



# Change and Variation Claims

Construction Contract Claims Article Series

## Construction contract claims article series

Over the course of the next six weeks, we will be covering a series of construction claims topics, beginning with this article on change and variation claims. Each article will focus on a different claim type, providing practical insights for contractors and principals. This first article explores change and variation claims, covering how they arise, how they are assessed, and common issues to watch out for. Our following articles will explore delay, disruption and prolongation claims, price acceleration claims, different site conditions claims, progress claims, and damage claims.

## Contractual variation claims

Due to the fast-paced and ever-evolving nature of the construction industry, the original scope of works of a construction contract will almost always require some level of variance over the course of the project's delivery. Whilst a variation or change to the contract may be necessary to overcome unforeseen requirements or to implement additional works into the original contract scope of works, contractual variations often result in a change to the contract price. Understanding contractual variations and how to negotiate, manage and implement variation claims is therefore essential for all parties to a construction contract.

## What are variations?

A contractual change or "variation" refers to any agreed variance or change to the obligations of one or both parties under an existing contract.

Such changes may involve adjustments to the scope of works, timeframes for delivery or the type of goods to be purchased under the contract. Whilst most contractual variations may be minor in nature, variations can also have a significant impact on a project's quality, timeline and cost.

Due to the potential negative impact variations can have on your construction project if not implemented correctly, it is critical for principals, contractors and subcontractors alike to be wary of the common pitfalls of contractual variations and how to avoid them.

This article focuses on the common types of variation claims, and for more information on how you can properly administer contractual variations to minimise the impact on your construction project, we recommend you read our variations article issued as part of our Contract Administration Article Series issued earlier this year. That article also explores in detail the specific processes typically required under both bespoke contracts and the widely used Australian Standards construction contracts, including the powers granted to the parties to vary a contract, the typical process that must be followed when dealing with variations (including the detail that must form part of a variation claim) and how the cost of variations are generally valued under a construction contract. Strict compliance with these procedures is critical to ensuring that variation claims are valid and enforceable under your construction contracts.

A link to our previous variations article can be found [here](#).

## What are variation claims?

A variation claim refers to a formal request by a party to a construction contract to change or vary a certain aspect of the project or the construction contract itself. A contractual variation claim will generally be a claim to:

1. change or vary the contractual scope of works (which will typically result in a change to the costs payable to the contractor/subcontractor); and/or
2. change or vary the terms of the contract itself (this is commonly referred to as a contractual amendment).

Whilst variation claims may be requested by either party at any time, it is important that the proper process to claim a variation is followed. Most construction contracts will outline specific and strict provisions for the handling of variation claims, including the process by which the parties are to claim, discuss, negotiate, agree upon and implement contractual variations.

## Common types of variation claims

There are several types of variation claims that commonly occur on construction projects, including:

### 1. Positive variations

A positive variation claim is a claim to add or increase a certain aspect of a project's scope of works beyond the original contractual scope agreed by the parties. This type of variation is claimed when there is a need for additional works to be carried out by the contractor/subcontractor that was not initially anticipated when the project commenced, including for instance additional modifications required to address a new change in legal or industry standard requirements.

When a positive variation claim is agreed upon, the cost for the contractor/subcontractor to perform the additional works is added to the contract price, hence the word "positive". The pricing of a positive variation will generally include the cost for increased labour, materials, or additional subcontractors required to carry out the additional works.

### 2. Negative variations

On the other hand, a negative variation claim is a claim to remove or decrease a certain aspect of the contractual scope of works when that aspect of the works is no longer required for the project. It is a "negative" variation because, once agreed, the reasonable cost for carrying out the aspect of the works being removed is deducted from the contract price.

Importantly, while valid where certain aspects of the scope of works are genuinely no longer required, negative variations are not a tool for a principal/head contractor to reduce costs or increase project timelines as they see fit. In *Hansen & Yuncken (SA) Pty Ltd v Chadmax Plastics Pty Ltd* (1984) 1 BCL 52, the Court found that the principal's decision to issue a negative variation to remove a certain material from the scope of works, which would result in the removal of almost the entirety of the subcontractor's scope of works, was a breach of the subcontract.

It is important to remember that whilst variation claims (both negative and positive) give the parties the ability to amend or vary certain aspects of the scope of works or the project, such claims cannot be used to the extent that they result in a substantially new scope of works or cancel the current contract.

