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

involves the higher risks for architects, in fact an increasingly high proportion of claims relate to the architect's administration of the building contract.

As a result of recent decisions, the period of exposure for those in the building industry is now uncertain. The RAIA has been notified of a claim relating to a project completed 24 years ago.

If a person is sued for breach of contract, the limitation period during which the action has to be started, commences to run from the date of the breach.

If a claim is made in tort for negligence, the limitation period commences when the damage complained of is suffered. This may occur many years after the work is completed.

There can be a simultaneous liability for breach of contract and in tort for negligence. It is even more difficult to identify the period of exposure when there is a possibility of a series of events, each founding a separate cause of action and each with its own limitation periods.

What of the future? The professional associations are becoming more active in educating members on the need for professional indemnity insurance and for effective risk management.

The RAIA has been pressing for the introduction of a limitation of the liability period to bring us into line with the UK and a large number of states in the US.

- Karyn Kinsella, Partner, Phillips Fox, Solicitors.

9. ALTERNATIVE DISPUTE RESOLUTION - THE INSTITUTE OF ARBITRATORS INVOLVED

Although the Institute of Arbitrators, Australia published Conciliation Rules several years ago, it is fair to say that the Institute to date has had little involvement in alternative dispute resolution. That appears to be changing.

The Institute has informed members of its intention to establish a Register of Conciliators, Mediators etc. and to publish a List of the names on the Register. This Register and List will be separate from the Institute's List of Arbitrators and its Register of Practising Arbitrators.

Admission to the Register and List will be restricted to Institute members who are either Graded Arbitrators or lawyers who have attended an ADR course conducted by the Institute or comparable course conducted by the Australian Commercial Disputes Centre prior to October 1988. There will be no examination as a prerequisite to admission to the Register and List.

No doubt in support of this decision, the Institute is planning to hold its first alternative dispute resolution training course in October, 1988.

10. COURTING THE PROFESSIONS

The New South Wales Supreme Court Building and Engineering List is looking to the professions to assist it to deal with its heavy workload and backlog.

The Court is seeking experienced professionals from the architectural, building, engineering and quantity surveying professions to act as 1. arbitrators and conciliators; 2. Court appointed experts; and 3. as assessors, i.e. Judge's advisors.

In all three categories, the intention is that the person appointed would be considered a helper of the Court and would be entitled to "due respect and dignity".

11. IMMUNITY FROM THE TRADE PRACTICES ACT EXTENDED TO GOVERNMENT CONTRACTORS

The case of New South Bar Association & Others v Forbes Macfie Hansen Pty Ltd & Others (1988) ATPR 40-875 has implications for contractors to Government, as it extended the immunity from operation of the Trade Practices Act, which State Governments enjoy, to persons contracting commercially with a State Government.

In this case, an advertising agent under contract to the NSW Government to promote Transcover and WorkCover was able to obtain immunity in an action against it and the relevant Ministers for an injunction to stop allegedly misleading advertisements. The action for an injunction was dismissed summarily. The Ministers were held to have immunity both as principal offenders and as aiders and abettors of the allegedly misleading conduct. It was also held that the advertising agent's conduct in performing the contract was immune from the Act.

Although unlikely to have relevance to simple construction contracts, which would probably not attract allegations of breach of the Trade Practices Act, the case could have relevance to other situations such as joint ventures with a Government and development and subsequent lease or sale of Government land.

12. TAXES

In the current political climate and the uncertainty of the taxation debate, there is at least some possibility of the introduction of new taxes, such as a consumption tax on goods and services, which might increase the cost to contractors of performing contracts. As in the case of fringe benefits tax, the cost of such a tax may be extremely difficult to recover, if not impossible, depending upon the terms of the contract. It should not be assumed that the terms of a rise and fall clause would automatically result in full or even partial recovery, nor should it be assumed that recovery would necessarily be possible under the terms of the general conditions of contract.

Contractors should consider the potential effect on them, particularly since such a tax could equal or exceed the contractor's profit margin. There would seem to be the potential that such a tax could result in the bankruptcy or liquidation of some contractors, in the absence of a contractual right to recovery (or to full recovery) and in the absence of an ex gratia payment from the client.

It should also be noted that it would probably be difficult to gain the client's agreement to an ex gratia payment, due to the likely view that the new tax was applicable to the whole community, including the client, and that there was no compelling reason why the client should shoulder the contractor's burden (except perhaps to avoid the adverse consequences of the contractor's impending insolvency).

Consequently, it is recommended that contractors give serious consideration to including a qualification in future tenders in the following terms or similar:

> "If after the date hereof, a State or the Federal Government increases a tax or imposes a new tax other than income tax and thereby the cost to the Contractor of performing the Contract is increased, the Principal shall reimburse the Contractor to the extent that the Contractor is not entitled to be reimbursed under the Contract."

The terminology used in this proposal is based on that in contracts such as NPWC3 and AS2124. The provision would require amendment for other contracts such as JCC-A (which refers to "Builder", "Proprietor" and the "Agreement").

The proposed qualification is framed to entitle the contractor to full recovery, in the event that there would otherwise be no such right under the contract, and also to top-up recovery, in the event that there is a right under the contract to partial recovery. In the event that the contractor has a right under the contract, which entitles full recovery, then the provision would have no operation; the contractor would not get it twice.

Increases in income tax have been excluded on the basis that it