With all due respect to The Institution and those responsible for the preparation of the Report, it is unlikely that the statements contained in the Report are likely to be of great influence in determining the criteria for the establishment of legal liability. The criteria suggested does not necessarily match the criteria which would be used by the Courts to establish the existence or otherwise of liability. In certain circumstances, liability could arise in relation to inaction, as well as in relation to decisions and actions. Furthermore, in some circumstances, liability could arise despite or even because of absence.

4. CLAIMS AND DISPUTES RESEARCH PROJECT

Due to serious concern at the high level of claims and disputes in the construction industry, the Australian Federation of Construction Contractors initiated a research project to be carried out by representatives of the National Public Works Conference (at both Commonwealth and State level), the National Association of Australian State Roads Authorities, the consulting professions and AFCC.

The project has involved a study tour of Europe, Scandinavia, the United Kingdom, Canada and the United States. The purpose was to identify the underlying causes of claims and actions taken in other countries to address the world wide claims/disputes phenomenon. To lessen the time burden on study tour participants, AFCC carried out separate investigations in Singapore, the Philippines, Hong Kong, Taiwan and Japan.

It is intended that a Report shall be released in November 1988 and that it will include recommendations for changes to be instituted in Australia to contract strategies; tendering systems and procedures; contractual provisions, policies and practices; and to dispute resolution procedures to address the problem.

Australian Construction Law Newsletter subscribers shall be informed in due course of the content of the Report and its recommendations.

5. NEGLIGENT BUREAUCRATIC ADVICE

The recent New South Wales Court of Appeal decision in Parramatta City Council v Lutz (1988) ATT 80-159 has serious implications with respect to responses from Ministers, Government Departments and Local Authorities to people who seek a solution to problems. It is not unknown, when one writes to a Minister, to receive a polite response that the matter is being looked into and never to hear again, unless further action is taken to pursue the issue.

In Parramatta City Council v Lutz, an elderly lady, Mrs Lutz, purchased a weatherboard house adjacent to a burnt out cottage. Concerned at the fire danger presented to her house, she contacted the Local Council to have something done to safeguard her own house. When no action was taken, she returned to the Council on a monthly basis for ten months. It is relevant that Mrs Lutz was an elderly lady, who had a poor command of English, who had little understanding of the law and who took the view that the Council was the appropriate method of solving her problem. When her house was destroyed by a fire that began on the derelict property next door, Mrs Lutz brought an action against the Council for negligence.

The Court of Appeal took the view that the Council had acted reasonably when first contacted by Mrs Lutz. Council passed a resolution to notify the owner of the adjacent property to remove the hazard. In the second month, the Council gave notice to rectify the matter within 60 days. The owner of the adjacent property failed to comply with this notice and the Council did not enforce compliance in the intervening period, due to "ill directed activity by numerous officials". The Court of Appeal found that the Council failed to take reasonable care and that it was guilty of negligence.

Kirby P. considered that the Council was bound to act promptly after the expiration of the 60 day period and that, if it decided not to demolish itself, then it had a duty not to mislead Mrs Lutz by lulling her into a false sense of security which would result in her avoiding other action. Mahoney J. took the view that liability which arose on the part of the Council was of the Hedley Byrne type, i.e. liability for negligent advice. If the Council had not mislead her as to the likely period of its inactivity, then Mrs Lutz would have taken other action. McHugh J. took the view that Mrs Lutz was entitled to rely upon the Council to protect her and that it had a duty to take action within a reasonable time to demolish when the owner failed to comply with the notice. It might have been otherwise, if the Council had taken a decision not to demolish on the basis that the delapidated premises presented no risk to persons or to property, or if the Council's actions to demolish were suspended by legal challenge.

Mrs Lutz was awarded damages to the cost of restoration of her house, although this amounted to twice the value of the house at the time that it was destroyed.

It is salient to note that the basis of the Council's liability to Mrs Lutz was on the basis of negligent advice that, in effect, it was dealing with the matter. This advice mislead Mrs Lutz and she relied upon the Council to her own detriment, by not taking other action.

