

Australian Construction Law Newsletter

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1. BUILDING CODE OF AUSTRALIA

The new Building Code of Australia is due to be introduced into all States in 1989.

The new Code, which will replace existing different regulatory requirements, is based on performance criteria with less emphasis on prescription.

The Australian Building Regulation Co-ordinating Council (AUBRCC) has developed the Code in consultation with Local Government and Industry in all States.

A draft code was issued in 1986 for industry comment and the first edition of the Building Code is to be released later this year. Each State is currently amending existing administrative provisions and reviewing the technical provisions embodied in the draft code. Generally, most States have legislation already in hand with the expectation of calling up the Code from the middle to the second half of 1989, with a short transition period to enable a smooth but ready take-up of this National Code.

The Code involves two additional issues which are of primary importance. These are:

- . the accreditation of materials, products and systems;
- . and certification and approval of documents.

Accreditation

As the Code calls up performance criteria, all products, materials and systems will require accreditation that they meet these requirements. Those not covered by a standard or not already deemed to comply will require appraisal. It is proposed that this will be co-ordinated by the National Building Technology Centre (NBTC) nationally and each State will have an authority responsible for accreditation.

Certification

The issue of certification documents is also under review and it is expected that a great deal of discussion and analysis of the roles and responsibilities for such approvals will occur over the next twelve months, with particular attention focussed on the current Melbourne initiatives, which involve professional certification.

Both these issues, as well as the implications of the Building Code itself, will have some impact on current methods and practices in our industry.

If further information is required, AUBRCC has contact officers in each State.

- Richard Dinham, Chief Architect, Leighton Holdings Ltd.

2. LIABILITY AND INSURANCE IN THE CONSTRUCTION INDUSTRY

A joint committee was established by the National Public Works Conference and the National Building and Construction Council in 1986 to examine the issues of liability and insurance in the construction industry.

Apart from the constituent members of NPWC and NBCC, the committee included representatives from the Department of Industry, Technology and Commerce, the Australian Law Reform Commission and the Insurance Council of Australia.

The committee was concerned at the rapid growth in litigation, awards and out of court settlements over claims of negligence in the building and construction industry in recent years. The committee noted the following as indicators of the problem in Australia:

- . the number of liability claims against architects had more than doubled since 1974, with a recent rapid rise;
- . an analysis of consulting engineers in recent liability cases revealed that 40% had to pay for other defendants' liability, as well as their own;
- . instances where innocent parties preferred to reach out of court settlements, rather than spend something in the order of \$100,000 to defend a Supreme Court action.

According to the committee the main problems are:

1. Where there are "several concurrent tortfeasors", each of whom are found partly liable, and some cannot pay, then those with the means to do so bear the full extent of damages. (In the committee's view, this situation encourages the joining of every possible party, regardless of degree of re-

sponsibility, to maximise the chances of recovery.)

2. The Statutes of Limitation create a certain period for actions to be brought in contract; e.g. in New South Wales six years for simple contracts and twelve years for contracts under seal (the periods differ in some of the other States). However, in tort, the period is somewhat uncertain and open ended, as it runs from the date when the damage occurs, whenever that may be (see the Article below by Adrian Batterby on Latent Defects and the Pirelli case).

In addition to recommending the development of project insurance packages to cover all parties for the duration of their potential liabilities, the committee has made two specific proposals for legislation to address the problem. These recommendations are:

1. Time Limits

- . that amendments to the Statutes of Limitation be introduced to place an absolute time limit on the liability of those involved in construction;
- . that this time limit be six years, plus one year to serve the writ;
- . that the period commence at the completion of the building or project (BOMA's view is that the period should be twelve years from completion).

2. Limit of Liability

- . that when several defendants are each found partially liable for damage for negligence, the amount recoverable from each would be limited to the proportion by which that person had contributed to the damage suffered.

3. THE PROFESSIONAL ENGINEER AND LEGAL RESPONSIBILITY FOR BUILDINGS

The Civil College of The Institution of Engineers has prepared a Technical Report entitled "The Professional Engineer and Legal Responsibility for Buildings" as a discussion paper. The stated purpose is to "provide guidelines from The Institution of Engineers to the legal profession in litigation pertaining to responsibility for building construction".

The Report notes that "it is now possible for an owner to recover damages for building faults which appear after construction from almost anybody involved in the design, checking, supervision or construction, even if the party sued only played a minor part in the building process". The report also notes attempts by Local Government Authorities to obtain "certificates of compliance" for the design and construction of buildings from engineers, presumably in an attempt to avoid Councils' own potential liability in relation to building defects.

The Institution of Engineers' Report states that The Institution should establish "some fair policy which could be used by the legal profession in their own arguments and judgements in such cases". The Report states that there should be two basic prerequisites for liability for decisions or actions, i.e. the opportunity for decision or action and the authority to take the decision or action. The Report states:

"For example, an engineer cannot be held responsible for a decision made when he is not there, and not involved in the decision making process. Hence opportunity is the first prerequisite of responsibility.

A party must have the authority to carry out the decision or action or to make sure the decision or action is carried out by others. Without this authority then the party cannot accept responsibility for the result."

The Report states that when the engineer is not on site, then the contractor is responsible for work done at that time.