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Construction Contract Risk & Security of Payment

A Practical Field Guide for Contractors and Subcontractors

PRACTICAL GUIDE AND IMPLEMENTATION STRATEGIES
A clear, practical guide explaining why construction risk arises, how it is allocated in practice, and how disciplined administration protects time, money and cash flow.

Contents:

"Over the past 10 years, many of the leading causes of disputes still revolve around the parties' failure to understand their contractual obligations related to contract administration."

Global Construction Disputes Report
Arcadis (2020)

Introduction

About this guide

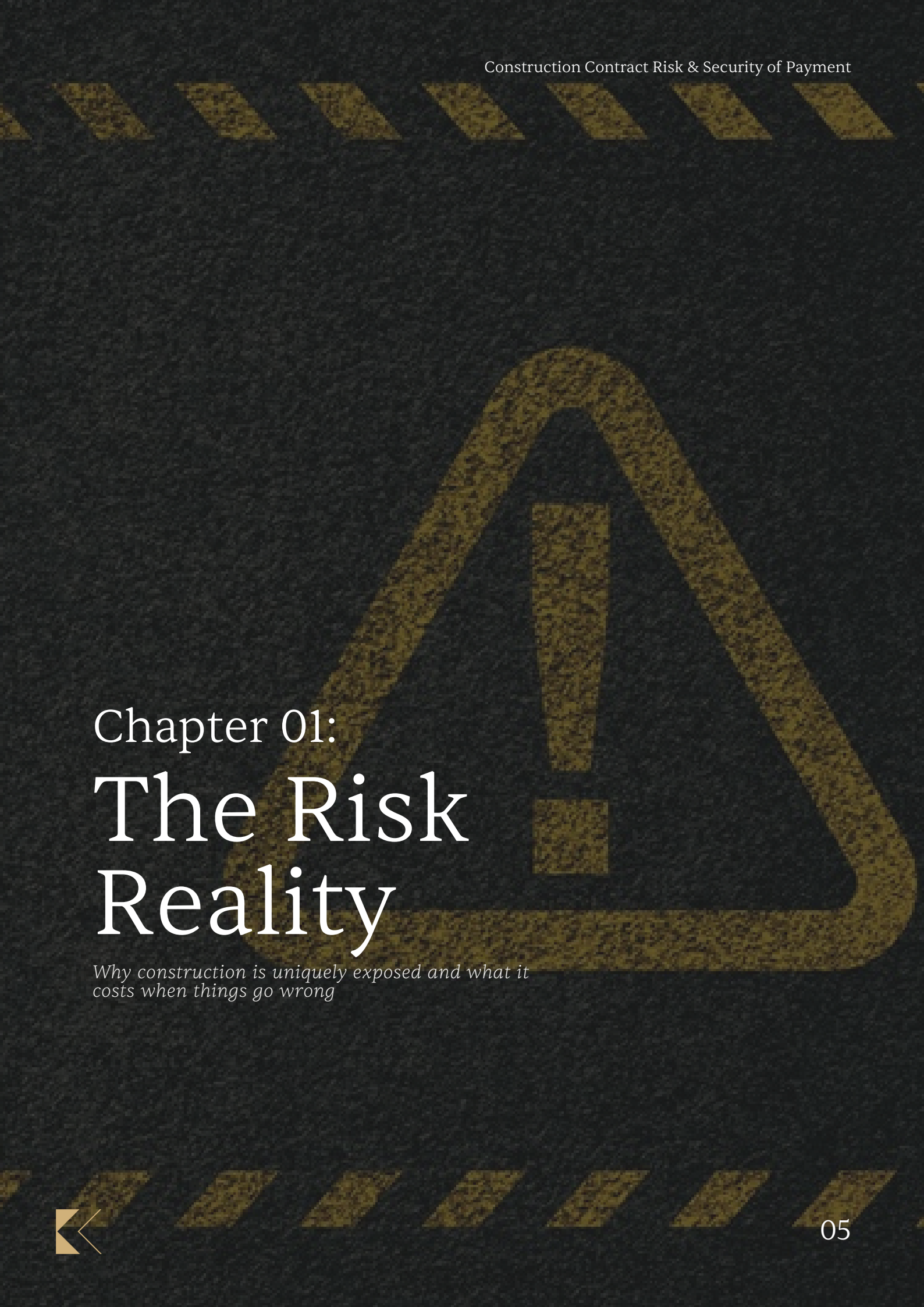
Construction is one of the highest-risk commercial environments in Australia.

Disputes are common, margins are thin, and the consequences of getting it wrong - missed notices, forfeited entitlements, unpaid claims - can be catastrophic for contractors and subcontractors at every level of the supply chain.

This guide is for anyone who signs, administers, or delivers under a construction contract in New South Wales. The guide does not assume a legal background but it does assume a desire on the part of the reader to understand how risk is allocated through contracts, and how disciplined administration preserves entitlements and enforces the right to be paid.

The guide is structured across six chapters. Each Chapter builds on the last.

- Chapter 1 - **The risk reality:** the structural features of construction that generate disputes, and the cost when they arise.
- Chapter 2 - **Your contract:** what it is, how the documents fit together, and how risk is allocated through them.
- Chapter 3 - **The six clauses that matter most:** substantive guidance on the provisions that generate the majority of disputes.
- Chapter 4 - **Notice provisions:** the discipline that keeps entitlements alive.
- Chapter 5 - **Records and documentation:** the evidence base for every claim and adjudication.
- Chapter 6 - **Security of payment:** your statutory rights under the Building and Construction Industry Security of Payment Act 1999 (NSW).



Chapter 01:
The Risk Reality

Why construction is uniquely exposed and what it costs when things go wrong

"The traditional risk management strategy adopted by clients has been to transfer as much of this risk as possible to others and further, clients often try to transfer risks to designers and contractors that are more within the control of the client."

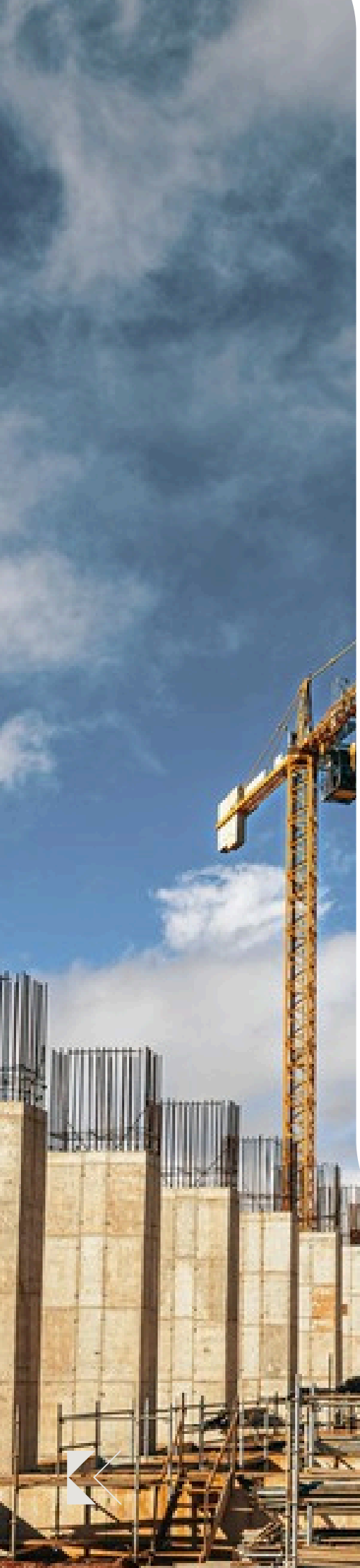
s3.1, Relationship Contracting: Optimising Project Outcomes
Australian Constructors Association (1999)

The Risk Reality

Construction is consistently ranked among the most dispute-prone and insolvency-prone industries in the world. This is not incidental; it is structural.

The nature of construction projects, the way they are procured, and the way risk is allocated through contracts creates a predictable set of conditions in which disputes arise, claims go unresolved, and businesses fail.

Navigating this environment effectively begins with managing risk, and you cannot manage risk you have not identified.



i. Why Construction Is Uniquely Exposed

Almost a century ago, English civil engineer and barrister EJ Rimmer observed that construction works:

> *"...are to be carried out in open air under unstable conditions with material and labour of varying quality; that the conditions of excavation and foundation cannot be entirely foreseen until the ground is opened up; that the amount of money involved is often such as to imperil the financial resources of a contractor who has made an unwise tender."*
>
> EJ Rimmer, as cited by Christopher R Seppälä at the FIDIC/ICC International Construction Contracts Conference, Cairo, March 2005

The observation is as accurate today as when it was made. Construction projects are unique, one-off undertakings carried out in exposed environments by teams assembled specifically for each project and then dispersed. They involve long development and execution life cycles, complex multi-party structures, fixed prices agreed long before conditions are fully known, and an inherent inability to "reject and send back" defective work in the way a manufacturer can recall a defective product.

These structural features generate a predictable set of risk factors that the Australian construction industry has grappled with for decades:[1]

- Intense competition for available work drives contractors to under-price risk at tender, either because they genuinely cannot identify it, or because they know that pricing it honestly will lose them the work.
- Consistently low margins mean there is no buffer when something unexpected happens. A single unpriced risk materialising can destroy the profitability of an entire project.
- Complex multi-party supply chains mean each link in the chain is exposed to the performance of the links above it. A principal's failure to deliver information on time cascades down to every subcontractor on the critical path.
- Safety obligations and environmental risks carry both regulatory and civil liability consequences, compounding the financial exposure.

ii. Conflicts, Claims and Disputes - An Important Distinction

Construction professionals frequently use the terms "conflict", "claim", and "dispute" interchangeably. They are not the same thing, and conflating them leads to poor risk management decisions.

A conflict often exists wherever there is an incompatibility of interest. Conflict is a feature of every construction project. With good contract administration it can be managed to the point where it does not become a dispute.