In the light of this decision, it would seem likely that Ministers, Government Department bureaucrats who prepare standard "the matter is being looked into" responses and Local Authorities will have to review the manner in which they deal with problems addressed to them for attention. Indeed, it is understood that one major Government Department is already considering the problem. With an awareness of this case, people who seek solutions from Government or Local Government, might seek to further assist their own chances of recovery by indicating, in response to a letter or advice that the matter is being looked into or that it will be attended to, that they are taking no further action in reliance upon this response. Whether such inaction by the complainant would be seen as reasonable would depend upon the circumstances.

6. INTEREST AS DAMAGES

If one were asked to select the most important case in 1987 for the Construction Industry, the choice would have to be Walker & Ors. v Hungerfords & Ors. (1987) Aust. Torts Reports 80-145, a decision of the Full Court of the Supreme Court of South Australia delivered on 2nd December, 1987. Special leave to appeal to the High Court has been granted (1988 A L M D April p171) and the decision of the High Court is likely to be more important than that of the South Australian Full Court.

The case concerned a claim by taxpayers against their accountants. Due to the negligence of the accountants, the taxpayers over a period of 7 years overpaid $47,469 in tax. The taxpayers claimed the amount of $47,469 and an additional $334,521 for loss of use of the $47,469. The additional $334,521 was calculated on the basis of compound interest at the highest rate which the taxpayers were paying Mutual Acceptance for loans used to finance the taxpayers' business.

The Court found that the taxpayers were entitled to damages for the loss of use of the $47,469 and that, had the money been available to them, it would have been used to repay the loans to Mutual Acceptance bearing the highest rates of interest or put into the business if that would have been more profitable than repaying the loans. However, taking into account the possibility

that part of the money, if available, may have been used for non business purposes, the Court awarded $270,000 for loss of use of the money and not the whole $334,521 claimed.

Consider for one moment the implications for the Construction Industry. Assume that a Superintendent negligently calculates the value of work and undercertifies (as happened in Lubenham Fidelities Investments v South Pembrokeshire District Council (1987) 6 ACLR18 where the Engineer deducted retention before deducting a sum in respect of defective work). It may be years before the Contractor recovers the underpayment from the Principal and meanwhile the Contractor may be borrowing money at high rates of compound interest to finance the Contractor's business. On the basis of the South Australian decision, the Superintendent may have a liability for the interest, even though the liability to pay the amount underpaid is that of the Principal. If the Superintendent overcertifies (as happened in Sutcliffe v Thackrah (1974) AC 727) and, as a consequence, the Principal pays to the Contractor moneys earlier than might otherwise have been necessary, the Principal may claim interest from the Superintendent.

The same problem does not exist in contracts using AS2124-1986 or AS2987-1987, where the Superintendent or Engineer's certificate does not have the same interim binding effect as certificates under other forms of contract. Under these contracts the Principal's and Purchaser's obligations respectively are to pay the amount actually due, rather than the amount "certified".

The South Australian decision will be welcome news to Contractors who can actually prove that being kept from their money has caused loss which cannot be compensated in full by an award of interest at the rate applicable by statute. Each State and Territory has legislation which enables a court or arbitrator to award interest for the whole or part of the period between the breach of contract and the delivery of the award or judgement, but there are a number of limitations on the statutory power which mean that a Contractor is often not compensated at all or not fully compensated for the loss of use of the money. An example may assist to demonstrate the problem.

Assume that a Contractor has performed work to the value of $1,000 and the Principal, in breach of contract, refuses to pay it. Assume that it is 2 years before an arbitrator makes an award in favour of the Contractor for the $1,000. If the Contractor has an overdraft and is paying 18% per annum interest compounded at monthly intervals, the loss of use of the $1,000 for two years will cause the Contractor considerably greater loss than the Arbitrator could award by way of interest under Section 31 of the uniform Commercial Arbitration Act.

Section 31 of the N.S.W. Commercial Arbitration Act, 1984 empowers the Arbitrator to award interest for the period between the date on which the cause of action arose (i.e. the date when the Principal breached the Contract by not paying the $1,000) and the date of the award, but Section 31 provides that the rate shall (unless a contrary intention is expressed in the arbitration agreement) not exceed the rate at which interest is prescribed for the purposes of Section 95 of the N.S.W. Supreme Court Act, 1970. That rate is currently 15% per annum simple interest. There is a considerable difference between simple interest at 15% per annum for two years and interest at 18% per annum compounded monthly.

