AGS Commercial notes

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Termination of Commonwealth contracts

The premature end of a contract can have significant implications for both parties. In addition to the practical and commercial considerations, there are legal issues that will need to be taken into account to ensure that the best outcome is achieved.

There can be a range of different reasons why the parties to a contract want to end it prematurely – whether it is because of poor service delivery by the contractor or a failure by a grant recipient to comply with the requirements of a grant or a change in policy resulting in the cancellation of a program. In addition, sometimes external factors can result in a contract coming to an end. The way in which a party approaches ending a contractual relationship can have a significant impact on their legal position. A party needs to consider what outcome it wishes to achieve – to be put in the position it would have been in had the contract been performed or to be returned to the position it was in before the contract commenced.

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The law in this area can be complex. A range of different legal principles are involved and potentially each has its own legal jargon. This note looks at some of the more common mechanisms for termination of a contract[1] and some of the practical considerations when preparing and terminating a contract.

In this issue

How can a contract be terminated?

Most contracts include specific provisions that deal with termination. In addition, the general law (at common law and in equity) provides rights of termination that exist concurrently with any termination rights that are set out in the contract. Contracts can also be terminated by mutual agreement between the parties or set aside under the provisions of a statute.

Termination provided for in the contract

It is common for a contract to include provisions that deal expressly with the termination of the contract. In some cases, these provisions are largely restatements of termination rights that may otherwise be available under general law. In other cases, the provisions include additional or expanded termination rights. Set out below is a brief discussion of some of the more common termination clauses included in contracts.

Termination for default

A termination for default clause usually gives a party the right to terminate the contract if the other party fails to perform the contract in accordance with the requirements of the contract (often referred to as a 'default'). The right to terminate is usually in addition to any other rights that may arise as a result of the default, such as the right to seek damages for any loss suffered as a result of the default.

The scope of a party's rights will depend on the drafting of the clause. In addition to a failure to perform the contract in accordance with its terms, it is common for these clauses to specifically identify other events that will be deemed a default and trigger the right to terminate. Examples of default events that are often contained in contracts include:

- a failure to perform the contract as required, sometimes by reference to specific provisions such as meeting the timetable or achieving milestones, service delivery or management of grant moneys
- a failure to remedy or address a breach in accordance with the contract's requirements
- a failure to satisfactorily resolve a conflict of interest affecting the contractor
- a failure to comply with the security, confidentiality or privacy requirements
- a failure to comply with any express contractual representations/warranties that have been provided by the contractor.

Where a party is a corporation, the contract will often include express provision for termination in the event the corporation comes under some form of external administration. This clause will cover situations where the corporation voluntarily goes into administration or has an order made against it to place it under administration. A contract may also provide for termination to cover cases where the contractor becomes bankrupt or if a corporation becomes insolvent or enters into a scheme of arrangement with creditors or defaults under other material contracts.

'A contract may also provide for termination to cover cases where the contractor becomes bankrupt or if a corporation becomes insolvent...'

In drafting a 'termination for default' clause, you should carefully consider when the clause should be triggered, taking into account the subject matter of the contract and the objectives that a party is trying to achieve.

Termination for convenience

Many Commonwealth contracts contain a 'termination for convenience', 'termination without default' or 'termination by notice' clause. Most termination for convenience clauses in Commonwealth contracts are 'one-way' – that is, they are only for the benefit of and only exercised by the Commonwealth. As of 1 January 2016, all non-corporate Commonwealth entities (NCEs) must use the standard terms in the Commonwealth Contracting Suite (CCS) for contracts for goods and service valued up to $200,000, with some exceptions.[2] The CCS Contract Terms include a termination for convenience

clause.[3] This clause provides a bilateral right for either the Commonwealth or the Supplier to terminate the contract at any time by providing notice. The clause expressly provides that both parties can only exercise their rights under the clause in good faith and the supplier must mitigate all losses and expenses in connection with the termination.

