

# Building bridges in the classroom: A view from the academy

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*Over the past two decades, the rise of specialist practice in the area of construction law has led to – and been fostered by – a proliferation in construction law teaching. This article examines this trend, offering observations about what makes for “best practice” in teaching students across construction-related disciplines – lawyers, construction professionals, undergraduates and graduates – and how the academy can assist in building bridges between those disciplines.*

## WHY (AND WHAT) DO CONSTRUCTION PROFESSIONALS NEED TO KNOW ABOUT THE LAW?

It seems to be a truth universally acknowledged that lawyers are not particularly well liked.<sup>1</sup> This is reflected by weathervanes of popular culture spanning four centuries: Shakespeare’s recipe for a happier society being “the first thing we do, let’s kill all the lawyers”,<sup>2</sup> and *The Simpsons* episode where attorney Lionel Hutz imagines a “world without lawyers” as a sunshine-filled landscape where everyone joins hands and dances around.<sup>3</sup>

While that might be the glib image of the profession, lawyers are, at least grudgingly, recognised as being useful or necessary – at any rate, when people get themselves into trouble. As Jerry Seinfeld observed:

To me a lawyer is basically the person that knows the rules of the country. We’re all throwing the dice, playing the game, moving our pieces around the board, but if there’s a problem, the lawyer is the only person that has actually read the inside of the top of the box.<sup>4</sup>

The paradox underpinning this was remarked upon nearly 150 years ago by the novelist Anthony Trollope:

Is it not remarkable that the common repute which we all give to attorneys in the general is exactly opposite to that which every man gives to his own attorney in particular? Whom does anybody trust so implicitly as he trusts his own attorney? And yet is it not the case that the body of attorneys is supposed to be the most roguish body in existence?<sup>5</sup>

It remains true today that lawyers are (often) reviled in the abstract yet (sometimes) revered in the specific. Likewise, the law is often regarded as “an ass” (or worse); yet it is an institution upon which the community relies to provide certainty in relationships – whether commercial or personal or the many types falling in between<sup>6</sup> – and to resolve disputes when those relationships break down.

## Law – what is it good for? Absolutely nothing?

These themes find themselves brought into sharp relief when it comes to the interaction between law – and lawyers – and construction practice. The technical and commercial risks and tensions inherent in

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<sup>1</sup> A recent Google search for “lawyer jokes” produced 15.2 million results (in 0.16 seconds, no less!)

<sup>2</sup> William Shakespeare, *Henry the Sixth, Part II* (1623) Act IV, Scene II.

<sup>3</sup> “Marge in Chains” (Gracie Films/20th Century Fox Television, 1993). There is also the famous quote by Clarence Darrow that “the trouble with law is lawyers” (which also happens to be the title of a repository of lawyer-related observations edited by Randy Voorhees (Mountain Lion Inc, 2001)).

<sup>4</sup> Seinfeld J, *SeinLanguage* (Bantam, New York, 1993) p 90.

<sup>5</sup> Trollope A, *Miss Mackenzie* (1865) Ch 17.

<sup>6</sup> See *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.

the delivery of building, engineering and infrastructure work – notably, the unpredictability of markets and ground conditions, the diversity of bargaining strengths which often lead to lopsided risk allocation and a myriad of other factors – inevitably make for an uneasy interface with a system, like law, which seeks to impose order, structure and predictability of outcomes.

This is especially the case when “the law” is itself a far from perfect means of regulation, reliant as it is upon the exigencies of political compromise in the framing of legislation, endemic underfunding of courts and, in the common law tradition, an adversarial approach pervading the entire system which seeks resolution, rather than solution, of disputes. As Justice David Byrne noted in 2007, factors such as these, combined with the factual complexity that is a hallmark of construction disputes, mean that the “patient” of construction dispute resolution is “seriously, if not critically ill”.<sup>7</sup>

An apparently logical reaction to the failings of the legal system is for the construction industry to endeavour to have as little to do with it as possible. An oft-heard refrain in law reform proposals and the development of standard form contracts<sup>8</sup> is that lawyers should not interfere in the dealings of commercially and technically savvy participants in the industry. In the authors’ view, however, such calls simply point towards the failings of the legal system (and the need for its “heroic resuscitation” as identified by Justice Byrne),<sup>9</sup> rather than that the construction industry should turn its back on the law.

