EDITORIAL

John Twyford

For the past three issues the ACLN has been edited by Anthony Herron. I am sure that our readers have found Anthony's work both stimulating and informative. I would like to express my gratitude for his stepping in during my absence on sabbatical leave. I would also like to acknowledge the contribution made by Gillian White over the past year. We have appreciated her enthusiasm and dedication. Both Anthony and Gillian have brought a high degree of professionalism during their time with ACLN.

Few subjects have captured the attention of lawyers and those otherwise interested in building law as much as the Security of Payments legislation. ACLN receives a large number of articles on the subject and from this we deduce that the developments are of interest to our readers and contributors. For that reason issue #103 has three pieces looking at the problem from a different point of view. Each of the articles is authoritatively written.

Thomas Uher and Philip Davenport have compared the New South Wales and New Zealand Security of Payments legislation and reached some interesting conclusions. First, the scope of the New Zealand legislation allows for a wider range of disputes to be adjudicated whereas the New South Wales legislation deals with the recovery of a particular payment. The price paid for the added utility of the New Zealand scheme is the potential for longer delays. The other interesting aspect of the article is reasons that the authors give for the antipathy of the New South Wales judiciary for the scheme. Christopher Wong reports on the latest cases decided under the Security of Payment Act and in doing so notes that it is a 'robust' area of the law. In particular, he discusses the position of the insolvent claimant. Finally Patrick Fisher explains the raison d'être for the legislation both in Australia and overseas, that being to 'pay now - argue later'. This perhaps raises a battle of the clichés, namely, from a contractor's point of view the 'power of the purse' and from a subcontractor's, the 'bird in hand'. The legislation in its 'pay now - argue later' policy tips the balance in favour of the second proposition. This view is reinforced by the outlawing of 'pay when paid clauses', an issue of risk allocation and a matter for negotiation between the parties.

Peter Bowers' article, whilst not necessarily related to construction contracts as such, raises issues of importance to all contractual transactions. The author has analysed in detail the way exemption and limitation of liability clauses work. This learning has implication for the construction industry. The popular press has from time to time been unstinting in its criticism of Defence procurement. The author makes the interesting point that the Defence Department has abandoned some of the protection it might have gained at common law via such exemption clauses for the prospect of getting a better commercial deal from its contractors and suppliers.

Public / private partnerships are now part of the contracting landscape and it will be a help to those involved that the Victorian Government and the New South Wales Treasury have cooperated to identify the issues that need to be addressed in the documentation for a project. Christopher Kelly has, with great acuity, described the progress made to date and pointed to areas that need further attention.

Peter Meades has doubts about the potential of the recent amendments of the Home Building Act 1989 to cure the ills of the previous legislation. The dispute resolution provisions bring on a feeling of déjà vu harking back to the inspection system that existed under the Builders' Licensing Act of 1971. The author refers to a weakness in the previous regime to the effect that inspectors were biased. As legal advisor to the Master Builders Association at the time, I can say that this was not the impression that builders had. The author's work clearly describes what the Government has attempted to do and is not sanguine about the outcome.

Joe Catanzariti describes the long-expected legislation dealing with workplace deaths. This type of legislation, which has been in the pipeline for some time, was first adumbrated after the Longford incident; see ACLN issues #75 and #78. Given the passion with which the legislation was sought by those representing the interests of workers, the amendments to the Occupational Health & Safety Act are restrained. Mr Catanzariti does, however, note that the appeal provisions are wanting.

Will Dwyer explains how the amendments to s94 of the Environmental Planning & Assessment Act 1979 will permit a more flexible approach to the levying of these contributions. The flexibility comes at a price, namely the enhancement of Council's 'prospects of obtaining more concessions from developers than was previously possible'.

Since a good number of our readers fulfil the role of expert witnesses, the article by Andrea Martignoni and Annie Tan is a timely warning about how expert reports are to be sought if professional privilege is to be maintained.

This publication is very much dependant on contributions from people who are interested in construction law and associated areas of practice. I would like to take this opportunity to remind our readers that contributions are always welcome and to invite you to send material of interest.