

## EDITORIAL

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Since a substantial part of this issue of the *Australian Construction Law Newsletter* is taken up with articles on dispute resolution it is fitting that our leading article reviews the operation of the uniform *Commercial Arbitration Acts* introduced to the various states since 1984.

The thesis proposed by the author, Victoria Bell, is that much of the utility of commercial arbitration is eroded by willingness of the courts to intervene on the basis of errors of law and, in more gross cases, the misconduct of the arbitrator. This puts paid to the notion of 'arbitration as a speedy, economical dispute resolution mechanism'. As the author aptly put it, arbitration is liable to become a 'dry run before litigation'.

The article includes a comprehensive review of the cases on the subject and the way other jurisdictions have approached the problem. The author concludes with some suggested legislative reforms.

Brigid Harradine has written a very interesting article on the implication of requirements on parties to perform their contractual obligations in 'good faith'. In an extensive review of the cases the author points to a timid approach taken in most Australian jurisdictions. The most robust approach is taken in NSW with decisions that might be described as the usual suspects: *Renard Constructions* and *Burger King*. The author suggests that to avoid the potential for dispute, contracting parties might either include a clause in the contract defining the parameters of application of an obligation of good faith or exclude it altogether.

Graeme Armstead discusses the operation of the Victorian law in respect of the right of

a concurrent wrongdoer who settles to claim contribution from the other wrongdoers.

Patrick Mead has provided some information on the arcane subject of Romalpa Clauses. This is timely in the light of the current financial climate.

Andrew Chew, Geoff Wood and Franco Aversa discuss the legal difficulties inherent in 'no blame' regimes in alliance contracts. Undoubtedly the 'no blame' culture if adhered to has many benefits for the members of an alliance. There remains the problems of obtaining professional indemnity insurance, the law's reluctance to allow the ouster of the court's jurisdiction and how to preserve some liability for wilful default. The authors suggest drafting ideas to deal with these issues.

Simon McConnell, Mun Yeow and Stanley Li describe an intergovernmental agreement whereby judgements obtained in Hong Kong may be enforced in the People's Republic of China and conversely judgements obtained in the People's Republic enforced in Hong Kong. For businesses in Hong Kong dealing with parties in the People's Republic this opens up another potential for dispute resolution but the authors point to a number of hoops that potential users of the changes to the law must jump through. Commercial arbitration might still prove to be the better proposition

The Australian Government proposed extensive amendments to the *Trade Practices Act 1974*. Richard Westmoreland describes these proposals and in particular the maximum term of 10 years imprisonment for persons found guilty of 'serious cartel conduct.' Part of the definition of serious cartel conduct relates to rigging bids. One wonders if this provision would extend to the unsuccessful

tenderer's fees that so upset the Giles Royal Commission? Generally, wide changes to the law are proposed and businesses would be well advised to re-examine the compliance strategies.

The Australian Government has set up a statutory advisory council Infrastructure Australia to audit and survey Australia's infrastructure needs. Rob Leacock and Nikki Formenton describe the initiative and speculate on its chances of success.

Michael Hollingdale and Robert French discuss the effect of writing 'N/A' or 'NIL' in the space in the schedule to a standard contract where the quantum of liquidated damages is shown. Whether this denies the principal any damages for breach of the time provision in the contract or remits the principal to damages assessed according to ordinary rules will depend on the text of the clause. It is clear that great care is needed in completion of the schedule.

There is a good deal of news from Hong Kong in this issue. David Bateson provides us with a good overview of commercial arbitration as it is practised in the People's Republic of China. In many ways the Chinese arbitration law has much in common with its western counterpart. There were a couple of things I did not know. Arbitrators may either adopt an inquisitorial or adversarial mode of trial. This however is subject to agreement of the parties. The People's Republic is a party to the New York Convention and has been since 1985.

Robert Riddell describes yet another amendment to the *Home Building Act 1989* (NSW). This must be one of the most amended statutes in NSW legal history. This time the amendment

concerns the suspension of builder's licences.

Kristen Lopes and Sam Ingui summarize the proposals in the Australian Fair Work Bill 2008 introduced by the Minister for Employment and Workplace Relations Julia Gillard. At 613 pages the bill is as long as War and Peace but the summary gives a clear idea of the intent of the proposed legislation. One noteworthy matter that emerges from the article is the emphasis placed on alternate dispute resolution.

Julian Hill warns of the potential cost increases in building materials that will be part and parcel of the Australia's Carbon Pollution Reduction Scheme due to start in 2010. Contracts that continue into 2010 and beyond should include appropriate provisions.

Rebecca Mason notes the ABS statistics for working days lost in the construction industry due to strikes. In 1996 the figure was 269.3 working days per 1000 employees. In 2008 it was 3.8 working days lost per 1000 employees!

The issue concludes with a review of an excellent book on construction contracts, *Understanding Australian Construction Contracts*, by Ian Bailey and Matthew Bell.

It is that time of the year again. We at the *ACLN* wish our readers a joyous Christmas and a prosperous New Year. I would like to acknowledge my indebtedness to Ms Myra Nikolich, the Assistant Editor. Myra locates the material and then transmogrifies it into the *ACLN*.

In addition I would like to thank our contributors for the excellent material we have been able to publish and finally our readers who make the publication possible.