While it is tempting to ignore the law (and lawyers as the rule-keepers), this is no more a sensible prospect than the Elysian fantasy depicted in *The Simpsons*. The reality is that law is much like the air we breathe or other concepts that are taken as a given by industry professionals. Just as an engineer accepts that a beam will act in a certain way when a particular type of force is applied to it, all industry participants need to accept that the ultimate outcome when things go wrong during the course of construction will be influenced – indeed, often dictated – by legal concepts.

### Ignorance is bliss?

Unfortunately, those in the construction industry who make the – albeit understandable – mistake of thinking they can operate without a detailed understanding of relevant legal principles run a significant risk: if their relationship breaks down or the sums in dispute are simply too great to be ignored, they will have their rights and liabilities determined by law and lawyers, at their own expense yet (often) without the ability to significantly influence the outcome.

Examples of such a “hope for the best without preparing for the worst” attitude are rife in construction law cases. Indeed, the following recent observation from Elliott J in the Supreme Court of Victoria would resonate for many in the construction law community:

[The plaintiff] gave evidence that he was “old school”, and did business on a handshake unless someone insisted that a contract be put in writing. This, perhaps, explains the absence or sparsity [sic] of documentation in relation to a number of aspects of this case.<sup>10</sup>

Essentially, the plaintiff in this case had outlaid a significant amount of money to purchase some crane equipment in order to undertake work as a subcontractor on a road project. He then found that the equipment was unsuitable for the job and as a result he was unable to fulfil his obligations to the head contractor. The plaintiff’s claim against the crane supplier was dismissed, largely because he was unable to furnish the court with reliable evidence to prove his case, including as to the performance requirements which allegedly had been conveyed to the crane supplier when the equipment was being purchased.

<sup>7</sup> Hon Justice David Byrne, “The Future of Litigation of Construction Law Disputes” (2007) 23 BCL 398 at 398.

<sup>8</sup> See, for example, Booth R, “The ABIC Suite of Building Contracts – Development and Particular Features” (2002) 85 *Australian Construction Law Newsletter* 10 at 11. It was recently observed that the process of drafting standard and bespoke forms is one “in which talented young lawyers under the supervision of equally talented and experienced partners continue to draft ... to reflect and accommodate the principal’s position ... These contracts become tighter and tighter and more onerous with each succeeding draft”: Collins B, *Final Report of the Independent Inquiry into Construction Industry Insolvency in NSW* (2013) p 66.

<sup>9</sup> Byrne, n 7 at 398.

<sup>10</sup> *Hogan v BPW Transpec Pty Ltd* [2013] VSC 249 at [9].

The ultimate outcome for the plaintiff was not disclosed in the case, but it can be surmised that he was left not only without a remedy where he had outlaid the cost of the equipment (including financing charges) and lost his subcontract, but also with a costs order against him for the failed litigation (as well as presumably having to pay his own lawyers). One naturally can sympathise with him, especially given the following picture as painted by Elliott J:

[The plaintiff] said he was hard of hearing by reason that he had driven trucks for so many years. [He] is also missing the top of his left thumb which, at times, made it difficult for him to turn the pages of the court book when asked to do so. [He] also said at times he struggled to understand, at one point noting that he finished his schooling in grade 6.

As a result of his frustration, at times [the plaintiff] behaved in a manner which was somewhat unbecoming. This included swearing while expressing his annoyance with the process and also making veiled threats at opposing counsel during cross-examination. After each of these episodes, [he] was extremely contrite and apologetic.<sup>11</sup>

The impression given is of an industry participant, highly experienced in the ways of managing and delivering construction work, yet somewhat naïve as to the workings of one of its essential elements: the law.

### Building bridges through knowledge

Unfortunately, situations where industry people are disadvantaged by their ignorance of the law are all too common.<sup>12</sup> Conversely, lawyers' lack of technical and commercial knowledge relating to construction leads, at best, to inefficiency (whether in taking instructions, giving advice or resolving disputes), and can be a cause of great frustration for industry professionals.

