ARCHITECTS AND ENGINEERS: PRACTISING IN THE PUBLIC INTEREST

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I. REGULATION

Standards of practice of architects and engineers, whether members of a professional institute or not, are controlled by legislation and to a greater extent by common law principles which are concerned only indirectly with the good of society at large. The provision of services by architects is governed by the Architects Acts and Ordinances in the States and Territories. Except in Queensland, the use of the title 'engineer' is unrestricted.[1]

Architects and engineers who are members of the Royal Australian Institute of Architects ('RAIA') and the Association of Consulting Engineers Australia ('ACEA') do not have a monopoly on the provision of architectural and engineering consulting services. Nor are members of the RAIA and the ACEA immune from the impact of s 45 of the *Trade Practices Act* 1974 (Cth) on anti-competitive agreements. In this context architects and engineers who are members of professional associations are indistinguishable from members of

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1 *Professional Engineers Act* 1988 (Qld).

trade associations.[2] Restrictive practices involving mandatory minimum fee scales, prohibitions on advertising and restrictions on competitions unless authorised by the institute, are not justifiable on the grounds of public interest or public safety.[3]

A prerequisite to registration as an architect is a pass in the examination conducted by the various Boards of Architects on behalf of the Architects Accreditation Council of Australia, preceded by the completion of a recognised university or college course and a prescribed period of practical experience. Once in practice an architect faces the risk of removal from the register for improper conduct. In New South Wales, improper conduct as defined in the Act includes failure "to comply with the requirements of any Act, regulation, by law, ordinance or rule with respect to the design or construction" of a building.[4] However, the clients of architects and engineers, or third parties injured by their negligence, must look to common law remedies to obtain any compensation for injury or loss caused by improper conduct.

Apart from exercising some control over the general competence of architects and (in Queensland) engineers, the regulatory legislation does not attempt to control the environmental impact of the output of architects and engineers. That function is performed by building regulations and town planning legislation. The common law, concerned as it generally is with the rights and obligations of individuals rather than broad social issues or ethics, does not provide a basis for dealing with the aesthetic impact of architectural and engineering design on the environment.

II. PROFESSIONAL ETHICS

Speaking at the first National Seminar on the Mutual Recognition of Standards and Regulations in Australia, the President of the New South Wales Council of Professions gave the following definition of a profession "as currently adopted by the Australian Council of Professions":

> A profession is a disciplined group of individuals who adhere to high ethical standards and uphold themselves to, and are accepted by, the public as possessing special knowledge and skills in a widely recognised, organised body of learning

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2 *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 3 BCL 434 at 437-8, per French J.

3 *National Society of Professional Engineers v United States* 435 US 679 (1978) at 681, per Stevens J; *Re Association of Consulting Engineers (Aust)* (1981) 6 TPC 876; Trade Practices Commission *Information Circular No.9* (16 May 1975); Monopolies and Mergers Commission (UK) *Architects' Services* (1977).

4 *Architects Act* 1921 (NSW) s 17(1)(h).

> derived from education and training at a high level, and who are prepared to exercise this knowledge and these skills in the interest of others.[5]

The ideal of service to the community is upheld in the codes of conduct of the RAIA and the Institution of Engineers, Australia ('IEA'). Members of the RAIA are exhorted "to be of constructive service in civic affairs and to apply their skill to the creative responsible and economic development of their community".[6]

Engineers, under the IEA code, must "in the course of professional life endeavour to promote the well being of the community".[7]

Both codes of ethics recognise the possibility of conflict between the interests of clients or employers and the public interest.