A claim is an assertion of a right to money, additional time, or other remedy under the contract.

A claim is not a dispute and not every claim becomes a dispute. Most claims, submitted correctly and on time with proper supporting documentation, can be resolved through the contract machinery.

A dispute generally arises when a claim has been made and rejected and the rejection is challenged in some way.

In the event of a dispute, the implication for contractors and subcontractors is significant. By the time a genuine dispute exists, the contract mechanism for managing it appropriately has usually been available for some time. The question is whether that contract mechanism was used.[2]

iii. Why Projects Fail - The Data

Arcadis research, conducted across multiple years of its Global Construction Disputes Report series, consistently identifies two root causes of disputes above all others: poor contract administration and a failure to understand contractual obligations or terms.[3] These are not legal problems. They are operational ones. [4]

Looking at the specific project-level triggers, research published in the International Journal of Scientific & Technology Research[5] in 2016 identified the following occurrence rates across construction projects:

Trigger	Occurrence Rate
Delays in work	75%
Errors in design drawings and plans	58%
Errors and defects in contract documents	58%
Slow decision making by principals	57%
Variation in quantities	53%
Changes in scope	53%
Poor planning and scheduling	50%
Acceleration of work	50%
Different site conditions	46%
Payment delays	44%

El Hawary, A. & Nassar, A., "The Effect of Building Information Modeling (BIM) on Construction Claims", International Journal of Scientific & Technology Research, Vol. 5, No. 12, December 2016, p. 29.

Almost every trigger on this list can be managed through the construction contract when properly drafted. Extensions of time provisions deal with delays. Variation clauses deal with scope changes. Payment terms deal with cash flow. The contract is the core mechanism through which these issues are supposed to be managed. When those mechanisms are not used, those triggers can quickly erupt into disputes.

In Australia specifically, studies have categorised construction disputes into five main types: breach of contract, failure to settle, insurance and indemnity, contractual interpretation, and security of payments.[6] Every one of these is a contract issue.

iv. What Disputes Actually Cost

From the outset of a dispute, the cost is almost always underestimated at the beginning. In most cases the costs of fighting and resolving a dispute can easily become disproportionate to the amount at stake by the end.

For example, when disputes proceed to arbitration or litigation, the direct costs – legal fees, arbitration fees, consultant costs, diversion of management time can be comparable to, and often exceed, the value of the claim itself.

Indirect costs are frequently worse than direct costs and can include:

- project delays;
- cascading programme disruption;
- reduced on-site productivity;
- senior management distraction;
- reputational damage; and
- the loss of future work.

The costs of lawyers and internal management brought in to deal with claims can often outweigh the perceived benefit of having shifted the risk in the first place.[7]

As is well known, construction operates on thin margins. A project that looked profitable at contract can deliver a loss that takes years to recover from, if the business survives at all.

For example, in a case often referred to about the catastrophic effect of time bars; administrators were appointed to *CMA Assets Pty Ltd* in August 2013,[8] approximately two years before the Western Australian Supreme Court handed down its judgment in the time bar litigation.[9]

The financial impact of the costs of that dispute, on top of the lost entitlements, was catastrophic.

v. The Risk Shifting Problem and Why It Costs Everyone

The Abrahamson Principles developed by construction law academic Max Abrahamson[10] provide a principled basis for risk allocation in construction contracts.

According to those principles, a party should bear a risk where:

- the risk is within that party's control;
- the party can transfer the risk through insurance most efficiently;
- the preponderant economic benefit in controlling the risk lies with that party; or
- the loss falls on that party and it is not practicable to transfer it to another.[11]

The problem is that principled risk allocation is routinely overridden by bargaining power and unfair and unreasonable "risk transfer". Principals use their position at the top of the contractual pyramid to push and transfer risk downward to contractors and, through back-to-back arrangements, to subcontractors.

A 2024 survey of ACA member contractors conducted with Arcadis found that 71% of respondents agreed that current contracts do not adequately and fairly allocate risk between contracting parties.[12]

> *"The traditional risk management strategy adopted by clients has been to transfer as much of this risk as possible to others and further, clients often try to transfer risks to designers and contractors that are more within the control of the client."*
>
> Australian Constructors Association, Relationship Contracting: Optimising Project Outcomes (ACA, 1999), s 3.1

Common experience demonstrates that excessive risk transfer does not make projects more efficient. It increases costs in at least two ways:

(a) Contractors price the risk into their tender, making the project more expensive; or

(b) Contractors do not price it, making their tender artificially competitive, but then make claims if the risk materialises.

Both outcomes increase the principal's ultimate cost. The by-product is a more strained, adversarial relationship between the contracting parties – a breeding ground for disputes.[13]

It is also not exclusively a top-down phenomenon. Contractors routinely impose more onerous conditions on subcontractors than those created by the principal in the head contract going beyond a true back-to-back arrangement.

The party at the bottom of the chain, with the least financial resilience, ends up carrying the greatest exposure.

Chapter 02:
Your Contract

What it is, how it allocates risk, and what you need to understand before you sign

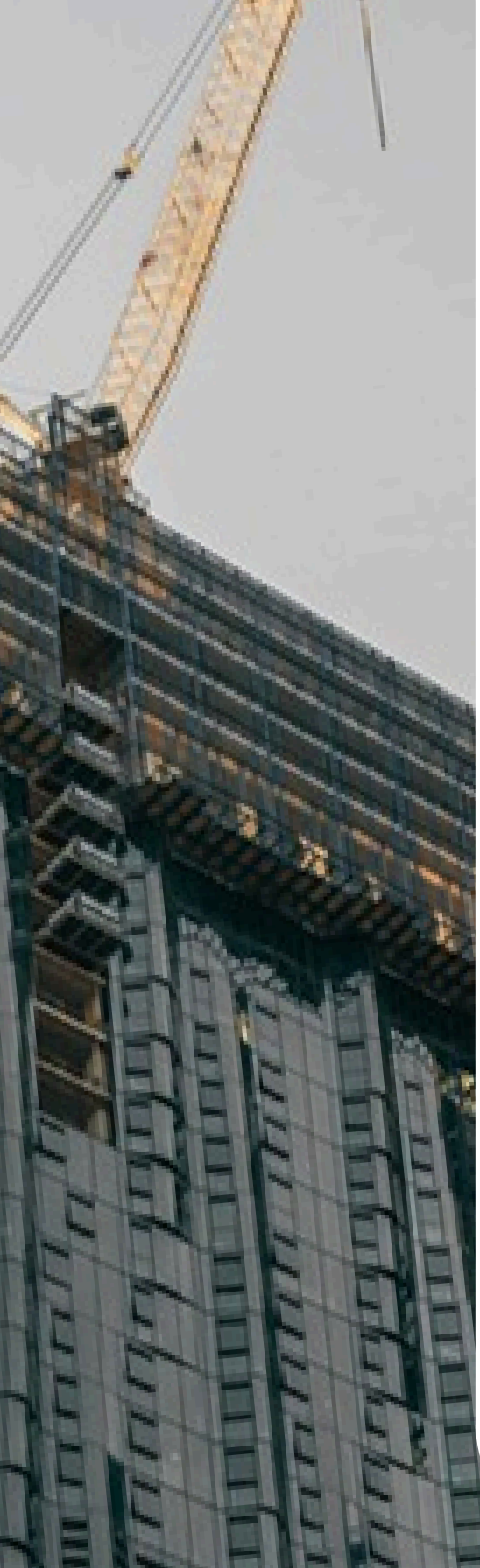
Your Contract

A construction contract is the primary risk management instrument for your project.

It defines what you must do, when, to what standard, how much you will be paid, and what happens when something goes wrong.

Courts enforce contracts as written even where their terms are harsh, and even where you did not fully understand what you were agreeing to.

This principle that commercial parties are taken to understand what they sign has been consistently applied by Australian courts for well over a century.



i. What the Contract Actually Is

The term "construction contract" refers not to a single document but to a suite of documents that together define the full scope of the parties' rights and obligations. Understanding the priority order between these documents is fundamental in cases of conflict and the contract generally specifies which document prevails.

1. **Conditions of contract -** the general conditions (the standard form) and any special conditions. These govern the legal relationship: time, payment, variations, delay, risk, insurance, dispute resolution, and termination.
2. **Technical documentation -** specifications, drawings, and design documents defining the work. These describe what is to be built; the general conditions govern the rules under which it is built.
3. **Schedules -** project-specific data including the contract sum, completion dates, liquidated damages rates, and other project-specific particulars.
4. **Programme -** the construction schedule. The contractual status of the Programme can vary. Under some contracts the Programme is contractual; under others it is a management tool only.
5. **Bills of quantities or other pricing documents -** the priced breakdown of the work. The treatment of bills of quantities varies significantly between AS 2124 and AS 4000.

The general conditions (as amended) and special conditions is usually where the majority of risk sits.

They govern extensions of time, variations, liquidated damages, payment, latent conditions, dispute resolution, and termination.

The general conditions describe the agreed rules under which the work is to be done and disputes are to be resolved.

ii. The Principal Risk Allocation Principles

The Abrahamson Principles provide the theoretical foundation for risk allocation in standard form construction contracts.[14]

The main thrust of those principles is that risks should be allocated to the party best able to deal with them, both physically and economically. This is how the Australian standard forms, in their unamended state, are designed.

AS 2124-1992 and AS 4000-1997 remain the most widely used standard forms in Australia for major construction projects, despite their age.

In practice, however, the unamended standard form is rarely what you are working with.

iii. The Amendment Problem

In 2014 Melbourne Law School[15] research surveying 295 respondents across 379 projects found that over 80% of standard form construction contracts are heavily amended by principals before they go to tender.

Those amendments are not random. They concentrate in the same six clauses that generate the most disputes.

