
Index

Acceleration clauses

- effect of *Andrews* decision on, 245-246
- funds in trust following, 116

Accrued rights

- divested by termination, 429-434
- progress claims and, 158, 219

Adjudication

- claims made within time or “recycled”
518-523
- enforcing determinations, 372-384
- right to seek review of, 498-530
- time limits for decisions, 523-530

Alternative dispute resolution

- breaches of natural justice in, 247-255

Andrews decision

- High Court doctrine on penalties, 233-246

Appropriation of payments

- specific allocations required for, 435-444

Arbitration

- breaches of natural justice in, 248-251

Architectural services

- partial payment for, 487-497

AS 2124-1992

- cls 30.1, 30.3, 33.1, breach of obligation
under, 19-116
- cl 33.1 construed, 70, 73-75
- cl 44, form of a notice to show cause, 57-70
- cl 44.4, principal exercising right under, 99
- cl 44.6, cost to complete certificates issued
under, 19-116
- work remaining to be completed taken out of
contractor’s hands, 99-102

AS 4000-1997

- liquidated damages after determination, 400

AS 4300-1995

- General Conditions regarding completion,
477-481

AS 4902-2000

- General Conditions of modified, 172-178,
201-203

Ascertained damages *see* Liquidated damages clauses

Australian Consumer Law

- approach to building contracts, 455-456

Book reviews

- Best Practice in Construction Disputes,
450-451

- The Leaky Buildings Crisis: Understanding
the Issues, 120-121

Breach of contract

- not essential for relief against penalties,
233-246
- quantum issues and, 26-28

Certainty principle

- certification processes and, 407-408

Certification processes

- in contracts, 406-416

Certoriari

- grounds for granting, 498-530

Charges *see* Liens, charges or other interests

Collins Inquiry

- recommendations of, 457-460

Commercial arbitration *see* Arbitration

“Commitment”

- legal status of, 185

Completion *see* Substantial performance

Conspiracy to injure

- failure to prove allegations of, 159, 164, 205,
212-213

Constitutional law

- security of payments legislation and, 463-475

Construction law *see also* Contracts

- effect of *Andrews* decision on industry,
241-246
- good faith, conscionableness and
reasonableness in, 4-15
- implications of PPSA for, 298-310
- penalties in affected by High Court decision,
233-246

Construct-only contracts *see* AS 2124-1992; AS 4000-1997

Consultants

- role in endorsing payment claims, 476-486

Consumers *see* Australian Consumer Law

Contractors

- claim for interlocutory injunction, 256-265
- confusion over identity of, 203
- damages claims by, 256-265
- liquidated damages provisions, 129-130
- prima facie cases demonstrated by, 256-265
- quality assurance obligation of, 39-40

