

Table of contents

<i>Foreword</i>	vii
<i>Foreword to the Second Edition</i>	ix
<i>Preface</i>	xi
<i>Authors</i>	xv
<i>Table of cases</i>	xxv
<i>Table of statutes</i>	xlv
<i>Table of clauses (standard forms)</i>	li
<i>Abbreviations used in this text</i>	lv

Chapter 1 The Australian legal system

Law and legal systems	1
Nature and definition of law	1
Legal systems	2
Law in Australia today	3
Enacted law – legislation	3
Unenacted law – case law	10
Relationship between case law and statute law	20

Chapter 2 Understanding the law

Legal expressions	23
Evolution of the law	25
Case study: liability for negligent advice	25
Legislative change	29
Legal remedies	29
Finding the law	31
Law reports	32
Legislation	35
Textbooks	36
Finding construction law	36

Chapter 3 Regulation of construction

Division of legislative power	39
Commonwealth legislation	40
Fair trading/consumer protection	40
Other	41
State and Territory legislation	42
General regulatory legislation	42
Security of payment	43
Residential building	45
Building and development approvals and certification	46
Conflict between Commonwealth and State/Territory laws	47
Reform and harmony	48
Local Government	48
Building Code of Australia	49
Australian Standards	50
Consumer protection and sale of goods	50
Misleading and deceptive conduct	50
Unconscionable conduct	51
Unfair contract terms	52
Unfair practices	52
Consumer transactions – goods and services	52
Limitation of actions	53
Remedies other than damages	53
State and Territory legislation	54
Professionals	54
Professional standards legislation	55
Industrial relations and employment	55
Long service payments	57

Chapter 4 Participants in the industry

Key parties to construction contracts	59
Principal	59
Contractor	61
Sub-contractors	62
Consultants	63
Architects	64
Engineers	64
Quantity surveyors	65
Other technical consultants	65
Unions	65
Corporate structures	66
Companies	67
Unincorporated associations	71
Partnerships	72

Chapter 5 Law of contract

The nature of contract law	75
Formation of contracts	76
Intention to create legal relations	77
Offer and acceptance	79
Consideration	83
Capacity	84
Contract terms	85
Terms and representations	86
Express and implied terms	86
Conditions and warranties	87
Incorporation by reference	88
Exclusion or limitation clauses	89
Collateral contracts	91
Contract documents	92
Form – deeds and agreements	92
Ambiguities and inconsistencies	93
Grounds on which contracts may be unenforceable	97
Requirement of writing	98
Mistake	99
Misrepresentation	100
Duress, undue influence and unconscionable dealing	103
Illegality	104
Statutory provisions	105
Privity of contract	106
Discharge of contract	107
Discharge by performance	108
Discharge by agreement	109
Discharge by frustration	110
Discharge by breach or repudiation	111
Remedies for breach of contract other than termination	115
Contractual remedies	116
Damages	116
Quantum meruit	120
Specific performance and positive injunctions	122
Estoppel and waiver	122
Limitation of actions in contract	123

Chapter 6 Law of torts

Overview	125
Negligence	127
Elements generally	127
Duty of care	128
Breach of the duty	131
Damage	133
Defences	134

Negligent misstatement	135
Liability for dangerous activities	136
Nuisance	137
Private nuisance	137
Public nuisance	139
Nuisance from construction	139
Defamation	141
Liability of occupiers	142
Entering the site under contract	143
Lawful entrants other than entrants under contract	144
Trespassers	144
Vicarious liability	145
Independent contractors	145
Employers	147
Legislative reforms	148
Remedies	148
Damages	148
Injunctions	151
Specific performance	152
Proportionate liability	153
Key features	153
Impact upon commercial arbitration	155
Limitation of actions in tort	156
Case study: latent defects	157

Chapter 7 Law of property

Overview	159
Real property	160
The meaning of "land"	160
Estates and interests in land	161
Title to land	166
Land dealings	170
Land development	171
Sub-division control	174
Other controls on land use and development	174
Personal property	176
Choses in possession – goods and chattels	177

Chapter 8 Procurement

Overview	181
Risk allocation	182
Process issues	184
Relevance of standard forms	185

Delivery methods	185
Outline	185
Categorisation by design responsibility	187
Categorisation by remuneration method	189
Relationship contracting	195
EPC and EPCM	197
Public Private Partnership models	198
Sub-contracts	199
Head contract provisions	200
Sub-contract conditions	200
Provisional sums and prime cost items under sub-contracts	201
Nominated sub-contracts	202
Relationship of sub-contractor and principal	204
Warranties	206
Payment	206
Assignment and novation	208
Assignment of rights	208
Assignment of obligations – novation	209
Methods of assignment	210
Contractual restrictions on assignment	210

Chapter 9 Key issues in construction contracts

Tenders	213
Tender documents	214
Invitations to tender and "tender process contracts"	215
Tenders	216
Withdrawal of tender	217
Acceptance of tender	217
Recalling tenders	218
Costs of tendering	219
Alternatives to tenders	219
Contract documents	220
Impact of interpretation principles	222
Execution of the contract	223
Implied terms	224
Administration of the contract	225
Specification of the roles	226
Independent administrator	226
Replacement	227
The site	227
Access	227
Latent conditions	228

