CHAPTER 3

Regulation of Construction

[3.10] In this chapter, we consider the legislative and regulatory framework of the construction industry at Commonwealth, State/Territory and local government levels. The legislative powers of the Commonwealth and States/Territories are reviewed, and the judicial process of addressing conflicts between them is referred to. The governmental and administrative process of achieving harmonisation in legislation across the States and Territories, and reform of the law generally, are briefly considered. The significant role of local government in the control of building work and planning law is also described.

The inherent impediment of inconsistency which pervades this framework has its historic origins in our Federal system of government (discussed at [1.60]). The recent rapid development of electronic communication and information technology has exposed the difficulties which the independent and inconsistent development of legislation and government administration imposes on commerce generally and, in some respects, uniquely upon the construction industry.

This is exemplified in the contrasting approaches taken by legislatures across Australia to the sensible reform of legislative security of payment in the construction industry. The various approaches are considered in [3.60]. It is regrettable that such starkly different regimes have been imposed both within the legislation itself and in the administration and regulation of adjudications and the training and accreditation of practitioners. The need for reform in this area of the law is discussed in [3.60] and [3.100].

DIVISION OF LEGISLATIVE POWER

[3.20] As was noted in [1.60], the distribution of legislative power in Australia is essentially prescribed by the *Commonwealth of Australia Constitution Act 1900* (Imp) (*Constitution*), which developed out of negotiations between the colonial governments during the 1890s. The colonies (which became the States) agreed to cede specific powers to the Commonwealth, which was itself created by the *Constitution*. These powers for which the Commonwealth has exclusive jurisdiction are generally those necessary for a national administration such as external affairs and defence. The *Constitution* also provides that the Commonwealth has power to legislate "with respect to" a series of aspects identified in s 51. These, in a sense, are shared between the Commonwealth and the States. To the extent that the Commonwealth exercises these legislative powers, that will generally

supplant state provisions or be authoritative in the field concerned. The remaining wide and unspecified powers are retained by the States.

As a result of progressive broad interpretation of the *Constitution* by the High Court, the power of the Commonwealth has been increased to permit legislation beyond the expressly defined powers. The use of the foreign affairs power, for example, permits the Commonwealth to legislate to give effect to inter-governmental agreements and treaties. The use by the Commonwealth of the corporations power to justify legislation in areas such as industrial relations is but one example and will probably be adopted as the basis for further centralisation and consistency for national legislation affecting commerce. Some of those who argue for national legislation in areas such as security of payment in the construction industry base their support, in part, on the corporations power.

COMMONWEALTH LEGISLATION

Fair trading/consumer protection

[3.30] On 1 January 2011, the *Australian Consumer Law* (ACL) came fully into force. The ACL forms Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (CACA), an Act which draws upon, consolidates and replaces a range of Commonwealth and State legislation. Australia's former general consumer law consisted of two Commonwealth Acts – the *Trade Practices Act 1974* (Cth) (TPA) and the *Australian Securities and Investments Act 2001* (Cth) – and eight State and Territory Fair Trading and Sale of Goods Acts.

The reforms involved in the introduction of the ACL were developed through co-operation between State and Territory governments which, under the agreements under the Council of Australian Governments (COAG), will introduce like amendments to existing legislation. It represents, therefore, a welcome introduction of uniformity, which hopefully will be followed by further reform in areas which concern the construction industry, although progress to date has been limited.

To a substantial degree, the ACL amends and replaces the previous consumer laws. It was largely based on the TPA; however, it also introduced new national unfair contract terms law and modifies the former law as to implied and statutory warranties in consumer contracts with the introduction of consumer guarantees. Sections [3.140]-[3.210] summarise these key aspects of the ACL, with particular reference to those provisions of interest to the construction industry.

The Australian Competition and Consumer Commission (ACCC) is a Federal government agency which administers the ACL and other consumer legislation. The ACCC also regulates national infrastructure industries. The ACCC investigates complaints arising from conduct in trade and commerce and brings proceedings for prosecutions for offences under the CACA, including the new civil pecuniary penalties under the ACL. It may also pursue

recovery proceedings on behalf of consumers against those who contravene the CACA.[1]

Other

[3.40] Commonwealth legislation dealing with the formation and management of corporations also has some significance for the construction industry. The *Corporations Act 2001* (Cth) addresses the formation, management, solvency and winding up of corporations. The enforcement and recovery against corporations of amounts payable under actions based on State and Territory security of payment legislation (see [3.60]) are subject to the *Corporations Act*. Although somewhat inconsistent with the intended objective of speedy recovery of progress payments, it seems that a corporation may defend a claim based on a statutory demand under s 459G by reliance upon an off-setting claim possibly based on the matters raised in defence of the claim in the course of an adjudication.[2]

The Australian Securities and Investments Commission (ASIC), under the authority of the *Australian Securities and Investments Act 2001* (Cth) (ASIC Act) and under the ACL, is responsible for the regulation of companies and the securities and futures industries. ASIC may bring prosecution or recovery proceedings against directors in the event of insolvency and offences relating to the formation and management of corporations. The activities of ASIC are somewhat peripheral to commercial activities in the construction industry; however, there will be occasions when conduct by a corporation or its directors would be the subject of an action for recovery for unpaid amounts arising from unlawful management practices.

