EDITORIAL

John Twyford

It is my pleasant task to welcome our readers back to the *ACLN* for 2009. A good deal of water has gone under the economic bridge since our last issue and the changed circumstances will no doubt dictate the content of our publication. Difficult times could see the parties to transactions more concerned to assert their rights. This will be so in both the principal/contractor and employer/employee relationships. The latter fuelled by the Federal Government's election undertakings in respect of the industrial relations laws. Both questions are well canvassed in this issue.

Richard Calver writes extensively on the proposals to amend the WorkChoices legislation. It seems that the Australian Building and Construction Commission (ABCC) will be phased out in January 2010 and the future of the National Code of Practice is in doubt. It is the view of the author that both of these reforms have contributed to the stability and productivity of the industry over the past few years.

The article includes an interesting discussion of the ABCC's power to compel evidence. This is much opposed by the union and civil libertarian movements. The author points out that a similar power, when given to the Australian Consumer and Competition Commission and the Australian Securities and Investment Commission, attracted little criticism. Indeed it was arguable that coercive powers in this context protect a witness. What is clear is that a voluminous and complex legislative framework regulates industrial relations in Australia. I wonder if Henry Bourne Higgins (the author of the federal industrial relations power, section 51(xxxv) of the Australian Constitution, I think) would recognise his brainchild.

Lee Constantine, Stephen Nettleton, Jennie Mansfield and Gina Capasso have described the work of the National Review into Model OHS Laws. Those contractors who work in more than one jurisdiction would welcome such an outcome. An advisory panel appointed by the Federal Government is undertaking the work. The panel has made 75 recommendations on duties of care, offences, personal liability and penalties. It would seem that a wider category of persons would be subject to the duty of care and, in most circumstances, the duty would be non–delegable. For prosecutions the criminal standard of proof would apply. The danger with a committee given this task is the temptation to incorporate the most stringent provisions from each jurisdiction into a national code.

Richard Fernyhough QC has allowed us to reproduce his fascinating two–part article on international commercial arbitration. The article canvasses in detail the reasons why parties to an international transaction would choose a particular arbitration regime. The article dispels some misconceptions that your editor held. For instance, the most common choice of law in contracts subject to arbitration under the International Chamber of Commerce was that of Switzerland followed by New York State. I should add that neither England nor Australia would be popular choices of venue!

Continuing the international arbitration theme, Lawrence Boo writes on the 2006 amendment to the UNCITRAL Model Law whereby the requirement that the agreement to arbitrate be in writing was relaxed to the point where 'evidenced in writing' was enough. Apparently this change was at the instance of lobbying from leading international

arbitrators. Professor Boo's warning that this might be tantamount to throwing the baby out with the bathwater is timely.

Andrea Martignoni, Nicola Nygh and Anna Brown give details of a discussion paper published by the Federal Attorney–General inviting submissions on proposed changes to the Australian international arbitration law. Coincidentally, most of the reforms suggested in the paper address issues raised by Richard Fernyhough. One matter of importance that was not thus raised was a proposal to vest jurisdiction relating to international arbitration in the Federal Court, thereby introducing Australia wide uniformity and avoiding some inconvenient decisions of State Supreme Courts.

The difference between expert determination and arbitration has always been subtle. The note from Sparke Helmore reaffirms this fact. There are no doubt savings in time and costs in using expert determinations but perhaps at the cost of the parties or a party feeling that the process is lacking in authority. The *Northbuild* case is interesting and especially the dissenting judgment. What is clear is that considerable care and skill is needed in drawing up an expert determination provision.

Robert Fenwick Elliot looks at the incidence of consensual adjudication in the United Kingdom and considers whether similar regimes could usefully be adopted in Australia.

Chern Tan looks at the difficult questions that can arise where a subcontractor indemnifies a head contractor against liability arising out of the execution of the subcontract works. The corollary to this arrangement is that the subcontractor is required to insure its potential liability under this clause. The article examines a New South Wales Court of Appeal decision where, on a strict construction of the documents, it was held that the head contractor was not protected as thought. It seems this position arose out of standard documents and the author suggests amendments that would overcome the problem.

The need for care in effecting insurance is emphasised by Nicholas Andrew and Wesley Rose. They discuss a situation where a contractor has agreed to design and construct a project. In the wash up the court decided that the professional indemnity insurance that the contractor was required to hold did not extend to its defective work as opposed to design faults.

Mary Still and Timothy Webb raise a fascinating topic that has not been dealt previously by the *ACLN*, namely, the various forms of intellectual property that exist or come into play during the execution of a major project. The authors identify and describe the application of copyright, design, patents, confidential information and trade secrets. It is the last dichotomy that is the most interesting. Anyone interested in a nominative determinative case that discusses the issues in detail should look up *Faccenda Chickens v Fowler* [1987] Ch 117. Many of us would have thought the eleven secret herbs and spices the work of an advertising agency, but to publicly disclose the formula would result in a quick trip to the Equity Court.

Jason Sprague continues the copyright discussion pointing to two cases that establish that copying part of a design could amount to a breach and, that it is possible for an employee of a firm in breach to become personally liable for the same breach.

Jeremy King and Bernard Edmond give an encouraging overview of the Private Public Partnership market in Australia and estimate the impact of the global liquidity crisis on that market.

Scott Budd describes a curious case where a contractor failed in a claim in restitution after completing work pursuant to a contract that governed its entitlement to payment. The contractor needed to execute additional work due to incorrect dimensions on the drawings given it at the time of entering the contract. The court held that the contractor was bound by the terms of the original contract. One wonders if the case might more appropriately have been brought in negligence or under the *Trade Practices Act 1974* (Cth).

David Goldstein and Bree Miechel add a Hong Kong note to this issue. They describe a case where the effect of a critical path analysis determined the outcome of a claim for delay damages.

Scott Lambert and Troy Lewis give details of how the courts have looked at the power of a superintendent to grant an unsought extension of time since the *Peninsula Balmain* case. The legal position is still unclear and the article suggests some amendments to solve the problem.

Steph O'Connor gives details of a case that on appeal to the NSW Court of Appeal where the liability of owner builders in negligence is canvassed. The outcome is interesting as it sets boundaries on the decision of *Bryan v Maloney*.

Brandon Yap discusses the vexed question of calling up bank guarantees.

I hope that our readers will find this material as interesting as I have.