Adjustment of the contract sum	229
Provisional allowances	229
Rise and fall	229
Errors in bills and schedules	230
Variations	231
Contract variations	231
Power to order variations	232
Instructions for variations	233
Recovery without written orders	233
Extra work and omissions	235
Certificates and payment	237
Progress payments	237
Progress claims	238
Progress certificates and payments	240
Recovery without a certificate	241
Security/retention	242
Final certificate	243
Statutory payment procedures	243
Time and performance	247
Progress	247
Programming	248
Requirements regarding completion	248
Extensions of time	248
Delay costs	251
Liquidated damages	252
Completion	257
Practical completion	257
Final certificates	259
Materials and workmanship	259
Defects	259
Defects liability periods	260
Rectification costs	261
Indemnities and insurance	263
Contractual provision for default and termination	264
Termination under the contract	265
Insolvency	266
Impact of Personal Property Securities Act 2009 (Cth)	267

Chapter 10 Standard forms of contract

The role of standard forms	269
Current practice in Australia	270
Client and sector-specific forms	271

Forms in common use in Australia	272
Australian Standards	272
ABIC	273
Other standard forms	274
Standard sub-contract forms	274
Consultancy agreements	274
Use of standard forms	275
Selection	275
Amendments	276
Inserting contract-specific information	278

Chapter 11 Professional liability

The nature of professionals	279
Architects	280
Engineers	280
Professional liability	281
Legal responsibility	282
Liability in contract	283
Liability in tort	286
Standard of care	289
Breach of duty	291
Statutory liability	297
Limitation of actions	298
Professional indemnity insurance	298

Chapter 12 Dispute avoidance, management and resolution

Introduction	301
Dispute avoidance and management	301
Dispute Resolution Adviser	303
Dispute Review Boards	305
Dispute Adjudication Boards	308
ADR: Alternative/Appropriate Dispute Resolution	309
Mediation	309
Conciliation	310
Non-binding expert determination	311
Senior Executive Appraisal	312
Procedure and enforceability	313
Looking to the future	313

Chapter 13 Conduct of construction disputes

Overview	317
Litigation	318
Commencement of proceedings	318

Construction case lists	320
Preparation for trial	321
Impact of proportionate liability	324
Offers of compromise	325
Reference out of court	326
Hearing procedure	327
Judgment and enforcement	329
Arbitration	330
Legislative scheme	331
Arbitration agreement	332
Jurisdiction	333
Procedure	334
Court supervision and appeals	336
The award and enforcement	337
Evidence	338
Admissibility generally	339
Expert evidence	339
Subpoenas	340
The impact of ADR	341
Mediation	341
Fast-track arbitration	341
Binding expert determination	342
Procedure and enforceability	342
Further reading	345
Index	367

Table of cases

Note: Throughout the text, cases are referred to by the year in which the relevant judgment was handed down. In some cases, this may be different to the year in which it is reported – if so, this is noted below.

1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd [2009]	
VSCA 308	[12.11]
406 George Street (Qld) Pty Limited v BG International Limited [2010]	
QCA 245	[5.20]
ABB Powerplants Limited v Electricity Commission of New South Wales	
t/as Pacific Power (1995) 35 NSWLR 596	[13.6]
Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3)	
(2006) 67 NSWLR 341	[3.13], [3.19], [9.21]
ACCC v Baxter Healthcare Pty Ltd (2007) 232 CLR 1	[5.33]
ACN 002 804 702 (formerly Brooks Building) v McDonald [2009]	
NSWSC 610	[9.38]
Adelaide Corporation v Jennings Industries Ltd (1985) 156 CLR 274	[8.19]
Aerospatiale Holdings Australia Pty Limited v Elspan International	
Limited (1992) 28 NSWLR 321	[13.6], [13.28]
A-G (Belize) v Belize Telecom Ltd [2009] 1 WLR 1988	[5.15]
Agricultural and Rural Finance Pty Ltd v Gardiner (2008)	
238 CLR 570	[5.54], [9.31]
Al-Atabi v Zaidi [2009] NSWCA 433	[9.34]
Albert Dell Fabbro Pty Ltd v Wilckens and Burnside Pty Ltd [1971]	
SASR 121	[8.30]
Aldridge v J O Clough & Son Pty Limited (1979) 2 ACLR 167	[6.14]
Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd (1998)	
14 BCL 215 (judgment handed down in 1997)	[9.46]
Allianz Australia Insurance Ltd v GSF Australia Pty Ltd (2005)	
221 CLR 568	[6.7]
Allianz Australia Insurance Ltd v Waterbrook at Yowie Bay Pty Ltd [2009]	
NSWCA 224	[5.49]
Amann Aviation Pty Ltd v Commonwealth of Australia (1990)	
22 FCR 527	[5.50], [9.72]