BUILDING AND CONSTRUCTION DISPUTES

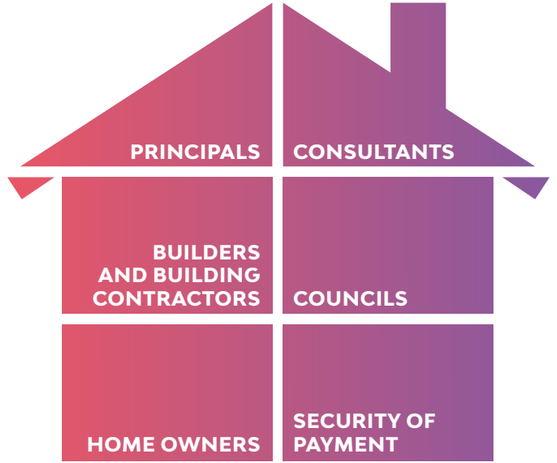
FACTS & FIGURES

Bartier Perry
LAWYERS

“Laws and obligations surrounding the building industry are not as safe as bricks and mortar”

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PRINCIPALS/ DEVELOPERS

DOES YOUR CONSTRUCTION CONTRACT REFLECT YOUR APPETITE FOR RISK?

How does your construction contract deal with:

- Claims for an increase to the contract sum
- Claims for time and cost relief by your contractor
- The provision of indemnities and warranties
- Disputes and alternative dispute resolution processes
- Termination, including for your convenience
- Adjustments to the contract sum
- Extensions of time
- Time over runs
- Site conditions
- Variations
- Discrepancies in documents
- Back charges
- Rights of termination

INTERESTING FACTS:

CONSTRUCTION CONTRACTS

The primary reason for amending contract terms is to **shift risk**

The **Australian Standard** forms of contract are the most popular

68% of construction contracts are based on a **standard form contract***

84% of **standard form contracts** are amended or have additional clauses inserted*

*CLAUSES MOST LIKELY TO BE AMENDED RELATE TO:	
EOT's	76%
delay damages including LD's	68%
variations	63%
warranties as to quality	62%

*University of Melbourne ' Standard Forms of Contract in the Australian Construction Industry Research Report' dated June 2014

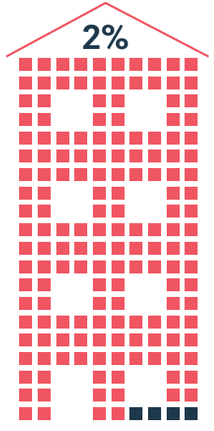
CONSTRUCTION CONTRACTS

A comprehensive **Scope of Work** can avoid disappointment and reduce the potential for dispute.

Accurately specify and detail:

1. **the Works and its purpose**
2. **the required performance standards**
3. **the builder's responsibilities**

INTERESTING FACTS:



Developers of residential buildings of **4 or more storeys** must pay a bond of **2%** of the building contract sum to **Fair Trading NSW** to cover the costs of rectifying any defects

PRINCIPALS



Most principals know of the ***Building and Construction Industry Security of Payment Act*** but don't know of the risks and ramifications of not complying strictly with the tight timeframes that it imposes

BUILDERS AND BUILDING CONTRACTORS

ISSUES TO CONSIDER:

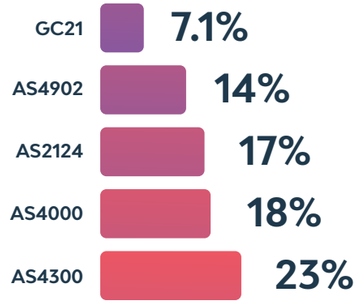
- Your entitlement to time and cost relief including delay damages
- Do you own the benefit of any float in the program?
- Is the superintendent required to act reasonably and in good faith?
- Will there be other contractors on site that may impede your progress?
- Are you subject to any unreasonable time bars which prohibit you from making claims?
- Do your payment claims comply with the Building and Construction Industry Security of Payment Act to ensure timely payment or resolution of any disputes by adjudication?
- Did you know that if your construction contract with the principal or head contractor is executed as a deed, then the period of time within which a claim can be brought against you for breach of an obligation may be increased from 6 to 12 years



INTERESTING FACTS:

TYPES OF CONSTRUCTION CONTRACTS

The most widely used standard forms of contract are the **Australian Standards**. **GC21** is also widely used in New South Wales for **government contracts**.



