

Construction Contracts (Security of Payments) Act: "Construction Contracts" and Prohibited and Implied Terms

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Part I

Definition of "construction contract"

1. "construction contract":
 - 1.1. must be entered into after 1/7/2005: s.9(1), Gazette G21, 25/5/05, p.3
 - 1.2. doesn't matter if none of it is in writing: s.5(1); s.9(2)(a);
 - 1.3. doesn't matter if entered into outside the Territory: s.9(2)(b);
 - 1.4. doesn't matter if it is expressed to be governed by the law of a place outside the Territory: s.9;
 - 1.5. but does not include employees operating under an award or certified agreement under the Workplace Relations Act 1996 (Cth): s.9(5).
2. The "construction contract" cannot exclude, modify or restrict the application of the Act – no contracting out: s.10.
3. To be a construction contract it must include an obligation:
 - 3.1. to carry out "construction work": s.5(1)(a);
 - 3.2. to supply "goods" to the site of "construction work":
s.5(1)(b);

3.3. to provide “professional services” – on or off site – related to the construction work: s.5(1)(c);

and/or

3.4. to provide “on-site” services: s.5(1)(d).

4. “Construction work” is defined very broadly in s.6(1):

4.1. must be “on a site” in the Territory (s.6(1)), although the thing being constructed does not need to be intended to remain in the Territory (s.6(1)(c));

4.2. includes “civil works”: see definition in s.4;

4.3. includes:

... constructing the whole or a part of any civil works, or a building or structure, that forms or will form (whether permanently or not and whether or not in the Territory), part of land or the seabed (whether above or below it)... (s.6(1)(c))

4.4. does not include some mining work: s.6(2)(a), (b);

4.5. does not include “wholly artistic works”: s.6(2)(c);

4.6. does not include constructing a “watercraft”: s.6(3).

5. “Goods” are related to construction work if s.7(1) is satisfied.

6. “Professional services” are related to construction work if s.7(2) is satisfied. Defined very broadly, but excludes “accounting, financial or legal services”.

7. “On-site services” are related to construction work if s.7(3) is satisfied. Includes the supply of labour.

8. NB: does not appear to exclude domestic house construction.

Part II

Prohibited Terms

9. NB: these provisions appear to have effect for all purposes and not just for adjudications.
10. Pay when paid terms have no effect, but contract remains on foot: s.12, s.15.
11. Provisions deferring payment for more than 50 days after payment is claimed are ineffective and replaced with an obligation to pay after 28 days: s.13.

Implied Terms

12. Nine different sets of terms on different topics, each of which will be implied into a construction contract if the contract does not have "written provisions" about the particular topic: ss.16-24; (mildren)
13. NB: these provisions also appear to have effect for all purposes and not just for adjudications.

Variations – s.16 and Division 1 of the Schedule

14. No obligation to perform any variation of a contractor's obligations unless nature and extent and amount or means of calculating has been agreed.

Entitlement to be paid – s.17 and Division 2 of the Schedule

15. Contractor entitled to be paid a reasonable amount for performing his obligations whether or not the contractor performs

all of them. NB: means "entire obligation"/"lump sum" principles cannot apply if these terms are implied.

Progress Claims – s.18 and Division 3

16. Progress claims may be made at any time and multiple claims may be made: Again, if implied, these exclude application of "entire obligation"/"lump sum" principles.

Making claims – s.19 and Division 4

17. Sets out requirements for valid payment claims. They must "itemize and describe" obligations performed or the basis for the principal's claim to enable the claim to be assessed (**NB: applies to both contractor and principal claims**). Value to be calculated by reference to the contract or by proportion of work done, schedule of rates or reasonable sum.

Responding to claims – s.20 and Division 5

18. **NB: if payment claim is not disputed within 14 days, it must be paid in full.**

Interest – s.21 and Division 6

19. Interest payable on overdue sums at current s.85 rate (10.5%).

Ownership of Goods – s.22 and Division 7

20. Ownership does not pass until paid for or they become a fixture.

Unfixed goods in an insolvency – s.23 and Division 8

21. Insolvent principal must retain goods and give contractor a reasonable opportunity to collect them.

Retention money – s.24 and Division 9

22. Retention monies are held on trust(!). Should they be put into a separate account? Does this expose a principal (and its directors) to actions for breach of trust if they apply these funds for their own purposes? Can they be traced and recovered in an insolvency?

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