The tendency for gaps in knowledge between the legal and construction disciplines to lead to misapprehension and disputation is well documented, but a neat encapsulation of its effects can be found in a survey report published by the Australian Constructors Association and Blake Dawson Waldron in 2006, entitled *Scope for Improvement*.<sup>13</sup> Key findings included that:

- 20% of respondents thought that the procurement model used for their project was inappropriate;<sup>14</sup> and
- the “overwhelming majority of respondents said that they had invoked a dispute resolution process in their projects”.<sup>15</sup>

A 2009 report extrapolated the *Scope for Improvement* Report's findings to estimate that, on average, 5.9% of the contract price ends up being consumed by costs relating to disputes which could have been avoided.<sup>16</sup> That report also offered an industry-wide general magnitude estimate of the direct costs of resolving disputes as between \$560 million and \$840 million per year, with the “total waste” exceeding \$7 billion per year.<sup>17</sup>

This brings us to the key message of this article; namely, that there is a pressing need for lawyers and industry professionals to better understand each other's perspectives so as to avoid the inefficiency

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<sup>11</sup> *Hogan v BPW Transpec Pty Ltd* [2013] VSC 249 at [215]-[216].

<sup>12</sup> Further examples can be found in the numerous cases in which the parties have incorrectly applied the provisions of standard forms: see, for example, Bailey I and Bell M, *Understanding Australian Construction Contracts* (Thomson Reuters, 2008).

<sup>13</sup> Australian Constructors Association and Blake Dawson Waldron, *Scope for Improvement: A Survey of Pressure Points in Australian Construction and Infrastructure Projects* (2006) (*Scope for Improvement* Report).

<sup>14</sup> *Scope for Improvement* Report, n 13, p 14.

<sup>15</sup> *Scope for Improvement* Report, n 13, p 27.

<sup>16</sup> Cooperative Research Centre for Construction Innovation, *Guide to Leading Practice for Dispute Avoidance and Resolution* (IconNet Pty Ltd, 2009) p 11.

<sup>17</sup> Cooperative Research Centre for Construction Innovation, n 16, p 12.

and disputation which plagues the industry. The authors of this article believe – based upon their many years of experience as practitioners and teachers – that the academy can play a crucial role in fostering this greater understanding.<sup>18</sup>

The article therefore builds upon the existing scholarship in the area,<sup>19</sup> and focuses upon teaching law to industry professionals,<sup>20</sup> via the following structure:

- an overview of the construction law teaching currently being undertaken in Australia which reveals that only a handful of the 40-odd universities in this country offer construction law subjects;
- discussion of the pedagogy that underpins the courses that each author is involved in teaching; and
- identifying aspects of the existing education system that impede the greater proliferation of construction law teaching, and suggesting ways in which these challenges can be addressed.

### OVERVIEW OF CONSTRUCTION LAW TEACHING IN AUSTRALIA

The cohort of people who might seek to enrol in construction law subjects – whether at undergraduate or graduate level – represents a great diversity of backgrounds and expectations. The global, cross-border nature of construction practice means that students are drawn from every continent, as well as from across a broad spectrum of disciplinary and professional backgrounds. For some students, the study of construction law is a new endeavour and they are seeking a foundational understanding of the field. Other students come to classes with an extensive knowledge of construction law practice and legitimately expect to participate at the highest levels of international scholarship. In response to these challenges, it is central to this article's approach to construction law pedagogy that the student experience is innovative, transnational and inter-cultural, while being driven by concern for the individual.

That said, it is the authors' experience is that the bulk of students fall into one of the following categories:

- (1) law students undertaking a degree that will enable them to be admitted to legal practice (typically, a Bachelor of Laws or Juris Doctor) and for whom construction law might be an area of specialisation once in practice;
- (2) legal practitioners undertaking a masters or graduate diploma who are looking to consolidate and deepen their understanding of the specialised area that is construction law;
- (3) students undertaking a course leading to practice in the construction professions (architecture, construction management, engineering, property development, contract administration, quantity surveying and so forth); and
- (4) construction professionals already working in the construction industry who are seeking to consolidate and deepen their understanding of the law regulating their activities.

<sup>18</sup> The reasons for this belief were elaborated in Evans P, "Avoidance of Construction Disputes through Legal Knowledge", *Queensland Roads* (12th ed, October 2012).

