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EDITORIAL – *Editor: Michael Christie SC*

Construction Contracts and Technology Related Contracts 479

ARTICLES

How Will the New Unfair Contract Terms Regime Affect Construction Contracts? –
Jey Nandacumaran and Cameron Inglis

The new unfair contract terms (UCT) regime, which came into effect through reforms to the Australian Consumer Law in late 2023, marked the beginning of a new era. As the reforms significantly expanded the reach of the UCT law, many parties to standard form building contracts may now be subject to “Australian norms of fairness”. This will impact the Australian construction industry, as some terms common to building contracts may be declared unfair and rendered void, causing project disruption and exposing parties to multi-million dollar penalties. Even if not declared unfair, contracting parties may seek to avail themselves of the regime if a particular term is thought to be unfair or if its enforcement causes detriment. This article explores how the UCT reforms will impact the Australian construction industry, how it may influence the behaviour and risk allocation of contracting parties large and small, and whether it is beneficial for the industry or not. 480

Concurrent Delay and the Prevention Principle – Resolving the Conflicting Lines of Authority – *Ian Thorpe*

It is submitted that a preventative act by a principal that causes delay concurrent with a contractor’s delay will engage the prevention principle and set the time for completion at large, unless the contract provides for an extension of time for that concurrent preventative act. There is conflicting authority on this subject – the courts found otherwise in *North Midland Building Ltd v Cyden Homes Ltd* and *Turner Corp Ltd (in liq) v Co-ordinated Industries Pty Ltd*, but this submission is consistent with *Wells v Army & Navy Co-operative Society* and *Perini Pacific Ltd v Greater Vancouver Sewerage and Drainage District* and the characterisation of the prevention principle in *Roberts v The Bury Improvement Commissioners*, *Dodd v Churton*, *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*, *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* and *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd*. 498

For Better or for Worse? An Analysis of “Betterment” in the Assessment of Damages in Construction Claims – *Amanda Jade Staninovski*

The traditional principle underpinning the measure of damages is the cost of rectification of the works which are necessary to achieve conformity with the plans and specifications. However, if the remedial works go beyond the scope and specifications originally stipulated by the contract, and thereby placing a plaintiff in a better position than it had originally bargained for, a defendant may seek to reduce damages based on this “betterment” enjoyed

by a plaintiff. While the concept of betterment is clear, the legal principles underpinning betterment, and entitlement to this reduction in damages, are not so prescriptive. This article aims to provide a comprehensive review of the principles of betterment in Australia and its application to practical situations experienced in construction-related legal disputes. 517

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