

Book Review

Understanding Construction Law

Coggins, J., Davie, T., Ears, T., and Evans, P. (2016). *Understanding Construction Law*. Chatwood NSW, Australia: LexisNexis Butterworths.

This book is about both construction and law and, since encounters with the law can rarely be avoided once construction commences, it is for any construction professional; architect, engineer, quantity surveyor or builder, who seeks to practice outside the realm of the theoretical. It will also fit usefully on the bookshelves of the construction lawyer.

In Chapter 1, Jeremy Coggins gives the reader a hitchhiker's guide to the development of the common law and equity in England, starting with the medieval King Henry II. He then describes the structure of the Australian legal framework, its legislation, codes of practice, case law, courts and tribunals, and asks the reader to consider the consequences of having no law at all. Of course the answer to this question is occasionally found, at least in its embryonic stage, on building sites and as the book unfolds, it addresses the many problems that architects, engineers, builders and their legal advisers encounter.

The opening chapter flows naturally to the 2nd, which describes the regulatory framework of the construction industry and the pyramidal sub-contracting structure with the potential for descending layers of insolvency. It points to the particular vulnerability of those small businesses at the bottom of the pyramid and the relief that the Security of Payment legislation was designed to provide. It also covers the industrial relations scene, which is of particular interest in the current political climate after the recent Royal Commission exposed corrupt misuse of union power. There is also a discussion about the proposed, but as yet unsuccessful, Australian Building and Construction Commission bill.

Chapter 3 is on contract law, which is a pleasure to read as it so clearly sets out the elements of a contract and how one might be discharged. Case law is cited to illustrate judicial analysis of these concepts. An example is the NSW Court of Appeal's decision in *Empirnell Holdings v Machon Paull Partners*¹. Through an agent, the plaintiff engaged a firm of architects to design and build a property. After work commenced the architects proffered a standard form construction contract to the agent, who promptly informed them that ". . . [the plaintiff] does not sign contracts". Building work continued and payment was made in the terms contemplated by the unsigned standard form contract. When a dispute erupted the plaintiff relied on the conversation between his agent and the architects to submit that they had not entered the agreement on the terms contained in the standard form. The Court of Appeal found to the contrary, saying that acceptance had been established by conduct and that the statement that ". . . does not sign

1 *Empirnell Holdings v Machon Paul* (1988) 14 NSWLR 523

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contracts” supported, rather than weakened, the architects' case, concluding that the objection was not to the terms and conditions of the contract but to the manner of acknowledging them.

The next chapter is on the law of tort, a subject that includes the word “*negligence*”, which when used in a legal context is adopted all too often to describe the performance of construction professionals. The chapter describes the origins of the concept of a duty of care, its expansion to include pure economic loss and the boundaries surrounding this. It also covers professional indemnity insurance, a cover that is, for example, mandatory for architects registered in NSW. The tort of trespass and the difficulties encountered when buildings encroach on adjoining land are also described.

Phil Evans writes Chapter 5, which covers the detail of construction contracts, including the initiating process of tendering and the dark art of collusive tendering. It covers the variety of questions that standard contracts address in some detail, and describes the difficulties and risks associated with latent conditions. The chapter concludes with a consideration of sub-contracts. Of particular interest is the section at page 238 covering the changing attitudes of the legislature to the protection of small businesses from unfair contract provisions.

Chapter 6 by Tony Earls begins with the cautionary words *things do not always go exactly as planned*. With this introduction it is probably unnecessary to say that the topic is contract administration. The chapter is comprehensive and will be a welcome guide to the inexperienced and the battle-weary alike. On page 296, for example, the author considers the circumstances where it may be permissible for the superintendent to authorise payment for goods or materials stored off site and the kind of protection that should be afforded to the principal. The chapter also covers the complexity of delay claims, including the frequent requirement for the contractor to take all reasonable steps to preclude the consequences of delay.

Finally, as with many construction projects, the book ends with an episode of dispute resolution. It is a topic with which the author, Tom Davie, is very familiar, being a barrister who has practiced at the NSW bar in construction disputes for many years. It covers the typical kinds of claims that arise and the many procedures that are currently available in the various courts and government tribunals. It also describes the myriad forms of alternative dispute resolution (ADR) processes available: negotiation, mediation, expert determination and commercial arbitration.

In conclusion I would recommend this book to the various schools of building, engineering and architecture, to practitioners both young and experienced, and to construction lawyers, as an instructive guide to the many legal difficulties faced while a project is being constructed. The book is clear, concise, compact and full of useful references.

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