The Office of the Australian Building and Construction Commissioner (ABCC) has responsibility to ensure compliance with workplace relations law by industry participants. It was established in October 2005 following recommendations of the Cole Royal Commission. Its legislative basis has recently been modified by the *Fair Work Act 2009* (Cth). The ABCC publishes a National Code and Guidelines which apply to Commonwealth Government projects. The Code includes model tender and contract documentation.

The Australian Building Codes Board (ABCB) has an important role in the establishment and publication of building regulations and standards for use across Australia. The ABCB was established in 1994 and revived in 2017, as a result of agreement of all levels of government. Its primary objective is to "address issues relating to health, safety, amenity and sustainability" by providing for efficiency in the design, construction and performance of

1. See, eg, the proceedings against Venture Industries and others by the ACCC's predecessor in *Trade Practices Commission v Collings Construction Co Ltd* (1996) 142 ALR 43 and also *Australian Competition & Consumer Commission v HJ Heinz Company Australia Ltd* [2018] FCA 360 (19 March 2018).
2. See *Greenaways Australia Pty Ltd v CBC Management Pty Ltd* [2004] NSWSC 1186 and *BBB Constructions Pty Ltd v Frankipile Australia Pty Ltd* [2008] NSWSC 982.

buildings through the National Construction Code (NCC), which incorporates the Building Code of Australia (BCA) and the development of effective regulatory systems (see [3.120]).

STATE AND TERRITORY LEGISLATION

General regulatory legislation

[3.50] There are dozens, if not hundreds, of State and Territory Acts and Regulations which potentially apply to the process of planning, constructing, completing and maintaining construction work. Some of the more important of these are described in the following sections.

Each State and Territory has legislation which, with varying terms and limits of intervention, regulates the industry as a whole. These statutes typically require that persons undertaking construction work be properly qualified and registered, set out standards and certification provisions for various categories of work and make provision for industry regulators (such as the Victorian Building Authority in Victoria).

The primary Acts which, along with their associated Regulations, perform this umbrella function include the following:

ACT: *Building Act 2004* (ACT), *Planning & Development Act 2007* (ACT).

NSW: *Environmental Planning and Assessment Act 1979* (NSW); *Building Professionals Act 2005* (NSW), *Home Building Act 1989* (NSW).

NT: *Building Act 1993* (NT), *Planning Act* (NT).

Queensland: *Building Act 1975* (Qld); *Queensland Building and Construction Commission Act 1991* (Qld).

South Australia: *Building Work Contractors Act 1995* (SA); *Development Act 1993* (SA).

Tasmania: *Building Act 2016* (Tas), *Land Use Planning & Approvals Act 1993* (Tas), *Residential Building Work Contracts & Dispute Resolution Act 2016* (Tas).

Victoria: *Building Act 1993* (Vic), *Planning & Environment Act 1987* (Vic).

Western Australia: *Building Act 2011* (WA), *Building Services (Registration) Act 2011* (WA).[3]

As even this simplified list demonstrates, the approaches to the fundamental issue of industry-specific regulation vary widely across the States and Territories.

Security of payment

[3.60] Since 1999, all States and Territories have introduced legislation which creates a statutory right to progress payments for construction work

3. See also [3.70] and [3.80] as to specific aspects of the regulatory regime in respect of, respectively, residential building and approvals and certification.

and related goods and services and a means of enforcing that right through procedural default provisions or for prompt interim adjudication of disputed claims for payment. The key features and history of the legislation are addressed here whilst the procedures associated with claims, adjudications and challenges to them, and the enforcement of rights under this legislation, are dealt with in [9.520]-[9.530].

The legislation in its various forms seeks to ensure that those who perform construction work under construction contracts have an enforceable right to payment, despite contractual provisions which either do not permit progress payments or limit the right to recover payment. The legislation also introduces the statutory mechanism of adjudication for the resolution of disputes as to the claimant's entitlement to payment. The determinations by adjudicators are merely interim, and accordingly the process of adjudication is recognised as not involving the rigid precision that would apply in reaching final and binding determinations of the rights of the parties. Whilst the legislation precludes contracting out the commercial reality is that subcontractors have to be aware of the response of some major contractors to the use of the legislation and the impact this may have on future business prospects.

The inspiration for the legislation was the scheme for adjudication of claims under construction contracts introduced in the United Kingdom under the *Housing Grants, Construction and Regeneration Act 1996* (UK). The problem which precipitated the UK reform, being postponed rights to arbitrate payment disputes, was not present in Australia, a fact which the strong advocates of the process rarely recognise. The initial iteration under the *Building and Construction Industry Security of Payment Act 1999* (NSW) was not as effective as intended in that there was an option to provide security for, rather than payment of, amounts due.