> *The six clauses most frequently amended by principals are: extensions of time (76% of contracts), delay damages including liquidated damages (71%), site conditions (68%), payment (65%), variations (63%), and claims provisions (62%).*
>
> Sharkey & Bell, Standard Forms of Contract in the Australian Construction Industry (Melbourne Law School, 2014)

Every contract must be read in full, on its own terms, before it is signed. The general and special conditions are where the real risk sits.

iv. At Least Seven Questions to Ask Before you Sign

Before executing any construction contract, a contractor or subcontractor should be able to answer these seven questions. If you cannot, the contract needs more scrutiny.

1. **What is the scope, and is it clearly defined?**
   Ambiguous scope leads to variation disputes.

2. **What risks is our business assuming, and are we being paid to carry them?**
   Work through the special conditions clause by clause and identify where risk has been shifted.

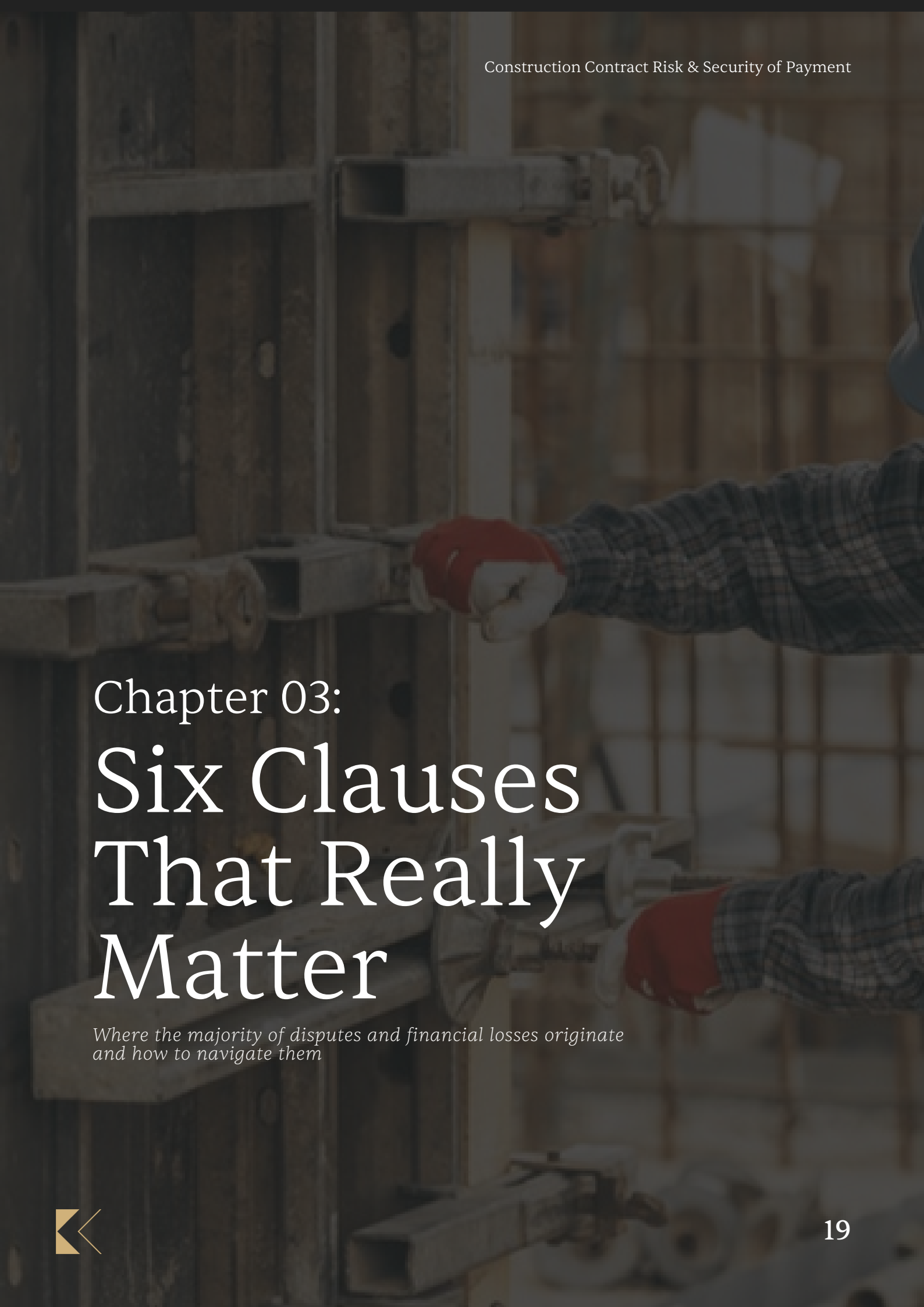
3. **What are the notice requirements for delay, variations, and latent conditions claims and can our project and contract administration team comply with them operationally?**

4. **What are the liquidated damages, and how do they interact with the extension of time regime?**
   Calculate the LD exposure for a 30-day overrun and consider whether it is within the risk tolerance of your business.

5. **What are the payment terms and are they compliant with the maximum payment periods under the Building and Construction Industry Security of Payment Act 1999 (NSW)?**

6. **What are the insurance obligations, and are we covered by our current policies?**
   Check policy limits, exclusions, deductibles, and contractual endorsements.

7. **What is the dispute resolution mechanism?**
   Is there a tiered process (superintendent determination, then mediation, then arbitration)? Are there time bars if we don't trigger a dispute? Are the timeframes workable?



Chapter 03:
Six Clauses That Really Matter

Where the majority of disputes and financial losses originate and how to navigate them

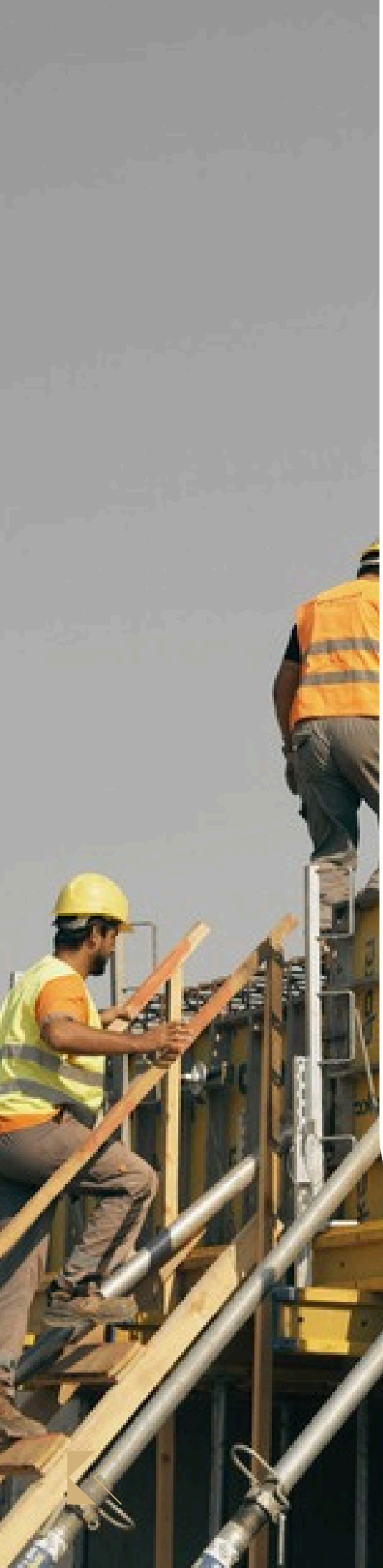
Six Clauses That Really Matter

Substantive guidance on the provisions that generate the majority of disputes

Contract review is time-consuming, and most contractors are under pressure.

The practical approach is triage: as a minimum concentrate your attention on the clauses that generate the most disputes and carry the greatest financial risk.

Melbourne Law School research and decades of litigation have consistently identified the same categories of provision as the most frequently amended and most frequently disputed. The six areas addressed in this chapter are drawn from that research.[16]



i. Extensions of Time

An extension of time clause adjusts the date for practical completion when the contractor is delayed by qualifying causes.

If the extension is not obtained whether because the contractor failed to claim, claimed too late, or claimed in the wrong form, the completion date is unchanged and liquidated damages accrue for every day of overrun.

The qualifying causes of delay can differ between standard forms, and differ again once the contract has been amended. What constitutes a qualifying cause and therefore what entitles you to an extension depends entirely on the specific contract in front of you.

Some forms use a detailed enumerated list of qualifying causes; others use a more general formulation. Amendments by principals commonly narrow the concept, removing causes from the qualifying list or imposing additional preconditions. Before signing, check what qualifies as a delay event and whether the events most likely to affect your project are covered.

Notice windows also differ. Some forms trigger the notice period from when the delay occurs; others from when the contractor "*should reasonably have become aware*" of the causation a materially different trigger.

Some forms provide that if the superintendent fails to assess an EOT claim within a specified period, the contractor is taken to be entitled to the extension claimed. Others provide no such protection.

Check which position your contract adopts.

The concurrent delay problem deserves specific attention. Where two delay events run simultaneously — one a qualifying cause, one not — most standard forms will deny the contractor an extension for the period of overlap.

The logic is that the non-qualifying cause would have caused the same delay regardless. The result is that a contractor can be delayed by the principal's actions and still receive no extension and face liquidated damages because a concurrent non-qualifying cause was also operating. This is frequently litigated and the outcomes are highly fact-specific.[17]

> *The EOT clause and the liquidated damages clause are the same risk, viewed from different directions. An extension you fail to claim is a liquidated damages liability you may not know you had.*

ii. Liquidated Damages

Liquidated damages are a pre-agreed daily rate payable for late completion. They should be a genuine pre-estimate of the principal's likely loss if the project is delivered late. Courts will enforce them without requiring the principal to prove actual loss. The rate is agreed at contract, before the delay occurs.

A nuance that most contractors do not appreciate: the liquidated damages provision is primarily for the benefit of the contractor, not the principal.

By pre-agreeing a daily rate, the contractor limits its exposure for late completion to that rate.[18]

Without a liquidated damages clause, the principal could sue for general damages for breach of contract which could be greater or smaller than the LD rate depending on the facts.