Contracts *see also* AS numbers of specific contract forms; Breach of contract

- certification processes, 406-416

- completion clauses in, 329-367
- determination of, 385-405, 498-530
- duty of care, 10
- “entire contract” and substantial performance, 340-348, 489-494
- exclusions to liability caps, 311-314
- expert determinations and, 266-293
- good faith in, 6-7
- implications of PPSA, 301-305
- incompleteness of, 195-201
- liquidated damages provisions, 127-153, 385-405
- modification of, 154-226, 305
- monetary value as proxy for vulnerability, 452-462
- notice of award of, 166-172, 203
- payment provisions, 514-515
- protection against latent defects, 326-328
- reasonableness in, 8-9
- repudiation. *see* repudiation
- security for. *see* security calls
- specific performance orders in, 429-434
- termination. *see* termination
- time for performance in, 10
- uncertainty about, 194-201, 203
- unconscionability in, 7-8
- unenforceable under Home Building Act 1989 (NSW), 438-439
- Cost to complete certificates**
 - issued under cl 44.6 of AS 2124-1992, 104-112
- Costs**
 - appeals against cost orders, 496
 - basis of order for payment, 16-18
- Damages** *see also* **Liquidated damages clauses**
 - availability of after termination, 403-404
 - claims by principals, 256-265
 - common law, 113-116
 - formulae to calculate, 127-153
- Defective work and materials**
 - commercial premises, 323-324
 - cost to complete certificate, 106-107
 - emergence of, 40-57
 - identification of substantial breach, 79-86
 - liability issues, 25-26
 - notices about. *see* notices
 - subsequent purchasers and, 315-328
- Delay** *see also* **Extension of time; Liquidated damages clauses**
 - construction program and, 36-39
 - formulae to calculate damages, 130-132
- Design and construct contracts** *see* **AS 4300-1995; AS 4902-2000**
- Determination of contracts**
 - application for leave to enforce as judgments, 498-530
 - availability of liquidated damages after, 385-405
- Directions notices**
 - authority to give directions, 65-69
 - identification of substantial breach, 75-79, 92
 - liability issues, 24-25
- Disclosure**
 - reassignment from vendor to purchaser, 326-327
- Dispute resolution** *see also* **Alternative dispute resolution**
 - addressed by General Condition 42, 154-226
 - Best Practice in Construction Disputes, 450-451
 - enforceability of mechanisms for, 429-434
 - good faith negotiation, 14-15
 - status of adjudication decisions, 498-530
 - whether heads of agreement binding, 417-427
- Dunlop test**
 - in calculating liquidated damages, 133-136
- England** *see* **United Kingdom**
- Entire contract** *see* **Contracts**
- Environmental approvals**
 - delays in providing, 209-210, 212-213
- Error of law**
 - in expert determination, 271-290
- Essential terms**
 - uncertainty as to, 154-156, 186-204
- Execution creditors**
 - implications of PPSA for, 305-306
- Expedition notices**
 - identification of substantial breach, 86-90, 92-93
 - legal requirements for, 69-75
 - liability issues, 25
- Expert determinations**
 - breaches of natural justice in, 251-252
 - contracts and, 266-293
 - errors of law in, 271-290
 - misconception of function, 271-277
- Extension of time** *see also* **Delay**
 - construction program and, 36-39
- Fair value** *see* **Valuation**

Fairness

implied duty of in tender process, 9-10
procedural fairness in ADR, 247-255

FIDIC contracts

liquidated damages after determination,
399-400

Forfeiture

doctrine of, 241-242

Formulae

in liquidated damages clauses, 127-153

Fraud

exclusions to liability caps, 313-314

General Conditions *see* **AS 4300-1995**; **AS 4902-2000****Good faith**

breach of implied obligation, 350-357
in construction law, 4-15
statutory protection of, 13-14
termination for convenience and, 122-126

Gross negligence *see* **Negligence****Heads of agreement**

whether intended to be binding, 417-427

High Court decisions

penalties affected by, 233-246

Hong Kong

formulae for liquidated damages, 143-146

Indemnity

basis of order for payment, 16-18
effect of Andrews decision on, 246

Injunctions

claims for interlocutory injunctions, 256-265
made under invalid legislation, 470-472

Judgment debts

enforcing security of payments
determinations, 372-384

Judicial power *see also* **Constitutional law**

federal and state, 381-382

Jurisdictional error

enforcing determinations tainted by, 382-383

Kable principle

enforcement of State legislation and, 373-383
security of payments legislation, 463-475

Latent defects *see* **Defective work and materials****Leases**

implications of PPSA for, 298-300
options to renew, 266-293

Legislation

Constitutional law and validity of, 467
dual scheme approach to harmonising,
461-462
The Leaky Buildings Crisis: Understanding
the Issues, 120-121
mechanisms for intervention via, 453-455

Liability

exclusions to liability caps, 311-314
notices and, 24-26
resolution of uncertainties in proportionate
liability, 230-232

Liens, charges or other interests

exemptions for in PPSA, 307-309

Limitation of liability clauses *see* **Liability****Liquidated damages clauses** *see also* **Delay**

determination of contracts and, 385-405
formulae in, 127-153

Market value *see* **Valuation****Misconduct**

exclusions to liability caps for wilful
misconduct, 311-312
failure to prove allegations of, 159, 164, 205,
212-213

Monetary value

as proxy for vulnerability, 452-462

Natural justice

breaches of in alternative dispute resolution,
247-255

Negligence

exclusions to liability caps for gross
negligence, 312-313

New Zealand

The Leaky Buildings Crisis: Understanding
the Issues, 120-121
liquidated damages after determination,
401-403

Notices

to take over works, 99-102
validity of notices to show cause for
substantial breach, 19-116

