

Article Information

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Criticisms of the updated AS4000 - all smoke no fire?

The AS4000 construct-only standard form document is having its first refresh in over 25 years[1].

Excepting the inclusion of a Formal Instrument of Agreement and an optional dispute avoidance board, most of the amendments made by the drafting committee are stylistic and minor in nature. This is because the drafting committee was not given a mandate to amend the document's underlying risk allocation.

But was a belts and braces updated AS4000 ever going to replace implementing the right project structure at the outset or having the right people involved in negotiating and later administering this document?

Key issues

Much of the criticism in response to the updated AS4000 suggests it was a missed opportunity to modernise and improve its functionality.

This perspective is likely informed by the fact that the standard AS4000 (including its cousin, the AS4902) is often heavily amended – and so why not update the document (including its risk allocation) to reflect the amendments frequently encountered during negotiations?

While this perspective is understandable, it raises two important issues.

Firstly, reaching consensus on additional drafting to comprehensively address current issues (via optional clauses/positions) would be difficult and almost impossible to achieve. This is evidenced by the learnings from the failed AS11000, that promised a new and revised standard but did not get off the ground. Also, key legislation is (unfortunately) not harmonised across the states and so including all the different options in one standard is impractical.

Secondly and more importantly, modernising the standard with a broader scope does not necessarily guarantee better contractual outcomes or remove the need for project-specific drafting and detailed negotiations around key issues.

The pursuit of better contractual project outcomes (including more efficient negotiations and fewer disputes during project delivery) should be the metric used to assess whether more ambitious standard form updating is required.

Drafting differences

Many may agree in principle on a range of inclusions to the updated AS4000 standard (WHS obligations, SOPA requirements, the reality of submitting notices electronically and through commonly used portals), but there will inevitably be some who do not accept whatever final drafting makes its way into an updated standard and would still amend these “uncontroversial” clauses going forward.

Further, it's worth questioning whether project practitioners would be likely to reach consensus on updating the standard document to reflect more challenging issues, such as:

- an agreed list of qualifying and compensable causes, and how these could be updated for new events (ie COVID);
- how to deal with delays by authorities and also access to neighbouring land, particularly how time/cost relief from authorities/neighbours delaying approvals/access is apportioned;
- the steps a contractor is required to take to properly pursue recovery under an insurance policy as part of a liability cap carve-out;
- how the entitlement for time and cost above a site conditions baseline as set out in agreed reports is determined,

- (e.g. reference to volume of excavation and soil quality) and any interrelation with disposal rates for soil removal; or
- the requirement for subcontractor warranties and consequences where they cannot be obtained.

Assuming the AS4000 were to be updated to include a “market” position on these items (and many others), each project (particularly complicated ones) would still be subject to detailed negotiations- largely dependant on project specific details including the relevant specifications, price proposals, market conditions and party dynamics.

Subcontracts

Moreover, a varied and wide range of risk positions are currently the reality for subcontracts, where contractors use their own base templates with changes to the risk allocation position dependent on each project. These differ between project participants, and are often dependent on the relevant project sector.

If the AS4000 (and AS4902) were further modernised as some are suggesting, would this mean head contractors should also modernise and harmonise their downstream suites with consultants/subcontractors to achieve market uniformity on commonly seen issues across differing industries? There would be few head contractors (if any) that would subscribe to this proposition.

Improving outcomes

Another perspective is that the real and tangible opportunity to improve contractual outcomes and project success lies more in detailed project planning, developing the right procurement model at the outset and having the right participants involved along the way to administer the suite of documentation.

Time should be invested upfront in the consideration of risk appetite and allocation for the project at hand.

For example:

- wary of increased insolvency risk?
 - undertake detailed financial diligence on tenderers prior to contract award (including balance sheet review) and obtain undertakings from the parent re projects exposure in the case of step-in; and
 - consider what risks are pushed downstream in a tough supply-chain market and help obtain approvals/access rights/site reports/DA matrix matters prior to tender.
- concerned about the high project costs and compliance risks, including associated liabilities?
 - de-risk delivery by considering tendering on a construct only basis with the engagement of lead/specialist consultants to take on all design liability; and
 - discuss appropriate feasibility assessment and consider sharing cost risk on neutral events leading to cost escalation/rise + fall on key materials identified prior to contract award.

Early (and frequent) engagement

Engaging with all project participants at an early stage (e.g. during procurement and prior to tender responses being sought) is the best way to implement, from the outset, a project structure and risk allocation that is focussed on key issues and matters that tenderers are being sought to price for. This approach leads to a more efficient negotiation than relying on a belts and braces updated standard AS4000 that necessarily will need amendment to reflect the specific nature of each project.

Early engagement also extends to making quick amendments to a project structure (e.g. re-allocating risk based on tenderer feedback) if there is a market response that warrants such. Having frequent project team/group meetings (with all stakeholders) with an open and transparent approach to negotiation can allow issues to be resolved efficiently.

There is merit in ventilating commonly encountered issues with standard form documents to raise awareness across the industry, which may perhaps lead to the updated AS4000 being clearer and more user-friendly in some respects. However, having the right project structure, being open to adapting it based on market response, and having the right people administering the contract (technically and commercially) will do more to improve project outcomes than waiting for any material modifications and modernisation of the very well-worn and very well-understood standard form AS4000.

[1] <https://www.standards.org.au/flagship-projects/general-conditions-of-contract>