The LD clause trades certainty for both parties.

The interaction with extensions of time is direct: every day of overrun for which no extension has been granted generates LD liability.

Check:

- the daily rate;
- whether there is a cap;
- whether the LD rate is a genuine pre-estimate; and
- the qualifying causes of delay and make sure that they include the delay risks that will affect your project.

iii. Variations

Entitlement:

A variation is any change to the scope, character, or quantity of the work required under the contract. Whether particular work constitutes a variation is frequently disputed.

The test applied by courts is whether the work falls outside the works upon which the contractor tendered and contracted, having regard to the terms of the contract. This is more complex than it appears.[19]

Three categories of variation regularly arise in a typical project.

First: where work performed is not included in the contract documents at all – relatively straightforward.

Second: where work is to be inferred from the contract documents but the contractor contends it was not in scope – highly contestable and frequently litigated.

Third: where the work is described in the contract but the circumstances in which it is to be performed are materially different from those anticipated – the most difficult category.

The general threshold rule for variations is: no written direction, no variation claim.

The contract will usually provide that the contractor is not entitled to payment for a variation unless the principal or superintendent has given a written instruction. There are limited exceptions.

Those limited exceptions include:

- where work is genuinely outside the scope of the original contract documents (a claim outside the contract);
- where work is wrongly rejected by the superintendent and re-performed; or
- where there is a separate agreement to pay for additional work, or to waive the written instruction requirement.

The basis for such claims lies not in the contract conditions but in general law – for breach of contract or in restitution.

These claims are available but difficult to prove without contemporaneous evidence.

Valuation:

The valuation of variations is a separate and equally complex assessment for the superintendent.

Generally the common contract regime values variations by reference to the original contract rates where applicable, where the rates are reasonable or even possibly by negotiation where not.

Always obtain the variation direction including the agreed price before commencing the additional work where possible, and comply strictly with the contractors regime especially when you receive a direction to vary the works or when you believe a document you have received from the principal is a variation.

A failure to comply with the contract may result in you not being able to recover either the costs or time you incurred in performing the variation works.

iv. Latent Conditions

As a matter of general principle a latent condition is a physical site condition that differs materially from what a competent contractor, exercising reasonable care, should have anticipated at the time of tender.

The Victorian Court of Appeal in *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2009] VSCA 221 made important observations about how latent condition clauses operate.

In that case, the court held: the test is objective. A latent condition is determined not by what the particular contractor did or did not do, but by what conditions a reasonable contractor should have anticipated. In that case the fact that a principal gave out information as the basis for a fixed-price tender was relevant in determining how far a reasonable contractor should be expected to go in comprehending other available material.

Before signing:

- read the latent conditions clause;
- understand the due diligence standard it imposes; and
- has the principal provided site information – geotechnical reports, contamination assessments, drawings of existing services?

Under the objective test, documents provided by the principal for the purpose of tendering are relevant to what a reasonable contractor should have anticipated.

If the site information is inadequate, either price the residual risk, seek additional information, or seek to negotiate the clause.

Amendments to the latent conditions clause frequently tighten the contractor's due diligence obligations beyond the standard form. Some contracts require the contractor to have obtained "actual knowledge" of all reasonably obtainable information, shifting virtually all unforeseen site risk to the contractor.

These amendments require careful attention at tender.

Also be careful if the Principal requests the site risk to be assessed by the Contractor as at the time of contract and not at the time of tender when the Contractor priced the work.

This may be unreasonable as a Principal could argue that the site condition was foreseeable based on the information that became available after the price was locked in. The simple point is that you do not want to be blamed for not pricing a risk you could not have known about.

v. Payments

Payment clauses govern the most fundamental aspect of any construction contract, when and how the contractor gets paid.

They also interact directly with the Security of Payment Act, which provides a parallel statutory regime for payment recovery.

Progress payment terms in NSW are capped by statute to a maximum of 15 business days from the payment claim for head contractors and 20 business days for subcontractors. Any contract provision purporting to extend these periods is void.

Retention is the percentage withheld from progress payments as security for performance. It is typically 5% of the contract sum, held until practical completion (half released) and the end of the defects liability period (balance released).

From the contractor's perspective, retention ties up working capital throughout the project.

Check the release conditions carefully, some contracts impose additional preconditions on retention release (certification of final completion, resolution of outstanding claims) that can significantly delay actual receipt of funds.

Final payment clauses are frequently where the most serious traps are buried. Some contracts, particularly subcontracts, require the subcontractor to execute a final release or deed of release extinguishing all future claims as a condition of receiving the final payment.

This is a gotcha clause encountered by Contractors repeatedly in practice. If you sign that release without identifying and preserving all outstanding claims, you lose them.

The SOPA regime may not override a properly executed contractual release.

Final Payment Trap:

- Check the final payment clause before it is too late:
    - Does execution of the final release extinguish accrued SOPA rights?
    - Does it release claims for damages that have not yet been formally lodged?
    - Does it release defects claims?
- These are questions to raise **before** the final payment claim is submitted – not after.

vi. Time Bars and Claims Provisions

A time bar is a contractual provision that extinguishes a party's right to make a claim if notice is not given within a specified period.

Time bars are the most dangerous provisions in a construction contract — not because they are complex, but because they are easy to miss when everyone is focused on delivering the project. They must not be ignored.

Courts have generally tried to read time bars as directory rather than mandatory where this is possible from the contract language — meaning non-compliance creates a liability in damages (for the loss caused by failure to give timely notice) but does not extinguish the claim entirely.

However, courts will give full effect to a time bar as a condition precedent where the contract clearly so provides.[20]

The purpose of notice provisions was addressed by the Queensland Court of Appeal in *Re Multiplex Constructions Pty Ltd* [1999] 1 Qd R 287:

> *"[The] purpose of the notice provision [is to] alert the superintendent to the need for investigation of facts on which the claim is based in order to determine whether that justifies an extension of time for practical completion. The later any such notice is given after commencement of the delay, the later the superintendent may appreciate that need and the more difficult it may be for him to verify whether there has been delay and, if so, its cause."*
>
> *Re Multiplex Constructions Pty Ltd [1999] 1 Qd R 287 (QCA), Davies JA and Lee J*

CMA Assets Pty Ltd v John Holland Pty Ltd [No 6] [2015] WASC 217 which we referred to earlier is the authoritative Australian case on strict enforcement.

In that case CMA Assets failed to give notice of delay within the 7-day window required by clause 10.12 of its subcontract (which also made compliance a condition precedent under clause 10.13).

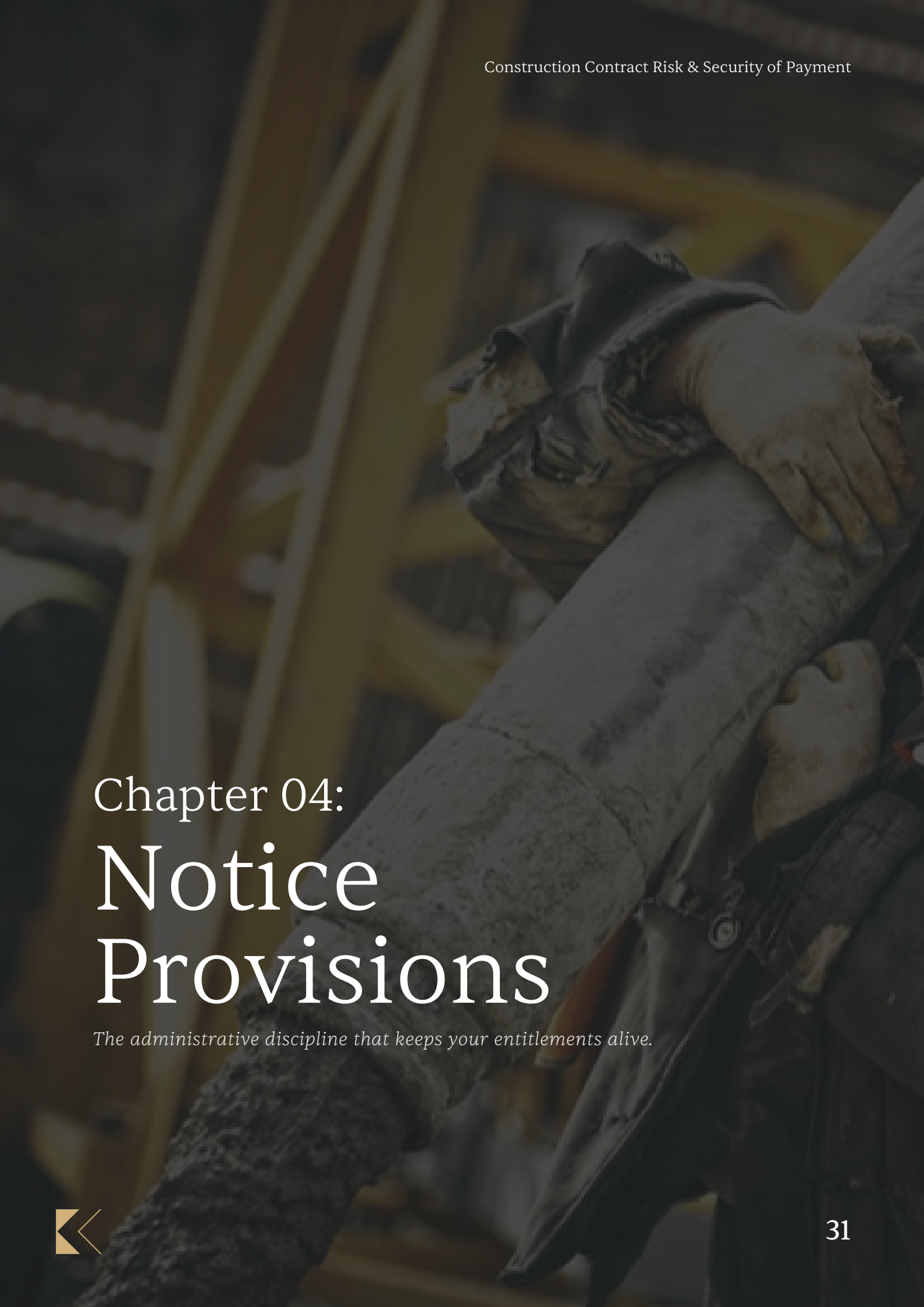
The court enforced the time bar without sympathy. CMA's arguments on the prevention principle were also rejected: the contract expressly provided that any principle of law or equity which might otherwise render the completion date unenforceable would not apply.[21]

> *"CMA is precluded from the benefit of an extension of time and is liable for liquidated damages, even where the relevant delay has been caused by John Holland."*
>
> *CMA Assets Pty Ltd v John Holland Pty Ltd [No 6] [2015] WASC 217, Allanson J*

CMA argued estoppel and the parties had adopted a convention of not strictly complying with notice provisions. The court rejected this and said the evidence did not support any common assumption between the parties.

