EDITORIAL

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The Australian Construction Law Newsletter has two sources of articles for publication. First, material that is submitted to us for publication by the authors and we are pleased to say that this source is on the increase. The second is material that my colleague the Assistant Editor by skilful research finds. Both sources are of great importance. The first and second articles in ACLN #114 are excellent examples of each respectively.

As we have come to expect Patrick Mead has written a very informative article on payment risk. This is not a topic that has often been touched on, yet one that is dear to the hearts of contractors, subcontractors and suppliers alike. The author identifies the application of the 'golden rule' to such transactions, that is, the person with the 'gold' makes the rules. Generally, principals have the 'gold' and can dictate terms to the contractor. This situation is often obfuscated by the arcane relationship between principal and financier. The 'gold' paradigm applies to the relationship between contractor, subcontractor and supplier. The article includes some very interesting authorities on bank guarantees and Romalpa clauses.

Our second work is from Eoin Quill, a legal academic from the University of Limerick. The article is an extensive review of the development of the duty of care owed by builders to their clients and subsequent purchasers. The review extends to the development of the law in England, Ireland Canada and Australia, in which jurisdictions there are both similarities and substantial differences.

The author distinguishes between large commercial, small business and domestic clients of builders- the latter two categories being vulnerable to the losses caused by defective building and worthy protection by extension of the case law. This is particularly so in England whereas the Australian law seems to offer the more protection. Needless to say, Bryan v Maloney and Woolcock Street Investments get a mention. The article concentrates on the tension in the case law between 'principle' and 'policy' and concludes by making the point that the courts and legislatures have an equally important role in protecting consumers in this area. It should be added that the article is meticulously referenced and makes fascinating reading.

Some years ago Kieran Tapsell, in the Australian Law Journal, likened the management of a construction dispute to a Wagnerian opera. Now Pamela Jack, in an informative paper, sees the similarities between construction contracts and warfare. The metaphor is continued by the observation that even victory comes at a considerable cost. To avoid conflict the parties must appropriately allocate the risk and ensure that the terms of a contract are clear. The author cites several examples of time provisions where it was not crystal clear when a notice should be given. Having the matter determined in court, as the author points, our leaves a 'body strewn battle field'. Finally, there is a need for good contract administration.

In a note, Andrew Chew advises that the Building Professionals Board commenced to function in NSW on 1 March 2007. The Board was set up under the Building Professionals Act 2005 (NSW) and has the statutory obligation to accredit and regulate building certifiers. Certifiers privately perform functions formerly carried out by officers from local government. The Act recognises the potential for certifiers to have

a conflict of interest and in this regard imposes some draconian penalties.

Justice Peter Biscoe continues the debate about the evidence of expert witnesses. His Honour's paper contains some particularly interesting anecdotal information about the use of single experts and concurrent evidence (hot tubbing).

Sarah Hilmer introduces us to the Hong Kong pilot scheme for mediation of construction disputes. The author gives something of the history of mediation in Hong Kong and notes how the process had been successful in resolving disputes arising out of the construction of the Hong Kong Airport and in family mediation. The scheme started on 1 September 2006 and detailed provisions are made for the conduct of mediations. Mediation is not compulsory, however, an unreasonable failure to attempt mediation may attract cost sanctions.

James Williams points out that presently the abundance of construction work available to a finite number of contractors has tilted the balance in favour of the contractors' bargaining position. This has meant that amendments to standard documents sought by principals to place added risk on the contractor may now be resisted.

In two articles that we publish together, the author has listed the amendments commonly sought and the danger for a contractor in making these concessions. In respect of Standards Australia's AS2124 a contractor is asked to warrant the design that originated from the principal's consultants and accept the consequences of deficiencies therein. Other amendments restrict the right of the contractor to recover the security, inhibit the claiming of an extension of time, reach practical completion or recover proper reimbursement for latent defects. Equally, in the design and construct contract AS4300 contractors are asked to give enhanced design warranties including responsibility for the Principal's Project Requirements. Contractors should resist such amendments to the standard documents.

Joanne Smith and Bree Miechel discuss the meaning of the expression 'practical completion', particularly in situations where the contract does not define the expression. It would seem that the use of the expression without definition might impose a higher responsibility on the contractor than the requirements of standard building contracts. However, in a similar situation where the principal has taken possession of the building it is likely that will result in practical completion even if the requirements of the contract are not strictly followed.

Finally, Matthew Bell reviews the 8th edition of Keating on Construction Contracts. Predictably, the review highlights the indispensability of the work. We are delighted to receive his review and note that book reviews are a matter that your Editor should pay more attention to.