<sup>19</sup> See, for example, Bell M, Gerber P, Evans P, Kirsh HJ, Barrington L, Britton P, Green M, McAdam B, Davenport D, Ndekugri I, Frilet M, Chan EHW, Chao-Duivis M, Auchie DP, Chan P and Sklar SP, "Construction Law Graduate Studies around the World" (2009) 1 *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 70; Bell M and Gerber P, "Passing on the Torch of Learning in the 'Primordial Soup' of Construction Law: Reflections from the Construction Law Academic Forum, 2012" (2012) 7 *Construction Law International* 26; Bruner PL, "The Historical Emergence of Construction Law" (2007) 34 *William Mitchell Law Review* 1; Gerber P, "How to Stop Engineers from Becoming 'Bush Lawyers': The Art of Teaching Law to Engineering and Construction Students" (2009) 1 *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 179; Gerber P, "The Teaching of Construction Law and the Practice of Construction Law: Never the Twain Shall Meet?" (2010) 20 *Legal Education Review* 59; Harris TL, "Teaching International Construction Lawyers: A Proposal" (2012) 7(1) *Construction Law International* 41; Sweet J, "Construction Law Conferences: Lessons Learned" (2011) 6(2) *Construction Law International* 24.

<sup>20</sup> In offering this perspective, it should be noted that the bridge between lawyers and construction professionals runs both ways. Indeed, the two leading Masters-level courses in construction law – those of King's College London and the Melbourne Law School – offer as a core part of their curriculum subjects taught by construction professionals in which lawyers learn about technical issues such as structural engineering, costing, soil mechanics and programming.

For the purposes of this article, the authors undertook an internet-based survey of construction law subjects offered at Australian universities as at mid-2013. The results indicate the following offerings within the four categories referred to above:<sup>21</sup>

Category	1 (Law Students)	2 (Lawyers)	3 (Construction students)	4 (Construction professionals)
University of Canberra	✓ LLB subject		✓ Bachelor of Building and Construction Management subject	
University of Melbourne	✓ JD elective "Construction Law" (not offered in 2013, although a JD elective in construction law research was available). An elective was offered in the now-defunct Melbourne LLB from 2007-2012.	✓ 17 masters-level subjects (not all subjects are taught each year)	✓ subject for Master of Construction Management and other courses	✓ law masters subjects available to non-lawyers
Monash University	✓ LLB elective	✓ LLM subject "Principles of Construction Law" (not offered in 2013).		
Murdoch University		✓ PG Cert in Construction Law		✓ PG Cert available to non-lawyers
University of Newcastle			✓ Bachelor of Construction Management subject	
Swinburne University			✓ 2 units in Diploma of Building and Construction (TAFE)	
University of Technology Sydney	✓ LLB elective			
University of Western Sydney			✓ unit in Bachelor of Construction Management	

Given that the focus of this article is upon teaching construction law to non-lawyers, only the third and fourth of these categories are examined in detail.<sup>22</sup> In this context, it is worth noting that at the authors' experience at the University of Melbourne, Murdoch University and University of Notre Dame Australia<sup>23</sup> is that there has been a quite remarkable uptake in enrolments by construction professionals who do not possess a law degree. At Melbourne, non-lawyers have consistently constituted about half of the Masters-level cohort and the percentage may have been significantly higher at the two Western Australian Universities.

<sup>21</sup> This list only recognises subjects which predominately focus on construction law – it does not, for example, acknowledge that many contract law units will deal with construction law-related cases, or that in construction management teaching there is often a "contracts" component. The findings are, however, consistent with the work done by Paula Gerber ((2010), n 19 at 60). The authors would be grateful to hear of any courses that may inadvertently have been overlooked in this survey.

<sup>22</sup> See Gerber (2010), n 19, where the focus is on teaching construction law to law students.

<sup>23</sup> Paula Gerber was Co-Director of Studies at Melbourne until 2005, when Matthew Bell took over, and Phil Evans directed the program at Murdoch until mid-2013, having previously directed the program at the University of Notre Dame Australia.



It should also be noted at the outset that – if it is accepted that each of the four categories is distinct – this represents a very significant resourcing challenge for an educational institution (or, indeed, a group of institutions working collaboratively) seeking to provide meaningful teaching in all four categories. Thus, at the University of Melbourne (which, at present, is the only Australian institution to offer teaching across all four categories),<sup>24</sup> 20 construction law subjects will be offered in 2014, namely:

- an elective subject in the JD program;
- a subject accredited into the graduate programs run by the Melbourne School of Design; and
- 15 “core” construction law subjects available for credit in the Master of Construction Law and Graduate Diploma in Construction Law, three of which are offered twice a year.