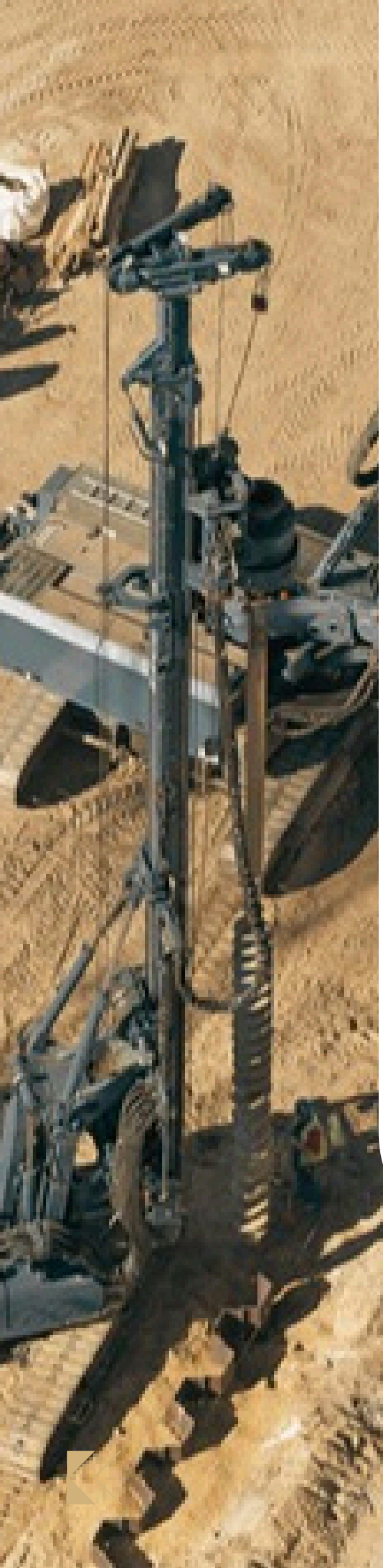
The key lesson from CMA is that you should not ignore time bars. You must comply strictly with time bars even if your relationship with the Principal is going well.

A failure to comply with time bars can lead to a forfeiture of legitimate entitlements.



Chapter 04: Notice Provisions

The administrative discipline that keeps your entitlements alive.



Notice Provisions

The single most consistent finding across decades of construction litigation in Australia is that contractors lose entitlements not because they lack merit, but because they fail to give notices.

A meritorious claim — one that would succeed on the merits — can be extinguished entirely by a missed notice window. The administrative burden of compliance is real.

It is also always less than the cost of non-compliance.

i. The Function of Notices

Generally notices perform at least five functions in a construction contract:

- **Early warning** - alerting the other party to an emerging issue while there is still time to investigate, mitigate, or make alternative arrangements.
- **Entitlement assertion** - formally placing on record that a right to additional time, additional cost, or other contractual relief is being asserted.
- **Contractual mechanism** - many contractual entitlements are conditional on notice; being provided with a particular time frame the notice is not the claim itself, but the trigger that initiates the assessment process.
- **Force majeure protection** - where events beyond a party's control affect performance, proper notice activates the contractual protections available for those events.
- **Evidence creation** - every notice is a contemporaneous record of the event, its timing, cause, and response; in any subsequent dispute, the notice file becomes primary evidence.

ii. What Makes a Notice Compliant

The requirements for valid notices vary between contracts and must be checked each time. Common minimum requirements across major standard forms are:

- **In writing** - a formal notice or letter, not a meeting minute, RFI, or an email chain marked “for your records” or similar.
- **Addressed to the correct recipient** – the party or role specified in the contract (for example under AS 2124 and AS 4000, usually the Superintendent; under many subcontracts, the head contractor’s nominated representative).
- **Given within the contractual timeframe** – noting that time may run from the date of the event, the date the contractor became aware of it, or the date the contractor ought reasonably to have become aware of it; these triggers can differ materially.
- **Addressing both time and cost** – where the event affects both, the notice must deal with each expressly.
- **Containing sufficient particulars** – including the cause of the event, the anticipated time impact, steps taken to mitigate delay or cost, and any available alternatives. Comply with the content requirements of the notice as set out in the contract.
- **Served in the required manner** – strictly in accordance with the contract’s service provisions (for example, registered post, hand delivery, or specified electronic means as prescribed); an incorrect method of service can invalidate the notice entirely

Also watch for: "immediate" notice requirements.

These are gotcha clauses – who decides what is immediate? When we negotiate contracts, we always push back on any immediate notice requirement. Also check whether timeframes are calendar days or business days. Seven calendar days is very different from seven business days, especially over a holiday period.

Rolling notices are required by some contracts for ongoing delays. Under AS 4000 clause 35.3, where further delay results from a qualifying cause already evidenced in a claim, the contractor must "promptly" give a further claim evidencing the additional delay.

iii. The Waiver and Estoppel Defence - A Last Resort, Not a Strategy

Where a time bar has been missed, a contractor may attempt to argue:

- that the clause is directory rather than mandatory;
- that there is an implied term displacing the time bar;
- that the claim can be brought in restitution or under Australian Consumer Law outside the contract;
- that the other party has waived the time bar; or
- that a conventional estoppel prevents reliance on it.

In *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2017] QSC 85, the Queensland Supreme Court awarded CMC a 208-day extension of time on the basis that WICET's conduct, consistently assessing and responding to out-of-time EOT claims on their substantive merits, without objecting to their lateness was inconsistent with strict insistence on the notice requirements and constituted a waiver.

A "no waiver" clause in the contract did not prevent this finding.[22]

But Wiggins Island required extensive documentary evidence of the principal's consistent prior conduct over a prolonged period. The evidentiary burden is substantial.

On the other hand; in *CMA Assets Pty Ltd v John Holland Pty Ltd [No 6] [2015] WASC 217* discussed previously, the court rejected an estoppel argument because the evidence did not support the claimed common assumption.

Estoppel arguments are available, but they are expensive, uncertain, and definitively a last resort. Build the system so you never need to rely on them.

iv. A Practical Notice System

Notice compliance cannot depend on individual project managers remembering what to do under pressure. It must be built into the way the business operates.

1. **Contract kick off register**
   At the start of every project, systematically extract every notice requirement from the contract. For each one, record the clause reference, the trigger event, the time window, the required content, the required method of service, and the addressee.

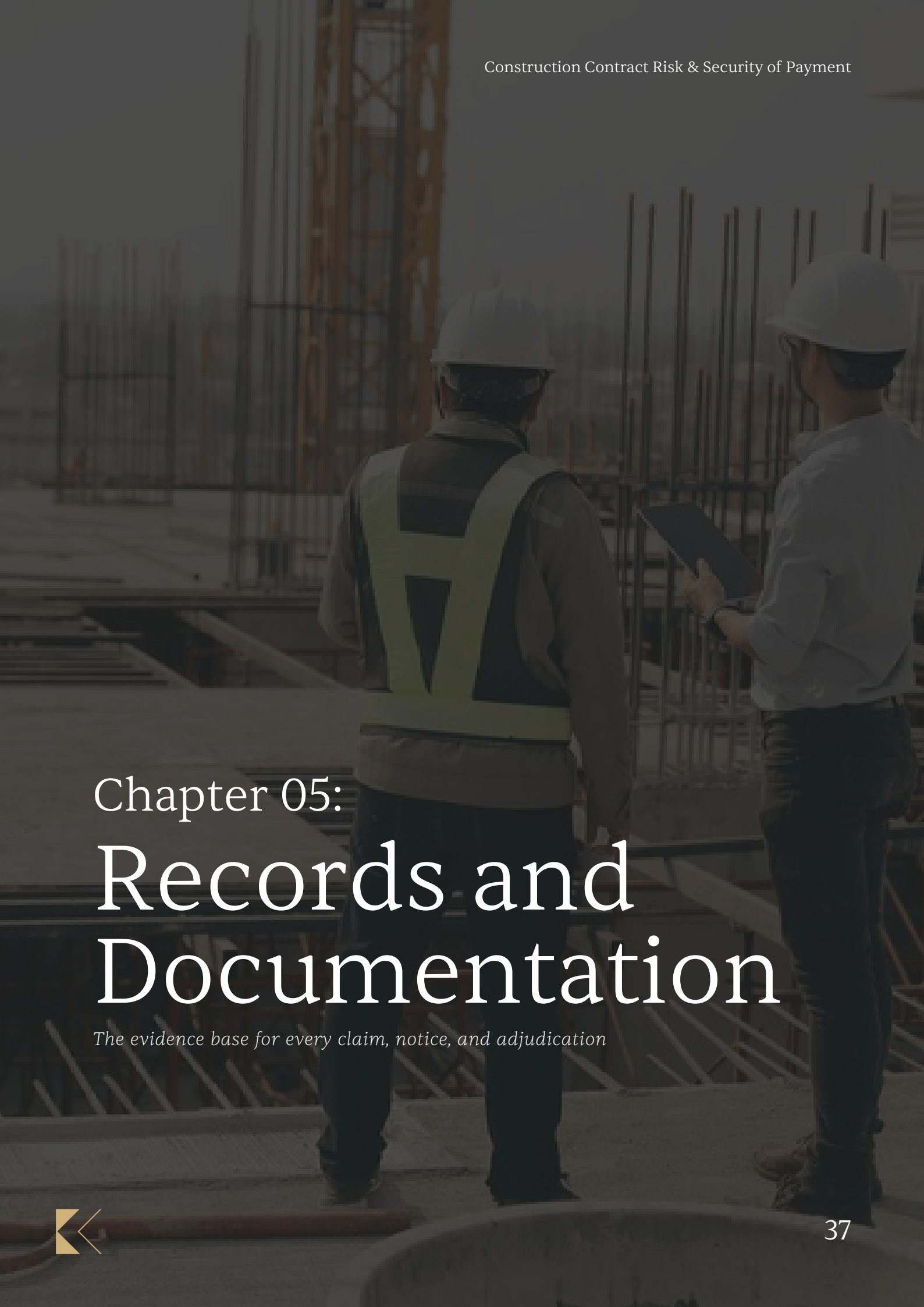
2. **Calendar reminders**
   Set automated reminders for every notice deadline. For a 7-day window, your reminder fires at day 3 or 4. For a 28-day window, at day 14.