The initial New South Wales scheme was replicated in Victoria under the *Building and Construction Industry Security of Payment Act 2002* (Vic). Substantial amendments were introduced in New South Wales in 2002 and that more effective scheme has been introduced, with variation, in Queensland in the *Building and Construction Industry Payments Act 2004* (Qld), as well as in the Australian Capital Territory, South Australia and Tasmania.

On the other hand, the 2006 amendments to the Victorian Act have not effected material improvement. The amendments introduced were neither consistent with other State schemes nor effective in implementing the intended objective. Their key distinctive feature is to exclude from the statutory scheme most types of claims which do not directly relate to payment on account of the contract price, such as time-related claims (including in respect of liquidated damages) and claims for latent conditions and non-agreed variations (the latter subject to a complex regime of exceptions): see, generally, *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd*.[4]

4. *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183.

In Western Australia under the *Construction Contracts Act 2004* (WA) and the Northern Territory under the *Construction Contracts (Security of Payments) Act 2004* (NT), a somewhat different approach was introduced. This so-called "west coast model" permits a wider category of claims to be the subject of adjudication and seems to operate effectively.

The differences between the legislative schemes themselves and the disparate approaches to judicial review of adjudication determinations suggest that amendment, and at least legislative harmonisation, is urgently needed. The primary divide has been upon the issue of the limited approach to judicial review of adjudications. The approach in New South Wales following the approach articulated in *Brodyn (t/a Time Cost & Quality) v Davenport*[5] and *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*,[6] in contrast with the approach taken in Victoria.[7] The approach in *Brodyn* had not been unanimously accepted as correct and has now been overturned, in part, by the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*[8] following the decision of the High Court in *Kirk v Industrial Relations Commission*[9] as to relief from administrative determinations. Whilst the scope for judicial review is slightly wider in the light of *Chase*, it could not realistically be described as "wide". The limits to the scope of, and for, judicial review was confirmed by the High Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[10] and *Maxcon Constructions Pty Ltd v Vadasz* (both 14 February 2018).[11]

Additional complications with the legislation arise where a response to a payment claim is based on breaches of the prohibition against, and cause of action for, misleading and deceptive conduct under Commonwealth legislation where such a defence is purportedly excluded as a remedy under the State/Territory Act.[12]

The process of amendment and development has continued, including to the Queensland and the New South Wales legislation.[13] It is to some extent

5. *Brodyn (t/a Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421.
6. *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd* [2004] NSWSC 1206.
7. See, primarily, *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* [2009] VSC 426 and *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156, discussed in, eg, Bell M, "Security of payment: can Victoria offer insights into the re-shucked Oyster of judicial review?" (2011) 27 BCL 36. See also *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2016] VSCA 119 and *Southern Cross Engineering Pty Ltd v Steve Magill Earthmoving* [2018] NSWSC 1027 as to the approach which adjudicators should adopt in assessing a payment claim.
8. *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393.
9. *Kirk v Industrial Relations Commission* (2010) 239 CLR 531.
10. *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4.
11. *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5.
12. See [3.80].
13. *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW).

regrettable that, rather than moves towards uniformity or harmonisation, there is likely to be further divergence and complexity in this fundamentally sensible reform of payment practices in the industry.

During 2017 and 2018 a comprehensive review of the legislation was conducted by John Murray AM which concluded with a detailed and considered report[14] recommending in particular that harmonisation should be implemented based upon a modified version of the "east-coast model". The Murray Report has been referred to the Building Minister's Forum (BMF) which was established in 2014 with the principal objectives of:

- Introducing harmonisation of building regulations and standards;
- Collaboration on compliance and enforcement; and
- Considering other national policy issues affecting Australia's building and construction industries.

Apart from the 2018 Murray Report concerning Security of Payment, the BMF also has before it the important "Building Confidence", February 2018 report by Professor Shergold and Bronwyn Weir[15] which addresses the broader issues of building regulation and compliance and also emphasises the objective of uniformity and a national approach. The fragmented approach adopted by State governments to deal with the issue of flammable cladding does not encourage optimism as to the response from government on the broader issues referred to.

Residential building

[3.70] The greatest impact of legislation and regulation upon the construction industry, at least in terms of volume and complication, arises under residential building contracts. Governments regard the protection of purchasers of residential property as a significant component of their consumer protection responsibilities. Most domestic building legislation and regulation has a consumer focus and is administered by consumer protection agencies.

As a result, apart from incidental commercial consequences through the necessity for licensing and the home building insurance requirements, the legislation and the agencies affect commercial building work only in relation to "mixed-use" developments, which have residential components in otherwise commercial developments. In this respect, the law associated with residential contracting and dispute resolution is a distinct refinement sitting on top of construction law generally. The emphasis in this text is unapologetically focused on the salient elements of construction law. The following summary of the relevant legislation and identification of the responsible

14. https://www.jobs.gov.au/review-security-payment-laws.
15. https://archive.industry.gov.au/industry/IndustrySectors/buildingandconstruction/Documents/Shergold-and-Weir-Report---BMF-Expert-Assessment.pdf.

government agencies is, therefore, merely by way of introduction to the residential aspects of construction law.