The JD subject, the Melbourne School of Design subject and two of the Masters-level subjects, are designed to be “overview”/“entry-level” subjects, aimed at introducing the breadth and depth of the construction law curriculum so as to form the foundation for further study or practice. The remainder of the Masters-level subjects are pitched at a higher level of assumed knowledge and address, in greater depth, specific issues in construction law, including payment, risk management, procurement, dispute avoidance and resolution and cross-border contracting, and dispute resolution.

This article focuses upon the pedagogy underpinning the design and delivery of the “entry-level” subjects.

## THE PEDAGOGICAL UNDERPINNINGS OF TEACHING LAW TO CONSTRUCTION PROFESSIONALS

### The “need to know” basis

The authors’ approach to construction law teaching and curriculum design aims to develop students’:

- interdisciplinary understanding as well as doctrinal knowledge;
- sense of common membership within a learning community of construction law professionals (including lawyers); and
- skills necessary to work effectively in teams to address complex legal issues.

It should be remembered, however, that education in this context does not seek to train lawyers, but rather professionals who need to engage with the law. This distinction has been elaborated upon as follows:

[C]onstruction students do not need to be taught *the law*, but rather they need to learn how to recognise when legal issues arise, how to respond to those issues, how to protect their interests, and how to best assist their legal team to deal with problems when they do arise. It is analogous to the medical training that paramedics receive compared with the training that medical students receive. Paramedics need to have enough medical knowledge to be able to deliver first aid until a patient can be transferred to a doctor. The thesis propounded here is that construction and engineering professionals need to know just enough legal “first aid” to effectively manage a crisis until a lawyer is engaged.<sup>25</sup>

One might add to this characterisation that, as with first aiders dealing with a minor abrasion or headache, there will be some situations that can adequately be handled by construction professionals with some understating of the law without the need for intervention by lawyers.

At the very least, however, the legal training that those working in the construction industry receive should enable them to identify which situations are minor and which need to be referred to a qualified lawyer. The adage that “a little knowledge is a dangerous thing” is very apt here, and it is essential that construction professionals understand the limitation of their knowledge and do not fall into the trap of “erroneously believing that they have sufficient legal knowledge ... to handle the problem themselves”.<sup>26</sup>

<sup>24</sup> An international survey of construction law teaching was undertaken for Bell and Gerber’s 2012 article: Bell and Gerber (2012), n 19.

<sup>25</sup> Gerber (2009), n 19 at 179.

<sup>26</sup> Gerber (2009), n 19 at 180.

## Principles for curriculum design

Previous research has identified a number of elements which should underpin the teaching of construction law to students who do not have a legal background. These include:

- taking note of techniques used in teaching by colleagues in the students' primary discipline;
- ensuring that non-law students receive sufficient grounding in legal research skills and terminology to engage with the reading and research tasks in the subject; and
- emphasising what it is that students need to know about the law in order to engage in their professional practice.<sup>27</sup>

In the context of students being taught a single "law" subject within their degrees – say, a construction management course – these general principles might translate into a subject which covers the nature of law, legal issues in tendering, contracting and contract administration and dispute avoidance, management and resolution.<sup>28</sup> The subject would avoid, however, legal case analysis, contract drafting and the detailed aspects of the law relating to time, variations, latent conditions, payment and so on – these latter matters are regarded in the context of the practice of a construction manager as a project management issues rather than issues in which they would engage in detail on the legal side.

In other words, it is construction managers' "bread and butter" task – and the core focus of their training in their primary degree – to keep the project running efficiently. In doing so, they need at least to be able to anticipate the legal consequences that can arise when, for example, a latent condition is encountered or unforeseen wet weather delays a concrete pour. Having identified that potential, they then need to know to seek specialist legal advice at the earliest opportunity so as to forestall those consequences to the extent possible, and to be able to "talk the talk" with their lawyers so as to make instructing them as efficient as possible.

On the other hand, in the context of a student undertaking a suite of law subjects – such as where a construction manager enrolls in a graduate diploma or masters degree in construction law – the "entry-level" subject may be approached slightly differently. In the Master of Construction Law at the Melbourne Law School, for example, students complete eight subjects to obtain their graduate degree and those who do not have a law degree from a common law system must pass the subject "Fundamentals of the Common Law" as one of their eight subjects.<sup>29</sup> This covers the key institutions and procedures of Australia's legal system, the division between law and equity and principles of contract, tort and other causes of action.

