BOOK REVIEW

Constructive Conflicts of Interest

Best Practice in Construction Disputes – Avoidance, Management and Resolution by Paula Gerber and Brennan J Ong, LexisNexis Butterworths – Australia 2013.

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The authors, Dr Paula Gerber and Brennan Ong, are leading construction law academics. Dr Gerber is currently an Associate Professor at Monash University Law School, where she teaches Construction Law. Brennan Ong is a PhD candidate and Research Assistant at Monash University Law School and is the Managing Editor of Construction Law International (he was also formerly an Associate to Justice Peter Vickery, the Judge in charge of the Supreme Court TEC List). Both have written extensively on dispute avoidance and management strategies in the construction industry, with a particular emphasis on Dispute Boards.

At the commencement of the book they make the pertinent observation that construction is a risky venture owing to the uncertainty of unknown factors that can emerge during the life of a project. Conflict is pervasive in the construction industry. Conflict often materialises into claims and inevitable disputes, which frequently conclude in arbitration and litigation, at great cost and inconvenience to the parties.

The book undertakes a helpful examination of the root causes of construction conflicts, how conflicts in the construction industry can readily escalate into disputes and what parties can do to minimise the risk of this occurring, or if a dispute does occur, how to best manage the dispute. Not surprisingly, conflict on a construction project all too frequently results in the parties adopting negative adversarial attitudes which damage relationships and which can severely impact upon the success of the project, resulting in delay and increased project costs.

The unique focus of this significant work, unlike most texts on construction disputes, which focus on strategies to resolve disputes after they have arisen, is on both conventional dispute resolution techniques, such as ADR, Expert Determination and Early Neutral Evaluation, and strategies for dispute avoidance.

The authors provide a comprehensive, thoroughly researched (with many helpful references) and very readable analysis of how conflict, which is an integral part of human interaction, can best be managed in the construction industry, by hopefully developing mutually cooperative and trusting working relationships on construction projects, from the outset.

Of particular assistance to prospective mediators is a useful discussion on the theory of "integrative bargaining", as a way of finding a mutually beneficial solution to the parties' conflicts by identifying the disputes, exposing the true needs and concerns of both parties by a process of open communications and helping the parties to fashion a solution which meets the greater number of the parties' interests; what is described in mediation terminology as a "win-win" solution.

The book has the most extensive and up-to-date analysis that I have read of the history and evolution, both overseas and in Australia, of what is known as Dispute Resolution Boards (DRBs), or Dispute Avoidance or Adjudication Boards (DABs), which are a relatively new innovation in construction and infrastructure projects in Australia, but have consistently proven to be remarkably successful in dispute avoidance in many large and complex construction and infrastructure projects. The theory behind DBRs is that the parties appoint a panel of independent third party experts with a mixture of experience and expertise, including technical, legal and ADR. Generally, a DRB panel consists of three persons, although on a smaller project the DRB can consist of one person, whose function is to assist the parties from the commencement of the project (even from the design stage if the project has design and construct elements), to proactively identify, manage and resolve disputes, or potential disputes, without resorting to arbitration or litigation. The DRB usually reviews project documentation, such as Contract Control Group Meeting Minutes, undertakes regular site visits and conducts meetings with key on-site and senior off-site personnel to monitor the progress of the project and facilitate frank and open discussions of any potential areas of conflict.

If the parties are unable to resolve a dispute by negotiations, the DRB usually has the ability to make non-binding recommendations, which experience has shown are invariably accepted by the parties, as they are recommendations by an independent expert panel with extensive knowledge of the project. Different DRBs adopt different approaches as to whether a non-binding determination of the DRB is "without prejudice" or "with prejudice" (as adopted in Sydney's Desal Project), and entitled to be relied upon by a party in any subsequent proceedings. The authors favour the approach that a determination of the DRB should not be admissible in a subsequent proceeding, given that the purpose of the determination is to assist the parties to arrive at a consensual resolution. The opposing view is that a "with prejudice" determination will encourage the parties to resolve the dispute without recourse to litigation, as a court or an arbitrator is likely to be persuaded by an independent determination made by an expert panel with detailed knowledge of the project.

The record of success of DRBs in Australia is that in some 40 projects with DRBs, as I understand, no project has had a dispute referred to arbitration or litigation, and there have been few DRB determinations required, as most disputes have been able to be resolved consensually by the parties themselves in the course of the project. Remarkably enough, the Victorian State Government has still not come on board, and there have been no DRBs appointed on large construction and infrastructure projects in Victoria to date. This is presumably due to the perceived high costs of DRBs, which is not necessarily the case, and the often over-optimistic belief that their project will be free of disputes. The authors note that all Standard Form FIDIC Contracts now include DRBs as a feature.

The authors make a compelling argument for the legal profession involved with construction projects to change its mind-set from maintaining traditional adversarial attitudes, to appreciating the range of dispute avoidance and dispute management strategies, which are now readily available and proven, to better manage construction projects. This will hopefully result in more successful projects and satisfied clients whose relationship will not be damaged by acrimonious litigation.

The concluding chapter contains an apt quotation from Warren E. Berger, former Chief Justice of the United States Supreme Court, who noted:

> *The entire legal profession – lawyers, judges, law teachers – has become so mesmerised with the stimulation of court room contest that we tend to forget we ought to be healers of conflict. Doctors, in spite of astronomical medical costs, do retain a higher degree of public confidence because they are perceived as healers. Should lawyers not be healers?*

The publication of this work, which promotes a holistic approach towards construction disputes, is greatly welcomed, and should be included in the library of every lawyer whose practice involves dealing with construction projects.

1 (formerly Chair of the DRB of Sydney's Desalination Plant Project and currently Chair of the DRB of Sydney's South-West Rail Link Project)

EXCLUSIVE

New ACCC Formed

MEDIA RELEASE[1]

It can now be revealed that the Minister for Inclusive Wellness will put in place a game-changer: an Anti-Cliché Control Commission (ACCC). After a bitter turf war, the Minister has decided that this new structure will take over the functions previously exercised by the dysfunctional Agency for the Spread of Irritating Clichés (ASIC).

In an exclusive interview with Bar News, the Minister said that he had been looking through the window of opportunity over the level playing field. It was covered with sand, in which, at this point in time, he proposed to draw a line, as well as moving the goalposts. Enough was, having regard to forward Budgetary estimates and environmental implications, give or take, within the ballpark, enough.

The Minister had first considered naming the new body Clichés Australia (CA), like Cricket Australia, Parsnips Victoria (PV) and Scrabble Queensland (SQ). But in Canberra the number of letters in your acronym, which are allotted by the Australian Program for the Recognition of Acronyms (APRA), is a sign of status, a bit like stars for hotels and film reviews. So ACCC it will be.

The ACCC will have an over-arching overview, aiming for the empowerment of human capital through capacity building and a flat management structure.

Being over-arching, it will be able to drill down, taking care not to shoot the messenger.

It will be transparent and accountable, being incredibly fantastic, moving forward across a wide range of issues, including those out of left field.

Needless to say, it will be iconic, indeed uber-iconic. There will be more Russian orthodox religious emblems than you could shake a sauce bottle at.

This will be a game changer and circuit breaker, meeting a steep learning curve on a whole-of-government evidence-based approach across rural and regional Australia.

As it hits the ground running, the ACCC will literally tick all the boxes in our DNA as it engages in a national conversation, joining the dots as it pushes the envelope.

The Minister urges the Opposition not to trash the brand, or engage in a race to the bottom.

1 All media enquiries should be delivered to the Hon Peter Heerey AM QC who will respond with tongue firmly in cheek.