3. **Correspondence register**
   Keep a regular and a running log of every notice sent and every response received, with service dates and methods recorded.

4. **Daily site diary**
   Make sure any verbal instruction that could affect scope, programme, or cost is confirmed in writing the same day, and that Daily Site Diaries are properly completed.

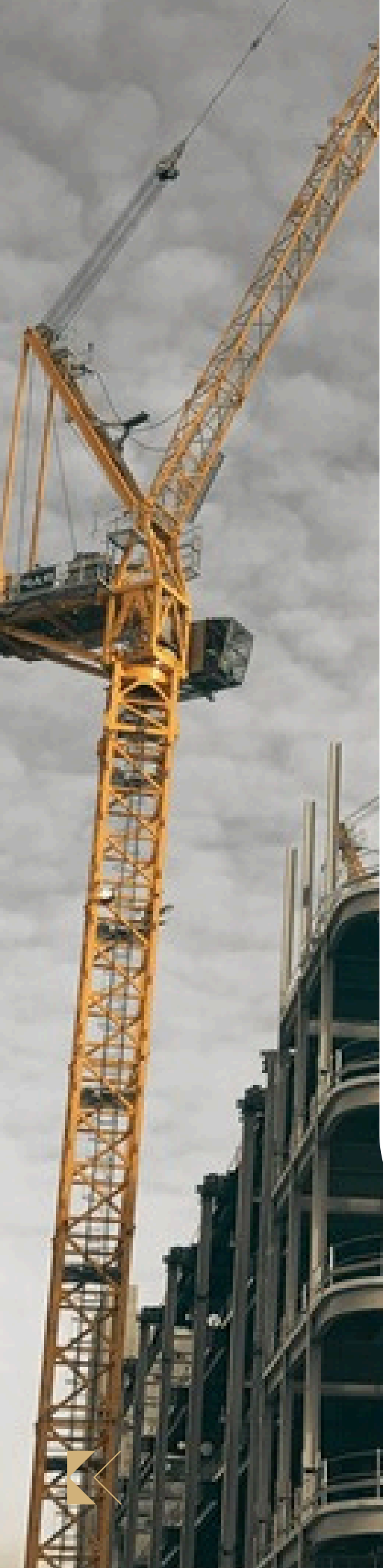
5. **Audit your compliance practices**
   A standing agenda item in the weekly project meeting: are all registers current? Are any notice deadlines approaching? Are any claims outstanding and unresolved? Are Notices being issued in time? If not, find out why and fix it.

"The administrative burden of compliance is always less than the cost of non-compliance."



Chapter 05:
Records and Documentation

The evidence base for every claim, notice, and adjudication



Records and Documentation

"If it wasn't documented, it wasn't done."

This is not a legal maxim, it is a construction reality.

In every dispute, every adjudication, and every court proceeding involving a construction contract, the party with the better documentary record has a decisive advantage.

Documentation is the memory of the project. It is the only contemporaneous record of what was actually happening on the ground, in real time.

The significance of this is well recognised in construction law. In *Glenorchy City Council v Tacon Pty Ltd* [2000] TASSC 51, concerning a latent conditions claim, the court noted that whether a contractor could reasonably have anticipated site conditions "was a determination of fact" a determination made on the evidence available at the time.

That evidence depends entirely on what was documented. The principle applies equally to delay claims, disruption claims, variation claims, and payment disputes and the list goes on.

i. Contemporaneous Documentation

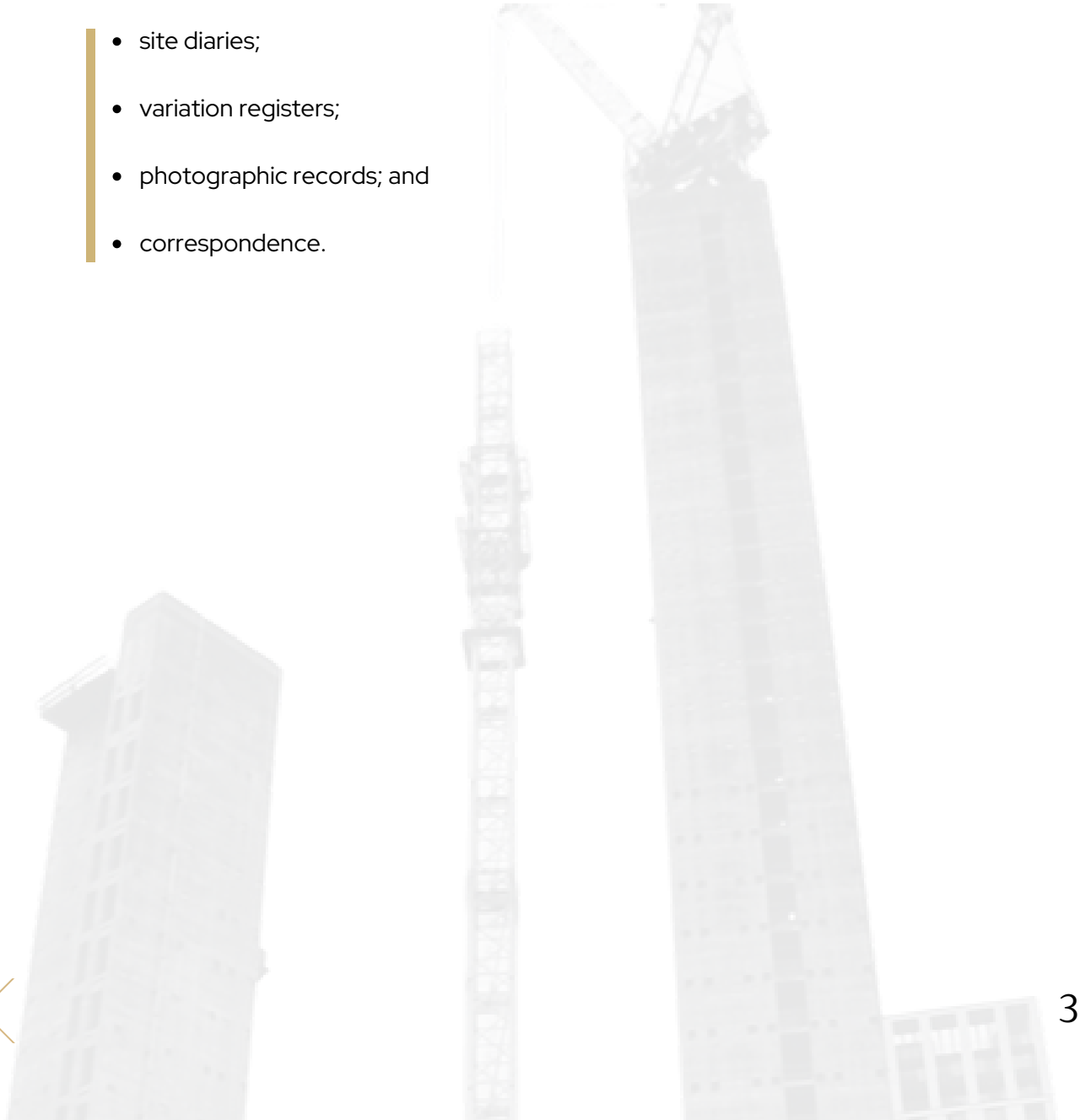
Contemporaneous documentation records made at or near the time of the relevant event carries significantly greater evidential weight than retrospective reconstruction.

Courts and adjudicators are familiar with the phenomenon of records being assembled or "filled in" after a dispute has arisen. Contemporaneous records are harder to challenge, and much more persuasive.

The adjudication process under the Security of Payment Act places particular weight on documentation. Adjudicators assess the material put before them: the payment claim, the adjudication application, the payment schedule, and the adjudication response.

An adjudication application built on comprehensive, contemporaneous records:

- site diaries;
- variation registers;
- photographic records; and
- correspondence.



ii. Seven Core Documents

Some of the core documents that you must have as a minimum include the following:

Document	Purpose	Frequency
Site Diary	Daily record of personnel, progress, weather, conditions, verbal instructions, and events that could give rise to a claim	Daily – no exceptions
Correspondence Register	Tracks every letter, email, and notice sent and received – with dates, addressees, method of service, and response status	Ongoing
Variation Register	Logs every variation: direction received (written or verbal), notice given, status, and valuation	Ongoing
EOT Register	Logs every delay event: date of occurrence, cause, notice given, claim status, and any determination received	Ongoing
Photographic Diary	Time-and-date-stamped photographs of progress, conditions, and any issue of note	Daily or as events arise
Meeting Minutes	Accurate records of all project meetings – reviewed and corrected within 48 hours	After every meeting
As-Built Records	Records of what was actually constructed versus what was designed – critical for final account and variation claims	Updated through construction

iii. The Site Diary in Practice

The site diary is one of the most important records on any construction project.

