The Legal 500 Country Comparative Guides

Australia: Construction

This country-specific Q&A provides an overview to construction laws and regulations that may occur in Australia.

For a full list of jurisdictional Q&As visit here.
1. **Is your jurisdiction a common law or civil law jurisdiction?**

   Australia is a common law jurisdiction. It is also a federal system with Commonwealth and state/territory laws based on the constitutional allocation of jurisdiction in relation to specific powers. Consequently, both Commonwealth and state/territory legislation may apply to a specific legal issue. This may result in different legal approaches between jurisdictions (e.g. in relation to security of payment and proportionate liability legislation).

2. **What are the key statutory/legislative obligations relevant to construction and engineering projects?**

   Whilst relationships between parties are regulated by contract, there is significant statutory intervention in the areas of:
   - security of payment;
   - imposition of 10 year limitation of liability for ‘building actions’ in a number of jurisdictions, which overrides normal tortious and contractual limitation periods (see Question 25 below);
   - work, health and safety;
   - environmental obligations;
   - industrial agreements and workplace arrangements;
   - misleading and deceptive conduct;
   - apportionment of liability between ‘concurrent wrongdoers’ (with non-harmonised entitlement versus prohibitions on contracting out);
   - insurance; and
   - unfair contract terms for small businesses.

3. **Are there any specific requirements that parties should be aware of in relation to:**
   (a) **Health and safety;** (b) **Environmental;** (c) **Planning;** (d) **Employment;** and (e) **Anti-corruption and bribery.**

   **(a) Health and safety;**

   Model work, health and safety (‘WHS’) laws exist across jurisdictions (other than Victoria and Western Australia) to achieve significant harmonisation of WHS obligations. The common statutory regime imposes obligations on persons conducting a business or undertaking to (amongst other things) take reasonably practicable steps to ensure the health and safety of workers and others including by providing a safe work environment, safe plant and structures, systems of work, the same use, handling and storage of plant, structures and substances, information, training and instruction to protect all persons from risks to their health and safety and monitoring the health of workers and the conditions at the workplace. Specific obligations are also imposed on entities with management and control of a workplace and on entities which have been appointed as a principal contractor for construction work. There is a positive, personal duty imposed on individual officers to exercise “due diligence” to ensure their organisation complies with WHS obligations. There are also personal obligations...
imposed on workers. There are significant penalties that can be imposed against companies, individual officers and workers for breaching WHS obligations.

(b) Environmental issues;

At a federal level, a construction project that is likely to have a significant impact on nationally protected matters, such as threatened species of flora or fauna and heritage properties, may be referred to the environment minister. The minister may approve a project unconditionally or with conditions, refuse a project, or decide that federal assessment is required.

Environmental requirements vary between jurisdictions. Generally, approval or licencing will be required if the project generates air pollution, noise, if it impacts biodiversity or heritage items, or involves environmentally hazardous chemicals or contaminated land.

(c) Planning;

Planning legislation regulates development within specific zones. Where a construction project is permissible with consent in a zone, a development application is submitted to the designated planning authority and will be subject to specific development controls (e.g. building height, setbacks and floor space ratio). Where a construction project is permitted without consent, it can proceed without a development application (although other building and environmental consents may be required).

(d) Employment; and

Employment relationships are generally governed by the Fair Work Act 2009 (Cth), which sets national minimum standards for matters including maximum weekly hours, leave, notice of termination and redundancy pay. The Australian employment regime is unique in the application of industrial ‘awards’ with force of law which establish additional minimum standards for employers and employees across industry and occupational lines. Employees in the construction industry may be covered by the Building and Construction General On-site Award 2010, for example. Additional employment obligations are imposed on entities that have tendered for Commonwealth-funded work. Industrial disputes are subject to a Conciliation and Arbitration legal system which regulates how industrial action may proceed and allows for judicially imposed settlement of disputes. The Building and Construction Industry (Improving Productivity) Act 2016 (Cth) also regulates certain matters such as unlawful industrial action or attempting to coerce employers or employees entering into or altering industrial agreements.

(e) Anti-corruption and bribery.
Under the Commonwealth Criminal Code, it is an offence to provide, offer to provide, or cause a benefit to be offered or provided to a person that is not legitimately due to that person. The offer must be made with the intention of influencing a foreign public official to obtain or retain business or a business advantage that is not legitimately due to them. There are also similar offences under the Commonwealth Criminal Code in relation to the offering of benefits to Commonwealth public officials.