Students without a law degree are encouraged to undertake the subject Principles of Construction Law, which provides an overview of the construction law curriculum, tailored to the needs of industry professionals. Topics covered include:

- the regulatory regime for construction contracting;
- causes of action in construction disputes;
- contracting methodologies;
- contract administration (standard forms of contract, tendering and contract preparation and minimising legal exposure);
- role and liability of superintendents;
- issues relating to subcontracts;
- variations;
- quality of work (including defects);
- latent conditions;
- time, programming and liquidated damages;
- contractual mechanisms for payment and security of payment legislation;
- security for performance;

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<sup>27</sup> Gerber (2009), n 19 at 180.

<sup>28</sup> See the detailed outline at Gerber (2009), n 19 at 181-184.

<sup>29</sup> See, generally, [www.law.unimelb.edu.au/constructionlaw](http://www.law.unimelb.edu.au/constructionlaw).

- insurance;
- dispute avoidance procedures (DAPs) and alternative/appropriate dispute resolution (ADR); and
- construction litigation and arbitration (domestic and international).

This approach has been designed explicitly on the basis that it anticipates that students will choose their remaining six subjects from a range which is available to lawyers and non-lawyers alike: in other words, having successfully completed the two introductory subjects, non-lawyers are ready to learn and contribute in the classroom alongside legally-trained students.

### DAPs and ADR

It is worth briefly highlighting one aspect of this “smorgasbord” of topics – namely, DAPs and ADR – given the growing acceptance of the potential for these techniques to contribute to more efficient project outcomes.<sup>30</sup> This approach to curriculum development reflects that it is vitally important to emphasise this potential to non-lawyers. There are two particular messages that are emphasised, namely:

- (1) to those uninitiated in the exigencies of traditional forms of dispute resolution, the outcomes in terms of cost, delay and many other downsides often come as a shock (aptly expressed in the oft-cited quote attributed to Voltaire, “I was never ruined but twice in my life; once when I lost a court case and once when I won one”); and
- (2) parties can often obtain achieve markedly improved outcomes when they participate actively in the anticipation and resolution of disputes within a recognised legal framework, such as dispute boards or facilitated executive negotiation.

These propositions are of course trite, and contestable, when viewed by experienced construction law practitioners. However, as a starting point, it is often vital to disabuse construction professionals of assumptions as to law and lawyers that they may have picked up elsewhere (for example, television dramas which indicate that court proceedings can be concluded successfully within mere days or weeks). It is also a good opportunity to emphasise the positive message that construction professionals can play a meaningful role in the avoidance and “real time” resolution of construction disputes: these should not be “controlled” solely by lawyers (including arbitrators and judges) but can sensibly be the subject of a more collaborative process.<sup>31</sup>

### Problem-based learning

Best practice in the teaching of construction law involves problem-based learning.<sup>35</sup> For example, the Principles of Construction Law course incorporates the use of “hypothetical” legal problems, based on real-life issues, which require students to engage in legal analysis and advice, and the assessment mode dovetails this approach. This reflects the idea that the academic’s job is to “make learning possible, by encouraging students to actively participate with the content, rather than being passive recipients of knowledge”.<sup>32</sup>

Construction law is a subject that lends itself to problem-based and experiential learning. The highly practical and visible nature of construction encourages students to think critically, analyse “real world” problems, and identify solutions. An effective way of implementing problem-based learning in construction law is to take students on site visits and involve them in discussions about what is happening on the project and how the law influences and regulates the onsite activities they are observing. Such an exercise gives students an opportunity to apply what they learn in the classroom to what they see on site. For example, they can consider the role the construction contract plays in determining how the parties should respond to the discovery of unforeseen, disused, underground cables during excavation.

<sup>30</sup> See, for example, Gerber P and Ong B, *Best Practice in Construction Disputes* (LexisNexis, 2013).

<sup>31</sup> The 2006 *Scope for Improvement* Report, n 13, p 27 indicates that experienced industry professionals are already well aware of this potential: project level negotiation and executive negotiation being the two most commonly used dispute resolution methods.

<sup>32</sup> Gerber (2009), n 19 at 184. Examples of problem-solving exercises are set out in the Appendix to that article.



