EDITORIAL

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With ACLN #111 the seventh year of publication of the newsletter by the University of Technology, Sydney comes to a close. The first issue we published was #70 so that UTS has been the publisher for more than a third of the life of the newsletter. Editing the publication has been a pleasant task and in addition to teaching me some law, it has made the university many friends. It is our intention to continue this activity into the foreseeable future.

It is hoped that our readers will not think your Editor too self indulgent for publishing an article of my own. Mostly it is a temptation I have been able to resist—in part because of the slender corpus of my work. My excuse here is a fascination with the nature of justice. It is to be hoped that it is more than Plato has Thrasymachus say in The Republic:

What I say is 'just' or 'right' means nothing but what is in the interests of the strongest party.

In addition we have a collection of interesting material for holiday reading. Dolone Chakravarti introduces us to multi–tiered dispute resolution clause (MTDRC). In less complex forms the process has been around for some time—long enough to be judicially criticised in Aiton v Transfield. The author notes the potential for the process for resolving complex international disputes and makes some practical suggestions for drafting an MTDRC clause.

The security of payments legislation has proved a fertile ground for litigation and material for the ACLN. Here, Philip Davenport continues a discussion commenced in the last issue with Christopher Kerin and Veno Panicker's article on John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd. As usual, the author has some interesting insights into the matters raised.

Simon McConnell and Mun Yeow describe the effect of the new law introduced into Hong Kong and the Peoples Republic of China (PRC), whereby judgments of the courts of each jurisdiction will be recognisable and enforceable in the other. This arrangement will add to the confidence of those wishing to do business in the PRC.

Andrew Morrison, Sara Dennis and Mia Livingstone give us an overview of how proportionate liability has been introduced into the various jurisdictions in Australia. As the authors point out, it is impossible to predict how the legislation will affect litigation with much remaining to be settled by the courts.

Michelle Knight introduces us to a new legal maxim 'hot–tubbing' which is a development of the expert conclave. It seems that with 'hot–tubbing' the experts from both sides are heard together as a sworn panel. The scheme has the potential to save court time but equally, without discipline, to develop into a free–for–all.

Gadens Lawyers describe the effect of the Australia–United States Free Trade Agreement on how tenders are called by the Commonwealth and the various States. The end result will be that instrumentalities calling tenders must adhere strictly to advertised evaluation criteria and will need a good reason, all other things being equal, for not awarding the contract to the lowest tenderer.

Michael Hollingdale and Jeremy Sher describe a recent decision of the English High Court where an architect was successfully sued for failing to initiate an appropriate procurement regime for the client. The work was commenced before the

documentation was completed, necessitating 7,500 variation notices and a cost overrun of £2 million.

Patrick Mead, in successive articles, has shown how risks can be assessed and then suggested options for dealing with those risks. Risk is part and parcel of the construction industry and, as the author indicates, dealing with risk has gone beyond the Abrahamson principles.

Andrew Short's article should cause cold shivers to run down the collective spines of members of corporation boards. He describes how a director and senior managers were successfully prosecuted under the Occupational Health and Safety Act 2000 (NSW) after the death of a worker. The defendants were not in the construction industry but the probability of a similar prosecution being launched against a construction company is high.

Robert Riddell, in an interesting article, gives details of the changes to the NSW regime for the regulation of building certifiers. The author's explanation of the requirements for prevention of conflicts of interest will be of particular interest to certifiers.

Jonathan Fulcher gives us details of the decision of Justice Wilcox in Bennell v State of Western Australia. The case is of considerable interest to developers and there remain many issues to be resolved. It would seem to be a matter of 'watch this space'.

'Gross negligence' is a term that is quite common in popular speech but, as Gavin Witcombe points out, the expression does not have a settled legal meaning. If it were necessary to include the expression in an instrument it would be wise to add a definition.

Brett Vincent brings to our attention a very ingenious use of the security of payments legislation by a contractor making a back–claim against a subcontractor. The attempt failed in litigation in the Local Court but with some further 'tweeking' by the draftsman, who knows?

Andrew Kelly conveniently summarises the present state of the law on security of payments in Queensland and Leighton O'Brien explains the decision in Bitannia Pty Ltd and Anor v Parkline Constructions Pty Limited, where the relationship between the Security of Payment Act 1999 (NSW) and the Trade Practices Act I974 (Cth) is explored.

In addition, #111 includes a number of interesting case notes. Kelly Wilshire tells us that Bellgrove v Eldridge is still alive and well. Nick Rudge and Greg Roebuck refer to an instance where proportionate liability is applied to construction litigation in Victoria, and Beth Cubitt discusses a case suggesting that the implied duty of good faith in contracts might not be as well established as first thought.

As this is our last issue for 2006, some acknowledgements are appropriate. First to Ms Myra Nikolich, our Assistant Editor, whose systematic exploration and boundless enthusiasm locates much of the material we use. Next, I would like to thank the people who have taken the trouble to write articles especially for us. These works add a particular flavour and relevance to the publication. Please keep up the good work. Of equal importance are the legal firms and the enthusiastic legal writers within those firms who allow ACLN access to their material. Finally, but not least, I would like to thank our subscribers without whose support the publication would not exist.

Our ambition is that it will be bigger and better in the future. One suggestion we are investigating is the addition of a refereed section for the publication of serious academic papers. In doing this, however, we would not detract from immediate practical utility of ACLN. In the meantime we wish our friends the compliments of the season.