The Code imposes penalties of either imprisonment or significant fines for individuals and corporations. Additionally, if a contractor has illegally obtained the award of a contract, it will likely be void and unenforceable.

There are also offences under the laws of each State and Territory in relation to the offering, solicitation or receipt of corrupt benefits, including in relation to transactions between private parties as well as with local public officials. Some states have independent corruption investigatory bodies, with significant legal powers to investigate corruption affecting government bodies.

4. **What permits/licences and other documents do parties need before starting work, during work and after completion? Are there any penalties for non-compliance?**

Licensing requirements vary significantly between jurisdictions. All states require licences for specific trades such as electrical, gas and plumbing work.

In respect of building, New South Wales contractors require licences only for residential building work. In Tasmania and South Australia, licences are required to carry out both residential and commercial building work. Queensland has a comprehensive licencing system, which licences contractors for particular types of work subject to caps on the size of project for which the contractor is licenced. In some states, owners also need to ensure that the party they are contracting with holds the necessary licences to carry out building work.

A breach of licensing requirements is an offence, with legislation in most jurisdictions imposing fines for both individuals and corporations, and in some cases unlicensed contractors are prevented from exercising their contractual rights (i.e. recovering payment).

5. **Is tort law or a law of extra contractual obligations recognised in your jurisdiction?**

Yes, tort law is recognised in Australia.

6. **Who are the typical parties to a construction and engineering project?**

The principal as the party procuring the work. Principals may contract with both design consultants and building to carry out and complete building work. Alternatively Design and Construct procurement models are commonly used, under which the Contractor engages the
design consultants. Contractors will engage various sub-contractors to complete different aspects of the work, depending on their expertise. Project managers are also often engaged by a principal in such projects.

Subcontractors are almost always engaged as most ‘Tier 1’ contractors have minimal capacity ‘in house’ to perform construction work.

7. **What are the most popular methods of procurement?**

All the standard international procurement models are commonly used in Australia (i.e. construct only, Design and Construct, Construction Management, EPC, EPCM). Early Contractor Involvement procurement models are increasingly used.

8. **What are the most popular standard forms of contract? Do parties commonly amend these standard forms?**

Whilst parties are free to use any contract, standard form contracts are commonly used as base documents for construct and design-and-build projects. These are generally modified to make them ‘principal-friendly’. Large PPP and other infrastructure projects will commonly use ‘bespoke’ forms of contract.

The most widely used standard form contracts are published by Standards Australia. Other commonly used forms are published by the Master Builders Association and Australian Institute of Architects. For major projects, traditional construct-only and D&C/EPC/EPCM contracts are common, along with BOOT/DCM style contracts for major economic public-private partnerships.

9. **Are there any restrictions or legislative regimes affecting procurement?**

Procurement rules generally apply to contracts awarded by government bodies using public money, or relating to public property. At the federal level, the *Public Governance, Performance and Accountability Act 2013* (Cth) regulates government procurement. Legislation in each state and territory also establishes central bodies to conduct and regulate state procurement and publish codes of conduct. Rules also apply to local government procurement activities.

10. **Do parties typically engage consultants? What forms are used?**

Consultants are regularly engaged across the planning, design and construction phases of a project, depending on the project size and complexity. Consultants may be engaged by the principal, or by the contractor under a D&C model. Standards Australia and other professional bodies issue standard forms for engagement of consultants, although bespoke contracts are also used.
11. **Is subcontracting permitted?**

Yes. There are no statutory restrictions on subcontracting, however had contract contracts may restrict the amount or type of work that can be subcontracted or require prior authorisation to subcontract.

12. **How are projects typically financed?**

Private projects may be financed internally or through financier lending. Project financiers will usually require significant oversight of the contractual terms. Government projects are mostly funded by government allocations, however public-private partnerships are often used for procurement of very large economic and social infrastructure. Request for tenders are the traditional way for the government to approach the market.

In June 2018, the NSW Government released a 10 point “Action Plan” to improve construction procurement processes. For example, the NSW Government aims to move away from a reliance on “fixed price, lump sum” procurement methods (that have required projects like the Sydney CBD and South East Light Rail project (currently in dispute between construction contractor and the NSW Government) to be delivered by certain date and within a certain budget) to instead be open to collaborative contracting models (like alliancing). Participants in the non-government sector may also rely on unsolicited proposals to communicate innovative investment ideas for the government to consider.

