EDITORIAL

John Twyford

Richard Calver expresses a view of the likely operation of the Independent Contractors Act 2006 (Cth). Whilst the federal government clearly sees the benefit to the economy and home purchasers in particular, of maintaining the viability of the subcontract system in the construction industry; the concern is whether the legislation achieves this goal.

The philosophical debate has been whether the subcontract workforce in the industry is a kind of independent yeomanry, prosperous and satisfied with its lot or people who would otherwise be employees forced to give up many of the incidents of the contract of employment. Commissioner George Burns concluded that the former was the case after his inquiry in 1970's. Perhaps the answer depends on one's political persuasion.

The author points to some problems with the legislation. First, it relies on the common law distinction between a contract for service and a contract of service. The courts have been struggling with this distinction since Yewens v Noakes (1880) 6 QBD 530 and are yet to find the answer. Thus, the decision to rely on the common law seems questionable.

The discussion so far has ranged over such disparate suspects as musicians in a dance band and bicycle couriers. The author suggests that this problem might have been overcome by a comprehensive definition of 'independent contractor'. A further problem is the potential for the quasi–criminal aspect of the legislation to be used to intimidate employers.

It is fair to say that the regime created by the Building and Construction Industry Security of Payment Act 1999 (NSW) and similar legislation in other states has strengthened the hand of contractors when it comes recovering progress payments. One criticism of the law has been that the issues that may be decided by an adjudicator are more or less restricted to the liability for and quantum of progress payments (especially in NSW). Contractual issues such as liquidated damages, damages for breach of contract and claims for release of security cannot be raised before an adjudicator. A party wishing to pursue such a claim must go elsewhere.

Philip Davenport argues in this paper for a dual system whereby all issues could be canvassed simultaneously. Mr Davenport is a very experienced adjudicator and his views merit careful consideration. His proposals are detailed and he takes care to maintain the expedition of adjudication without introducing the obfuscation of litigation. This is a matter for our legislators to take note of.

Nick Crennan points out that the famous House of Lords decision in Bremmer Vulcan v South India shipping Corp Ltd is applicable in NSW. An arbitration does not necessarily die because one party delays in prosecuting its claim. A litigant faced with this problem and wishing to bring the proceedings to an end would be well advised to approach the court for a permanent stay.

Trevor Thomas writes in detail about a decision of the Industrial Relations Commission to the effect that Telstra retained 'control' of premises despite the fact that the premises were the subject of a facility management agreement whereby the obligation to comply with the Occupational Health and Safety (Commonwealth Employees) Act 1991 (Cth) was clearly placed on the facility manager. The author points out a similar situation

could arise under a construction contract with a Commonwealth instrumentality. The relevant provisions of the federal law are a little different to the various state occupational health and safety regimes and it will be interesting to see if the reasoning is extended. If so, private principals would need to look to their positions.

The law relating to a superintendent's failure to issue a progress certificate within the prescribed time regrettably varies from state to state. David Rodighiero has admirably described the decisions of the various state jurisdictions in his article. The decisions in the main relate to clause 42.1 of AS 2124–1992, however, since the provision has been repeated in many other contracts, there is a potential for the problem to arise again. There would seem a need for some courageous party to take the matter to the High Court. A superintendent who fails to issue a certificate will do his or her principal less harm if he or she does so in NSW or Victoria!

We live in a risk–averse world, yet one of the most neglected and obscure aspects of construction law are the insurance requirements related to construction contracts. St John Frawley has, in a comprehensive way, shed light on the problem. His article carefully identifies the types of insurance needed for a construction project and explains the functions and categories of policies.

The discussion is wide–ranging and includes consideration of works insurance, public risk and professional indemnity insurance. The paper concludes with a tabular comparison of the various state schemes for proportionate liability; and in addition, the author has provided samples of insurance clauses from construction contracts and the insuring provisions of insurance policies.

Scott Alden and Alyson Eather describe a situation that has echoes of George Orwell's famous aphorism that 'big brother is watching you' from Nineteen Eighty–Four. The Federal Court has affirmed the right of a principal to collect and store information about the performance of a contractor for use in making decisions about awarding that contractor future work—this, notwithstanding the fact that some of the information was misconceived and prejudicial.

The litigation arising out of the Security of Payment legislation seems unstoppable. Christopher Kerin and Michael Seton report on a decision of the NSW Court of Appeal demonstrating how difficult it is to set aside the findings of and adjudicator.

Finally, Tom Adames describes an ingenious argument that failed in the Queensland Supreme Court. Counsel for the defendant argued that a claim for damages caused by neighbouring building operations grounded in nuisance was a 'building dispute' within the meaning of the Commercial and Consumer Tribunals Act 2003 (Qld). Far out legal arguments that fail are always a source of amusement. In the next issue of ACLN we will print what is surely the finest example of the genre.