In New South Wales, Queensland and Victoria there is extensive supervision of the conduct of the residential building industry including specialist tribunals to assist in the resolution of disputes between contractors and home owners. The legislation and the schemes for administration vary and are subject to frequent "reform" which commonly produces greater complexity and uncertainty. Perhaps the most serious issue confronting the domestic construction industry is the inconsistency and variable reliability of the home owner warranty insurance schemes; this is particularly the case in New South Wales, where the statutory scheme bears little resemblance to insurance in the usual sense or to the form and operation of the scheme when it was originally introduced.

In New South Wales, the relevant legislation includes the *Home Building Act 1989* (NSW), which deals with the regulation of residential building, licensing, administration and disciplinary actions. Specific provisions address the process for the resolution of disputes which preclude agreements to refer to arbitration. Part 6 of the Act sets out a scheme for home warranty insurance. The Act is administered by the Office of Fair Trading in New South Wales, and the NSW Civil & Administrative Tribunal (NCAT) has the principal jurisdiction[16] with respect to the resolution of building disputes[17] in accordance with the *Civil & Administrative Tribunal Act 2013* (NSW).

In Victoria, the Victorian Building Agency oversees the building control system and legislation including the *Building Act 1993* (Vic) (which has general application) and the *Building and Construction Industry Security of Payment Act 2002* (Vic). Residential building activity is specifically addressed under the *Domestic Building Contracts Act 1995* (Vic). Residential building disputes are dealt with in the Domestic Building list of the Victorian Civil and Administrative Tribunal (VCAT) under the provisions of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

The Queensland Building and Construction Commission regulates the building industry in that State under the *Queensland Building and Construction Commission Act 1991* (Qld) and has overall responsibility for licensing, dispute management and home warranty insurance. The Commission also has responsibility for the administration of the *Building and Construction Industry Payments Act 2004* (Qld). Residential building disputes are addressed under the broad industry jurisdiction of the Queensland Civil and Administrative Tribunal (QCAT) pursuant to the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

16. Section 48L of the *Home Building Act 1989* (NSW).
17. Defined in s 48A of the *Home Building Act 1989* (NSW).

In the remaining States and Territories, residential building contracts are regulated in similar terms to those applicable elsewhere. In South Australia there is the *Building Work Contractors Act 1995* (SA), in Western Australia the *Home Building Contracts Act 1991* (WA), and in Tasmania the *Building Act 2016* (Tas) and *Residential Building Work Contracts & Dispute Resolution Act 2016* (Tas). As was noted in [3.50], the Australian Capital Territory *Building Act 2004* (ACT) and the Northern Territory *Building Act* regulate building standards, certification and permits for the building industry generally.

Building and development approvals and certification

[3.80] A common characteristic in the legislative schemes in the States and Territories for the approval of development applications, building works and the final approval of construction works is the certification procedures introduced to permit local government authorities to share the responsibility and the associated legal risks to private certifiers or building practitioners or professionals. The means vary but essentially the relevant legislation permits a private practitioner to certify relevant compliance of proposed development and building works with prescribed controls and regulations so as to allow the issue of development or building permits.

Further, the regimes usually provide that upon completion of the building works, an occupancy permit or certificate will be issued by the authorising local government authority based on certified compliant completion by an authorised practitioner. The process involves questions of reliance upon a series of compliance statements or certificates which may render the ultimate certifier liable, at least insofar as the occupancy certificate is shown to be inaccurate, thus involving misleading and deceptive conduct.[18]

"Acumen", the guidance for members of the Australian Institute of Architects, is a useful source of details as to the rights of applicants to the various authorities controlling building.[19]

In New South Wales, environmental and development assessments and approvals are made under Pt 4 of the *Environmental Planning and Assessment Act 1979* (NSW), with special provisions applying to major infrastructure and development projects with a State-wide significance (Div 4.7, ss 4.36-4.43). Construction and occupation certificates are made pursuant to Pt 6 of the Act. To facilitate the certification process, accreditation of building professionals is given by the Building Professionals Board pursuant to the *Building Professionals Act 2005* (NSW), which also provides for the review of complaints and disciplinary actions.

The *Local Government Act 1993* (NSW) and the *Environmental Planning & Assessment Act 1979* (NSW) confer powers on local councils to issue the

18. See *Macquarie Bank Limited v Meinhardt (NSW) Pty Limited* [2010] NSWSC 1228, but see also *Ku-ring-gai Council v Chan* (2017) 224 LGERA 330; [2017] NSWCA 226.

19. See http://acumen.architecture.com.au/.

necessary certificates and to make orders in the event of non-compliance or unauthorised development and building works.

