

Construction Contracts: Variations

Construction projects often require changes to the original scope of work and design; hence, it is quite common to have *variations* to it. There can be two main types of variations to construction contract – (i) an alteration to the scope of works, or, (ii) variations to the terms of the contract itself.

This article focus on variations to the scope of works.

General principals

A number of general principals have been established by the courts on variations to scope of works. These are:

1. A contractor is not entitled to charge for better quality materials than the quality required by the contract (without instructions from the owner);
2. A contractor is not entitled to charge for additional work outside the terms of the contract (without instructions from the owner);
3. An item specifically provided for in the contract is not a variation; and
4. “Indispensably necessary works” are not variations (see below).

“Indispensably necessary work” – not a variation

If for example, the plans specify that there be doors to a cupboard, the supply of the hinges and screws on the doors will be part of the scope even if the specifications do not refer to the provision of any hinges or screws.

Contractors have to perform all works which is “*indispensably necessary*” for the completion of the contracted work, without each minor item of work involved specifically detailed in the contract.

Power of variation

An owner does not have an automatic right to instruct variations either scope of work or to the contract itself. It is therefore standard for construction contracts to provide for a power of variation that gives the owner the right to make variations. Without that, a variation by the owner may be considered a breach of contract which may give a contractor the right to terminate the contract.

Restrictions to power of variation

Whether or not an owner has the power of variation under the contract, they cannot (1) change the fundamental nature of the works or their value or (2) cancel works in order to engage another contractor to perform the works.

What happens if something has goes wrong?

Depending on your specific situation, there may be a verbal or collateral contract established for the performance of the variation which you may enforce.

If you are a contractor and you have been denied your entitlements under the contract, you could claim compensation on the basis that the other party has been unjustly enriched by you performing the variations (known as *restitution*). There are other remedies available under the *Competition and Consumer Act 2010* (Cth) and common law for recovering the loss you have suffered in reliance upon the actions of the other party.

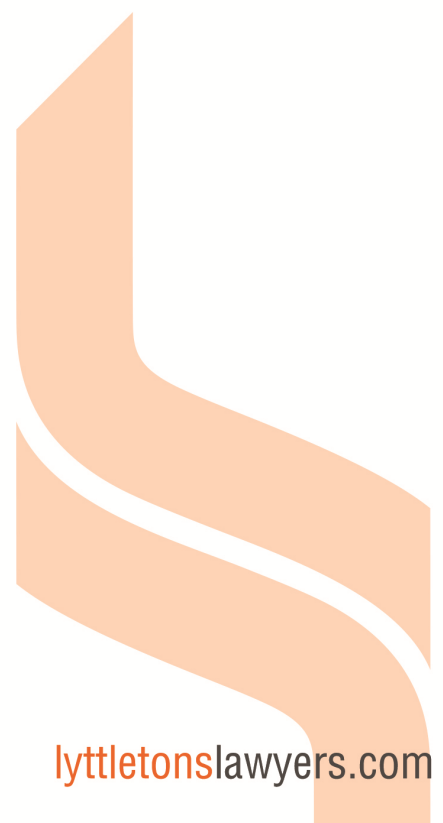
It should be noted that disputes can arise whether or not the constructions contract has a variations provision. There may be disagreement regarding whether or not a variation instruction was given in accordance with the contract or whether or not a contractor has provided a valid notification to a variation in accordance with the contract.

A well drafted constructions contract is important to the success of a project. Most importantly, a written contract should be a non-negotiable prerequisite for all projects whether it is a small bathroom renovation or a construction of a new home. In this respect, it is best to put more effort in getting in place the most appropriate contract for the job in the first place as having a clear, accurately drafted contract that reflects the parties' agreement can avoid unnecessary expenses in the future.

The other best practice which parties should adopt in relation to variations is to record variations in writing (be it sms, email etc) including following up verbal discussions with a short written confirmation. This can be important evidence especially if there is a disagreement or dispute later on.

To review standard form contracts or draw up construction contracts or discuss any issues you may have in relation to building and constructions contracts or disputes please contact our office at (03) 8555 3895.

Lyttletons Lawyers



350 Boundary Road, Dingley VIC 3172
PO Box 250, DINGLEY VIC 3172

TELEPHONE: 03 8555 3895

LYTTLETONS LAWYERS PTY LTD
ABN: 88 163 725 077

Liability limited by a scheme approved under Professional Standards Legislation

lyttletonslawyers.com

© 2017 Lyttletons Lawyers Pty Ltd