Implementing this form of problem-based learning ensures that students understand the reasons why they are studying construction law, which in turn increases the likelihood that the course will be successful in teaching students the law that they need to know in order to effectively practise their chosen profession.

## CHALLENGES TO FURTHER DEVELOPMENT

If, as proposed above, construction law education for industry professionals is worthwhile, it might reasonably be asked why more educational institutions in Australia (and internationally) are not offering it. Given the authors' shared desire to encourage other institutions to provide such offerings (and to encourage the construction law community who are stakeholders for those institutions to push for, and support, such provision), it is worthwhile to examine some of the barriers to further development and how they might be overcome.

At present, the key issue is a significant lack of available capacity to develop and implement appropriate courses within Australian universities. The authors note this self-consciously, knowing intimately what is involved in setting up and running these programs. Put simply, in the authors' experience, successful programs are founded upon the goodwill and expertise of practitioners being willing to share their experience, but there needs to be a dedicated academic resource on faculty to navigate the interface of such teaching with the demands of universities and their students.

These expectations are not only ever-increasing but also dynamic. Front of mind for academics and faculty administrators at present, for example, is the need to ensure that course offerings comply with the necessarily high standards prescribed by the Tertiary Education Quality Standards Agency, while also ensuring that the offerings remain attractive to potential students in what is a fiercely competitive market for educational services.

There need not be a conflict between these tensions if handled appropriately, but the factors which go into such successful navigation are complex. They include:

- an unwavering commitment to rigour in the academic oversight of curriculum development and assessment methodologies, in the context of a cohort of students, many of whom have very demanding positions in industry and therefore often find it difficult to attend classes and submit assessment on time;
- design of course delivery so that it is done in the most convenient mode for students while maintaining the optimal learning environment (for this reason, and bearing in mind the time-poor nature of students as noted above, the authors' current preference in teaching graduate construction professionals remains face-to-face classroom teaching in an "intensive mode" – typically, several consecutive business days – supported by electronic delivery of research resources, rather than the exclusively online mode which has been adopted by some overseas institutions);<sup>33</sup> and
- the need constantly to "market test" whether students feel they are obtaining value for money, and respond meaningfully to their relevant feedback.

Of concern is that, at the same time as the demands placed upon the academic co-ordination role in construction law is increasing, there is also a reduction occurring in the capacity to undertake this role. This is due to a combination of factors which place those who already undertake this role under pressure to focus on other tasks. They also make it less attractive for suitably qualified academics to apply to join the academy to foster construction law studies. These include (not in any order of priority):

- a relentlessly increasing emphasis on research output by universities (not simply in reflecting that research is a "core business" of the sector but also pushed down upon universities by governments' desire to enhance output through initiatives such as Excellence in Research for Australia);

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<sup>33</sup> Programs offering distance learning-based Masters degrees in construction law, as identified in Bell and Gerber (2012), n 19, include those of Central Lancashire, Leeds Metropolitan, Robert Gordon and Salford Universities.

- relatively low academic salaries combining with high barriers to entry for potential applicants (almost invariably including a PhD) create difficulties in attracting full-time staff, especially experienced legal practitioners; and
- the “corporatisation” of universities and competition from private education providers,<sup>34</sup> in turn requiring academics to spend more time on marketing and other non-core activities.

Many of these matters are primarily internal concerns within the tertiary sector. They have been ventilated elsewhere in the context of the sector generally,<sup>35</sup> and also in the specific context of construction law teaching.<sup>36</sup> They are worthwhile noting here, however, in order to help to explain to the broader construction law community (both construction professionals and lawyers) the challenges which need to be addressed, so as to enlist the support of the community in dealing with them.

Overcoming these barriers requires a focus on the promotion of career opportunities for teachers, based in law schools, who are able to straddle the academic-professional divide. There remains considerable work to do in this regard, but – in a perennially tight fiscal environment for the sector – the emphasis needs to remain upon the attractiveness of the non-pecuniary benefits of academia. These include:

- the opportunity to engage in detailed, innovative research and writing in an environment that still – despite the pressures noted above – strives to insulate academic lawyers from the commercial exigencies that are the stuff of day-to-day legal practice; and
- the ability to establish hubs of construction law which provide neutral ground on which industry professionals and lawyers, who might otherwise meet as combatants in the office or the courtroom, can engage collegially for the advancement of their own knowledge and the rational reform of the law.