In New South Wales, environmental and development assessments and approvals are made under Pt 4 of the *Environmental Planning and Assessment Act 1979* (NSW), and construction and occupation certificates are made pursuant to Pt 4A of that Act. To facilitate the certification process, accreditation of building professionals is made by the Building Professionals Board pursuant to the *Building Professionals Act 2005* (NSW), which also provides for the review of complaints and disciplinary actions. Part 3A of this Act addresses the necessity for broader government control over major infrastructure and development projects with a State-wide significance. The *Local Government Act 1993* (NSW) and the *Environmental Planning & Assessment Act 1979* (NSW) provide power to local councils to issue the necessary certificates and to make orders in the event of non-compliance or unauthorised development and building works.

Planning approvals in Victoria are governed by Pt 4 of the *Planning and Environment Act 1987* (Vic). This does not provide for independent certification of compliance; however, the introduction of development assessment committees for some categories of development may facilitate the approval process. The *Building Act 1993* (Vic) governs the standards for building works, applications for building permits, the inspection of building work and the issuing of occupation permits on completion. Part 6 of this Act deals with the role of building surveyors in the approval and inspection procedures.

The legislation governing planning and development approvals in Queensland is the *Planning Act 2016* (Qld). Read with the *Building Act 1975* (Qld), they regulate the undertaking of development as well as aspects of the construction work. This scheme provides for private building certifiers in the assessment, inspection and certification.

The legislative framework in the remaining States and Territories adopts similar procedures to those referred to above, but with refinements to account for differences in policy approaches.

CONFLICT BETWEEN COMMONWEALTH AND STATE/TERRITORY LAWS

[3.90] For the most part, the specific legislative powers of the Commonwealth Parliament are concurrent (or shared) with the general and residual legislative powers of the State and Territory Parliaments. The distribution of legislative power under the *Constitution* is not based on a concept of mutual exclusiveness; the powers granted to the Commonwealth Parliament by s 51 of the *Constitution* (the principal list of its legislative powers) are not exclusive, but instead remain available, so far as their subject matter permits, for exercise by the States, subject only to the terms of s 109 of the *Constitution*.

n the event of inconsistency of State legislation with a Commonwealth law, ne usual test under s 109 is whether the Commonwealth Act was intended o "cover the field" which is the subject of it and in a sense preclude the States om legislating inconsistently with it. To the extent that is effectively inconsist-nt, the State law is rendered invalid to the extent thereof. Only those parts of ne State law that are impugned are invalid.[20] Such issues are relatively rare in egislation relating to construction.

REFORM AND HARMONY

3.100] COAG is the most important intergovernmental forum in Australia. ts role is to initiate and develop review policy reforms which require coop-rative action. The focus of its attention is primarily matters of national sig-nificance, and the target of the COAG Reform Council is the development of a seamless economy. One significant product of its activities has been the ntroduction of the ACL. A further example is the development of the National Construction Code (see [3.120]). The BMF, introduced, in part, under COAG, heoretically has the authority and capacity to encourage reform, but if history s a guide the sometimes aggressive or blind disinclination of State government agencies to co-operate does not encourage optimism.

The former Standing Committee of Attorneys-General (SCAG) sought to achieve uniform or harmonised legislative reform in areas associated with the law. In 2010, for example, SCAG approved a draft Bill for a nationally uniform *Commercial Arbitration Act* based on the UNCITRAL Model Law and consistent with the *International Arbitration Act 1974* (Cth). This reform has been introduced in New South Wales as the *Commercial Arbitration Act 2010* (NSW) that has progressively been adopted in all States (see [14.220]). It is also to be hoped that the BMF will assume responsibility to reform or harmonise the law concerning security of payment in the construction industry.

LOCAL GOVERNMENT

[3.110] A detailed review of the role and activities of local government is beyond the scope of this text. Generally speaking though, and as has already been noted,[21] local government in Australia is entirely the product of State and Territory legislation. As such, the various legislative schemes prescribe the powers and responsibilities of local authorities. These relevantly include regulation of planning and building and subdivision of land, providing

20. See *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9 in which the preclusion of cross or counter claims in s 15 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) was found to be ineffective in precluding by way of defence in enforcement proceedings, a contention that the service of the payment claim was not effective because it involved misleading or deceptive conduct in breach of s 52 of the *Trade Practices Act 1974* (Cth).

21. See [1.110].

services including drainage and public health. Local governments are an important authority in the construction industry; in some respects they have the principal interface with, and regulation of, construction activities.

Local government authorities originally held powers to proclaim building regulations and now primarily administer such regulations in the form of the NCC, including the BCA. They also exercise powers granted under other legislation including, in some cases, the reticulation and supply of electricity, gas and water and the control and regulation of the installation in building of such services.

The principal applicable legislation in each State and Territory is the relevant *Local Government Act*. For many years prior to 1994 the terms and form of building regulations differed as between the various States and Territories and in some instances as between different local authorities. The acceptance, adoption and implementation of the NCC with the BCA have brought a reasonable degree of similarity in regulations nationally. The development and adoption of the NCC ought to ensure consistency of application and interpretation of building regulations.

BUILDING CODE OF AUSTRALIA

[3.120] The BCA has been the principal instrument which regulated the manner in which building work is to be performed. First introduced in 1996, it has been revised in a number of editions. Amendments introduced over time by various States and Territories, which have introduced a degree of inconsistency, are being addressed under the development since early 2010 of the NCC by the ABCB.[22] The 2016 version of the NCC incorporates both the BCA and the Plumbing Code of Australia.

