

Construction Law Update

Findings into the use of standard form contracts in construction

Release of the "Standard Forms of Contract in the Australian Construction Industry" research report

WHAT YOU NEED TO KNOW

- A report into the use of standard form contracts in the Australian construction industry has been released by the University of Melbourne's Law School and the Society of Construction Law Australia.
- A large portion of the construction contracts used in Australia are based on standard forms, with AS4000 and AS2124 found to be considered the most suitable standard forms for use without amendment. The principal or the principal's lawyer was responsible for choosing the standard form for over 80% of the projects surveyed.
- This Report is a valuable summary of the standard forms available for use, and also more widely internationally recognised contracts.
- The findings of this Report also provide insight into the issues for consideration in the next review of Australian standard form contracts.

The Melbourne Law School, with the support of the Society of Construction Law Australia, has just released a [report](#) into the use of standard form construction contracts in Australia (**Report**). The Report was based on a web survey and interviews conducted with legal advisors (both external and in-house), contractors and subcontractors, commercial teams and contract administrators.

The Report provides a useful summary of the standard form contracts used in the Australian construction industry, as well as contracts from international sources, such as the FIDIC forms. A full summary of the findings can be found on pages 4 and 5 of the Report.

Prominence of standard form contracts

The Report indicates that standard form contracts were used on 68% of the projects surveyed and that there is broad support in principle for having suitable standard forms available for use by the industry.

The most prominent reason identified for their use is their familiarity, and their perception as an important benchmark of reasonableness. Other factors listed as

influencing the use of standard forms were (listed in order of importance):

- suitability of the standard form to the risk profile;
- ease of contract administration through the use of the form;
- minimising transaction and legal costs;
- best reflecting the 'deal';
- well-drafted form;
- form was recommended or mandated by a party's organisation, such as government tendering requirements; and
- gaining a commercial advantage for the party procuring the work.

Despite standard forms being consensus forms and more likely to be 'fair' to all parties, they are likely to contain compromises. The majority of individuals surveyed felt there was no standard form which could

be used without substantial amendment. One contractor interviewee even commented that contractors were required to 'put up with' Australian Standards because they had no choice.

Notwithstanding this finding, AS4000 and AS2124 were identified as the most suitable standard form contracts to use without amendment.

Which standard forms are used?

In considering the projects which used a standard form contract, AS4300 was used on 23% of these projects, 18% used AS4000, 17% used AS2124 and 14% used AS4902. In over 80% of these cases, the principal or the principal's lawyer was responsible for choosing the standard form.

The Report indicates that there is a large gap between the use of Australian Standard contracts and the use of other available standard forms such as FIDIC and Australian Building Industry Contracts. FIDIC standard forms were mainly used on relatively high value projects (eg those over \$100m) and in private sector infrastructure projects.

Amendments to standard forms

Despite the high proportion of construction contracts based on standard forms, 84% of these contracts were amended. The research did not seek to identify the extent of the amendments, only that these were "*typically voluminous*".

The primary reasons for amendment found were (listed in order of importance):

- the need to shift risk to another party;
- the need to reflect regulatory requirements, such as GST legislation;
- increasing the ease of contract administration; and
- to remedy poorly-drafted clauses.

In terms of the types of clauses amended, most modified standard forms had amended extension of time clauses, followed by delay damages, site conditions, payment, and then variation clauses. The lowest number of amendments were additions to dispute resolution, contract administration and inspection/testing clauses.

The possible effects of amendments were identified as increased understanding between the parties and efficiency in project administration. However, the report identified that amendments may also lead to the need for legal advice, increased costs and disputation.

Amendments to risk allocation

The Report also considered clauses which were added to the standard form contracts. The main clauses were those which limited the liability of the contractor and capped liquidated damages. This was viewed as important to contractors' preferred contractual risk matrix.

The concept of risk allocation was also considered in our [*Scope for Improvement 2011: Project risk - Getting the right balance and outcomes*](#) report* which was referenced by the Report. The results of the Report were consistent with the findings of the Scope for Improvement Report, especially that the requirements of the principal was the key factor influencing risk allocation, and that risk allocation was of great importance to parties choosing to use a standard form.

Implications for practitioners

This Report highlights the widespread use of standard form contracts in the Australian construction industry. However, the high rate of amendments to these contracts confirms that at present very few projects are suited to the blanket application of the standard form contracts currently available.

The possibility of a single form for use on most projects and without substantial amendment was raised in the Report. There are a number of obstacles to this concept. The standard form would be required to reflect the diverse nature of projects, sophisticated legislative requirements and ever-changing financing requirements. It is therefore likely that a single form would still require substantial amendments.

If amendments are to be made to standard form contracts, these changes should be drafted or reviewed by a construction law specialist. This is to ensure the provisions can operate within the greater contract and that clauses are not drafted with the effect of placing onerous obligations on the amending party.

The need for a revised standard form has also been recognised by Australian Standards in their decision to review the major works standard forms. The findings

of this Report provide useful discussion on the issues which may be considered in any standard form review.

** Our 4th Scope for Improvement Report will be released on the 24th of June 2014*

<http://www.ashurst.com/scope>

Authors



Georgia Quick
Partner
Sydney
T: +61 2 9258 6141
E: georgia.quick@ashurst.com



Joanna Jenkins
Partner
Brisbane
T: +61 7 3259 7094
E: joanna.jenkins@ashurst.com



Adam Firth
Senior Associate
Sydney
T: +61 2 9258 6422
E: adam.firth@ashurst.com



Ashleigh Vumbaca
Lawyer
Sydney
T: +61 2 9258 5941
E: ashleigh.vumbaca@ashurst.com

Key construction contacts

For further information, please contact:

Contacts			
Jeremy Chenoweth	Brisbane	T: +61 7 3259 7028	E: jeremy.chenoweth@ashurst.com
William Coulthard	Perth	T: +61 8 9366 8152	E: william.coulthard@ashurst.com
Chris Davidson	Sydney	T: +61 2 9258 6060	E: chris.davidson@ashurst.com
Mark Disney	Brisbane	T: +61 7 3259 7399	E: mark.disney@ashurst.com
Joanna Jenkins	Brisbane	T: +61 7 3259 7094	E: joanna.jenkins@ashurst.com
Jos Mulcahy	Melbourne	T: +61 3 9679 3512	E: jos.mulcahy@ashurst.com
Georgia Quick	Sydney	T: +61 2 9258 6141	E: georgia.quick@ashurst.com
Paul Riethmuller	Perth	T: +61 8 9366 8754	E: paul.riethmuller@ashurst.com
Grant Rowlands	Melbourne	T: +61 3 9679 3473	E: grant.rowlands@ashurst.com
Gareth Sage	Sydney	T: +61 2 9258 6798	E: gareth.sage@ashurst.com
Peter Ward	Perth	T: +61 8 9366 8163	E: peter.ward@ashurst.com

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at aus.marketing@ashurst.com.

Ashurst Australia (ABN 75 304 286 095) is a general partnership constituted under the laws of the Australian Capital Territory and is part of the Ashurst Group. Further details about Ashurst can be found at www.ashurst.com.

© Ashurst Australia 2014. No part of this publication may be reproduced by any process without prior written permission from Ashurst. Enquiries may be emailed to aus.marketing@ashurst.com. Ref: 652924145.01 19 June 2014