

6 May 2024
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Kareen Riley-Takos
COO
Standards Australia

Dear Madam,

Urgent Submission to Amend Default Dispute Clause in AS4000 Draft.

I am writing to bring to your attention a critical matter concerning the current review by Standards Australia of the AS4000 contract which is widely used and significantly impacts businesses in many industries, not only building and construction.

It has been more than 25 years since the last update, during which much has changed. However, it is alarming that the new draft default dispute process mandates arbitration in all scenarios. Given a significant portion of the in-house legal community would not recommend arbitration unless it was an international dispute and of a significant value, the current draft requires review. Maintaining a deemed default arbitration clause is even more concerning for businesses that do not have in-house legal counsel.

Arbitration is often touted as a preferred alternative to litigation, but it can be just as costly and time-consuming thereby hindering commercial success and cost-effective resolution options. Benefits such as confidentiality exist in other dispute processes such as mediation and dispute resolution boards and for a much lower cost. From a legal perspective, arbitration also has policy limitations; for example, it doesn't further the law via the establishment of precedent.

As one highly-regarded General Counsel points out: *"A significant part of our system is based on precedent and as lawyers we rely on precedent to inform how we consider risks when contracting. With the confidentiality of arbitral decisions it doesn't further the law and doesn't allow us to shift the longstanding issues that are within contract law ... If any number of arbitrations had been court cases, we would have a much clearer path ... when contracting. While there is a good reason sometimes for arbitration to occur, I agree that the parties need flexibility to decide when that is and not be bound by a document that was agreed 'in the good times' vs when there is a dispute."*

The current draft may have the effect of forcing parties to arbitration instead of other alternative dispute processes contrary to the parties' nomination. This deemed default without the option or flexibility of selecting litigation could be costly for business.

Accessibility and affordability of justice, particularly regarding legal costs associated with disputes, ought to be a core concern for businesses across Australia. Allowing businesses the flexibility to choose between arbitration and litigation is a feature many believe should be reinstated in the AS4000.

Given the short time for the public comment I urge Standards Australia to reconsider the draft default dispute clause in particular the deemed provision. Your support is needed to ensure it is amended to restore the flexibility for parties to elect the preferred dispute resolution method, be it arbitration or litigation without default or deemed provisions mandating arbitration in all options.

The standard should remove the default to arbitration where the contracting parties select multiple alternative methods such as mediation, expert determination and dispute resolution boards. It is not adequate to include a mere guidance note for Item 36 stating *"If you select more than one (1) of the above options, you will be deemed to have selected none..."*. Forcing parties to the default clause of arbitration when they have selected multiple dispute resolution methods alternative to arbitration is in conflict with free choice. Some may regard it as unfair or leading towards unfair practices, which is currently a focus for the ACCC.

Providing greater flexibility in selecting a dispute forum that best suits business needs must be achieved to preserve profit and avoid expanding the 'conflict footprint'. Standards Australian must ensure this contract fairly and evenly promotes efficient and cost-effective dispute resolution processes for businesses that minimise legal costs.

Thank you for your attention to this urgent matter. Having practised law for 20 years and spent nearly three quarters of that time in organisations trying to avoid unnecessary legal spend I am passionate about continuing that objective in my role with Mediatus so look forward to your urgent attention to this matter. Advocating for positive changes in this and further template contracts is going to keep profit in organisations, allowing them to invest valuable time and money into growth instead of legal disputes. Please feel free to obtain more information from [HERE](#) or contact me to discuss further.

Regards,

Michelle Antonio LLB LLM

Bachelor of Laws, Master of Laws, NMAS Accredited

M. 0452 071 075

E. michelle@mediatus.com.au

cc: BY EMAIL: Standards Australia Technical Committee Members