The BCA is a "performance based" document which permits a degree of innovation by the adoption of alternative solutions to construction design rather than a prescribed "deemed-to-satisfy" standard. This approach permits the application of engineering and construction initiative to the design of construction works. The basic standards are expressed as objectives and functional statements. Performance requirements outline the level of performance which must be met by building materials, components, design factors and construction methods in order that the functional statements are met and thence the objectives.

Building solutions are set out which identify the means of achieving the performance requirements. Deemed-to-satisfy provisions are examples of materials, components and design factors which if used will comply with the BCA performance requirements. Alternative solutions are permitted which differ from a deemed-to-satisfy standard provided the design can be shown to comply with the performance requirements. Such alternative solutions

22. https://www.abcb.gov.au/Connect/Categories/National-Construction-Code.

may be developed and proven to be equivalently compliant by design or experimentation or testing. The fire engineering design of buildings is a particular field in which the development of alternative engineered solutions is prevalent, although not always with a satisfactory degree of engineering certainty.

The NCC (BCA) relies upon many external documents, the adoption and compliance with which is prescribed as the deemed-to-satisfy standard. These include construction industry specifications and, most frequently, Australian Standards (AS).

AUSTRALIAN STANDARDS

[3.130] AS are developed by Standards Australia (a private entity) and published by SAI Global Limited. Among its publications are many standard form construction contracts, in particular the AS 2124 series and the more recent AS 4000 series. These are discussed in [10.60].

AS cover a wide range of activities in the building industry, including manufacturing, testing and installation of materials and processes. They often incorporate or refer to international standards. The importance of these standards is that, in many instances, they have been used to establish the standard to be met in order to satisfy the performance requirements and deemed-to-satisfy provisions of the BCA and in other ordinances and delegated legislation controlling building operations. The use of AS codes in specifications for building contracts is also a common practice. This provides a useful device for architects and engineers but is often used improperly and without adequate consideration of the purpose and real content of the specific code.[23]

Apart from standards or methods specified by AS, numerous government and private bodies have established and prescribed codes or standards for the execution of building work. These include statutory authorities providing services (water, gas and electricity), financial and lending institutions, the Insurance Council of Australia and controlling bodies such as Hospital Boards and Schools Commissions or National Parks and Wildlife organisations. Compliance with standards from sources such as these will depend on the circumstances in each instance.

CONSUMER PROTECTION AND SALE OF GOODS

Misleading and deceptive conduct

[3.140] Part 2.1 of Chapter 2 of the ACL, in particular s 18, dealing with misleading and deceptive conduct in the course of trade and commerce, has a greater impact on business dealings than might have been envisaged

23. Guidance notes are available to architects via Acumen (see n 19).

for it when it was introduced as Pt V of the TPA more than 40 years ago. Section 18(1) (the ACL equivalent of s 52 of the TPA) provides that:

> "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

This provision has been a major influence on business dealings. In addition to establishing norms of behaviour, it creates, in combination with s 236 of the ACL (formerly s 82 of the TPA), a cause of action for those who suffer loss as result of reliance upon misleading and deceptive conduct in trade or commerce. The case law as to the former (TPA) provisions will generally be applicable to the interpretation of this aspect of the ACL. Nonetheless, the detail of the provisions, and especially their points of variance with the TPA, will doubtless be the subject of detailed debate and judicial consideration in coming years.[24]

This cause of action, whilst similar to the action for negligent misstatement (see [6.100]), has its own elements and in many circumstances impinges upon almost sacrosanct principles of contract law. For example, it is often invoked to support a claim arising from pre-contractual negotiations, evidence of which would render other circumstances inadmissible to assist interpretation of contract terms.

The potential for claims based on misleading and deceptive conduct in the course of, and prior to, the entry into construction contracts is substantial. The cause of action arising from ss 18 and 236 of the ACL requires proof that the relevant representation was incorrect; that it was relied upon and that loss was caused as a result. As under the TPA, s 4 of the ACL provides that, if the erroneous representation was in respect of a future matter, then, if the person making the representation cannot show that they had reasonable grounds for making it, the representation will be regarded as misleading.

Further, although the ACL does not expressly address the issue of whether silence may amount to misleading and deceptive conduct, the representor may be liable, particularly if the court concludes that there was a duty to disclose. A potential problem exists for principals preparing tender documents if a statement is included that there is no information available on a particular issue but it is subsequently discovered that, unbeknown to the principal, relevant information was filed and forgotten: see *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3)*.[25] It will of course be necessary to prove that the information, if provided at tender, would have in fact made a

24. Note, eg, that s 19 of the ACL excludes the application of the provision against information providers in certain circumstances. See also [5.190] as to the difference in the wording of s 236 of the ACL as compared to s 82 of the TPA.

