National model building

by KIM LOVEGROVE of Home Wilkinson & Lowry

The Australian Uniform Building Regulations Co-ordinating Council (AUBRCC), which comprises the directors-general of planning and housing from each state and territory as well as departmental heads of building control, identified that there was a need to have uniform building regulatory provisions throughout Australia.

A number of research reports were prepared under my supervision (I was engaged by AUBRCC in November last year as project director) and were published by AUBRCC.

Those reports were: *The Comparative Study of the Primary Building Acts of Australia*; *Primary Building Acts of Australia - Dispute Resolution Systems and Options*; *Constitutional Options for Uniform Legislation*; and *Model Building Act for Consideration by the States and Territories: Legislative Aims and Options.*

Drafting

Dennis Murphy QC, Chief Parliamentary Counsel for NSW, advised that the most appropriate way of facilitating uniform legislation was to get the collective approval of the relevant ministers and the Standing Committee of Attorneys-General.

Both bodies sanctioned the legislative drafting process.

A draft of the legislation has been published in *The Model Building Legislation -- Legislative Commentary* and *The Building Bill 1991*.

The legislation has some profound innovations, particularly in the area of liability reform which could prove to be pioneering not only in Australia, but abroad.

There are two areas of reform in the legislation within the ambit of liability: (a) the imposition of a strict limitation period; and (b) the dispensation of the operation of joint and concurrent tort feasor liability.

Clause 185 of the model legislation says: Limitation on Time when Action may be Taken.

"185 (1) An action is not maintainable by a plaintiff or another person claiming on behalf of a plaintiff if it is brought after the end of a limitation period of 10 years running from the date on which the cause of action first accrues.

"(2) The cause of action accrues on the date of the issue of the occupancy permit in respect of the work or, if an occupancy permit is not issued, on the date of first occupation of the building concerned after completion of the work."

The legislation provides for certainty in respect of the commencement and the expiration of the limitation period.

It must be emphasised, however, that clause 184 exempts the limitation in respect of recovery of damages for detail or personal or bodily injury resulting from defective construction.

The liability clauses are akin to those in France which, for many years, had a 10 year cap in addition to decennial liability insurance cover.

Joint liability limit

There has been universal disquiet in respect of the inequitable consequences of the doctrine of joint and concurrent tort feasor liability.

Currently there are cases where pecunious defendants, peripherally implicated on the basis of joint and several liability, carry the can for financially impecunious co-defendants.

The victims of this inequitable doctrine are inevitably local authorities, insurers, architects, engineers and the like.

The real problem with the operation of this type of doctrine is that liability is open-ended and the risks are impossible to quantify, hence insurance premiums are exceedingly high.

The escalating cost of cover has meant that architects and engineers increasingly have been engaging in divestitures of assets as they have elected not to carry cover.

The draft legislation removes the operation of joint and several liability within the ambit of its jurisdiction but makes it obligatory for building practitioners to carry professional indemnity insurance cover.

It will be encumbent on the judges to apportion liability contribution, and a party found liable for a given percentage need not pay any more than that percentage.

The clause governing this area is 180:

"(1) After determining an award of damages in an action, a court is to apportion the total amount of the damages between all persons who are found in that action to be jointly or severally liable for those damages, having regard to the extent of each person's responsibility for the damage.

"(2) The liability for damages of a person found to be jointly or severally liable for damages in an action is limited to the amount apportioned to the person by the court."

Clause 187 says:

"The regulations may require classes of building practitioners (such as engineers, architects and building surveyors) to have professional indemnity or other insurance as the regulations may specify."

Liability capping and the removal of operation of the doctrine of joint and several liability will result in greater certainty which, in turn, should resurrect viable insurance packaging.

Dispute resolution

On the issue of building dispute resolution there was considerable variation from state to state on present systems.

code: AUBRCC

The consensus was that a "one stop shop" approach to dispute resolution was preferable.
The *Building Bill* coined the title the Building Appeals Board which is the sole, primary and all-encompassing appelate tier to have jurisdiction over any dispute coming within the terms of the ambit of the Act, the Regulations or the *Building Code of Australia.*
The Board comprises referees, predominantly technically qualified, with provision for two legal referees.
The Supreme Court will retain its inherent overriding supervisory jurisdiction.

Private certification

Past building booms characterised by strong resurgent construction activity have revealed that local authority resources have been severely tested in respect of construction approval.
Delays are the inevitable result.
The *Building Bill* has a division dealing entirely with private certification, namely *Division 1 of Part 5 -- Permits etc by other persons and bodies.*
The applicant will have the option of either engaging a private certifier to certify all aspects requiring approval or opt for the traditional route of seeking approval through the local authority.
If the applicant engages a private certifier the applicant must stay with that method from initial application to the issue of a Certificate of Occupancy.
In extreme cases the applicant will be able to get written permission from the Director of Building Control to either engage another certifier or go to the local authority.
The Director may feel persuaded to sanction such an election if the private certifier has been negligent or ethically remiss.
Obviously the applicant would have to indemnify the new certifier or local council against anything previously certified.
Clause 71(1) says:
"A building certifier may exercise any one or more of the following functions of a permit authority under this Act: (a) the giving of building permits; (b) the carrying out of inspections of building work; (c) the giving of occupancy permits.
"(2) A building certifier who exercises any of those functions is, for the purpose of this Act, taken to be the permit authority and is subject to the same duties and requirements as the permit authority in exercising those functions..."
The legislation will have mechanisms to provide for: random audit of private certifiers; an appropriate level of expertise; annual licensing; obligatory and comprehensive insurance.
It should be noted that the Northern Territory is intent on totally privatising all aspects of approval, thus the desire to take construction approval outside the jurisdiction of local councils.
The legislation has been drafted in a plain English user-friendly style; Dennis Murphy QC is well known for his skills in the area.
It should be noted, however, that with the exception of the abovementioned reforms, the legislative components bear substantial similarity to uniform features prevalent in the states and territories.

Future

The future of the model act is vested in the jurisdictional domains of each state and territory. Victoria and the Northern Territory are intent on legislative adoption in 1992.
In WA an Integrated Building Act Committee is assessing the principles of the model legislation and SA is using some of the concepts (in particular the liability reform proposals) to incorporate into its integrated development approval review.

Building contracts causing concern

Dear Editor,
You would be aware that for many years the Master Builder organisation has published a number of standard forms of building contract.
These forms of contract have been developed in conjunction with bodies such as the Royal Australian Institute of Architects, the Building Owners and Managers Association and the Building Industry Specialist Contractors Organisation of Australia Ltd. The most well known of these contracts are probably JCCA and B and SBW2.
It has come to our attention that some of these standard forms of contract have been transferred to word processing programmes to, first, facilitate the insertion or deletion of particular special clauses and, second, to enable multiple copies of the contract to be readily available.
This practice, if being carried out, is of grave concern to our organisation and the other parties to the agreed forms of contract for several reasons:
(1) the virtue of standard forms of contract is that they are *standard.* When standard clauses are modified and alterations printed in such a way that changes are not readily apparent then considerable difficulties can be experienced by the parties in determining the exact terms of the modified "standard" contract;
(2) by putting the forms on computer there is no technical impediment to the ability of contracual parties and/or their advisors to print any number of contracts without proper recognition of copyright.
I write this letter seeking to alert your members to the difficulties created by alterations to the contracts and to remind members that the contracts are the subject of copyright.
I also seek the views of your members on (a) the level of demand for contracts on disk and (b) any mechanisms used to limit the number of reproductions available on a disk.
John Murray
Executive Director
Master Builders.