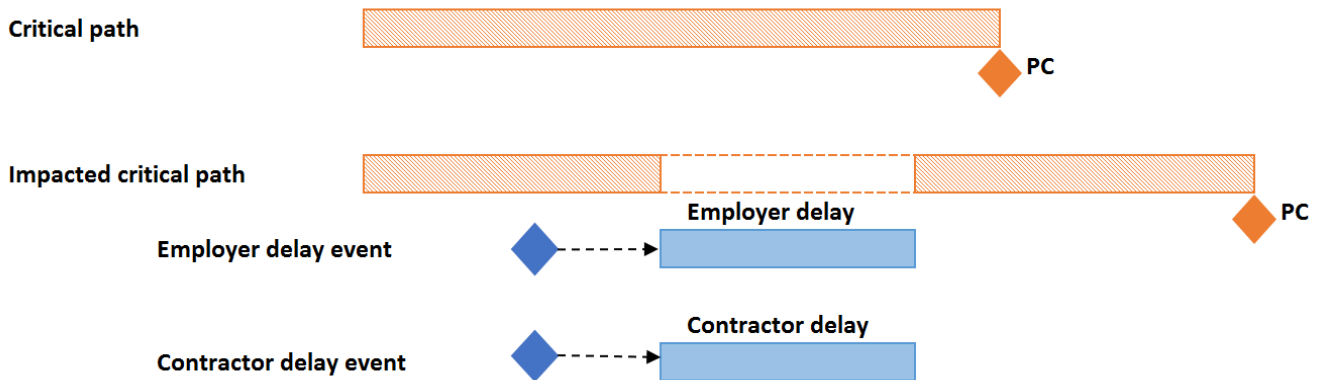
In addition, there is limited judicial guidance from the courts. Very often, decisions of the courts, whilst appearing to bring new and fresh guidance on concurrent delay, are actually considered against the specific circumstances and facts of each individual case.

As a result, the approaches adopted to assess extensions of time and delay damages where there is concurrent delay can be very subjective and this gives rise to differences of opinion and, in many cases, costly disputes.

What is concurrent delay?

There is no single generally accepted definition of concurrent delay. A narrow definition of concurrent delay is 'true concurrency'. True concurrency is where the employer and contractor delay events occur at the same time and cause a delay to progress for the same period sharing the same start and finish dates, either of which, in the absence of the other, is likely to cause the same delay to the completion of the works. True concurrency is illustrated in figure 1.

Figure 1: True concurrency



In true concurrency, the employer and contractor delay events both occur at the same time and the delay caused by the delay events start and finish at the same time.

In figure 1, the employer and contractor delay events both impact the same single critical path.

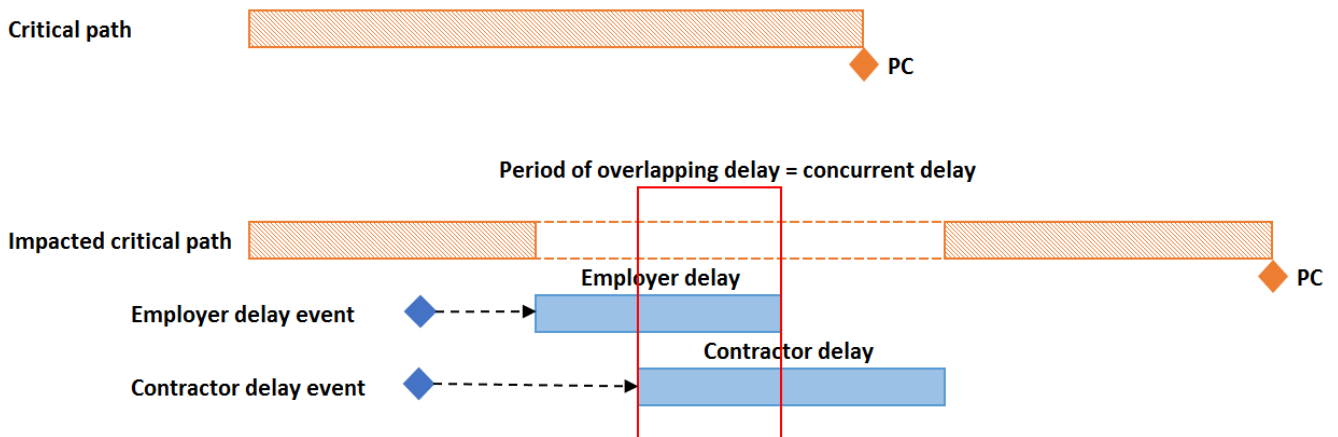
True concurrency is unlikely to occur, and it has been argued by some that this narrow definition of concurrent delay is possibly too limited for practical application.¹

In contrast, Keating says that it is probably sufficient to say that:²

- each delay event, in the absence of any competing event, has caused delay;
- each delay event is on the critical path; and
- the delays caused by the employer and the contractor overlap.