25. *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3)* (2006) 67 NSWLR 341.

difference. As to the issue of silence as conduct generally, see, for example, *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd*.[26]

Unconscionable conduct

[3.150] The former provisions of the TPA dealing with unconscionable conduct by corporations are repeated in ss 20-22 of Pt 2-2 of the ACL and apply as between individuals and corporations (as "persons") in the course of business transactions. The potentially most important impact for the construction industry is the broad circumstances as to what may constitute "offending conduct" in s 22. The process of negotiation of contracts could readily give rise to prohibited conduct, particularly in the case of subcontracts. The essence is generally that where an unfair advantage has been shown to have been taken, then there is probably unconscionable conduct.

The potential for the application of the unconscionable dealing provisions under construction contracts has not been as extensive as it might have been; however, it has been relied upon in the context of access to security under a contract: see *Boral Formwork & Scaffolding Pty Ltd v Action Makers Ltd*[27] and see also [5.350]. The scope and extent of the statutory recognition of unconscionability is particularly fact-specific and remains in a process of development: see the discussion in *Colin R Price & Associates v Four Oaks P/L*.[28]

Unfair contract terms

[3.160] The provisions of Pt 2-3 of the ACL (ss 23-28), dealing with unfair contract terms, are unlikely to have an immediate impact upon business dealings under commercial construction contracts. They apply to standard form consumer contracts including for the supply of goods and services which are wholly or predominantly of a personal or domestic character. The definition of what constitutes "unfair terms" is, however, in quite wide terms, and many in business should review their contracting practices and the terms of their standard contract forms in the light of the statutory provisions. See also [5.350].

Unfair practices

[3.170] Chapter 2 of the ACL includes the general prohibitions, referred to above, against unfair practices, including misleading and deceptive conduct, unconscionable conduct and unfair contract terms. In Chapter 3, particular practices are addressed. Most are relevant to defined consumers

26. *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* [2011] WASCA 76.
27. *Boral Formwork & Scaffolding Pty Ltd v Action Makers Ltd* [2003] ATPR 41-953; [2003] NSWSC 713.
28. *Colin R Price & Associates v Four Oaks P/L* (2017) 349 ALR 100.

who are generally unlikely to be participants under commercial construction contracts. These include Unsolicited Supplies (Div 2), Pyramid Schemes (Div 3) and Conduct in the Sale of Goods. There may, however, be circumstances in which allegations might be made of false or misleading representations as to the supply of goods and services under supply contracts for construction projects (see s 29).

Consumer transactions – goods and services

[3.180] Part 3-2 of the ACL deals with consumer transactions. Whilst these are more often likely to involve small business contracts, the statutory guarantees as to the supply of goods and the provision of services will apply to many agreements in the construction industry.

A general limitation occurs surrounding the definition of "consumer" which provides that the provisions only apply where the goods have a value of less than $40,000 or are of a kind usually acquired for personal domestic or household use. The exceptions to these limitations are when the person acquiring the goods does so for the purpose of re-supply or for the purpose of transforming them in trade or commerce.

There will clearly be application of these provisions of the ACL to supply contracts in the construction industry. Similar conditions apply to a consumer of services, and there is a presumption that persons acquiring goods or services are consumers.

Subdivision A of Division 1 of Part 3-2, dealing with the supply of goods, imposes statutory consumer guarantees as to:

- title of the supplier to the goods (s 51);
- undisturbed possession of the goods (s 52);
- the acceptable quality of the goods (s 54);
- the fitness for purpose of the goods for any disclosed purpose (s 55);
- the supply of goods by description (s 56); and
- the supply of goods by sample or demonstration model (s 57).

There will be circumstances where contracts for supply of goods under construction contracts will involve issues as to the application of these statutory guarantees.

Subdivision B of Division 1 of Part 3-2, dealing with the supply of services, imposes consumer guarantees as to the:

- application of due care and skill (s 60);
- fitness for purpose of the services (s 61); and
- reasonable time for supply of the services (s 62).

The provision as to fitness for purpose of the services does not apply to architects and engineers (s 61(4)).

Limitation of actions

[3.190] Actions for damages in respect of contraventions of the prohibitions referred to above must be commenced within six years of the relevant cause of action accruing (s 236(2) of the ACL). Generally speaking, then, time starts to run when the loss or damage is suffered, rather than when the contravention of the ACL occurs, see *Wardley Australia v Western Australia*.[29]

Remedies other than damages

[3.200] The remedies for actions under ss 18 and 22 of the ACL (formerly, respectively, ss 52 and 51AC of the TPA), among others, which are provided under s 246 of the ACL (s 87 of the TPA), as alternatives to damages under s 236 (formerly s 82), permit orders which are remedial and that would not be generally available at law.