Members of the RAIA shall "ensure that their professional actions do not conflict with their general responsibility to contribute to the quality of the environment" and "ensure that on accepting a commission involving matters of special public interest all necessary steps are taken to ensure that in the total concept recommendations made by the member give a solution based on full and proper consideration and evaluation including the public interest".[8]

Similarly, the IEA code requires engineers to "avoid assignments that may create a conflict between the interests of their clients or employers and the public interest".[9]

How are architects or engineers to identify conflicts between their responsibilities to satisfy their clients' particular requirements and their wider obligations to society and their professions? Is it a matter of individual practitioners coming to terms with their personal concerns about destruction of the natural or built environment, the profligate use of resources and the quality of their work; or are there some guiding principles? The professional bodies, it would seem, are not able to provide practical guidance. The members of the RAIA are by no means unanimous in their interpretation of the *Code of Professional Conduct* when it comes to acting in the public interest. It is now possible for an architect to have to decide whether it is proper to advise a client on the demolition of a building listed by a committee of the NSW Chapter of the RAIA as having architectural significance. The assumption of the Chapter committee will be that it is in the public interest that the building be preserved. But the committee does not speak for the whole of the RAIA. Nor will the views of the Chapter committee necessarily be persuasive in court. A court will

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5 Speech by Dr John R Graham on 4 September 1991 at State Office Block, Sydney; Seminar under auspices of Committee on Regulatory Reform; see *The Mutual Recognition of Standards and Regulations in Australia: A Discussion Paper*; Special Premiers' Conference July 1991 p 9.

6 RAIA *Code of Professional Conduct* (as at 31 December 1987) Rule 1.2.

7 IEA *Code of Ethics* (1987) Tenet 1(d).

8 RAIA *Code of Professional Conduct* (as at 31 December 1987) Rules 1.1 and 1.3.

9 IEA *Code of Ethics* (1987) Tenet 1(a).

not require the preservation of a building merely because it is the work of a famous architect. Listing by the RAIA, although it may carry weight, will not necessarily be decisive in the eyes of a court asked to review a decision by a consent authority that preservation of a particular building is in the public interest.[10]

In 1983 a committee of the same Chapter of the RAIA held an 'ideas' competition for the "Gateway" site at Circular Quay in Sydney with the implicit intention of supplanting some of its own members engaged for 10 years in the design of a building for the site. The competition provoked a letter from the architects for the project to the editor of the RAIA Chapter *Bulletin* which concluded with the sentiment that the "whole concept of a professional body surely embraces mutual responsibilities as between members and the body itself, quite apart from the duty to the public which is owed by all members".[11]

It is encouraging that the institute does not close ranks to protect its members on questions of public interest. On the other hand it is easier for the officious bystander to voice an opinion than to come to grips with the realities of practice. The architect or engineer who has been commissioned to do work has to make design decisions in the knowledge that there is a risk of breach of the contract of engagement if extraneous considerations result in the client's brief not being satisfied.

One of the realities of architectural practice is that architects and their engineer consultants are frequently required to work to the limits of planning controls to extract the best commercial value or the maximum allowable habitable space from the site. At some point it becomes professionally negligent not to do so without the client's consent. This is not to suggest that the floor space ratio is the only criterion by which to judge whether a building is in the public interest, but it is obviously an important factor in many commercial and residential developments. Demolition of an existing building of arguable heritage significance may be required to satisfy commercial imperatives. The easy way out, perhaps, is to assume that building regulations, statutory planning schemes, heritage legislation, structural codes and the regulation of professional practice by statute take care of the public interest. Architects and engineers are entitled to take this view up to a point. The codes of ethics suggest that the same cannot be said of members of the institutes bound by codes of ethics.

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10 *Karong Investments Pty Ltd v City of Prahran* (1989) 38 APA 442; *Seidl v Woollahra Municipal Council* (1972-73) 1 LGATR 211.

11 (1983) (March) RAIA NSW Chapter *Bulletin* 4.

III. AESTHETICS

A. THE MODERN MOVEMENT

For most of this century architects, aided and abetted by engineers, have seen their primary obligation to the community as one of education. The community was to be shown by example the inexorable logic of the architecture of the machine age. The order of rational planning, the efficiency of prefabrication and other technical advances were self-evident benefits of the new approach to architecture and planning. Most of the existing built environment was, to the purists, undesirable. The requirements of developers and a small band of avant garde domestic clients, as well as the obligations to the wider community, could be satisfied by the process or demolition and rebuilding. By designing buildings in modern style the unvoiced needs of society at large would be met automatically.