Keating’s ‘overlapping’ concurrent delay gives a scenario where the employer and contractor delays commence at different times but overlap for a period of time; the period of overlap being the period of concurrent delay. This is illustrated in figure 2:

Figure 2: Keating’s ‘overlapping’ concurrent delay



In figure 2, the critical path is impacted by both the employer and contractor delay. The periods of delay in figure 2 are:

- period of employer delay only; followed by
- period of employer and contractor delay overlapping (the concurrent delay); followed by

- period of contractor delay only.

Figure 2 shows the contractor delay starting after the employer delay but running concurrently with the employer delay for a period of time. However, Keating does not suggest which delay is to occur first. Would there be concurrent delay for example, if contractor delay started first followed by employer delay as in the Society of

¹ Stephen Furst and Vivian Ramsey, Keating on Construction Contracts (10th ed, Sweet & Maxwell, 2016), [8-025].

² Stephen Furst and Vivian Ramsey, Keating on Construction Contracts (10th ed, Sweet & Maxwell, 2016), [8-025].

Construction Law Delay & Disruption Protocol (“SCL Protocol”) scenario in figure 4 below? There are differing views.

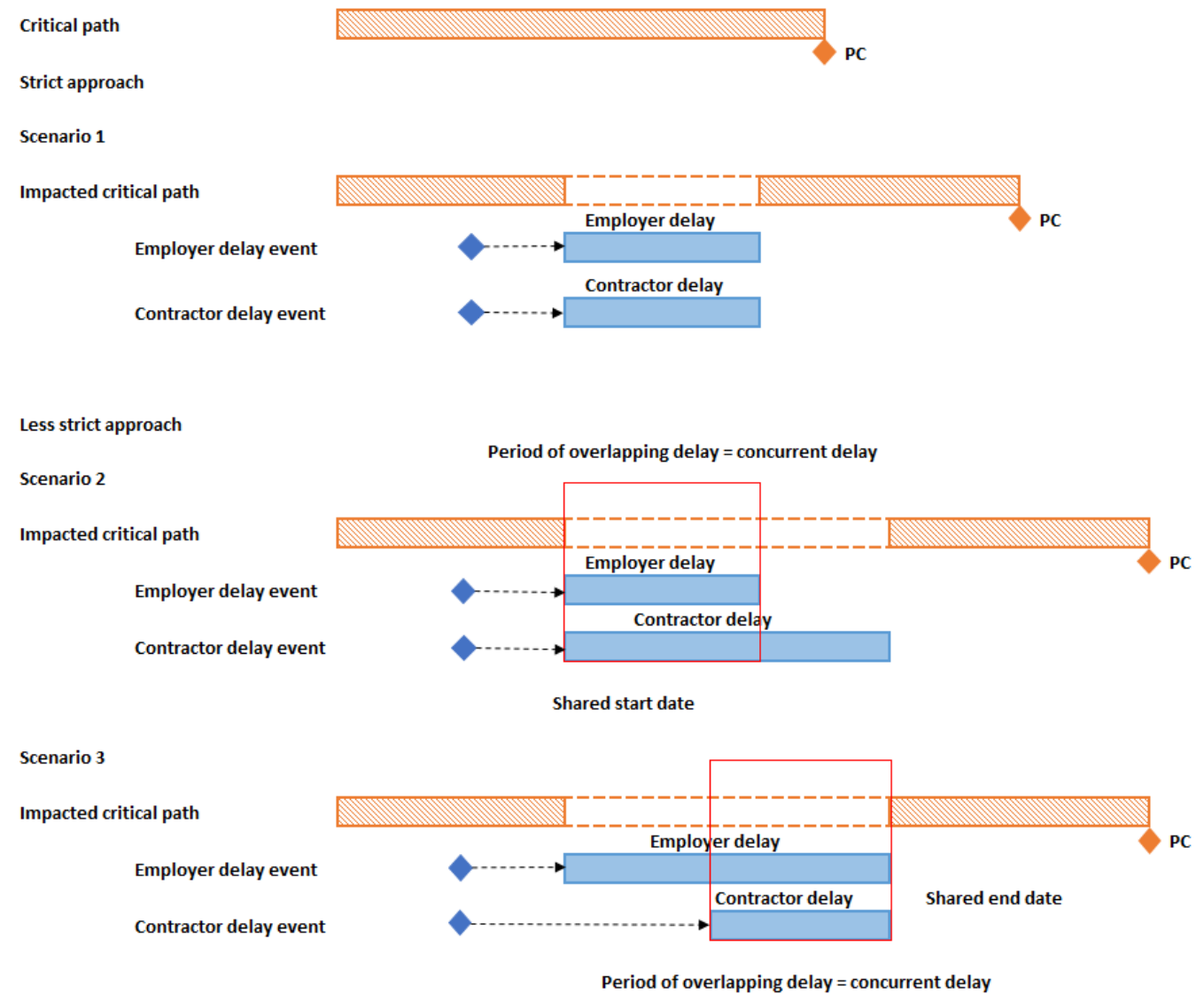
In *City Inn v Shepherd Construction*, (“*City Inn*”) the court said that one of the problems using such expressions as “concurrent delay” or “concurrent events” is that they may refer to a number of different situations.