In addition to providing for the termination of the contract, it is common for these clauses to give the Commonwealth the option to 'reduce the scope' of the contract. Where the clause provides this option, it is important that the clause clearly sets out the process that is to be followed and the obligations on the parties associated with the reduction in scope. In addition to reviewing the services or activity under the contract, this will often involve a renegotiation of price, as well as reconsideration of time frames and personnel.

A termination for convenience clause will often provide for compensation to be paid to the contractor by the Commonwealth. This will cover work completed or costs reasonably incurred by the contractor before the termination date and any additional expenses or costs that are necessarily going to be incurred by the contractor as a direct result of the early termination. Usually, the clause limits the amount of compensation payable. This is to ensure that the Commonwealth does not end up paying more than the total contract price under the contract.

The decision to include a termination for convenience clause is a matter for individual Commonwealth entities (acting in accordance with their Accountable Authority Instructions and having regard to the requirements of the financial management framework). Without a termination for convenience clause, Commonwealth entities may not be able to unilaterally terminate contracts in the event of a change of government policy or other government exigencies[4] (see the section on doctrine of executive necessity on page 8).

Good faith

The courts have considered the question of whether a government party has a duty to act honestly and in good faith when relying upon a termination for convenience clause. There is recent case law supporting an obligation by governments to only use the clause in good faith.[5] However, other cases suggest that an implied term of good faith when exercising a contractual right, where the right to terminate is provided in clear and express terms, does not necessarily apply in the private sector.[6] It would seem that the meaning of 'good faith' is the same whether the obligation is implied or express, unless this is clearly not intended.[7]

What amounts to good faith?

The law is not firm on the content, or boundary around, what acting in good faith means in the commercial contracts context. Courts have surmised the following behaviour to be consistent with good faith:

- acting honestly and taking reasonable steps to cooperate in matters where the contract does not define rights and obligations.[8] However, failure to cooperate need not always involve a breach of good faith and vice versa.[9]
- not depriving the other party of the substantial benefit of the contract or acting with due respect for the intent of the bargain as a matter of substance, not form.[10]

Good faith has also been articulated as a general application that serves to exclude many heterogeneous forms of bad faith.[11]

Good faith does not require a party to act in the interests of the contracting party or to subordinate their own legitimate interests to those of the other parties.[12] It is worth noting that if the project that is the subject of the contract is one that the Commonwealth would want to complete itself (or have another sub-contractor complete) then the right to do that should be expressly included in the termination clause. This is to avoid the argument that the Commonwealth is not acting in good faith when the contract is terminated and the work is given immediately to somebody else. As the law on the application and scope of good faith obligations is not settled, it is advisable to seek legal advice before relying on a termination for convenience clause.

Termination for convenience: Practical issues to consider

Is a termination for convenience clause required?

As noted above, the CCS includes a termination for convenience clause. Where the CCS is not being used, check the entities' Accountable Authority Instructions or other internal procedures to find out. Consider whether to obtain legal advice.

Should the clause be 'one-way' for the benefit of the Commonwealth or provide each party with the right to terminate?

During contract negotiations some contractors will seek to amend a 'one-way' clause for the benefit of the Commonwealth to allow both parties to terminate for convenience, often raising it as an issue of fairness (as an example, the termination for convenience clause in the CCS is a 'two-way' clause). You should carefully consider the practical implications of the contractor being able to unilaterally terminate the contract at any time having regard to the specific reasons put forward by the contractor as to the circumstances in which they might wish to exercise such a right.

What notice period should apply?

This will vary depending on the subject matter of the contract and should take into account both practical considerations (that is, how long it will take to wind up activity under the contract) and policy considerations (that is, how quickly you will want to be able implement the termination). If termination is as a result of a change in government policy, you may wish to be able to act very quickly.

Does the clause also need to allow for a reduction in scope?

Determine whether the clause will operate to terminate the entire contract, allow for a reduction in the scope of the contract or provide for both outcomes. An issue to consider here is whether the contract covers a 'single matter' – such that reduction in scope may not be practical – or a range of more discrete tasks or activities that could be excised.

Has liability for termination been limited?

