UNDERSTANDING AUSTRALIAN CONSTRUCTION CONTRACTS

By Ian Bailey QC and Matthew Bell
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Some years ago, it fell to this reviewer (in his role as in-house solicitor for a well regarded and long established building industry association) the thrilling task of sorting through some very old and very musty document archives for the purpose of document discovery.

There was nothing particularly memorable or interesting about undertaking such a task, save for one particular find among the cobwebs and the dust.

It was a standard form construction contract. It was an orange document of some six or so pages, was dated around 1965 or '66 and was for the construction of the association's new headquarters. It was unaltered, save for one small change to a clause that had been made in royal blue ink and in a style that bespoke considerable forethought, not to mention admirable clarity and brevity of expression. The project was undoubtedly costly and yet the contractual framework was concise.

Where, you may well ask, have we gone wrong (contractually speaking) in the succeeding 40 years, when commercial construction contracts are invariably of *War and Peace*-like proportions and, frankly, about as comprehensible as the loan documents that underpin the project.

Well, that particular question is not for this review to attempt to answer. What can be said without question is that Professor Bailey QC and Matthew Bell have rendered an invaluable service to the construction industry in general and to the legal profession in particular with the recent publication of their splendid handbook entitled *Understanding Australian Construction Contracts*.

The book covers the four most widely and commonly used commercial construction contracts and analyses in minute detail the clauses in those documents that deal with particular aspects of the project delivery, such as insurance, liquidated damages and service of notices under the contract. The arrangement of the text may therefore be said to follow broadly the progress of the project and the performance sequence of the contract.

The busy practitioner can now look to a specific section in the text when a specific issue relating to the performance (or more usually, the lack of performance) of the contract comes up for consideration. For that, the authors are to be congratulated.

The book is easy to use and easy to navigate through. There is a refreshing absence of footnotes (footnotes, at least in this reviewers opinion, often assume a life of

their own, which detracts from the text) and helpful further references are given at the end of each chapter. The book also contains many useful comparative tables of key aspects of each contract.

This is a reference book in the truest sense and should be on the shelves of all practitioners who work in or about the construction industry.

The book does, however, contain within its covers an irony: while the commercial construction industry is the beneficiary of this and many other learned and significant texts, the domestic building industry is not – which is strange when one considers that domestic construction projects affect more people in arguably more significant financial respects than is the case with commercial projects.

Perhaps this is a future publishing task that the learned authors may wish to undertake.

NEIL MCPHEE
Solicitor

The Australian construction industry is characterized as being a competitive and risky business environment due to lack of cooperation, insufficient trust, ineffective communication and adversarial relationships which are likely lead to poor project performance. Relational contracting (RC) is advocated by literature as an innovative approach to improve the procurement process in the construction [Show full abstract] industry.Â Understanding the Critical Success Factors (CSFs), commonly used construction contracts and the NEC system can help us address some of these issues. However, there are gaps in the validation of the benefits of NEC and its link with project success. Generally, construction contracts in the Australian jurisdiction will contain governing law clauses which stipulate that the governing law is the state or territory where the project takes place. However, despite the presence of a governing law clause, parties cannot contract out of certain legislation, such as certain provisions of the Competition and Consumer Act 2010 (Cth) and the security of payment legislation in each state or territory. In certain states and territories, parties will also be unable to contract out of proportionate liability legislation.Â In contrast, any contractual provisions that purport to impose a penalty on the parties for non-compliance with the contract are prohibited from construction contracts. This particularly relates to excessive liquidated damages.