In *City Inn*, the court uses the term “event” to describe the period of delay rather than to describe the cause of the delay. In summary, the court in *City Inn* describes events (delays) as concurrent on a strict approach plus, as the authors’ have called it, a less strict approach, as follows:³

- Strict approach:
 1. Events (delays) are concurrent only if they were contemporaneous or co-extensive, in the sense that they shared a starting point and end point in time.
- Less strict approach:
 2. If some part of their duration they overlapped in time; or
 3. If they possessed a common starting point or a common end point; or
 4. If they “possessed a causative influence upon some subsequent delay, such as the completion of works, even though they did not overlap in time”.

The *City Inn* strict and less strict approaches are further illustrated in figure 3 as follows:

Figure 3: City Inn concurrent delay



³ *City Inn v Shepherd Construction Ltd* (2010) CSIH 68 CA101/00 at [49]

City Inn’s strict approach (Scenario 1) is true concurrent delay. Scenario 2 of the less strict approach illustrates concurrent delay where the delays possess a common start point and overlap for part of their durations, and Scenario 3 illustrates concurrent delay where the delays overlap and possess a common end point.

In relation to *City Inn* point 4, if the delays possessed a causative influence upon some subsequent delay, such as the completion of works, even though the delays did not overlap in time, this appears to refer to delays occurring sequentially but having the same effect on completion of the works.

Subsequent to *City Inn*, in *Adyard Abu Dhabi v SD Marine Services*⁴, the court added that “...there is only concurrency if both events **in fact cause delay to the progress of the works** and the delaying effect of the two events is felt at the same time” and also that the “... act relied on must actually prevent the contractor from carrying out the works within the contract period or, in other words, must cause some **actual delay**.”[Authors’ emphasis added]

For Keating’s ‘overlapping’ definition and *City Inn*’s less strict approaches to satisfy *Adyard*, is it possible for the delay that started second, but overlapped with the first delay, to have actually caused delay during which the delays are concurrent? If the employer delay occurs second, how could that actually delay the carrying out the works unless it continues after the contractor delay ends? This

scenario and the differing views are considered in figure 4 below.

The SCL Protocol’s definition of ‘true concurrency’ is:⁵

“10... 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 time. For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion (i.e. the delays must both affect the critical path)...”