Consider what kinds of costs or compensation should be paid to the contractor and whether an overall cap should be placed on the amount that can be claimed by the contractor – for example, by limiting any compensation to an amount equivalent to the unpaid balance of the contract price as at the date of termination.

If the other party claims compensation, can the compensation be justified and is it carefully described?

You should always require the contractor to verify any claims (independently where possible) for compensation. Ensure that the contract contains a clause that obliges the contractor to verify any claims for compensation and to provide you and your advisers with access to their records for this and audit purposes.

Have transitional issues been considered?

Issues such as the treatment of records, finalisation of accounts or reports, transfer of any assets, intellectual property rights and transition to any new service delivery arrangements should be addressed. Consider whether the payment of any compensation should be made conditional on the contractor satisfactorily completing any transitional steps.

Negotiated early termination contract terms

A termination for convenience clause is not the only contractual option to terminate a contract before completion. Other clauses can be incorporated into the contract which can provide an express right to terminate in certain circumstances. Examples of early termination clauses include:

- a right to rescind or terminate on the happening of a particular event (whether that be described specifically or in general terms) which is likely to make the project or product unnecessary or not viable
- a right to terminate at the end of a design stage or the completion of a pilot if it did not achieve certain defined standards or specifications, or the costs of proceeding to the next stage were going to exceed a target amount
- in a contract where there are predefined stages (where you are not certain if you will have funding to proceed beyond the first stage or where subsequent stages may not be required), such as a standing offer arrangement for the second and subsequent stages so that the Commonwealth is not bound to proceed with the later stages (but there is an agreed process if you do want to proceed).

In all of the above examples, you will need to define the break costs or termination payments that will be paid if termination does occur. This may include reimbursement of sub-contractor costs incurred, fees for work done to date and any transition out or demobilisation costs. It may also be necessary to set some post-termination activities such as the transfer of software licences, the return of Commonwealth material, the removal of equipment and the vacating of premises.

These kinds of clauses are different from termination for conveniences clauses because they clearly define the circumstances and consequences of ending the contract, which are agreed between the parties at the outset.

'You should think about building break points into the contract where a project is complex ... or if there is a likelihood that certain events may occur that would make the completion of the contract unviable.'

You should think about building break points into the contract where a project is complex, if there is a degree of uncertainty as to whether there is funding for the whole project to be completed or if there is a likelihood that certain events may occur that would make the completion of the contract unviable.

Force majeure and termination

A *force majeure* event is an event beyond the control of the parties to the contract – for example, a natural disaster – that causes one or more parties to be physically or legally unable to perform their contractual obligations. There is no common law concept of *force majeure* in Australian law. Therefore, if the parties wish to allow for *force majeure* they will need to include a specific clause in the contract.[13]

Force majeure clauses usually allow:

- the affected party to avoid liability for non-performance if the circumstances fall within the ambit of the clause
- the parties to terminate or adapt their contract if a *force majeure* event occurs and continues for a period of time.

Usually the clause first deals with 'freezing' the contract for a period of time until the *force majeure* event ceases. This generally only applies to those contractual obligations which are affected by the *force majeure* event. Once the event ceases, the obligations recommence and the contract continues. The clauses usually provide for a right to terminate the contract if the *force majeure* event remains in force for a long period. This right to terminate reflects the fact that, where a contract remains 'frozen' for an extended period of time, the benefit of keeping the contract ongoing is likely to be significantly reduced (for both parties). See also the discussion of 'frustration' below.

Conditions precedent and conditions subsequent

A 'condition precedent' is a condition or requirement in the contract that must occur or be met for the contract to come into effect. If the event does not occur or the requirement is not met, the contract does not commence. Parties may also include a 'condition subsequent' in the contract – the difference here is that the contract has commenced, but it will be terminated automatically if a particular event occurs.

Examples of common conditions precedent include a requirement for a contractor to obtain a necessary licence or regulatory approval before commencing work under the contract, obtaining insurances, providing a parent company guarantee or bank guarantee or finalising sub-contracting arrangements with a major sub-contractor.

