

Article Information

Authors: Robert Riddell, Shaun Clifford

Service: Projects & Construction, Property & Development, Property Development

Sector: Aged Care & Senior Living, Agriculture & Food, Education, Electricity & Gas Regulation, Energy & Resources, Government, Health & Life Sciences, Hospitality, Tourism & Gaming, Infrastructure, IT & Telecommunications, Mining, Oil & Gas, Power & Utilities, Private Clients, Real Estate, Renewables, Transport & Logistics

Isn't it time to update the Australian Standards Contracts?

At the date of this piece, only three of the Australian Standards Contracts on the SAI Global Contract Standards Catalogue are less than 18 years old (AS 4950-2006 Form of formal instrument of agreement; AS 4904-2009 Consultants agreement - Design and construct; and AS 4122-2010 General conditions of contract for Consultants).^[1] They are showing their age, and not in the same way as a fine barrel aged whisky does.

In order to operate at a basic level in the contemporary Australian market most Australian Standards Contracts require significant amendment and additions to bring them up to date. This seems odd given the prestigious title "Australian Standards".

Some updating has occurred, but it has been rather sporadic. Examples of some of the issues addressed over time are:

- in AS 4000-1997 there is no template deed of novation attached (though one is required to give operation to subclause 9.4 which requires a bespoke deed of novation to be drafted by each user) but in AS 4902-2000 a template deed of novation is actually attached to give effect to the equivalent subclause 9.4;
- the style of language switches over time with the most obvious being a shift from "shall" in earlier documents to "must" in AS 4122-2010 but there are also noticeable language shifts in the documents released in the 1980s to mid 1990s to those released in the late 1990s and 2000s;
- the citation style in earlier documents is out of step with the Australian Guide to Legal Citation (e.g. "Bankruptcy Act 1966 (Cwlth)" should be "*Bankruptcy Act 1966 (Cth)*"); and
- only AS 4122-2010:
 - contains a GST clause;
 - fully references each paragraph which makes cross-referencing less awkward, especially with auto cross-referencing in modern word processors (e.g. "clause 10.5(a) or 10.5(b)" as opposed to "paragraphs (b) and (c) of subclause 14.3");
 - contemplates service of notices by email;
 - uses Business Days rather than calendar days;
 - references the *Corporations Act 2001* (Cth) (most only refer to "Corporations Law" as they are based on a pre-unified legislation approach) and has signature blocks that comply with section 127; and
 - capitalises every definition.

Other examples of issues that consistently have to be addressed are:

- the payment clauses are not structured around working generally with the security of payment legislation around Australia;
- some dispute mechanisms (such as in AS 4000-1997 and AS 4902-2000) default to arbitration which is banned in residential construction disputes in certain jurisdictions; and
- the default interest rate of 18% is well above the record low interest rates of contemporary Australia.

In January 2015 Standards Australia released a statement that it was revising the Standards related to general conditions of contract (AS 2124-1992 and AS 4000-1997) which was to become a new AS 11000.^[2] However, in April 2017 Standards

Australia released a follow up statement that “the document [AS 11000] was not supported by the full spectrum of interests” and that it resolved to “cancel the current project and recommence work when a new project proposal is submitted and approved for development by Standards Australia”.^[3] Whilst the nobbling of the exposure draft AS 11000 some years ago no doubt had a demotivating impact, we understand that Standards Australia has continued to have discussions with industry but progress seems to be at a glacial pace.^[4]

It is probably safe to assume that a new suite of Australian Standard construction contracts is not imminent. However that should not stand in the way of them being made more appropriate for contemporary Australia. The existing suite could be easily updated with non-controversial changes that do not change the risk profile (to avoid being “not supported by the full spectrum of interests”) such as:

- adopting improvements that have been made to the newer documents (AS 4122-2010 being the obvious template for style but there are other improvements spread across the suite);
- updates that are required for the documents to operate within the contemporary legislative framework;
- possibly linking the default interest rate to the Reserve Bank of Australia Cash Target Rate to avoid the default rate being up there with credit cards;
- updating alternative dispute resolution default provisions; and
- addressing GST,

amongst many other things.

This is not an unprecedented approach as the much touted AS 4122-2010 is an update from AS 4122-2000. It would likely lessen the Monty Pythoesque extent of amendments required for the suite to appropriately address the contemporary legal and commercial environment, reduce the cost of drafting and more particularly, contract review.

If you have any questions about the operation of the Australian Standards Contracts or need one amended so it operates in the contemporary Australian market, please contact us.

[1] https://www.saiglobal.com/Information/Standards/Licensing/Contracts/SAI%20Global_Contract_Standards_Catalogue_2014.pdf

[2] <https://www.standards.org.au/news/as-11000-colon-general-conditions-of-contract>

[3] <https://www.standards.org.au/OurOrganisation/News/Documents/Update%20on%20AS%2011000,%20General%20Conditions%20of%20Contract.pdf> - This statement has been removed since it was made so I suggest using the Wayback Machine at <https://web.archive.org/> to view it.

[4] <https://www.standards.org.au/news/roundtable-held-on-australian-standards%C2%AE-for-general-conditions-of-contract>; <https://www.standards.org.au/news/general-conditions-of-contract-industry-roundtable>;