EDITORIAL

Editorial

John Twyford

VIEWED FROM A DISTANCE, THE MOtif of this issue of *ACLN* is conflict. Having regard to the title and intent of the publication, this is, perhaps, not surprising. It does, however, raise the question of whether conflict in the construction industry comes with the territory or whether, on the other hand, it is an impression sustained by recurring high-profile disputes. Conflict is certainly not new to the industry, a fact illustrated by Adrian Bellemore's interesting article revisiting the High Court decision of *Liebe v Molloy*. This 1906 case reminds us that it is nothing new for a contractor to forget to issue a notice that is called for by the terms of a contract and also that the courts may be persuaded to forgive the same contractor for his or her want of circumspection. One wonders if this indulgence has benefited the industry. Certainly the quality of contract administration had not improved in the 84 years that elapsed between *Liebe v Molloy* and the revisiting of the same issue in *Update Constructions v. Rozelle Child Care Centre* (1990).

The attitude of the industry to the potential for dispute is consistent with the exclamation of St Matthew (12:30): 'He that is not with me is against me'. Parties everywhere have always sought to exploit contractual disputes. Of the common law jurisdictions, it was the Australian courts which were the last to recognise 'bid contracts' and to embrace the notion of good faith in the execution of all contracts. It was not until *Hughes Aircraft Systems International v Air Services Australia* (1997) that the Federal Court upheld a 'bid contract'. Although our courts flirted with the concept of good faith as early as *Perini v Commonwealth of Australia* (1969), there seemed a hiatus until the decision in *Renard Constructions v Minister for Public Works* (1992). The history of these developments is carefully traced in Pamela Jack's article in the following pages.

Given that litigation has become ubiquitous, the role of the expert witness becomes increasingly prominent. It is well understood by litigation lawyers that the quality of expert evidence can make or break a case. Even more significant is the fact that a favourable expert's report can engender the confidence necessary to institute legal proceedings. For these reasons, it is timely that the calibre and ethics of experts are canvassed. Bill Madden in his article discusses the recent amendments to the rules of the Supreme Court of NSW relating to the use of expert witnesses. On the same subject, Janet Grey's paper presents a practical guide to aspiring experts as to what is required of them.

Legislatures have, from time to time, sought to civilise the fractious nature of the industry using what can only be described as a big stick approach. The introduction of the *Security of Payment Act 1999* in NSW is a good example. The book by Philip Davenport reviewed in this issue will provide a valuable guide to parties to a construction contract, showing how their rights can be protected under the Act as well as acting as a prophylaxis against a party gaining advantage by default. Romauld Andrew's article explains the Victorian Government's fine-tuning of another example of the big stick approach, the *Domestic Building Contracts Act 1995 (Vic).* That this Victorian law and its NSW equivalent have so frequently needed fine-tuning illustrates the difficulty faced by legislatures in balancing the interests of consumers with the prevailing faith in market forces. To pursue the automotive metaphor further, it would be appropriate to say that the recent changes to the regulation of builders, first introduced by the *Builders Licensing Act 1971 (NSW)*, amount to a complete rebuilding of the engine. In Victoria and NSW the factor that now determines whether a contractor may operate in the home building industry is the ability of the contractor to obtain private insurance guaranteeing his or her performance. No doubt governments are looking to be quarantined from the fallout that accompanies a builder's failure to perform. Equally, insurers are not obtuse and the measures they take to minimise their risk are likely to restrict entry to the house building industry.

It appears that the development of the law we are now witnessing will place good management at a premium. Only those contractors who are able to find sufficient capital to enable them to deal with changes will prosper. Ultimately, this is likely to lead to fewer and more sophisticated contracting firms. ■