Examples of common conditions subsequent include having a required regulatory approval revoked or the loss of an accreditation necessary to perform the contract.

Termination under the general law

In general terms, the law provides rights of termination that exist concurrently with any termination rights that are set out in the contract.

A right to terminate may arise under the general law in a number of different circumstances, including where there is:

- breach of an essential term
- repudiation
- a frustrating event
- fraud/misrepresentation.

It may also arise under the doctrine of executive necessity.

Breach of an essential term

If a term is considered an essential term of the contract (sometimes referred to as a 'condition'), non-performance of this term may be considered by the other party as a failure to perform the contract as a whole. A term can be considered an essential term if:

- a breach of that term is likely to cause serious loss or detriment[14]
- the parties indicate that they consider the breach a serious matter by an implied agreement between the parties that the term is to be treated that way.[15]

If a party breaches an essential term of a contract, the other party can usually terminate the contract and claim damages. A serious breach of a non-essential term can also give rise to a right to terminate the contract. The distinction between an 'essential' and a 'non-essential' term and what constitutes a sufficiently serious breach that brings about a right to terminate may not always be clear. It is advisable to seek legal advice before attempting to terminate on these grounds.

'If a party breaches an essential term of a contract, the other party can usually terminate the contract and claim damages.'

Repudiation

Repudiation occurs where one party renounces their liability under a contract or shows through their actions an intention to no longer be bound by the contract.[16] A party usually has a right to terminate if the other party repudiates the contract. Repudiation does not automatically bring a contract to an end. If a party seeks to terminate on the basis of repudiation, they must 'elect' to terminate the contract (usually by notifying the other party of this intention), otherwise the contract will remain on foot. It is not necessary for a party to be in breach of its obligations under the contract for it to have repudiated the contract – for example, a repudiation may occur where a party expresses a clear intention not to perform its obligations, even if the time for performance has not occurred.

Frustration

A contract can be frustrated where an event occurs or a situation arises without fault by either party that undermines the contractual relationship between the parties. It is the effect of the supervening, or 'frustrating', event that gives rise to a right of termination. Events that create circumstances that are different from those that were agreed under the contract and events that deprive the party of substantially the whole benefit that was the intention of the parties as expressed in the contract have been held to constitute frustration. At common law, frustration automatically discharges the contract.[17] Both parties are relieved from further performance of their obligations under the contract from the time of the 'frustrating' event. Unconditional rights and liabilities accrued before the frustrating event occurred remain unaffected by the termination of the contract. Examples of events that could lead to frustration of a contract include the outbreak of war, destruction of subject matter and the compulsory resumption of property by a government.

The common law does not recognise any doctrine of *force majeure* (see above). Therefore, without a *force majeure* clause (which, as noted above, usually provides for a contract to be 'frozen' rather than terminated – at least initially), the doctrine of frustration could result in a contract being terminated.

Fraud/misrepresentation

A contract can be ended where the contract is induced by fraud. Fraud or a fraudulent misrepresentation takes place where a fraudulent or false statement is made by the representor with the knowledge that it is untrue. The test of fraud is subjective and the relevant question is whether the representor believed that the representation was true.[18] In some circumstances a contract can also be ended for innocent or negligent misrepresentation. The usual remedy sought here is for the parties to be returned to their 'pre-contractual' position – as though the contract never happened. The availability of this remedy depends in part on whether it is in fact possible to do this.

Fraud, misleading and deceptive conduct and the provision of false or misleading information can also give rise to other consequences, including under legislation such as the *Crimes Act 1914* (Cth). It is important that you seek legal advice if there is a concern that there may have been fraud.

Doctrine of executive necessity

A contract may be terminated at common law under the doctrine of executive necessity. This doctrine gives a government an option to terminate a contract where the contract fetters or purports to fetter statutory executive discretions and powers. This doctrine is based on the rationale that it would be in the public interest to terminate the contract in such circumstances.

