

Homeowners: Special Conditions in contracts for construction works

What are Special Conditions and why do you need them? Read this article to find out how incorporating Special Conditions into your construction contract can help you minimise risks.

What are Special Conditions?

Special conditions are additions or amendments to the contract, done as a way to prevent the contract terms from being heavily skewed in favour of one party over the other.

What is the importance of Special Conditions?

It is best for Special Conditions to be incorporated into your contract, to protect you against potentially unfair terms.

Standard form construction contracts issued by building and construction industry associations are generally written for the benefit and protection of their builder-members, hence, they tend to be more favourable to themselves than to the homeowner.

You may include special conditions in your contract as a precautionary measure against one-sided stipulations.

What is an example of a construction contract Special Condition?

Examples of Special Conditions are:

- Adding grounds favourable to the owner
- Amending definitions to be more favourable to the owner
- Removing parts of clauses that are detrimental to the owner

How do you write a Special Condition in a building contract?

1. When drafting special conditions, check if there are clauses that favour one party over the other. Important points to look into include:

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- whether the clause imposes an obligation, warranty, acknowledgement on a party
- who must comply with the obligation
- the time and date by which the obligation must be complied with
- timelines and penalties
- how the obligation may be satisfied

2. Look into whether there are clauses that give a party a right to terminate the contract.

Also check the circumstances in which the right to terminate may be exercised, the timelines, and the formal requirements in exercising the right to terminate. If the clause appears to be one-sided, you may draft amendments as special conditions, to even the playing field.

3. Use clear, simple language to avoid ambiguity and confusion.

4. Develop precedents or templates.

If you are a builder or contractor, creating a database of precedents will:

- scale back the time it takes to draft special conditions every time
- provide correctly prepared special conditions
- prevent potential disputes
- ensure a smooth execution of the contract

5. Transfer the risk.

It is always a good idea to have a specialist construction lawyer go over and review your contract, so that they may properly advise you on how to negotiate the contract, and so you can be sure that there are special conditions in place to minimise your risks.

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How to use Special Conditions in construction contracts

- **HIA Contract**

HIA New Homes Contract have Special Conditions built into them, but make sure you really go over each. For example, a Special Condition that says that "*The builder reserves the right to alter the specifications and/or inclusions at any time to a product of similar quality,*" is something you may need to negotiate or amend, as it seems to give the builder absolute power to just change anything they want on a whim.

- **Master Builders Contract**

Generally, a Master Builders Contract is skewed more towards benefitting the builder or contractor. Typically, it does not allocate the risk to the party who is best placed to manage it. It usually puts the builder in a much more favourable position than the homeowner. Adding Special Conditions would then offset the bias, and tilt the scales in favour of the owner.

- **Office of Fair Trading Contract**

The termination clause of the Fair Trading contract is favourable to builders. For your benefit, you may include, as part of Special Conditions, additional grounds for termination that are favourable to homeowners.

How we can help

If you want to minimise risks on the construction of your home, and need assistance with reviewing your contract and drafting Special Conditions, feel free to reach out to us. Our principal lawyer is a Sydney-based specialist construction lawyer who has over 10 years of experience in Contracts and Construction Law. First consult is free.

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