Now assume that after the arbitrator is appointed, but before the arbitrator delivers an award, the Principal pays the $1,000. The N.S.W. Commercial Arbitration Act, 1984 S.31 (2) provides that the Arbitrator may still award interest for the period between the date when the cause of action arose and the date of the payment by the Principal of the $1,000, but still there is the limit of, currently, 15% per annum simple interest.

The Commercial Arbitration Acts of Victoria 1984, S.A. 1986, Tasmania 1986, N.T. 1986, the A.C.T. Commercial Arbitration Ordinance 1986 and the Queensland Arbitration Act, 1973 do not currently include the power for the Arbitrator to award interest when the $1,000 is paid before the date of the award. The W.A. Commercial Arbitration Act, 1985, Section 31 follows the N.S.W. provision.

The Supreme Court Act 1970 (N.S.W.) was amended in 1983 to include provision for the Court to award interest not only when it gives judgement for the $1,000 but also where the $1,000 is paid after action is commenced and before judgement. At the time of writing, the Courts in the other States and Territories do not appear to have statutory power to award interest when the $1,000 is paid before judgement.

The case of Walker v Hungerfords is not only relevant to the quantum of interest but to the question of whether the Contractor gets interest at all, when the debt is paid before the judgement. In no jurisdiction is there statutory power to award interest, where the debt is paid before litigation or arbitration is commenced. Assume in the example, that the Principal takes twelve months to pay the Contractor's claim, but nevertheless pays $1,000 before legal proceedings are initiated. On the basis of the decision of the South Australian Supreme Court, Full Court in the Walker case, the Contractor may nevertheless be entitled to sue for interest, as damages for the twelve months that the Contractor was deprived of the use of the money. Contractors commonly add interest to claims but, notwithstanding the decision in Walker v Hungerfords, there is considerable doubt as to whether they are entitled to interest except to the extent of the limited powers given by statute to courts and arbitrators.

In England the House of Lords in President of India v La Pintada (1984) 2 All ER 773 refused to award interest as general damages. The Court of Appeal in N.S.W. in Simonius Vischer v Holt & Thomson (1979) 2 NSWLR 322 similarly refused to admit a claim for compensaiton for loss of use of moneys. The Full Court of South Australia distinguished those cases (and other cases in which Courts have refused to award interest as general damages) because the negligent accountants had "knowledge of the special circumstances of the taxpayers' business" and consequently they "ought reasonably to have contemplated that (the interest obligations to Mutual Acceptance) would occur". The South Australian Court distinguished the previous decisions on the basis that the ground for refusing interest in those cases was that under the common law interest was not generally presumed to be within the contemplation of the parties and was therefore too remote to be included as damages.

In the case of construction contracts there will be some instances where the Principal or Contractor or Superintendent will have knowledge of the fact that the party underpaid is operating on an overdraft or borrowed moneys. In the tendering stage the Principal frequently makes enquiries as to the finances of tenderers. Could this be sufficient to give the Principal the requisite "knowledge of special circumstances" to render the Principal liable to a pay interest as damages? There will be many cases where Walker v Hungerford could be distinguished because of the special nature of the relationship between the taxpayers and their accountants. The "knowledge of special circumstances" distinction is a very fine distinction and leaves considerable uncertainty.

In the case of claims under the Trade Practices Act, it appears that the Federal Court of Australia will award interest as damages. In Australian Meat Industry Employees' Union v Mudginberri Station (1987) 74 ALR 7 the three judges held that interest

was "clearly not" too remote and interest on moneys borrowed was recoverable as damages. The Federal Court did not agonise over whether the recovery of interest as damages for delay in payment depends upon the defendant's knowledge of special circumstances.

It now remains to see which way the High Court decides the appeal in Walker v Hungerfords. On the one hand, the High Court may refuse to follow the House of Lords in the Pintada case and thereby open the door to recovery of interest, as general damages without the need for any special knowledge or relationship such as existed in the Walker case. On the other hand, the High Court may endorse the decision of the South Australian Court or it may reverse the decision and place even more restrictions on the right to recover interest as damages than the South Australian Court saw fit. Whichever way the appeal is decided, it should assist to clarify the law and it will be of the utmost importance to the Construction Industry.

- Philip Davenport.