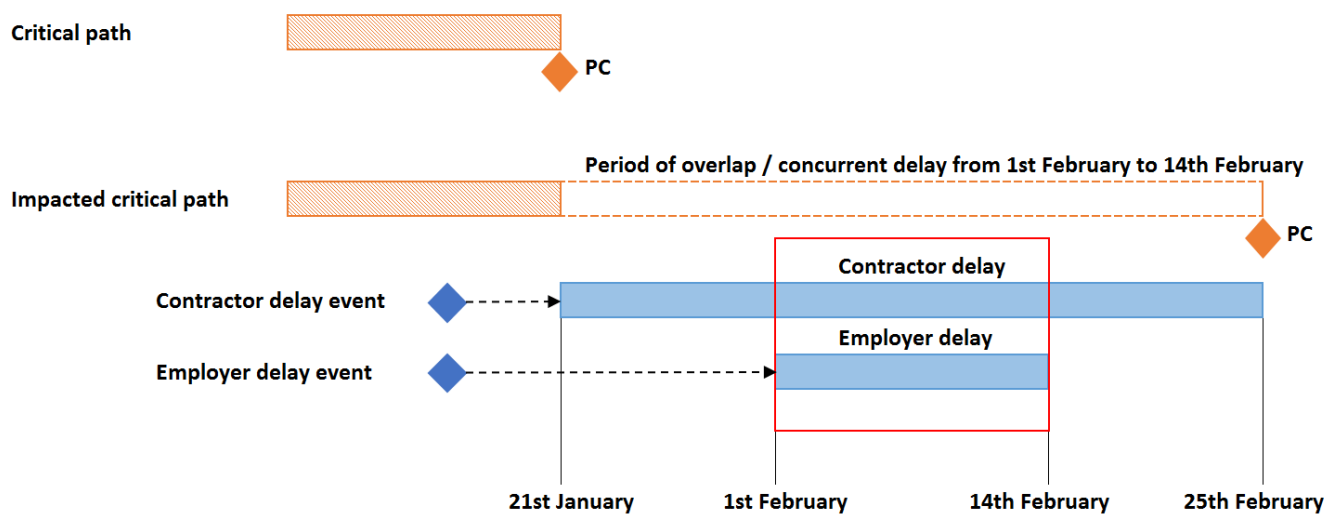
The SCL Protocol, however, observes that “... a more common usage of the term ‘concurrent delay’ concerns the situation where two or more delay events arise at different times, but the effects of them are felt at the same time.”⁶

The SCL Protocol emphasises that there are competing views as to whether an employer delay is an effective cause of delay when it occurs after the commencement of the contractor delay but continues concurrently with the contractor delay. The SCL Protocol illustrates this point with a scenario where there is:⁷

- contractor delay to completion, delaying the contract completion from 21st January to 25th February; and
- a few weeks after the 21st January a variation is instructed by the employer which would have resulted in delay from 1st to 14th February, had there been no contractor delay.

This scenario is illustrated in figure 4.

Figure 4: SCL Protocol’s example of whether there is concurrent delay



⁴ *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm) para 279

⁵ SCL Protocol 2nd edn, Guidance part B: Guidance on core principles, first paragraph page 30

⁶ Society of Construction Law, *Delay and Disruption Protocol* (2nd ed, 2017) para 10.4

⁷ Society of Construction Law, *Delay and Disruption Protocol* (2nd ed, 2017) para 10.8

In this scenario, the SCL Protocol considers two views as to whether there is concurrent delay. The first view being that both the contractor and employer delay events are effective causes of delay to completion for the two-week period from 1st to 14th February. This is because each of the events would have caused delay in the absence of the other.

The second view is that, because the works were already in delay as a result of the contractor delay, the employer delay has caused no further delay and there is therefore no concurrency.

The SCL Protocol recommends the view that, because there was already contractor delay:

- the employer delay event should not be seen as causing delay, therefore there is no concurrency; and
- concurrent delay only arises where the employer delay event is shown to have actually caused delay to completion.

The SCL Protocol's position on concurrent delay is influenced by the law on the 'prevention principle' and takes away the argument about whether an employer delay acting concurrently with a contractor delay hinders the contractor's progress.

Concurrent delay is neither 'pacing' nor 'parallelism'

Pacing

A situation in which there may appear to be concurrent delay is where an employer causes delay to the construction of a project and the contractor then decides to reduce its resources for part or all of the delay period knowing that its rate of progress can be slower than planned without causing any further delay to that caused by the employer. This is often referred to as 'pacing' by the contractor and is not concurrent delay.

Parallelism

Parallelism is where just one party (in this example the employer) is liable to the other (in this example the contractor) for more than one cause of the same delay. Where parallelism occurs, two or more causes of delay will be at the employer's risk, for which one of the causes may give the contractor entitlement to both an extension of time and loss and expense, and the other an entitlement to an extension of time only. An issue arises therefore as to whether the contractor is entitled to:

- an extension of time only; or
- an extension of time and loss and expense?

Where the contract does not set out the parties' position in such a situation, then the loss will lie where it falls, in this case upon the contractor.

Summary

This Part 1 has given an introduction to concurrent delay and has briefly explored what concurrent delay is and is not. The authors have noted that assessing concurrent delay in relation to extensions of time and delay damages is often a problematic and complicated issue.

There is no single accepted definition of concurrent delay. Further, there is the inconsistent language and terminology used to describe concurrent delay scenarios as emphasised by the court in *City Inn*. The SCL Protocol goes on to illustrate the differing views on whether there is concurrency if contractor delay starts before, but later overlaps with employer delay.

Part 2 of this article will explore clauses addressing concurrent delay in relation to both time and money in the Australian Standard form contracts.

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