There is support from the common law for the notion that it is in the public interest that a member of a profession should be protected to some extent from the risks attendant upon advancing the frontiers of knowledge. It is accepted that every advance in technique is also attended by risks.[12] These are risks of personal injury, property damage or financial loss. The law of torts provides little protection against aesthetic injury.[13]

The concept of the public interest also has a definite position in town planning and building control legislation. On at least one occasion in the heady days of the immediate post war period, a house design, rejected by a local council in suburban Sydney because it had a flat roof, received judicial approval on the ground that there was a general public interest that architects of repute should be allowed to try out ideas that had been widely accepted in Europe.[14]

The *Farley* case is the outstanding early post-war reported case of architectural ideology triumphing over the conservatism of the local council.[15] The Sydney architect Harry Seidler, who had studied architecture under Walter Gropius at the Harvard Graduate School and worked in the New York office of the architect Marcel Breuer, had similar successes, after initial opposition, with early houses in the Breuer manner in the Sydney municipalities of Kuring-gai and Willoughby and Warringah Shire.[16] In 1919 Gropius had become the first director of the Staaliches Bauhaus in Weimar, the renamed and amalgamated Grand-Ducal Academy for Visual Arts and Grand-Ducal School for Arts and

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12 *Roe v Minister of Health* [1974] 2 WLR 915 at 924, per Denning LJ; *Victoria University of Manchester v Hugh Wilson and Lewis Womersley* (1984) 2 Const LR 43 at 74; *McKone v Johnson* [1966] 2 NSWLR 471 at 472-3.

13 Note 53 infra.

14 *Farley v Warringah Shire Council* (1948) 17 LGR (NSW) at 9.

15 *Id.*

16 *Sydney Morning Herald* April 23 1950 p 6; *Melbourne Herald* 8 March 1952; *Sydney Morning Herald* 22 March 1952 p 9.

Crafts founded in 1909. Breuer had also taught at the Bauhaus before its dissolution in 1933.[17]

William Farley had appointed the architect Sydney Ancher to design him a house at North Curl Curl on land on a headland near the crest of a hill. The council refused to approve Ancher's design unless a low parapet wall concealed the flat roof. Farley had been abroad and he had asked for a building of "contemporary design".[18] This meant, among other things, a building with a flat roof. To Ancher, the site of the Farley house did not cry out for a flat-roofed house any more than other sites:

> the attractiveness of this type of building is not tied to particular sites or to freedom from surrounding buildings of different design. With other buildings around, it would still look attractive, although perhaps different. And he [Ancher] thinks that in any case the architecture of new buildings in the vicinity might be influenced so that they would harmonise.[19]

The council's objection seemed to Sugerman J, as he then was, to be clearly rooted in the "novelty and unfamiliarity"[20] of flat roofs. It must have been obvious to the court from the evidence of expert witnesses, including Sydney Ancher himself, that no selfrespecting supporter of the modern movement would have willingly dispensed with a flat roof when designing a house.

Architects were blinded to the technical deficiencies of flat roofs by the dogma of the modern movement. Walter Gropius had denied that there was a Bauhaus "'style', system, dogma, formula, or vogue"[21] but he did tend to be dogmatic about flat roofs. Seven functional benefits of flat roofs are listed in *The New Architecture and the Bauhaus*, the most important being that it made possible "a much freer kind of interior planning".[22]

In *Farley*, the architect Walter Bunning gave evidence in support of Ancher's design. Bunning and Ancher made reference in their evidence to "works of authority and recognised contemporary periodicals, and to the consensus of opinion and teaching amongst the teachers of design at the Technical Colleges, which favours flat roofs".[23] Ancher himself taught architectural design at the time at the Sydney and Newcastle Technical Colleges.[24] The general approach of these architects was summed up, said Sugerman J, in an extract which Walter Bunning had read to the court from a work of Walter Gropius, then Professor of Architecture at Harvard University:

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17 *Catalogue of Royal Academy of Arts Autumn Exhibition 50 Years Bauhaus* (1968) p 26.

18 Note 14 *supra* per Sugerman J at 12.

19 *Id.*

20 *Ibid* at 11.

