



GOOD FAITH UNDER THE NEW STANDARD CONTRACT

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The consultation period recently ended for draft AS11000 General Conditions of Contracts (“**AS 11000**”) from Standards Australia. AS11000 is a new standard contract that is intended to provide general guidance for legal contracts in all sectors of industry, including construction, engineering, health, manufacturing and infrastructure. It is intended to supersede AS2124-1992 and AS4000-1997.

Standards Australia hopes that AS11000 will provide a broadly balanced approach to risk allocation in plain language. The changes in AS11000 cover a variety of issues. Importantly, they include a new early warning procedure based upon an express good faith obligation, which is intended to assist in the management and resolution of disputes.

In this article, Litigation and Insolvency Partner, Sarah Davies, looks at these far reaching amendments and the important implications the changes will have for participants in the building and construction industry.

GOOD FAITH

AS11000 introduces a new obligation on each party to act in good faith towards the other. Good faith is not defined in the contract, so parties need to look to case law to understand what extra obligations this imposes on them.

Good faith is a difficult concept to define, but can involve the following:

- Co-operation between the parties to achieve the contract’s objectives;

- Doing what is necessary to ensure the success of the contract;
- Honest and reasonable standards of conduct being followed by the parties;
- Contractual rights being exercised for a proper purpose;
- Parties avoiding capricious or unreasonable behaviour;
- Parties having regard to the legitimate interests of the other party (although note they are not required to subordinate their own legitimate interests to the interest of the other party); and
- Avoiding bad faith, such as evasion of the spirit of the contract or wilfully rendering only substantial performance instead of complete performance.

EARLY WARNING PROCEDURES

AS11000 contains an early warning procedure, which requires a party to notify the other party if circumstances arise which create an issue under the contract. It imposes an obligation on the parties to try to resolve the issue, including by attending a resolution meeting. We will need to wait until the final version of AS11000 is available to see what specific obligations will be included. However, the early warning procedure will be impacted by both the obligations of good faith referred to above and the new dispute resolution clauses proposed for AS11000.

The parties to the contract should anticipate greater focus on attempting to resolve disputes at an early stage. In a practical sense, this is likely to involve the following:

- . notifying the other person of the issues that are in dispute and offering to discuss them;
- . responding appropriately if you receive such a notice from the other party;
- . providing relevant information and documents to the other party to enable them to understand the issues involved and how the dispute might be resolved;
- . considering whether the dispute could be resolved by a process facilitated by another person, such as a mediator;
- . attending any such process in good faith, and considering a different process if it fails to resolve the dispute;
- . attempting to negotiate with the other party, with a view to resolving some or all the issues in dispute;
- . actively engaging in any conferral process;

- . giving serious and genuine consideration to any proposals received from the other party and making appropriate proposals to settle the dispute;
- . making and responding to proposals in a reasonably timely manner having regard to the nature and scope of the issues to be negotiated, their technical and factual complexity, and their commercial significance to the parties; and
- . acting honestly and not conferring in an arbitrary or capricious manner.

Clearly, AS11000 can potentially deliver benefits to those in the building and construction industry. However, it will do so in a way that imposes additional obligations on parties to facilitate early resolution of issues in dispute between them. This might involve additional time and effort, but it is likely to pay off if disputes can be avoided or resolved at an earlier stage.

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