It should be completed daily, not weekly by the site supervisor or contract administrator and during or at least, at the end of each working day while events are fresh.

A useful site diary entry records:

- the date and weather conditions (relevant for weather delay claims and concurrent delay analysis);
- number and description of personnel and subcontractors on site (relevant for productivity and delay claims);
- work carried out, including location and stage of progress; visitors to site and the purpose of their visit;
- any verbal instructions received, including who gave them, what was directed, and the time
- any events, incidents, or conditions of note; and
- plant and equipment on site.

The importance of objectivity cannot be overstated.

A site diary that contains self-serving assertions or retrospective judgments about fault will be given less weight and may actively damage your case in adjudication or litigation.

Record what happened, not who was to blame.

iv. Contract Registers as a Management Tool

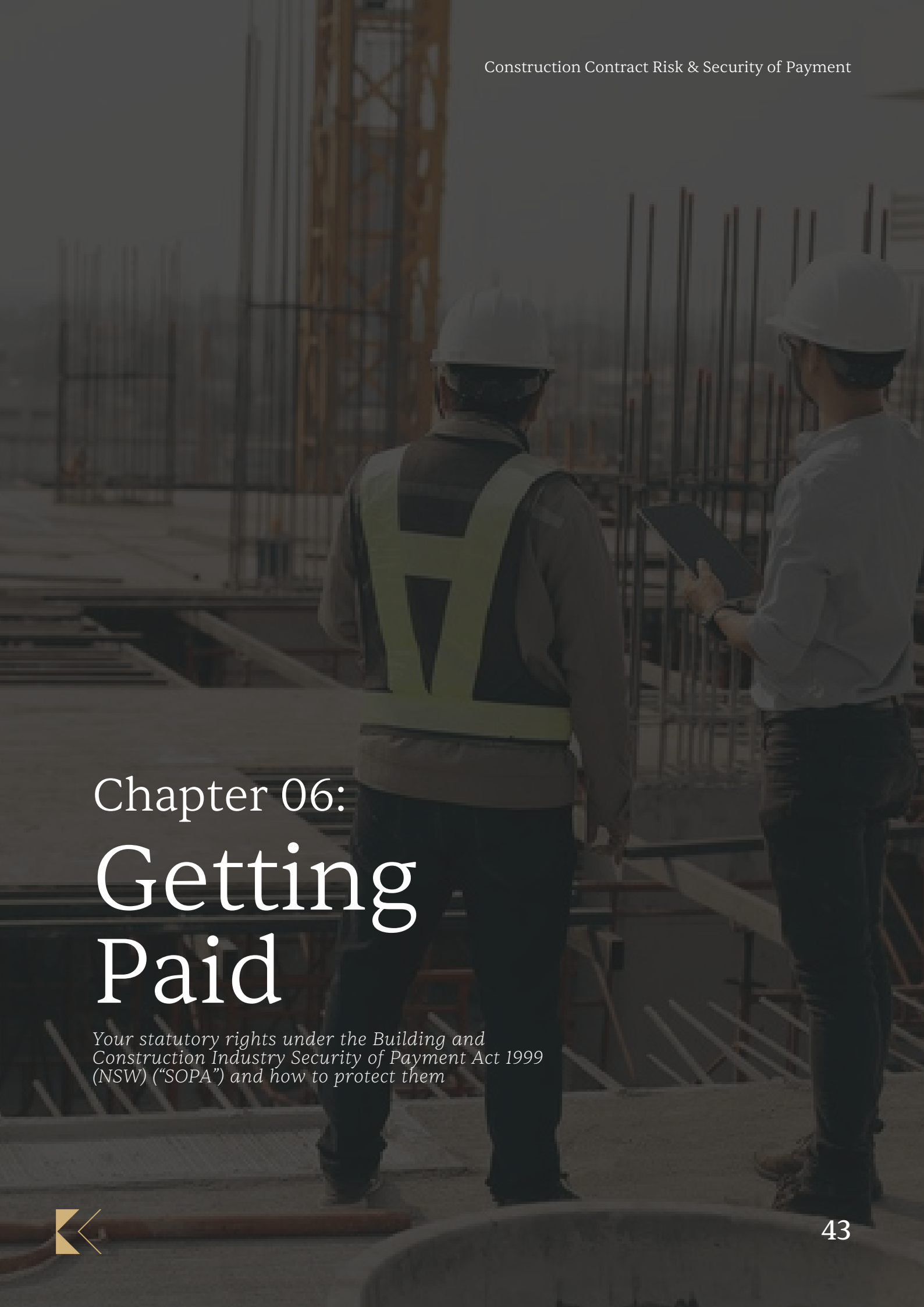
A contract register is a live document tracking all active contracts on a project, their values, variations, payments, and status and is a fundamental contract administration tool.

For a development project of any scale, the register is the control document that connects the financial position of the project to the contractual commitments made by all parties.

A well maintained contract register tracks, for each contract:

- the original contract value;
- approved change orders and their cumulative effect on the contract sum;
- total contract value;
- status (approved, pending, in dispute);
- payment history; and
- key dates.

It serves both as a financial management tool and as an early warning system for a contract where the change order value is approaching or exceeding the original contract sum is a contract that requires immediate management attention.



Chapter 06: Getting Paid

Your statutory rights under the Building and Construction Industry Security of Payment Act 1999 (NSW) ("SOPA") and how to protect them

Getting Paid

Cash flow is the oxygen of a construction business. When it stops, companies fail.

ASIC insolvency data confirms that construction insolvencies are predominantly caused not by project failure but by payment failure.

The money was earned. It was not received.

SOPA was enacted to try and fix this problem.

i. Why SOPA Exists

Before Security of Payment legislation was enacted in Australia, the construction industry had an entrenched payment problem.

Pay-when-paid clauses were standard: a head contractor could legally refuse to pay a subcontractor until the principal had paid the head contractor.

If the principal did not pay or delayed payment for months, that risk was borne by the subcontractor. The legislation was designed to break this dynamic.

The Building and Construction Industry Security of Payment Act 1999 (NSW) was enacted as the first of the Australian Security of Payment Acts.

Its stated purpose is to ensure that any person who undertakes to carry out construction work or supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments.

Every state and territory has since enacted equivalent legislation, though the detailed procedures differ.

ii. The Pillars of SOPA

Pillar 1	Pillar 2	Pillar 3
Statutory right to progress payment	Pay when paid provisions void	Fast-track adjudication

Pillar 1: Statutory Right to Progress Payment

Section 8(1) of the NSW Act provides: "A person who, under a construction contract, has undertaken to carry out construction work or to supply related goods and services is entitled to receive a progress payment."

This right exists regardless of whether the contract provides for progress payments. If the contract is silent on payment timing, the Act fills the gap.

In NSW, progress payments are due within 15 business days of the payment claim for head contractors and 20 business days for subcontractors, or an earlier date if the contract so provides. These maximum periods cannot be extended by contract. Any provision purporting to do so is void to the extent of the inconsistency.

Pillar 2: Pay When Paid Clauses Are Void

Section 12 of the NSW Act renders void any contractual provision that makes a party's entitlement to a progress payment conditional on that party's principal first receiving payment from its own principal.

This prohibition applies to both express pay-when-paid clauses and to disguised conditional payment arrangements. If your head contract or subcontract contains any version of this provision. whether it is labelled "*pay when paid*," "*pay if paid*," "*conditional payment*," or uses other formulations to the same effect that provision is void.

Pillar 3: Fast Track Adjudication

Where a payment claim is disputed or where a payment schedule is not served in time, or a scheduled amount is not paid, the claimant may apply for adjudication.

An independent adjudicator considers the submissions of both parties and issues a determination. That determination is an enforceable debt. The process typically resolves in weeks.

This is the "pay now, argue later" regime. An adjudication determination is an interim determination it does not prevent either party from pursuing the underlying dispute in court or arbitration. But during project delivery, it provides fast, affordable enforcement of payment entitlements.

iii. The SOPA Process in New South Wales

Step 1 Payment Claims	Step 2 Payment Schedule	Step 3 Adjudication Application	Step 4 Adjudication Response	Step 5 Determination	Step 6 Enforcement

Step 1. **Payment Claim**

The claimant serves a payment claim on the respondent. In NSW, the payment claim must be: in writing; identify the construction work or related goods and services to which the payment relates; indicate the claimed amount; and state that it is made under the Building and Construction Industry Security of Payment Act 1999 NSW.

Unless the contract provides a different date, one payment claim may be served under the contract on and from the last day of the month in which the construction work was carried out. A final payment claim may also be served after termination of the contract under section 13(1C) of the Act.

Step 2. **Payment Schedule**

The respondent must serve a payment schedule within 10 business days of receiving the payment claim. The schedule must identify the payment claim to which it responds, indicate the amount the respondent proposes to pay (the "scheduled amount"), and if the scheduled amount is less than the claimed amount the reasons for withholding payment.

If no schedule is served within 10 business days, the full claimed amount becomes due as a debt, and the respondent loses the right to raise any defence in adjudication. [23]

Step 3. **Adjudication Application**

If the respondent fails to serve a payment schedule at all, the claimant has two options: apply directly to court to recover the claimed amount as a debt, or serve a notice under section 17(2) of the Act giving the respondent a further 5 business days to provide a payment schedule, failing which the claimant may apply for adjudication. If the respondent serves a payment schedule for less than the claimed amount, the claimant may apply for adjudication.[24]

Step 4. **Adjudication Response**

In NSW, the respondent has 5 business days to respond to the adjudication application.