21 W Gropius *The New Architecture and the Bauhaus* (translated by P Morton Shand) (1935) p 62.

22 *Ibid* p 24.

23 Note 14 *supra* at 12.

24 *Ibid* at 11.

> We want to create a clear organic architecture, whose inner logic will be radiant and naked, unencumbered by facades and trickeries; we want an architecture adapted to our world of machines, radios and fast motor cars, an architecture whose function is clearly recognisable in the relation of its forms. With the increasing firmness and density of modern materials - steel, concrete, glass - and with the boldness of engineering, the ponderousness of the old method of building is giving way to a lightness and airiness. A new aesthetic of the horizontal is beginning to develop which endeavours to counteract the effect of gravity.[25]

The source is not stated, but the sentiments pervade the writings of Gropius and the contemporaneous Swiss architect Charles Edouard Jeanneret who worked and wrote in Paris under the pseudonym of Le Corbusier.

The position of Warringah Shire Council appeared "most clearly" in the evidence of the President of the Council and chairman of its Health and Building Committee:

> In my position as councillor I have to represent what I believe to be the opinion of the community and for that reason I say that I must object to any startling innovation.[26]

The judge held in *Farley* that it was in the general public interest for the court to favour the argument that "architects of skill and understanding should be allowed to introduce, or at any rate to try out, here, the principles of contemporary design which have been widely accepted elsewhere".[27]

There is far less emphasis in the court proceedings in *Farley* on the quality of the house as an element of the environment than on the house as an individual architectural expression. This approach is itself a reflection of the attitudes of the pioneers of the modern movement. An architecture based on a rejection of the past is not well suited to harmonising with the existing built environment. The best examples of the work of Breuer, Le Corbusier and Gropius stand on their own, literally and figuratively, leading the way in design, not making any attempt to harmonise with existing buildings. Harmony, as Ancher suggested in his evidence in *Farley*, could come when surrounding buildings were influenced by the newcomers.

It may have been, as Gropius had said in *The New Architecture and the Bauhaus* in 1935, that the truth and simplicity of the New Architecture had been distorted by formalistic imitation and snobbery and that a general ignorance of the motives of the founders of the New Architecture had impelled "superficial minds, who do not perceive that the New Architecture is a bridge uniting opposite poles of thought, to relegate it to a single circumscribed province of design".[28] But the fact is that 'modern' architecture was not able to bridge the gap between the pioneers of the modern movement and the outside world. At least part of the explanation is, according to Brolin, that "[m]odern designers never looked beyond the mythical simplicity they espoused to the actual

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25 *Ibid* at 12.

26 *Ibid* at 11.

27 *Ibid* at 14.

28 Note 21 *supra* p 10.

complex social realities that must be explored if architectural design is to accommodate people's needs",[29] and these needs are not merely physical.

There was no room for compromise in the architecture of the new age. The town planning solutions of Gropius and Le Corbusier and their followers did not have to harmonise with existing buildings or to take into account the personal desires of individual building occupants. This was social engineering on a grand scale. Architectural harmony would come from the gradual or wholesale replacement of existing buildings with buildings of the new age. To Gropius it was inevitable that this would occur:

> It is now becoming widely recognised that although the outward forms of the New Architecture differ fundamentally in an organic sense from those of the old, they are not the personal whims of a handful of architects avid for innovation at all cost, but simply the inevitable logical product of the intellectual, social and technical conditions of our age.[30]

Gropius certainly hoped for homogeneity - a homogeneity that would flow from the use of rationalised and prefabricated building components, embraced by a populace no doubt possessing Le Corbusier's "modern consciousness":[31]

> The unification of architectural components would have the salutary effect of imparting that homogeneous character to our towns which is the distinguishing mark of a superior urban culture.[32]

Traditional methods of building were irrelevant. "The masonry wall no longer has a right to exist", wrote Le Corbusier in 1933.[33] Standardisation, industrialisation and prefabrication of the components of domestic architecture were inevitable.[34] Structural elements had to be differentiated from the "membranes" needed to separate domestic functions. Unity would bring efficiency through harmony.[35] In fact lay minds did not become conditioned to delight in new architectural expressions as a result of increasing exposure to the use of prefabricated components and off-form concrete, towers of reflective glass, windswept and vandalised communal open space and streetscapes without human scale, shelter and ornament.

