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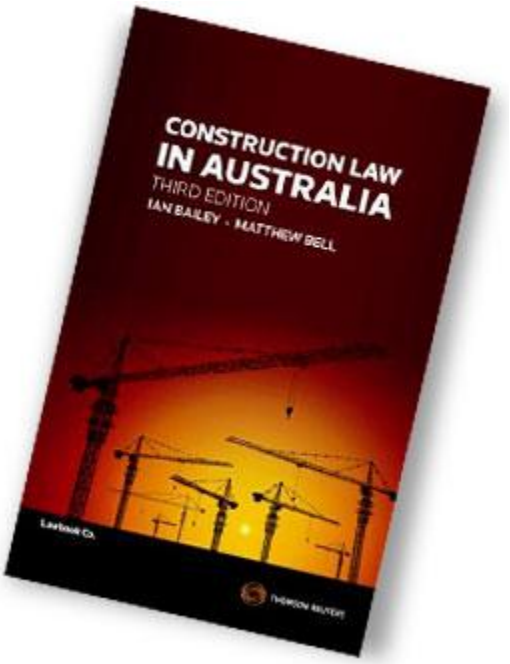
Construction Law in Australia (3rd Edition)



Authors: Ian Bailey and Mathew Bell

Publisher: Thomson Reuters

Reviewed by Chris Tam

The third edition of *Construction Law in Australia* is a concise and focused guide to a dynamic area of the law.

Co-authors, Professor Ian Bailey SC and Mathew Bell, have updated and refined their previous editions with the assistance of fellow counsel and academics as well as senior solicitors.

Their book is an indispensible first-point guide for further reading and research in an area of the law which involves repeated interplay between common law principles (some of them with an ancient heritage) and diverse specimens of statute law. Differing practices and standards within discrete industries and regions add a further layer of complexity for lawyers and operators.

Largely settled doctrines, rules and principles concerning the interpretation of commercial contracts apply to standard-form contracts in common use throughout Australia. Notwithstanding this, the incidence of highly complex and costly construction litigation either in specialist tribunals or in superior courts has not abated.

Professor John Uff QC – a pre-eminent construction law practitioner and academic – observed in 1991 that construction contracts 'drafted without full recognition of the possible effects of common law will lead inevitably to difficulty'. [1]

Professor Uff observed that the draftspeople of standard-form construction contracts do not 'face up' to the legal implications of the content of those documents. One of the reasons for this was a perceived difficulty of reaching consensus between the competing sides of the industry. Professor Uff rejected this as a justification. He said:

"All that matters is that the contractor should be allowed to price what he has asked to undertake. What is important is that the contractor should know with some confidence what it is that he has to price, and that his expectations should not be ordered (or unreasonably enhanced) by the intervention of principles of law which have not been taken in the consideration [by the draftsperson]." [2]

In the foreword to the second edition of *Construction Law in Australia*, then Giles J observed that building disputes often are founded 'in, or exacerbated by, misunderstandings between the participants or misapprehension of their rights and obligations'.

His Honour's insight alludes to how complexity in construction disputes takes hold and can take a life of its own. This particularly happens when settled common law principles are applied to circumstances where the participants are not fully apprised of their respective rights and obligations. It also occurs when they misunderstand what is required of them at law and pursuant to the terms of their agreement.

On top of this dynamic is the operation of what Bergin CJ in Eq in her foreword to the third edition describes as 'modernising' legislation such as the security of payments Acts.

With all these factors at play, the immense utility of the book as a first-reference tool shines through. The authors have included a particularly useful section at the end of the book which provides references to other books and journal articles (principally from other authors) which are relevant to the topics covered in the previous 13 chapters.

Professor Uff observed that construction contracts generally are concerned with three principal areas – quality, cost and time. The authors have, very helpfully, broken down these three areas in chapter nine ('key issues in construction contracts'). This is quite possibly the most helpful chapter for practitioners advising in the early stages of a dispute.

The context for chapter nine is provided in the preceding chapters. These provide an

overview of principles relevant to ‘contract’, ‘tort’ and ‘property’. The principles may be second nature to some practitioners but are helpful refreshers, nonetheless.

Perhaps the next most useful sections of the book for practitioners are chapters 12 and 13. Chapter 12 concerns ‘dispute avoidance, management and resolution’. When this fails, recourse may be had to chapter 13 – ‘conduct of litigation’.

The authors expressly acknowledge the complexity and diversity of construction law in the preface to this edition. They described the ‘overarching goal’ of the book as being geared towards promoting ‘understanding’ of the relevant principles and controversies.

They recognise that the ‘daily oscillations’ of the commercial world in which construction projects are planned negotiated and delivered mean that the area of the law is constantly changing.

Their focus is upon the broad themes as well as hard principles but the purpose of the book is really to assist further reading and research. This aim is commendably achieved.

The authors and contributors have produced a practical, focused and highly useable text. It is a valuable companion to their other work, *Understanding Australian Construction Contracts.*

Chris Tam

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Footnotes

1. J Uff *The Interplay of Contract Terms and Common Law* paper given to the Society of Construction Law, UK, 5 November 1991, p11-12.

2. Ibid