Party costs

solicitor and client costs vs, 16-18

Payment claims *see also* **Dispute resolution**

conditions to be met, 476-486
identification of, 516-518, 523-530

Penalties

Dunlop test, 133-136
High Court doctrine on, 233-246
unconscionability and, 12

Performance orders *see* **Specific performance orders**

Personal Property Securities Act 2009 (Cth)
implications for construction law, 298-310

Pickavance Formula
in calculating liquidated damages, 130,
132-133, 148-149

Principal contractors *see* **Contractors**

Privative clauses
identification and construal, 506, 508, 513

Procedural fairness
in alternative dispute resolution, 247-255

Programming
requirements for an expedition notice, 70-75
requirements to submit construction program,
32-36

Progress claims and payments
accrued rights and, 158, 219
claims for refund, 154-226
effect of Andrews decision on, 244
provisional sum claims made for scaffolding
in, 28-32
security of payments. *see* security of payments
legislation
submission of claims, 188
termination due to failure to make payments,
435-444

Proportionate liability
resolution of uncertainties in, 230-232

Public private partnerships (PPPs)
certification processes, 415-416

Pure economic loss
subsequent purchasers and, 315-316, 324-325

Quality assurance
inspections relating to, 52-53
obligation of contractor, 39-40

Quantum issues
breach of contract and, 26-28
failure of quantum meruit claim, 220-226
quantification of, 361-364
unpaid claims, 438-439

Reasonableness
in construction law, 4-15
Wednesbury unreasonableness in expert
determination, 267, 290-292

Rent
expert determinations of, 266-293

Repudiation
due to failure to make progress payments,
435-444

mutually asserted, 218-220
by principal, 99-100
termination amounting to, 357-361
wrongful, 218-220

Restitution
claims for, 361-364
quasi-contract vs, 13
suspension of works amounting to, 435-444

Retention moneys
implications of PPSA for, 302-303

Rights
implications of PPSA for, 303-305, 309

Rossiter formula
in calculating liquidated damages, 138, 150

Security calls
conditions to be met, 476-486
unconscionable conduct regarding, 13,
264-265

Security of payments legislation *see also*

Progress claims and payments
approaches to, 456-457
Constitutional law and, 463-475
enforcing, 372-384
jurisdiction over adjudicator's decision,
498-530

Security transactions
functional approach to, 298-310

Separation of powers doctrine
Constitutional law and, 468-469

Settlement
implications of PPSA for, 306-307

Sign-off forms
significance of, 79-80

Site access
failure to provide, 205-208

Solicitor and client costs
party costs vs, 16-18

Specific performance orders
in building contracts, 429-434
following dispute resolution, 423-427

State Administrative Tribunal (WA)
right to review adjudicated decisions, 498-530

Statutory adjudication
breaches of natural justice in, 252-254

Stay of judgment
made under invalid legislation, 470-472

Stipulated sums
formulae to calculate, 127-153

Subsequent purchasers
defective works and, 315-328

Substantial performance

application to entire contract, 340-348
payment claims for, 487-497

Superintendents

duties and obligations of, 108-109, 172-173
partial suspension of works by, 156-159, 161,
174-178, 210-213

Supreme Court (WA)

jurisdiction over adjudicator's decision,
507-511

Suspension of works

partial, 156-159, 161, 174-178, 210-213

Tender process

design and construct contract by, 154-226
implied duty of fairness, 9-10

Termination

accrued rights divested by, 429-434
amounting to repudiation, 357-361
claim for refund of progress payments on,
154-226
of contracts vs engagements, 394-395
for convenience/at will, 122-126
due to failure to make progress payments,
435-444
liquidated damages after, 395-399
purported, 225, 256-265

Time *see* **Delay; Extension of time****Trust funds**

following adjudication, 116

Unconditional undertakings

restraint from calling on, 256-265

Unconscionable conduct

in construction law, 4-15
resort to security and, 264-265

United Kingdom

Building Directive BCD-2 at West Sussex
County Council, 141-142, 151-152
defective works litigation, 316-319
formulae for liquidated damages, 140-143

Unreasonableness *see* **Reasonableness****Valuation**

expert determinations, 266-293

Vulnerability

duty of care and, 323
monetary value as proxy for, 452-462

Waiver

by virtue of forbearance or abandonment,
348-350

Warranties

against latent defects, 326

Wilful misconduct *see* **Misconduct**

