



LEVEL PLAYING FIELD
consultants and lawyers

KEY RISK AREAS IN THE CONSTRUCTION INDUSTRY

/// VARIATIONS

Once a site direction is given by a builder, a subcontractor has no choice but to complete the variation; often before the variation amount is approved. Timing is essential to ensuring variations are recoverable under the Security of Payments Act (specifically, variations over 10% of the contract should be monitored carefully).

There are 2 classes of claimable variations under the Security of Payments Act

First class of variations

There is an agreement as to:

- Work has been carried out
- The scope of works that needed to be carried out
- That the work constituted a variation
- That doing the work entitles them to a progress payment
- The value of the variation
- The time for paying the variation sum

Second class of variations

This is where there is a disagreement about any of these items:

- That the work constituted a variation
- That doing the work entitles them to a progress payment
- The value of the variation
- The time for paying the variation sum

If the variations fall into the second class of variations, the variation is not claimable if:

- The original contract sum is greater than \$5mil and has a dispute resolution clause
- If the variations exceed 10% of the contract sum and the contract contains a dispute resolution clause

A dispute resolution clause must state "a binding dispute mechanism separate from the Court system".

/// RETENTIONS

Retentions can be difficult to keep track of given that the defects liability period is usually 12 months.

There is an entitlement to Adjudication for the release of bank guarantees under the Security of Payment Act.

Excluded Amounts

Excluded amounts are items that Head Contractors cannot withhold from subcontractors when a Payment Claim under the Security of Payment Act is served.

These items are excluded amounts:

- (i) Latent conditions;
- (ii) Time-related costs;
- (iii) Changes in regulatory requirements;
- (iv) Any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;
- (v) Any amount in relation to a claim arising at law other than under the construction contract;
- (vi) Any amount of a class prescribed by the regulations as an excluded amount (No class is prescribed at the moment).