### 3. Variations for convenience

Variations for convenience are variations awarded by the principal/head contractor for the contractor's/subcontractor's convenience, even when the contractor/subcontractor has not itself requested or claimed the variation. Variations for convenience are typically awarded to continue the progress of a project even when the principal/contractor is not obligated to award the variation.

For instance, a variation for convenience may be awarded by the principal/contractor to extend the date for practical completion to enable the contractor/subcontractor additional time to complete the works, even though the contractor/subcontractor was likely going to breach the contract/subcontract for failing to complete the works in time.

A variation for convenience will generally not entitle the contractor to additional payment under the contract unless agreed to by the parties.

### Key considerations for variation and change claims

When considering whether to make a claim or agree to accept a claim for a contractual variation, whether you are a principal/head contractor or a contractor/subcontractor, it is critical to consider how the variation will impact your construction contract and the project. The key considerations will generally include the legal implications of the variation, the necessity of the variation, and whether the proposed variation can be properly and accurately estimated for agreement.

From a legal perspective, consideration needs to be given not only to whether or not the construction contract permits the proposed variation, but also what impact the proposed variation will have on the operation of the construction contract. If a variation claim causes (or has the ability to cause) a substantial shift in the nature of the contract, then the variation is likely to be void and unenforceable.

From a necessity point of view, parties need to consider whether the proposed variation is actually required. If the claim is for a positive variation, is the contractor/subcontractor already obligated to perform those works under the original scope of works? If the answer is yes, and the original contract scope of works already contemplates the additional works, then a positive variation should not be awarded.

Finally, from a cost perspective, careful consideration needs to be given to the costing of a proposed variation claim.

When a dispute concerning a variation claim arises, it is almost always due to an argument regarding entitlement to payment for the variation, or the value of the works to be performed under the variation. As such, it is critical for both parties to have open and transparent discussions regarding the estimated costs for variations when they are being negotiated, and subsequently record the agreement regarding costs to prevent future disputes.

### Conclusion

Variations are an inevitable part of construction projects. When handled correctly, they allow flexibility and ensure the project continues to meet evolving requirements. However, where variation claims are poorly managed or inadequately documented, they often become the source of significant legal and commercial disputes.

As such, if a variation claim is being proposed it is critical that the parties are aware of the type of variation being claimed and discuss, agree and document any decisions made regarding the variation claim to avoid or significantly reduce the possibility of legal disputes.

In the next article of this series, we will explore delay, disruption, and prolongation claims – how they arise, what evidence is required, and the practical steps contractors and principals can take to protect their interests.

In the meantime, if you have any questions in relation to this article or construction contract claims generally, please do not hesitate to contact us.



**Joseph Sammut**

Senior Associate

+61 428 834 096

joseph.sammut@muscattanzer.com.au



**Hugo Sherlock**

Lawyer

+61 466 662 121

hugo.sherlock@muscattanzer.com.au



**Paul Muscat**

**Director**

+61 408 234 289

paul.muscat@muscattanzer.com.au



**BJ Doyle**

**Senior Associate**

+61 419 104 996

bj.doyle@muscattanzer.com.au



**India Bennett**

**Associate**

+61 459 684 170

india.bennett@muscattanzer.com.au



**Hugo Sherlock**

**Lawyer**

+61 466 662 121

hugo.sherlock@muscattanzer.com.au



**Layla Montefiore**

**Law Clerk**

layla.montefiore@muscattanzer.com.au



**Gillian Want**

**Legal Assistant**

+61 411 469 480

gillian.want@muscattanzer.com.au



**Angelica Rusovan**

**Legal Assistant**

+61 417 153 965

angelica.rusovan@muscattanzer.com.au



**Craig Tanzer**

**Director**

+61 403 408 200

craig.tanzer@muscattanzer.com.au



**Joseph Sammut**

**Senior Associate**

+61 428 834 096

joseph.sammut@muscattanzer.com.au



**Sian Phelps**

**Associate & BD Manager**

+61 409 688 169

sian.phelps@muscattanzer.com.au



**Kayla Webb**

**Lawyer**

+61 473 586 473

kayla.webb@muscattanzer.com.au



**Isabel Rusovan**

**Office Manager**

+61 473 749 259

isabel.rusovan@muscattanzer.com.au



**Jackie White**

**Accounts & Compliance Manager**

+61 409 972 735

jackie.white@muscattanzer.com.au



**Joel Taylor**

**Consultant**

+61 407 641 338

joel.taylor@muscattanzer.com.au



Thomas Hendry

Intern

thomas.hendry@muscattanzer.com.au