Gropius admitted, in a lecture in 1945, that developing new community structures within the old cities presented difficulties. The experience gained from the planning of neighbourhood units in the open country - "the initial

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29 BC Brolin *The Failure of Modern Architecture* (1976) p 44.

30 Note 21 *supra* p 18.

31 Le Corbusier *The Radiant City* (1933) p 97.

32 Note 21 *supra* pp 27-8.

33 Note 31 *supra* p 30.

34 See W Bunning et al *The Housing Problem in Australia* Winter Forum of the Australian Institute of Political Science, Wollongong (1947) p 17; R Boyd *The Australian Ugliness* (1963) p 174; J D L Gaden *Local Government, the Law and Design* (1951) *Architecture* July-September p 88; W Gropius *The New Architecture and the Bauhaus* (1935) p 30; W Gropius *Rebuilding Our Communities* (1945) p 45.

35 Note 31 *supra* p 33.

process of reconstruction" - would be brought to bear on the problem.[36] For Le Corbusier the problem of urban regeneration required drastic remedies. In his Plan Voisin for Paris a large part of the old city north of the Seine was to be demolished (he 'spared' the mediaeval Tour Saint-Jacques) and replaced with the uniform glass cruciform towers of the Radiant City.[37] The solution may be rational but it would be difficult to imagine a way of opening up a wider gulf between modern architectural thought and a municipal administration. "Since 1922," wrote Le Corbusier in the 1964 edition of *The Radiant City*, "I have continued to work in general and in detail, on the problem of Paris. Everything has been made public. The City Council has never contacted me. It calls me 'Barbarian'."[38]

The theories underpinning the "New Architecture" of Gropius and "l'esprit nouveau" of Le Corbusier have not been embraced by outsiders, the members of the public. If suburbia is a guide to the taste of the general public, it sees the buildings which are the product of our age and, in general, does not like them. The current desperate attempts to preserve even the most decayed or relatively unimportant examples of our architectural "heritage" can be attributed in part to the dislike of the scale and detail of modern buildings and the not unjustified fear that the new will be worse than the old. Heritage protection legislation, planning and building codes and the reported planning appeal decisions are indicative of a general antipathy to the excesses of the modern movement.

In the *Farley* case a house quite unlike the accepted suburban norm of red brick walls and red tiled roof was to be allowed in the public interest. Forty years later the public interest remains an important matter for consideration.

B. PUBLIC INTEREST REINTERPRETED

The emphasis now, particularly in the suburban council codes, is expressly on the maintenance of homogeneous environments. What is perceived by courts as being in the public interest has changed in the forty years since the *Farley* case. In that case Sugerman J held that the advancement of architectural design was an aspect of cultural progress justifying the overturning of the consent authority's refusal to allow a modern design to be built.[39] It is less likely now that a court would find a threat to the public interest at large in the suppression of an example of contemporary architectural design. It would, in many instances, be difficult to argue successfully that a new building, in conflict with existing buildings, should be seen as the first example of, and prototype for, a neighbourhood of buildings in harmony with each other at some time in the future.

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36 W Gropius *Rebuilding Our Communities* (1945) p 50.

37 Note 31 *supra* p 207.

38 Note 31 *supra* p 207.

39 Note 14 *supra* at 14.

The lack of public acceptance of the architectural offerings of the modern movement and the so-called International Style is such that the introduction of new architectural ideas is not generally seen as in the public interest.

In common with their European mentors, architects in Sydney such as Sydney Ancher (the architect of the Farley house) were convinced that attempting to blend with existing buildings was not a relevant design consideration. Le Corbusier advocated the wholesale demolition of Paris north of the Seine to make way for residential tower blocks. The development of Australian cities after the second world war involved the not dissimilar obliteration of the existing streetscape.