7. PUBLIC SECTOR USE OF AS2124

A survey has been conducted of a number of Government Departments to determine the extent of adoption of SAA General Conditions of Contract AS2124-1986.

A total of 48 replies were received; 46 from Government organisations and one each from the National Association of Australian State Roads Authorities and the National Public Works Conference. The results were as follows:

AS2124-1986 - 12
NPWC3 - 15
Other contracts - 13
Not applicable - 6

It is understood that of those organisations currently using a contract other than AS2124, such as NPWC3, several are currently trialling AS2124-1986 on particular test contracts, prior to reaching a formal decision.

8. ALTERNATIVE DISPUTE RESOLUTION: LONG COURT LISTS ENCOURAGING NEW WAYS OF SETTLING DISPUTES

The complex nature of building and construction projects means that disputes occur frequently. Once a dispute crystallises into court action, a person or company who is in fact blameless may be caught up as a defendant in expensive litigation due to the difficulty in allocating blame where many people have participated in the design and construction of the building.

Many of the recent developments in the law of tort, particularly the law relating to negligence, have occurred in the context of the building and construction industry.

In a recent English decision, a specialist flooring sub-contractor who laid defective concrete flooring was found to be directly responsible for the losses of the owner when the factory was shut down and the flooring replaced. The sub-contractor did not have a contract with the factory owner but with the main contractor.

A large proportion of building disputes are resolved by an arbitrator appointed by the parties. However, disputes in the building industry have become so serious that New South Wales has followed the Victorian lead, and separate building and engineering lists have been set up to deal exclusively with building and engineering disputes in the Supreme Court and the District Court.

There are more than 150 current cases in the Supreme Court list and the judge who administers the list has stated that the basic premise of the court is to deal with cases expeditiously.

With that aim in mind, different procedures have been introduced:

- Special rules for the inspection of documents, which are often voluminous in building disputes;
- Experts' reports are exchanged well before the hearing;
- Experts often confer to limit the areas of disagreement, which formerly took up a large amount of time in Court;
- Cross-examination time can be limited;
- The court may take evidence by telephone, which can save time and money for the litigants;
- The judge may sit with assessors or special advisers;
- The judge may refer the whole or any part of a dispute to an experienced referee, who will frequently resolve technical matters such as that relating to the quality of the work.

Urgent matters can be given special attention, such as those where one party to a building contract seeks to prevent the other party calling up a bank guarantee held by that party as security for performance of the contract.

Today, multi-party disputes involving seven or eight parties are not uncommon. Often in a single action, the proprietor, the contractor, the architect, the engineer, the sub-contractor and the supplier of the materials will all be joined.

Perhaps because of dissatisfaction with the court system and the traditional methods of arbitration in the building industry, parties to building and construction contracts are now more frequently turning to alternative dispute resolution (ADR) procedures as a means of resolving disputes.

ADR may include conciliation, mediation, expert appraisal or mini-trial. The business community is looking to the United States experience for guidance.

The establishment of the Australian Conciliation and Dispute Centre (ACDC) in January 1986 is evidence of the growing use of such techniques in resolving commercial disputes, particularly building and construction disputes.

The ACDC educates the business community about alternative approaches, provides facilities and assists the parties in dispute to select a suitable dispute resolution technique outside the traditional system.

If claims are any indication of trends, today's target in the building and construction industry is the professional consultant. There has been an increasing number of claims made against architects and engineers.

In its 1987 report, the Consulting Engineers Advancement Society of Australia Ltd, the company which administers the indemnity insurance scheme for consulting engineers in Australia, has recorded for the previous 12-month period a 45 per cent increase in "alerts", the first warning of a claim by the insured member. The largest increase has occurred for structural engineers; "alerts" have doubled in NSW and Qld.

Architects are suffering similarly. The architect's traditional role of principal consultant for major building works may be changing. There is an increasing trend in the industry towards non-traditional contracting methods such as construction management, project management and design and construct contracts.

Today, the architect frequently works as a designer for the builder, who in turn negotiates a design and construction contract with the building owner. The architect is often just one member of the project team and there are frequently difficulties in identifying the duties of the architect.

About 1,000 architectural practices Australia-wide voluntarily belong to the Royal Australian Institute of Architects (RAIA) professional indemnity insurance group scheme. All large firms are insured. On average, one in four practices notify a claim at least once every year. Though it may be expected that design