EDITORIAL

John Twyford

I am pleased to welcome our readers to another year of publication of ACLN. We hope to continue to provide you with interesting, provocative material relating to the legal aspects of the construction industry.

You will recollect that in the first issue for 2006, ACLN #106, we published a very interesting paper by Professor John Uff on ethics in construction law. In February 2007 Professor Uff was visiting Australia and was kind enough to give an address to members of the Institute of Quantity Surveyors and the Institute of Arbitrators and Mediators Australia. The function was well attended and a great success. On this occasion Professor Uff widened his topic to include a discussion of developments in construction law in the United Kingdom.

Continuing the international flavour, the first article in #112 is from Simon Greenberg describing the new rules from the Australian Centre for International Commercial Arbitration (ACICA). The author has given us a careful critique of the most significant rules and compared the rules generally to those of other bodies catering for international arbitration such as the International Chamber of Commerce. The conclusion is that the rules are well drafted; carefully thought out with the potential to enhance international arbitrations in the Asia–Pacific region. The rules may be perused on the ACICA website at the address given in the article.

The law related to the position of the superintendent under construction contracts was settled by the House of Lords decision Sutcliffe v Thackrah in 1974. Since that time there have been some judicial inroads into the principles and the provisions of contracts have changed. Tim Elliott QC, in a paper delivered in Hong Kong, has in an informative manner reviewed all of the subsequent authorities both in the United Kingdom and in our part of the world. There have been small but significant changes to the law, however, the position of the superintendent under the contracts presently in use in Australian is not substantially different to that stated by the House of Lords. One point of interest is that a superintendent who under–certifies the quantum of a progress payment or the duration of an extension of time causing loss to a contractor still has no liability to the contractor. This is perhaps surprising in view of rapid expansion of the tort of negligence.

This issue contains no fewer than five articles on contracts. The first is from Sophie Mitchell concerning the meaning of the term 'reimbursable costs'. In a recent decision the Supreme Court of South Australia held that this term was subject to an implied term of reasonableness, otherwise the provision amounted to a 'blank cheque'.

In a very interesting article Jim Doyle unravels the mystery of concurrent delay. As he points out clauses purporting to restrict a contractor's right in this regard (Clause 35.5 AS2124–1992 or possibly Clause 34.4 of AS4000–1997) are not necessarily all doom and gloom.

Andrew Kelly lists the potential dangers inherent in the careless use of letters of intent. In particular a letter of intent has the potential to create a binding contract as a result of an application of the rules of offer and acceptance. In this regard a complete and binding contract can be entered by a principal accepting a contractor's tender. As Hudson's reminds us 'the purpose of an invitation to tender is to obtain from the builder a

firm offer capable of acceptance and hence conversion into a binding contract,' (10th ed.). The author sets out a helpful check–list of maters to be considered by parties proposing to use a letter of intent.

Insurance law is a notoriously difficult subject. David Rodighiero's article sounds a timely warning to parties where the benefit of an insurance contract is extended to another. In a sense the matter will depend on the terms of the insuring clause in the policy. The courts have been concerned with the difference in meaning of the terms 'for' and 'in respect of'. Since this type of arrangement is common in construction transactions, those concerned should read their policies carefully.

Ren Niemann and Rima Hor have given us a most interesting article on drafting clauses that would limit he liability of a party in breach of contract for 'consequential damages'. It must be clearly understood what the difference between the losses flowing directly and indirectly from the breaching event is. Loss of profit, for example, may be a direct consequence. The authors have shown admirable restraint in coming close to but not discussing Hadley v Baxendale!

Lisa Ridd's note points out that the making of a Calderbank offer is by no means a guarantee of an award of indemnity costs to the party making the offer. It depends on whether or not the party had made a genuine offer of compromise.

Brendan Hoffman examines the circumstances in which a caveat may lodged by a builder who has succeeded in an application under the Building and Construction Industry Security of Payment Act 1999 (NSW). It would seem that some of the charging clauses in standard contracts will need to be redrafted. It should be noted that in NSW the potential to lodge a caveat does not exist for most domestic construction.

Pamela Jack's paper illustrates the potency of section 52 of the Trade Practices Act 1974 (Cth) and the difficulty of contracting out of its provisions. Even in cases where the misleading and deceptive conduct is innocent, it is likely that the courts 'look to remedy the loss suffered.'

Richard Calver's article provides us with the keen insights into the industrial relations in the construction industry that we have come to expect from this contributor. His review of the office of the Australian Building Construction Commissioner and what has been achieved makes very interesting reading. Whilst some of the unlawful elements still bug the industry there has been a substantial improvement in the productivity attributable to the reforms. There is, however, a need for fine tuning. Another matter that the author deals with is the Independent Contractors Act 2006 (Cth) designed to protect the position of independent contractors. The new law purports to identify the distinction between independent contractors and people within the employment contract. In particular, the act will be aimed at state legislation that deems independent contractors employees. Hitherto, the distinction has depended on a number of tests evolved by the courts starting with the famous Palais De Danse case. It will be interesting to see how the Commonwealth Parliamentary Counsel resolved the problem. Since the article was written the legislation has come into force.

The output of decisions interpreting the various state security of payment regimes shows little sign of abating. For this reason it valuable to examine the current state of play. Stephen Pyman and Troy Lewis have done so admirably and their article will be of interest to those who practise in this area.

As Editor I would like to welcome Mr Christopher Kerin to our Editorial Board. Christopher is an enthusiastic supporter of ACLN and we look forward to his future contributions.