13. **What kind of security is available for employers, e.g. performance bonds, advance payment bonds, parent company guarantees? How long are these typically held for?**

Security in the form of performance bonds is often provided to principals on contractors’ behalves by the four major Australian banks. Increasingly, insurance bonds are also provided by large insurers. Bank guarantees are available and often take the form of an unconditional undertaking by a financial institution, or standby letters of credit given by the contractor to the employer. Parent company guarantees are also regularly obtained.

It is the industry standard to withhold 5% to 10% of the Contract Sum as security, of which half is returned on certification of practical completion, and the balance on the expiry of the defects correction period (typically 12 months).

14. **Is there any specific legislation relating to payment in the industry?**

Each Australian state and territory has enacted legislation to regulate security for payment in the building and construction industry. These laws are not harmonised, with consequent differences between jurisdictions.

The Murray Review of Security of Payment Laws was issued in May 2018 and made 86 recommendations, including recommendations relating to harmonisation between
jurisdictions. The New South Wales and Queensland governments recently enacted new security of payment legislation, which appear to address some of the concerns raised by the Review. The New South Wales government enacted legislation which is to come into force later in 2019. In Queensland, the state government enacted the Building Industry Fairness (Security of Payment) Act 2017 (Qld), which commenced on 17 December 2018. This Act ultimately repealed the Building and Construction Industry Payments Act 2004 (Qld) and the Subcontractors’ Charges Act 1974 (Qld), to form a single statute containing all security of payment legislation for that state.

Other Australian states and territories (including Victoria, Tasmania, South Australia, Western Australia, the Northern Territory and the Australian Capital Territory) not yet amended their security of payment legislation.

15. Are pay-when-paid clauses (i.e clauses permitting payment to be made by a contractor only when it has been paid by the employer) permitted? Are they commonly used?

Security of payment legislation in all jurisdictions renders void “pay-when-paid” clauses in contracts for the performance of construction works, or supply of related goods and services, in Australia. A recent High Court of Australia decision, Maxcon Constructions Pty Ltd v Vadasz [2018] HCA 5 confirmed this position. It clarified that a pay-when-paid provision will have no effect if it “makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract”.

16. Do your contracts contain retention provisions and, if so, how do they operate?

Retention provisions are permitted in contracts, but are less common than the provision of security by unconditional undertakings. Retention amounts are held in the same manner as third party security referred to in Section 12 above.

There is ongoing legislative concern to minimise the effect of head contractor insolvency on subcontractors. On construction projects with a value of $20 million or more in New South Wales, retention money must be held in trust by head contractors. In Queensland, construction projects valued over $1 million are required to operate a project bank account.

17. Do contracts commonly contain delay liquidated damages provisions and are these upheld by the courts?

Australian construction contracts commonly contain liquidated damages provisions for delay and (less frequently) for inadequate performance. Such clauses usually provide for a rate per day or per week (often subject to an overall cap), with the rate representing the additional costs and losses likely to be incurred by the principal.

The decision of the High Court of Australia in Paciocco and Another v Australia and New
Zealand Banking Group Ltd (2016) 333 ALR 569 at [166], confirmed that in enforcing liquidated damages clauses the Court will take into consideration the wider commercial circumstances in which parties entered into the contract and whether the liquidated damages protect a legitimate interest, consequently restricting the potential for challenges to liquidated damages as a penalty.

18. **Are the parties able to exclude or limit liability?**

Parties are free to exclude and limit liability, except in relation to death and personal injury.

19. **Are there any restrictions on termination? Can parties terminate for convenience?**

*Force majeure*

**Termination for convenience**

Termination for convenience clauses are commonly included in construction contracts.

*Force majeure*

There is no common law doctrine of force majeure in Australia. However, it is common for a force majeure clause to be included in construction contracts, which will allow the principal (or sometimes both parties) to terminate if the force majeure event persists for an extended period (6 or 12 months). A force majeure clause will operate on its terms, based on what the parties define as a force majeure event, and the allocation of risk in those events. The clause may operate more broadly than the doctrine of frustration at common law.

20. **What rights are commonly granted to third parties (e.g. funders, purchasers, renters) and, if so, how is this achieved?**

Rights may be granted to third parties under tripartite agreements (e.g. to restrict variations and additional expenditure without approval, or step in rights in the event of a principal’s breach or insolvency). Collateral warranties may also be required from the a builder direct to a funder, purchaser or tenant.