Common risk categories in a construction project are:

- **Time**
- **Design**
- **Quality**
- **Scope**
- **Site conditions**
- **Variations**

*University of Melbourne ' Standard Forms of Contract in the Australian Construction Industry Research Report' dated June 2014

UNLIMITED LIABILITY



Many builders sign contracts providing indemnities to their clients with **unlimited liability**

GET PROMPT PAYMENT



Builders know about the ***Building and Construction Industry Security of Payment Act*** but often do not know how to use it to **get prompt payment** of progress claims or resolution of disputes

INTERESTING FACTS:

RESIDENTIAL BUILDERS



All residential builders must have a contractor licence where the value of work and materials is in excess of **$5,000** (inclusive), or the work is specialist work such as electrical wiring or plumbing

RECOURSE



In many contracts, principals can have recourse to a bond bank guarantee or retention moneys without proving a right to do so

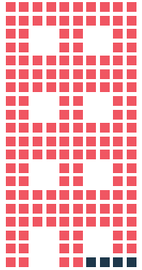
HOME OWNERS

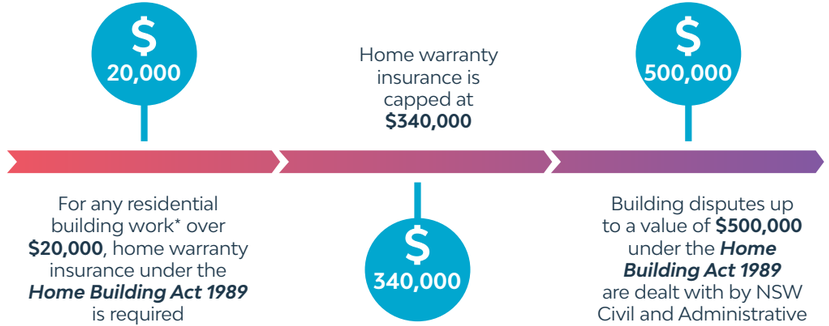
THINGS TO THINK ABOUT

- All builders must have a contractor licence where the value of works and materials is more than $5,000 (inclusive)
- Does your builder have the necessary licence and insurances?
- Has your builder provided a certificate of home warranty insurance under the Home Building Compensation Fund?
- Can you terminate the building contract with your builder and at what cost?
- Do you know the difference between a 'major' and 'other' defect' and the defect liability periods that apply to each?
- Did you know that you can only lodge a claim under the builder's home warranty insurance if your builder dies, disappears or goes into bankruptcy or liquidation?

INTERESTING FACTS:

HOME WARRANTY INSURANCE





*Builders carrying out residential building work are not required to take out home warranty insurance for new buildings which are 4 or more storeys and contain 2 or more separate dwellings.

STATUTORY WARRANTIES UNDER THE HOME BUILDING ACT

Every building contract for residential work will contain the **statutory warranties** set out in **section 18B** of the ***Home Building Act 1989***

The statutory warranty period:
- for a **Major Defect** is 6 years from completion of the work; and
- for **Other Defects** is 2 years from completion of the work

Section 18B Statutory warranties include:

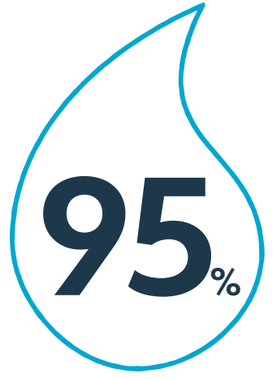
a) That work will be done:
   - with due care & skill
   - in accordance with plans & specifications
   - in accordance with and comply with all law
   - with due diligence
   - within the time stipulated in the contract

b) That work on a dwelling will result in a dwelling reasonably fit for occupation

INTERESTING FACTS:

HOME BUILDING DISPUTES

You can only claim on home warranty insurance in the event of death or insolvency of the builder, or where you can establish that the builder has disappeared.



of **defects** relate to **waterproofing**

CONSULTANTS

HAVE YOU CONSIDERED THE FOLLOWING AREAS OF POTENTIAL RISK:

- Contractual warranties and indemnities that you have given
- Unlimited liability
- Exposure to consequential and/or indirect loss
- Ambiguous and uncertain scope of services
- Potential novation of your consultant's agreement to an unidentified design and construct builder



INTERESTING FACTS:

- AS 4122 – **General Conditions of Contract for Consultants** is the most widely used standard form contract
- Consultants are usually called to give evidence in claims made against the builder of a project if **Court** or **Tribunal action** is commenced
- If you are a consultant who is also a superintendent, ***clause 20 of AS4000*** provides certain obligations of good faith
- Consultants are able to use the ***Building and Construction Industry Security of Payment Act*** to get prompt payment of fees
- Many contracts used by principals assign copyright in its consultants' work to the principal

COUNCILS

DOES YOUR CONSTRUCTION CONTRACT ACCURATELY SPECIFY IN DETAIL:

- The **deliverables, the 'works', warranties, indemnities, the documentation** comprising the contract
- The required **quality**
- When and in what circumstances the contractor is entitled to **time and cost relief**
- Does Council have the **right to terminate** the contract for its convenience?
- In what circumstances can Council have **recourse** to the contractor's security?
- Does the contractor's bank guarantee have an **expiry date**?
- Did you know that if your construction contract is executed as a deed rather than an agreement, then the period of time in which a claim can be brought for a breach of an obligation of the construction contract may be **12 years**, not the usual **6 years**?

INTERESTING FACTS:

>$150,000

Council must comply with the ***Local Government Act and Regulations*** regarding tendering prior to entering into any construction contract where the cost of work and materials is greater than **$150,000**

3

Lobbying of councillors and/or Council staff **may require exclusion** of a contractor from the tendering process

Once a tender offer has been **accepted**, there is no opportunity to negotiate the terms of the contract

Best value for money is not always the lowest price

Variation of a contract will not require Council to let a new tender if the variation is not so significant as to amount to a new contract, or there are extenuating circumstances

SECURITY OF PAYMENT

THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT:

- Does not apply to residential work being carried out for owner occupiers
- Was implemented to improve cash flow to contractors and the prompt resolution of disputes
- Requires a contractor claiming under the Act to comply strictly with its requirements
- Has very tight time requirements that must be met by the principal or lead contractor to avoid liability by default
- Can be used by consultants and suppliers of materials as well as contractors

INTERESTING FACTS:

INSOLVENCIES

On average, there are more than **1700 insolvencies** in the construction industry each year, representing **20% to 25%** of all insolvencies in Australia
(source ASIC, Insolvency Statistics)

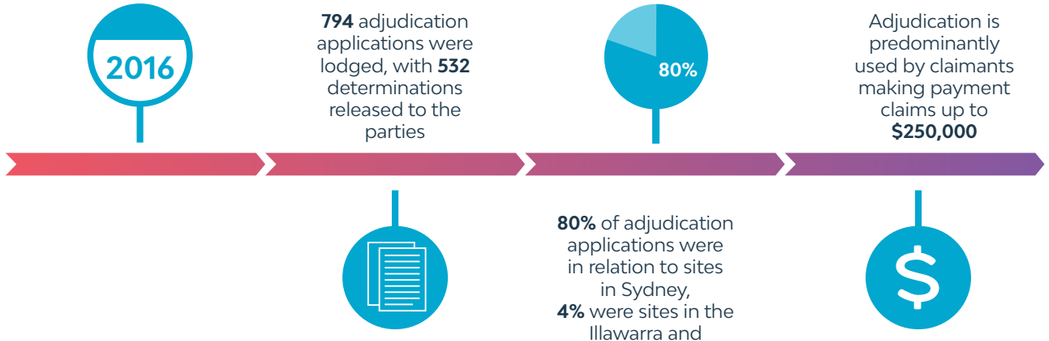
SECURITY OF PAYMENT ACT

Aim is to ensure prompt recovery of progress payments and resolution of disputes by adjudication

USE OF CREDIT CARDS

68% of construction businesses need to **borrow** or **use credit cards** due to late payments to their business
(source ASBFEO 2017)

SECURITY OF PAYMENT ADJUDICATION



INTERESTING FACTS:

ADJUDICATION DETERMINATIONS

70%

of adjudication determinations released were made in respect of claims under $100,000[1]

SOP ACT

Inadequate cash flow is the most frequent cause of business failure

The **SOP ACT** specifically overrides a "**pay when paid**" provision in a building contract

Principals cannot contract out of the **SOP ACT**

[1] *NSW Department of Finance & Services – Building and Construction Industry Security of Payment Act 1999 Adjudication Activity in NSW, Annual Report 2015/16*

KEY CONTACTS

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