Courts have defined the doctrine's scope by reference to:

- 'overriding public interest, such as the exigencies of war'[19]
- 'performing a statutory duty or exercising a discretionary power conferred by or under a statute'[20]
- 'common law powers and functions of the Crown or the Executive when they involve making decisions in the public interest'.[21]

In the case of *NSW Rifle Association Inc v The Commonwealth of Australia*[22] the Court found that the doctrine of executive necessity could not be relied upon to terminate a licence for use of land where the Commonwealth had changed its position on the future use of the land. In general terms, a consideration here was a finding that the entry into the licence was not an exercise of a statutory power or a Commonwealth prerogative but, rather, an exercise of the Commonwealth's power as owner of the land.

Other circumstances in which a contract can be set aside

A contract can also be set aside where a party was induced to enter the contract by a 'wrongdoing' recognised in equity. Circumstances where a contract may be set aside include where a party has entered into the contract as a result of undue influence exercised over that person by another party or where one or both parties have entered into the contract under a mistake of fact.

Termination by mutual agreement

Any contract can be terminated where both parties agree to terminate it. This can be done pursuant to a process contained in a clause in the contract or in the absence of such a clause, where both parties agree that they would like to end the contract. It is important that this agreement is clearly documented – this is usually done in a deed between the parties.[23]

'Any contract can be terminated where both parties agree to terminate it.'

Termination or unenforceability under legislation

The *Corporations Act 2001* (Cth) and the *Competition and Consumer Act 2010* (Cth) are just 2 examples of legislation containing provisions to set aside a contract because of a breach. For example, under the Competition and Consumer Act, a contract can be set aside because of misleading and deceptive conduct or because of a major failure in the supply of works.

Chapter 5 of the Corporations Act makes provision for external administration, which may be relevant to parties that contract with corporations. In general terms, if a company is being wound up, this chapter makes provision for the transactions of that company to be voidable at the option of the liquidator in certain circumstances.[24]

Considerations when preparing a contract

'When drafting a contract, it is important to consider the appropriate termination mechanisms for the contract.'

When drafting a contract, it is important to consider the appropriate termination mechanisms for the contract. As discussed above, even without specific provisions in the contract, the right to terminate can still arise at general law. However, it is usually better to specify the termination rights as far as possible in the contract. The contract can also be used to set out the process to be followed when terminating the contract.

Things to consider when **drafting a contract** include the following:
• In what circumstances will you want to terminate the contract?
• What actions or breaches of which provisions in the contract should be specified as acts of default that could trigger termination?
• Is termination for convenience appropriate? Should it be a one-sided or a mutual right? Should it include a right to reduce the scope of the contract? Are notice periods appropriate? What level of compensation should be paid?
• Should either party have the option to terminate at particular milestones?
• What is the process for termination? Can the parties terminate immediately for breach or should the contract provide for alternative dispute resolution mechanisms to operate before a party can terminate? Are there any exceptions?
• What happens after termination?
• Who will provide the services or complete the works? Is continuity of services important?
• What is required for successful transition to a new contractor? Provide for the transition in the contract.
• What equipment, materials and intellectual property are needed? Who will have ownership or control of these under the contract?

Considerations when terminating a contract

Terminating a contract can be a difficult exercise and getting it wrong can lead to significant drain on resources and involve significant time and costs, and lead to litigation. Taking steps to terminate a contract without justification is often itself a repudiation of the contract that may allow the other party to exercise a right to terminate the contract and sue for damages. Therefore, it is usually appropriate to seek legal advice before taking any steps to terminate a contract.