The authors’ experience – and, most likely, the experience of every successful academic program which has a practical focus – shows that, in order for these hubs and teaching programs to be established and thrive, there needs to be a significant buy-in from the local construction law community. In the case of the University of Melbourne program, for example, very substantial strategic guidance has been provided to the Law School by an Advisory Board comprising leading legal practitioners and industry professionals and representatives of relevant peak bodies. This was especially vital when the program was conceived and in gestation, and a “watching brief” and consultation role for the Board has been crucial to the evolution of the program once launched.

A less formal variant upon this, which may be appropriate where a less extensive teaching program is being considered (such as a single subject offering), could be for a “buddy” system to be established between interested academics and practitioners. Thus, an academic who is interested in construction law but does not have first-hand experience in the area could team up with a construction lawyer who is interested in teaching, but does not have substantial experience in presenting lectures or undertaking scholarly research. The academic could step out of the “ivory tower” and “shadow” the construction lawyer for a few weeks, to gain an understanding of intricacies of construction law. Conversely, the academic could teach the construction lawyer about the pedagogy of teaching at a tertiary level.

By sharing their expertise, each develops new knowledge and skills. They can then teach construction law together for a period of time, until both are experienced and confident enough to teach construction law on their own. This proposed buddy system could lead to an increase in the pool of people able and willing to teach construction law.

<sup>34</sup> For example, in Western Australia, a number of statutory authorities are sending large numbers of students to a construction administration diploma course run by the Australian Institute of Management. These courses have the advantage of being able to adapt specifically to the needs of organisations and are not constrained by the numerous administration protocols of universities.

<sup>35</sup> See, notably, Meyers D, *Australian Universities: A Portrait of Decline* (2012).

<sup>36</sup> See n 19.

## CONCLUSION

In mid-winter of 2013, on a grey and drizzly morning, a subject commenced in the Melbourne Law Masters construction law program. As the students introduced themselves to each other and the lecturer, the diversity of experience and expectations in the room was revealed. Less than half of the 30-odd students had any prior legal training, and fewer than half a dozen were based in Melbourne. There were project managers, engineers, designers and builders who had come to Melbourne from as far afield as the Philippines and Chile, Spain and the Maldives and who brought to the classroom their experience across the world.

In such an environment, the classroom teacher becomes both pilot and air traffic controller, guiding discussions so that all students' understanding is enhanced. This occurs not simply through the transfer of knowledge in the Socratic tradition of "teacher as oracle" but also through students' becoming active participants in the learning community through their contributions.

Happily, the feedback gained from the students at the institutions represented by the authors indicates that industry professionals' understanding is indeed being enhanced as hoped. At Melbourne, for example, a government engineer from Pakistan identified as a key strength of the program that "the teaching method is based on lectures by industry leaders discussing actually encountered issues and their resolution",<sup>37</sup> and an engineer from Perth who undertook the Graduate Diploma course was the winner of the 2012 Brooking Prize for construction law essays offered by the Society of Construction Law Australia.<sup>38</sup>

Thus, while significant challenges remain, the authors believe that they can be effectively addressed by harnessing the significant experience which already exists within the Australian construction industry in law-related teaching. In turn, the academy has a key role to play in reducing the tendency for needless disputation borne of apparent ignorance of the interface between construction and the law.

The last word in this respect should probably be left to Justice Bleby of the Supreme Court of South Australia. In 2012, his Honour ended a judgment of several hundred pages by making pointed observations about factors including one party's "flawed reliance on its perceived contractual position" and "administration of the contract ... plagued by incompetence in programming and project management" which had brought a contractual dispute relating to refurbishment of a power station into his court for 129 sitting days.<sup>39</sup> His parting note struck a dismal tone; it is, however, one which exhorts all those in the industry to do things better by avoiding repeating the mistakes of the past:

If some lessons for the future have been learned through the experience of this case, then some good may have come out of it. Otherwise, I regret that it has been a damaging experience for some and a frustrating experience for all.<sup>40</sup>

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<sup>37</sup> Student profile of Zaigham Naqvi, [www.law.unimelb.edu.au/masters](http://www.law.unimelb.edu.au/masters).

<sup>38</sup> This paper has now been published: Trinder D, "Deconstructing 'Constructive Acceleration'" (2012) 28 BCL 319.

<sup>39</sup> *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49 at [1598].

<sup>40</sup> *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49 at [1601].