An Owner's Short Guide to Standard Form Residential Building Contracts



A sample survey carried out by the Law Department of Melbourne University in 2014 found that the only sector of the construction industry where there was virtually no substantive incidence of amendments to the standard form of contract was residential building where a private individual was the owner. The survey concluded that a likely reason for this was the extent to which residential building contracts are subject to legislative consumer protections, but there are two further reasons:

1. Most standard forms contain terms that already suit the builder.
2. Most owners do not have the expertise, or the professional advice, which would allow them to negotiate fairer and safer contract conditions.

Even allowing for legislative protections, the current standard form contracts for residential building work are open to improvement from an owner's perspective. The following table is a rough generalisation:

Standard Contract Type	Produced by:	Owner "friendliness"	Strata Scheme (Corporate Owners) Suitability*
NSW FAIR TRADING standard form for Work between $5,000 and $20,000	Contracts are drafted by the **NSW Government Department of Fair Trading**, in plain English. They may be too simplistic for more complex works and arrangements.	7/10	5/10
NSW FAIR TRADING Standard form for Work over $20,000		7/10	5/10
Strata Works Agreement	Produced by **Strata Community Australia (NSW),** this standard form is only suitable for minor works within a strata scheme.	7/10	7/10
AS 4000	**Standards Australia** produces a wide variety of AS forms. These are developed through committees drawn from professionals across the industry, and the standard form are generally well balanced and comprehensive.	6/10	5/10
AS 4905		6/10	5/10
AS 4906		6/10	5/10

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ABIC MW-2008 major works contract – housing	Produced by the **Australian Institute of Architects,** through consultation with Master Builders Australia**,** and is arguably more balanced than the MBA form, but usually by involving an architect as superintendent.	5/10	5/10
ABIC SW-2008 Simple works contract – housing		5/10	5/10
MBA BC4	Produced by **Master Builders Australia**, an industry body that serves the interests of its members who are primarily building contractors.	4/10	4/10
HIA Plain English contract	Produced by the **Housing Industry Association**, an industry body that serves the interests of its members who are primarily building contractors.	4/10	4/10
HIA Contract for Renovations and Additions		4/10	4/10
HIA Cost Plus Contract		4/10	4/10

Balanced Contract Terms

In a commercial market, contract terms that are overly favourable to owners may attract a higher contract price from builders. So there is a balance to be achieved, between contract terms that are fair and reasonable, and provide sensible legal protection to both parties, and simply attempting to achieve the best terms one can get.

Amongst construction lawyers the 'Abrahamson Principles' are sometimes considered the fairest way to arrive at a balanced contract. These principles view contract drafting as an exercise in risk-allocation, and seek to weight the burden of individual contract terms towards the party (builder or owner) who is best able to manage that risk.

However, there is no rule that contracts have to be fair. The law allows people to negotiate their own bargains, and market dynamics of suggest that people will always attempt to strike the deal that works for their interests best. The current standard forms mitigate this to various degrees, largely guided by the interests of the bodies responsible for producing those forms.

The Main Standard Forms

The NSW Fair Trading standard form and Strata Works Agreement, are the more owner friendly agreements. However, they are only suitable for minor works. Notably they assume the owner will self-manage the administration required by the contract during the works. Most owners will engage a specialist consultant, such as an Architect or Engineer where the works are of any size or complexity, and it will usually be preferable for that specialist to represent the owner for the purposes of the contract and attend to administration of the contract. In such instances, these standard forms need amendment to accommodate a professional superintendent.

In aiming to be fair and uncomplicated the NSW Fair Trading standard form and Strata Works Agreement contain a number of provisions which owners will need to be aware of, and perhaps

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amend. For example there are deeming provisions regarding the existing site conditions, and there is no provision for liquidated damages for delay and a relatively generous extension of time regime.

The Australian Standard (AS) forms are highly regarded and well established. They strike a good balance between interests of owners and builders, but tend to require a lot of administration during the works. The forms cater for a range of circumstances and requirements, including superintendence or administration by the owner. So wide is the choice that it is not uncommon to find that the wrong form is selected. The forms have a high level of acceptance in the construction of commercial projects, but are sometimes considered too unwieldly for more simple residential work.

The use of ABIC standard forms seems to be on the decline. They have not been updated for some time, and require supplementary terms and conditions. As might be expected the standard clauses are predicated on the use of a supervising architect, which certainly helps to address some of the pitfalls that can befall owners.

The MBA and HIA forms are builder friendly, and owners must take care that they can live by the terms and conditions those forms contain. Lawyers with experience in advising owners will usually have a checklist of clauses specific to these standard forms that they know commonly cause problems and disputes, examples include:

- Response time requirements – contracts will often stipulate the time within which certain steps or notices need to be taken. These need to be fair, realistic and reasonable.
- The variation power – the capacity of the contract to accommodate changing requirements as the work progresses.
- Final certificate arrangements – these should ensure that the owner will have no difficulty with the council approvals required to occupy the finished building.
- Powers of suspension and termination – when things go wrong, there needs to manageable damage limitation processes.

Standard forms provide an efficient and tested basis to address the various matters that need to form part of a workable building contract, but one size rarely fits all. Where the cost of having a lawyer draft a bespoke contract is prohibitive, a standard form is often amended and supplemented by further terms and conditions. All of the standard forms are amenable to being rendered more suitable in this way.

Supplementary Terms and Documents

Contractors commonly supplement the standard forms with their own special terms and conditions. There is no reason why owners cannot do the same.

Matters that give rise to Owner specialist requirements that standard forms may not adequately deal with include:

- Finance arrangements – how are the works being funded.
- Whether the works are of a size and nature that will require specialist superintendence.
- Whether the works are new works, refurbishment or repairs.
- Whether the works are in the context of an existing strata scheme.

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In addition to the standard form a building contract will include drawings and a specification. Specifications often contain further contract clauses that need to be checked for consistency with the standard form. Other documents that may be included as part of the overall contract, include pre-contract correspondence and quotations. These too need to be checked for appropriateness and consistency.

The average owner, unless he is a developer, does not have the experience or expertise that a builder has been it comes to building contracts, and how such contracts apply to circumstances that arise. This is the main reason that the low incidence of amendments by owners to the standard form of residential building contracts. This will often be to the owner's detriment, and where the work to be performed is significant or important owners will often be well advised to seek professional advice before they sign such a contract.

*Works for Owners corporations on Strata common property require special contract conditions, to attend to the nature of shared living spaces and the ways in which strata schemes are managed.

Key takeaways

- Residential building contracts are often not amended due to legislative consumer protections.
- Most standard forms are drafted to favour builders, limiting owners' negotiating power.
- The NSW Fair Trading standard forms are more owner-friendly but only suitable for minor works.
- Balanced contract terms are crucial for fair negotiations between owners and builders.
- The Abrahamson Principles provide a framework for achieving balanced contract terms.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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