Things to consider when **terminating a contract** include the following:
• What termination rights are provided for in the contract? Are any of the general law termination rights applicable?
• Are there any express or implied limitations on the right to terminate? Consider whether an obligation to act in good faith may apply or whether the right to terminate may have been waived by the actions of the parties.
• Pay careful attention to preservation of rights clauses under the contract (that is, clauses that survive the termination of the contract. These often include indemnities, rights of access, obligations on parties to keep information confidential and so on).
• Be clear on what basis you are proposing to terminate. Is it for default or convenience? Act consistently and be able to justify your actions.
• Be careful, by your acts or omissions, not to waive any right to terminate.
• Consider the costs of termination and the impact on any underlying program.
• Can a mutually agreeable outcome be reached?
• Manage the relationship appropriately.
• Follow the process set out in the contract (for example, those for notice, cure periods and so on).
• Seek legal advice on the legal effect of the mode of termination. Consider if any property will need to be restored to its pre-contract owner.
• What happens after termination?
• What is your 'plan B' to complete the services/works?
• In the case of a grant, do you have an interest in the ongoing delivery of the services that are supported by the contract? If so, how will this be arranged?
• In the case of a procurement, how quickly can another contractor be engaged? Consider the Commonwealth Procurement Rules and whether an approach to market is required.
• What equipment, materials or intellectual property are required? Who owns or controls these? Will these need to be transferred to a third party?
• Have a transition plan.
• What level of cooperation is required from the contractor? Are they likely to provide this?

Other issues

There are a number of other issues that impact on termination of contracts.

See also the following AGS publications:

- Commercial notes 33: *Securities: Ensuring payment of debts to the Commonwealth*
- Commercial notes 35: *Managing government contracts through financial distress*
- Legal briefing 96: *Personal Properties Securities Act*
- Legal briefing 97: *Commonwealth grants: An overview of legal issues*.

This briefing is an update of Commercial notes 37

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1 The word 'termination' is used throughout this note to refer to the ending of a contractual relationship. As noted above, in this area a range of legal jargon applies and the law is complex. This note does not seek to provide a comprehensive analysis of all the relevant legal concepts. Commonwealth entities should ensure that they obtain appropriate legal advice before taking action to end a contractual relationship.

2 Department of Finance, 'Mandatory use of the Commonwealth Contracting Suite for procurement under $200,000 Resource Management Guide No 420'.

3 CCS Clause 12.

4 *NSW Rifle Association Inc v Commonwealth of Australia* [2012] 266 FLR 13.

5 *Kellogg, Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200.

6 *Sundarajah v Teachers Federation Health Ltd* [2011] FCA 1031; *Trans Petroleum (Australia) Pty Ltd v White Gum Petroleum Pty Ltd* [2012] WASCA 165; *Starlink International Group Pty Ltd v Coles Supermarkets Australia Pty Ltd* [2011] NSWSC 1154; *NSW Rifle Association Inc v Commonwealth* [2012] 266 FLR 13 (although note that there was no termination for convenience clause in the contract in question); *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15.

7 *Optus Networks Pty Ltd v Telstra Corp Ltd* [2001] FCA 1798.

8 *Hughes Aircraft Systems International v Airservices Australia* [No 3] (1997) 76 FCR 151.

9 *Australian Hotels Association (NSW) v TAB Ltd* [2006] NSWSC 293.

10 *Aiton Australia Ltd v Transfield Pty Ltd* (1999) 153 FLR 237, 263–265.

11 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 266–277.

12 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611, [393].

13 Donald Robertson, 'Force Majeure Clauses' (2009) 25 *Journal of Contract Law* 62.

14 *Wallis, Son & Wells v Pratt & Haynes* [1910] 2 KB 1003, 1012.

15 *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286.

16 *Shevill v Builders Licensing Board* (1982) 149 CLR 620, 625–626.

17 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 66; [1962] 1 All ER 474; [1962] 2 WLR 474 per Diplock LJ, CA.

18 *John McGrath Motors (Canberra) Pty Ltd v Applebee* (1964) 110 CLR 656; *Akerhielm v De Mare* [1959] AC 789; *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219.

19 *Northern Territory of Australia v Skywest Airlines Pty Ltd* (1987) 48 NTR 20, 46.

20 *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 74–75.

21 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 18.

22 *NSW Rifle Association Inc v Commonwealth of Australia* [2012] 266 FLR 13.

23 See also *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266; *Fitzgerald v Masters* (1956) 95 CLR 420; *Tekmat Pty Ltd v Dosto Pty Ltd* (1990) 102 FLR 240.

24 *Corporations Act 2001* (Cth) s 588FE.

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