21. **Do contracts typically contain strict provisions governing notices of claims for additional time and money which act as conditions precedent to bringing claims? Does your jurisdiction recognise such notices as conditions precedent?**

Yes. Time bars will be upheld, but may be challenged on grounds of waiver and estoppel if there is a factual basis to do so.

22. **What insurances are the parties required to hold? And how long for?**
By law, parties to a construction contract are required to hold workers’ compensation insurance and motor vehicle third party personal injury insurance for registered plant and motor vehicles. Contract terms will often require parties to hold other insurances for the duration of the project (in descending order of prevalence):

- contract works insurance;
- public liability insurance for on and offsite work;
- professional indemnity insurance for consultants or where a contractor undertakes design obligations (usually required to be held for 6 years after practical completion, because of the ‘claims made’ nature of such insurance);
- transit insurance for items transported to the site for incorporation into the works (optional);
- insurance of contractor’s plant and equipment
- advance loss of profits insurance (optional).

The principal will insure any existing buildings, and is responsible for the finished works from the date of practical completion. On very large infrastructure projects, a project-specific program of insurance will usually be put in place by the principal.

23. **How are construction and engineering disputes typically resolved in your jurisdiction (e.g. arbitration, litigation, adjudication)? What alternatives are available?**

Adjudication is available under security of payment legislation, and is widely used as an interim procedure to resolve contractor payment disputes. However, adjudication is only binding on an interim basis. A party wishing to challenge the determination will use the contractual dispute resolution procedures to seek the final resolution of matters. In Western Australia and the Northern Territory, principals can initiate adjudication, unlike other Australian jurisdictions in which it is solely the prerogative of the contractor.

Contracts generally contain tiered dispute resolution mandating alternate dispute resolution be undertaken prior to litigation. Mediation is a widely adopted process, along with expert determination to resolve matters of a specialist nature, such as valuation issues. International arbitration is also commonly used on large resources projects, which invariably involve international companies.

Litigation is common as the final stage of a tiered dispute resolution clause, with dedicated Technology and Construction Lists in most jurisdictions which actively case manage construction disputes.

24. **How supportive are the local courts of arbitration (domestic and international)? How long does it typically take to enforce an award?**

The Australian courts are very supportive of international and domestic arbitration.
Applications made to the courts in support of an arbitration, such as an application to stay court proceedings, interim measures and orders relating to the taking of evidence, are addressed swiftly and in an arbitration friendly manner. It is difficult to set aside an award or to challenge enforcement as the Australian courts have considered the grounds for challenge in a manner that is consistent with international practice.

Enforcement of an award where there is no challenge takes approximately 3 to 4 months. If there is an application to challenge enforcement, then the process may take 6 to 8 months depending upon the complexity of the grounds for challenge. The process may take a further 6 to 8 months if the court’s decision is appealed.

25. **Are there any limitation periods for commencing disputes in your jurisdiction?**

Yes, statutory limitation periods apply to prevent parties to a contract from commencing legal proceedings outside of a strict timeframe. However, careful consideration must be taken as time periods vary across jurisdictions and as between agreements and deeds (see further below).

The parties are also free to include contractual time bars for the commencement of disputes.

**Security of Payment legislation**

In each state and territory, security of payment legislation imposes a time period for issuing a claim or dispute arising out of a contract. This differs across jurisdictions, ranging from 90 days to 1 year from when the dispute arose or when the work was last performed.

**Contract and tort**

Generally, statutory limitations in each jurisdiction provide that actions arising in tort or contract cannot be brought more than 6 years after the date on which the cause of action accrued (with the exception of the Northern Territory, which has a 3 year limitation period). A cause of action in contract accrues at the date of the breach of contract. In negligence claims, the cause of action accrues when the loss is suffered or incurred.

**Deeds**

Where an agreement is formed under a deed, as opposed to an agreement, the limitation period ranges between 12 to 15 years, depending upon the relevant jurisdiction.

**Long stop provisions**

Long stop provisions in New South Wales and Victoria provide that ‘building actions’ must be
brought within 10 years after the date of the certificate of occupancy or certificate of final inspection.