For example, particular impugned terms may be varied or set aside. In some circumstances a contract may be set aside, if found that its entry was induced by the impugned conduct. In the construction context this may result in a contractor being entitled to recover the total loss arising from entry into the contract if it is found to have been induced by proven misleading and deceptive conduct. Alternatively, damages might be recovered for the loss arising from miscalculations in the preparation of tenders based on such conduct[30] or from reliance upon a report as to the extent of asbestos which was present in an existing building.[31]

State and Territory legislation

[3.210] All of the States and Territories have legislation to give effect to the ACL. The administration of many of the consumer protection aspects of the ACL is conducted by State/Territory Fair Trading agencies. The extent to which existing State and Territory legislation is supplanted by the ACL is dealt with and coordinated by future revision and refinement of the law at the interface between State/Territory and Commonwealth legislation. The intention however is clear that the ACL has prominence in all aspects of consumer law across Australia.

PROFESSIONALS

[3.220] The industry-wide regulatory framework referred to in [3.50] affects the manner in which professionals undertake their work in relation to construction projects. For example, building surveyors, quantity surveyors, engineers, draftspersons and architects all fall within the definition of "building practitioner" under the *Building Act 1993* (Vic) and are therefore

29. *Wardley Australia v Western Australia* (1992) 175 CLR 514.
30. See [3.140].
31. See *Multiplex Constructions Pty Ltd v Amdel Ltd* [1991] ATPR 53,182.

subject to detailed requirements under that legislation. The Victorian Act makes particular provision in respect of the roles and duties of private building surveyors. This approach is generally replicated in the other States and Territories.[32]

The architectural profession is specifically regulated and administered in most States and Territories by the various (and, in many respects, far from uniform) Architects Acts (in South Australia by the *Architectural Practice Act 2009* (SA)). This legislation, apart from restricting the use of the title "architect", establishes boards (such as the Architects Registration Board of Victoria – ARBV) to administer the registration of professionals and the conduct of complaint investigations and disciplinary proceedings against professionals. In the case of the ARBV, for example, the Board may refer complaints to the Architects Tribunal, and determinations of that Tribunal may be reviewed by the Victorian Civil and Administrative Tribunal (see Chapter 1).

In addition, the Australian Institute of Architects (AIA), as a self-regulating professional association, has the power to reprimand, suspend the membership of, or expel a member for breaches of the AIA's Code of Professional Conduct (see www.architecture.com.au).

The engineering profession, except in Queensland, is not subject to specific legislative regulation. The *Professional Engineers Act 2002* (Qld) imposes restrictions upon the use of the title "engineer" and provides for a separate status of registration as a "Registered Professional Engineer".

The National Engineering Registration Board is a self-regulated registration scheme run nationally by Engineers Australia (formerly the Institution of Engineers) and Consult Australia (formerly the Association of Consulting Engineers Australia). Engineers Australia conducts disciplinary investigations and proceedings: see, further, [11.40].

Professional standards legislation

[3.230] An important aspect of liability of professional practitioners in Australia has been the introduction of Professional Standards Acts across the country, following the initial introduction of such legislation in New South Wales in 1994. This legislation permits professional or occupational associations to develop schemes under which their members may limit their liability. Such schemes require compulsory professional indemnity insurance, and the associations which establish schemes must maintain continuing professional education and an approved complaints and disciplinary process. Apart from permitting professionals and their insurers to limit the extent

32. As with other areas referred to in this text, however, attention must always be paid to regional differences: for example, under the *Queensland Building and Construction Commission Act 1991* (Qld) and its Regulations, there are detailed requirements applying specifically to project managers and construction managers.

of their professional liability, these schemes are intended to improve the standard of professional conduct.

INDUSTRIAL RELATIONS AND EMPLOYMENT

[3.240] Employment in the building and construction industry remains organised largely on the basis of unionised employees, despite the increasing use of sub-contract labour and the significant reforms to industrial relations laws in recent years. As is discussed in Chapter 4,[33] unions and their relationship with employers are vital elements in the operation of the industry. The legal system prescribes a role for the union representing its members, and a body of industrial law exists where unions have a specific role.

Industrial law comprises both the law with respect to employment and the laws and regulations concerning industrial relations. Industrial relations in Australia have for many years been administered by both Commonwealth and State legislation and systems. The outstanding feature of those systems is, or at least has been, compulsory arbitration of industrial disputes. Commonwealth powers in this area are limited mainly by the following sections of the *Constitution*: s 51(i), the power to make laws with respect to trade and commerce with other countries and among the States; s 51(xxix), the power to make law with respect to external affairs; s 51(xx), the power to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth; and s 51(xxxv), the power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limit of any one State. The States' powers were not constitutionally limited, and various industrial relations and wage fixing systems, until recently, operated concurrently.

For many years, but, particularly since the turn of the century, industrial relations in Australia have been politically polarised and undergone far reaching and significant changes. For more than a century, industrial law comprised separate and concurrent Commonwealth and State-administered systems, with the main features being industry-wide awards and the compulsory arbitration of industrial disputes. As the Commonwealth could rely only on its limited constitutional powers in relation to "the conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State", State-based systems provided the dominant source of industrial relations law in Australia.

Earlier Federal Governments extended the reach of the Commonwealth's role in industrial relations, relying on the external affairs power (s 51(xxix)) and the corporations power (s 51(xx)) under the *Constitution* to legislate on matters such as minimum wages and leave entitlements, and then

33. See [4.10].