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EDITORIAL – *Editor: Michael Christie SC*

An Avoidable Pitfall for Construction Project Participants 227

BOOK REVIEW

Construction Law (3rd ed), by Julian Bailey – *Reviewed by Michael Christie SC* 228

ARTICLES

Is It Time for an Express Term of Good Faith in Australian Construction Contracts?
– *Joseph Biagio Xuereb*

Standards Australia was set to release the long-awaited AS11000: General Conditions of Contract as a replacement to the AS2124:1992 and AS4000:1997 suites. Among a host of proposed amendments, AS11000 introduced an express term requiring parties to act in good faith. The inclusion of this overarching obligation aligned with modern approaches to dispute avoidance and management ingrained in relational contracting theory. Ultimately, Standards Australia did not proceed with finalising and publishing AS11000 due to a lack of support “by the full spectrum of interests” from stakeholders within the industry. This article investigates what constitutes global best practice when it comes to express clauses requiring contracting parties to act in good faith and makes recommendations for the reform of Australian standard form construction contracts. 229

No-reliance Clauses: Are They Effective at Limiting a Principal’s Liability for Misleading or Deceptive Conduct? – *Eileen Yang*

The Australian Consumer Law’s (ACL) prohibition against misleading or deceptive conduct is meant to operate universally in the realm of trade and commerce. Contractual devices which purport to exclude liability for misleading or deceptive conduct from a transaction, such as “no-reliance” clauses, undermine this important cornerstone of commercial law. This article asks whether, and to what extent, such clauses are enforceable. It surveys the existing case law on this issue, which reveals the courts increasing reluctance to enforce such clauses for public policy reasons. The analysis is framed through the lens of construction contracting, and focuses on the particular mechanisms used to exclude or limit liability for misleading or deceptive conduct in that context. The article concludes by attacking no-reliance clauses from two angles: first, that no-reliance clauses cannot effectively operate to sever the causal nexus between a representation and reliance; second, that such clauses impermissibly curtail the ACL’s remedial and protective purpose. 247

REPORTS

Leeda Projects Pty Ltd v Zeng	258
TFM Epping Land Pty Ltd v Decon Australia Pty Ltd	295
C&V Engineering Pty Ltd v Hamilton & Marino Builders Pty Ltd	317