Two critical constraints apply to the respondent: the response is limited to reasons contained in the payment schedule – new reasons cannot be introduced; and the time to respond is fundamentally shorter than the time the claimant had to prepare the application (which has no time limit in NSW). The asymmetry is intentional and significant.[25]

Step 5. **Determination**

The adjudicator considers the payment claim, the payment schedule, the adjudication application, and the adjudication response, together with the provisions of the construction contract and the Act, and determines the adjudicated amount.

The adjudicator must give reasons.[26]

Step 6. **Enforcement**

An adjudicated amount not paid within 5 business days may be filed in the Supreme Court and enforced as a judgment debt. The principal or head contractor's bank account can be frozen.

An adjudication certificate can also be used to obtain a payment withholding request on money payable by the principal to the head contractor. [27]

iv. The Section 20 (2B) Trap - For Respondents

Section 20(2B) of the NSW Act restricts the respondent to reasons identified in the payment schedule when preparing the adjudication response. This provision creates significant asymmetric risk for respondents who fail to prepare thorough payment schedules.

The practical consequence is this:

(a) if a subcontractor serves a payment claim containing a complex variation or delay claim;

(b) the head contractor's payment schedule does not adequately address the reasons for withholding payment in relation to each element of that claim, the head contractor cannot fill those gaps in the adjudication response; and

(c) the adjudicator may be required to determine the claim on the basis of insufficient reasons, which frequently results in the claimant receiving more than it would if the full factual and contractual response were available.

The lesson for head contractors is direct: the payment schedule is your primary defence. It must be thorough, reasoned, and served within time.

Allocate the resources to do it properly on every claim.

v. What This Means for Subcontractors

SOPA is a powerful tool, but it is only as powerful as the documentation behind it. The Act creates a process for recovering entitlements it does not create the entitlements themselves.

If your site diary is sparse, your variation notices are missing, your correspondence is informal and not retained, and your payment claim is not supported by adequate records, adjudication will not save you.

The connection between the record-keeping discipline in Chapter 5 and SOPA is direct and structural. Every site diary entry, every variation notice, every correspondence record, every meeting minute this is the material that an adjudicator will assess. Treat documentation as the foundation of your payment security, not as an administrative burden.

The endorsement requirement and the "made under the NSW SOP Act" statement is a precondition for access to the NSW adjudication process. It cannot be added retrospectively.

Ensure every payment claim to be advanced under the NSW Act contains the required endorsement.

vi. What This Means for Head Contractors

If you are a head contractor, your SOPA exposure is bidirectional: recovery from principals above, and adjudication applications from subcontractors below.

The most important discipline for managing downward risk is the payment schedule. Build a system that captures every payment claim received on the day of receipt, records the service date, and ensures the payment schedule is prepared, reviewed, and served within 10 business days.

Also understand the correlation: adjudication applications from subcontractors increase during periods of construction insolvency and financial stress. The construction industry has experienced significant insolvency pressure in recent years. The risk of receiving adjudication applications from financially stressed subcontractors is material and ongoing.

Preparation and not reaction is the appropriate response.

Conclusion

Six chapters. One consistent message.

Construction is a high-risk industry. The risks are structural, well-documented, and predictable.

The causes of disputes have been identified across decades of research, consistently pointing to the same two root causes: poor contract administration and a failure to understand contractual obligations. The clauses that generate the most financial pain have been identified.

The statutory rights that protect cash flow exist and are enforceable. None of this is obscure or inaccessible.

What separates contractors and subcontractors who manage projects well from those who do not is operational discipline.

The discipline to:

- read the contract carefully before signing it — not to assume the standard form is unamended.
- price risk honestly rather than optimistically.
- appoint a dedicated contract administrator from day one.
- give notices on time, in the correct form, to the correct person.
- document every event, every instruction, every condition — daily.
- in the case of a head contractor to serve payment schedules before the 10 business day window closes.
- None of these practices requires a law degree.

They require systems, habits, and a genuine understanding of what the contract demands.

CMA Assets Pty Ltd v John Holland Pty Ltd [No 6] [2015] WASC 217 remains one the most instructive single case in Australian construction law for contractors.

A 7-day notice window missed. An entitlement extinguished. Liquidated damages applied despite the delay being caused by the other party.

The entire cost of a systematic compliance programme for every project, every year would not have approached the loss suffered on that one project.

Use the contract.
Build the system.
Give the notices.
Keep the records.

Footnotes

[1] *Arcadis Global Construction Disputes Report (annual series, including 2014–2024 editions)*

[2] *Glinatsis, D., Your Contract. Your Risk. (Kreisson Legal, 29 October 2019), Part 2, Common disputes, risks and tips; citing Acharya et al. (2006) and Powell-Smith and Stephenson (1993).*

[3] *See for example Arcadis GLOBAL CONSTRUCTION DISPUTES REPORT 2016 Contract Solutions DON'T GET LEFT BEHIND*

[4] *Arcadis, Global Construction Disputes Report 2018: Does the Construction Industry Learn from Its Mistakes? (Arcadis, 2018); consistent across the annual series 2014–2024.*

[5] *See El Hawary, A. & Nassar, A., "The Effect of Building Information Modeling (BIM) on Construction Claims", International Journal of Scientific & Technology Research, Vol. 5, No. 12 (December 2016), p. 29. Note: this data is drawn from a literature review of prior studies and represents aggregated findings rather than a single primary survey.*

[6] *Ana Laura Campos Gutierrez, Kriengsak Panuwatwanich and Angela Walker, Learning from the Past: Analysis of Factors Contributing to Construction Project Disputes in Australia (World Building Congress, 2013).*

[7] *Glinatsis, D., Your Contract. Your Risk. (Kreisson Legal, 2019), Part 2: "The ensuing costs, not only of lawyers brought in to deal with the claims, but also of internal management and administration, can often outweigh the perceived benefit of having shifted the risk in the first place.*

[8] *CMA Corporation Limited (Administrators Appointed) (ASX Announcement, 2 August 2013) see also Glinatsis, D., Your Contract. Your Risk. (Kreisson Legal, 2019), Part 9.*

[9] *CMA Assets Pty Ltd v John Holland Pty Ltd [2015] WASC 217.*

[10] *Max W Abrahamson, 'Risk Management', The International Construction Law Review (1984), p. 244*

[11] *Abrahamson Principles, as adopted by the Joint Working Party of the National Public Works Conference and the National Building and Construction Council, No Dispute: Strategies for Improvement in the Australian Building and Construction Industry (1990), p. 6; cited in Glinatsis, D., Your Contract. Your Risk. (Kreisson Legal, 2019), Part 2.*

[12] *Arcadis & Australian Constructors Association, Construction Market Sentiment Survey 2024, available at: constructors.com.au/advocacy/reports/2024-construction-market-sentiment-survey/; as reported in Infrastructure Magazine, 20 August 2024. The 71% finding reflects ACA member contractor respondents, not the Australian construction industry as a whole.*

[13] *Glinatsis, D., Your Contract. Your Risk. (Kreisson Legal, 2019), Part 2: Risk Shifting – Consequences.*

[14] *Max W Abrahamson, 'Risk Management', The International Construction Law Review (1984), p. 244.*

[15] *Sharkey, J. & Bell, M., Standard Forms of Contract in the Australian Construction Industry (Melbourne Law School, University of Melbourne, supported by the Society of Construction Law Australia, June 2014). Survey of 295 respondents representing 379 projects.*

[16] *Sharkey & Bell, Standard Forms of Contract in the Australian Construction Industry (Melbourne Law School, 2014).*

[17] *McMullan, J., Construction Contract Administration Principles 2023 (McMullan Solicitors, 2023), s 5.2.2, citing AS 2124-1992 cl 35.5 (concurrent delays provision).*

[18] *McMullan, J., Construction Contract Administration Principles 2023 (McMullan Solicitors, 2023), s 5.3: "The liquidated damages provision is primarily for the benefit of the Contractor. The operation of a liquidated damages clause effectively limits the potential exposure of the Contractor to damages for late completion."*

[19] *McMullan, J., Construction Contract Administration Principles 2023 (McMullan Solicitors, 2023), s 6.4: "The test applied by the Courts is, in substance, that particular work constitutes a variation if it is work outside the works upon which the Contractor tendered/contracted, having regard to the terms of the Contract."*

[20] *McMullan, J., Construction Contract Administration Principles 2023 (McMullan Solicitors, 2023), s 5.6; citing Re Multiplex Constructions Pty Ltd [1999] 1 Qd R 287 (QCA), Leighton Contractors Pty Ltd v SA Superannuation Fund Investment Trust (1996) 12 BCL 38, and Wormald Engineering Pty Ltd v Resources Conservation Co International (1989) 8 BCL 158.*

[21] *CMA Assets Pty Ltd v John Holland Pty Ltd [No 6] [2015] WASC 217, Allanson J (Supreme Court of Western Australia, 19 June 2015); Glinatsis, D., Your Contract. Your Risk. (Kreisson Legal, 2019), Part 9, Case Studies.*

[22] *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd [2017] QSC 85, Flanagan J (Supreme Court of Queensland, 19 May 2017). King Planning Pty Ltd provided expert evidence on the delay analysis. Subsequent appeals at [2019] QCA 12 (quantum) and [2021] QCA 8 (costs) did not disturb the principal waiver findings.*

[23] *Building and Construction Industry Security of Payment Act 1999 (NSW), s 14.*

[24] *Building and Construction Industry Security of Payment Act 1999 (NSW), ss 15, 17.*

[25] *Building and Construction Industry Security of Payment Act 1999 (NSW), s 20(1) (5 business days); s 20(2B) (respondent limited to reasons in payment schedule — the "s 20(2B) trap").*

[26] *Building and Construction Industry Security of Payment Act 1999 (NSW), s 22.*

[27] *Building and Construction Industry Security of Payment Act 1999 (NSW), ss 25, 26 (payment withholding request).*