26. **What are the biggest challenges and opportunities facing the construction sector in your jurisdiction?**

In the wake of the 2014 Lacrosse Tower fire in Victoria, and the 2017 Grenfell Tower fire in London, the issue of non-compliant building products has been the focus of Australian federal and state government inquiries and subsequent legislation. All states and territories (except the Northern Territory at this stage) are undertaking audits of buildings affected by combustible cladding. There is current uncertainty regarding the extent of remediation required, apportionment of liability for those involved in the design, construction and certification of existing buildings and the continued availability of insurance cover at commercial rates for contractors and consultants in this area.

Some examples of current regulation in this area include:

- In Queensland, the *Building and Construction Legislation (Non-conforming Building Products - Chain of Responsibility and Other Matters) Amendment Act 2017* creates a duty for all building industry participants to ensure non-conforming building products are not used. The *Building and Other Legislation (Cladding) Amendment Regulation 2018* also sets out the buildings that are subject to registration obligations. They include ‘private buildings’ of class 2 – 9; type A or B construction; and being built or that have had the cladding altered after 1 January 1994 but before 1 October 2018. Owners of houses or town houses do not need to register. Buildings undergoing cladding rectification/alteration works will require a building development approval.

- In New South Wales, the Fair Trading Commissioner has banned certain types of cladding products. The *Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2018* also requires owners of buildings that are both new and existing, of two or more storeys, to register. Cladding rectification works no longer exempt minor works and require approval.

- In Victoria, building surveyors are generally prohibited from issuing building permits to developers that propose to construct a building that consists of aluminium composite panels with a core comprising of 30% or more polyethylene by mass, unless the Building Appeals Board has approved the proposal. The state-wide cladding audit continues to be conducted by the Victoria Building Authority (VBA) on behalf of the Victorian Government. As part of the project, the VBA will send a letter to an owner before inspecting that property for cladding. To find out whether your building can be inspected, the VBA has a “start-to-finish guide for apartment and building owners”.

Out-of-cycle amendments to the National Construction Code have introduced a new verification method CV3 for testing and classification of external wall assemblies for fire propagation, which includes the new testing standard AS5113.
In relation to significant opportunities within the construction industry, the greatest opportunities now arise from infrastructure projects, which have been driven by government asset recycling schemes where the proceeds of sales of government assets in turn fund further infrastructure and in relation to renewables projects. In particular, there is a major government focus on renewable energy projects (Snowy Hydro 2.0), road and rail projects and upgrades to sporting facilities.

27. **What types of project are currently attracting the most investment in your jurisdiction (e.g. infrastructure, power, commercial property, offshore)?**

**Energy**

The renewable energy industry is booming, fuelled by new wind farms, large-scale solar photovoltaic and pumped hydro projects. Further development of the renewable energy industry has been hampered by regulatory and funding uncertainty arising from long-running political debate within the Liberal/ National Party coalition government regarding the role of government in subsidising baseload coal versus renewable energy generation and the setting of mandated target for the proportion of electricity to be generated from renewable sources.

**Inland Rail and metro**

The Commonwealth and state governments have made a series of commitments to new and upgraded rail line projects. This area has received particular attention with the new inland freight rail line and capital city rail projects recently securing greater Commonwealth and State funding. Some examples include the:

- **Geelong Fast Rail Line**, which will be between Melbourne CBD and Geelong;
- **Inland Railway Project**, which will extend from Melbourne to Brisbane through regional Victoria, New South Wales and Queensland to help connect the national freight network;
- **Sydney North-South Rail Link**, which will connect St Mary’s/Mt Druitt to Macarthur, via the new Western Sydney Airport; and
- **Sydney City Metro and North-West Rail Line**.

**Sydney’s second airport and Aerotropolis**

The New South Wales and federal governments are focused on developing a new economic zone around Sydney’s second airport, which is currently under construction in Badgerys Creek. In particular, this will involve the development of new roads, such as the M12, and rail connections across Western Sydney.

**Stadium upgrades**
The New South Wales Government has pledged to redevelop the “ANZ” Olympic Stadium at Homebush into a rectangular venue, as commenced replacement of the “Allianz” Sydney Football Stadium and recently completed building the new Western Sydney “Bankwest” Stadium. Further, the Western Australian Government recently finished its redevelopment of Perth “Optus” Stadium.

28. **How do you envisage technology affecting the construction and engineering industry in your jurisdiction over the next five years?**

Whilst the construction industry has often been viewed as a late adopter of technology innovation, there is an increasing use of new technology driven by both client demand and competition. Examples include increasing use of prefabrication, the widespread adoption of Building Information Modelling, 3D printing, drones and smart grids.