It is now recognised that a streetscape can have amenity.[40] Now it is said to be "in the public interest that building design should reasonably demonstrate good manners and respect for the amenity of neighbouring buildings as well as reasonably meeting an applicant's specification for a particular site".[41] Streetscape is now a matter of public interest[42] and a matter for consideration under s 313 of the *Local Government Act* 1919 (NSW).[43] Thus a typical planning scheme will require the local council, and therefore an appeal tribunal, to have regard to "[t]he effect of the development on the natural environment, including flora and fauna habitats, landscape, streetscape, character, amenity or other values of the locality".[44] It is recognised that "good design has sympathy for its neighbours"[45] and that in an area with "streetscape significance" a redevelopment should "rest quietly within the existing streetscape character".[46]

Consistency of urban form is now seen as desirable.[47] There is a belated realisation that a sense of enclosure in an urban public space is important;[48] that there is "little point in creating a number of pockets of virtually unusable communal open space",[49] such as the pieces of open space left over from the urban building setback exercises of the 1950s and 1960s; that the effect of unusual designs on neighbours and the appearance of the neighbours must be considered;[50] and that there is merit in retaining continuity of the building

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40 *Australian Posters Pty Ltd v City of Prahran* (1984) 17 APA 79 at 82.

41 *Peters v Warringah Shire Council* (1987) 30 APA 61 at 70.

42 *McDonald's Properties (Australia) Pty Ltd v Collingwood City Council* (1988) 33 APA 365; *Designer Builders (Aust) Pty Ltd v City of St Kilda* (1988) 37 APA 330 at 333.

43 *Wyse v North Sydney Municipal Council* (1987) 25 APA 44.

44 *Milglo Pty Ltd v Municipality of Scotsdale* (1986) 23 APA 478.

45 *Brick Equity Holdings v Prahran City Council* (1989) 39 APA 94 at 99.

46 *Ibid* at 39.

47 *Barnfield v City of Melbourne* (1986) 23 APA 445 at 449.

48 *Spackman v District of Burra Burra* (1988) 30 APA 467.

49 *Sikkes v City of Knox* (1986) 25 APA 30.

50 *Hince v Shire of Flinders* (1988) 32 APA 296.

line, rather than insisting on a setback in a street where all existing buildings are built up to the street frontage.[51]

C. THE RIGHT TO OBJECT

The common law right of members of the public who seek to object to the appearance of buildings at development or building approval stage is quite limited. The tort of public nuisance gives a possible basis for an action, or a relator action, although the reported cases give little encouragement to prospective litigants that such an action would be likely to succeed. In the case of the Black Mountain telecommunications tower in the Australian Capital Territory, Smithers J said: "it is going much too far to suggest that it might be a crime to construct a building which offends even a large majority of citizens in some locality by reason that it is considered to break a skyline, to be too large, too dominating, incompatible with the local traditions or the hitherto accepted principles of the planning of the locality".[52] This is in accord with long-established precedent and is, by analogy, consistent with the law of defamation.[53]

The tort of defamation is concerned with the balancing of the right of public criticism of artistic matters and the need to protect individual reputations against defamatory attacks. The aesthetic well-being of the public depends, in part, on freedom of artistic expression:

> ...it is in the public interest to have free discussion of matters of public interest. In the case of criticism of art, whether music, painting, literature or drama, where the private character of a person criticised is not involved, the freer the criticism is, the better it will be for the aesthetic welfare of the public.[54]

The aesthetic benefit to the public is, however, a derivative of the preservation of the right to express opinions about artistic matters within the constraints necessary for the protection of individual reputations.

It is not for the court to pass judgement on the quality or value of the opinions being expressed:

> The court may, as private individuals, agree or disagree with the opinions expressed. Indeed it may disagree very much, and yet hold that there is nothing in the language used which exceeds the limits of public criticism so as to become a mere personal defamation.[55]

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51 *Stankovic v City of Melbourne* (1981) 2 APA 54; *Cortez Pty Ltd v City of Melbourne* (1981) 2 APA 366 at 368; *Hooker Retail Developments Pty Ltd v City of Melbourne* (1981) 2 APA 369 at 371.

52 *Kent v Johnson* (1973) 21 FLR 177 at 212.

53 *William Aldred's Case* (1611) 9 Co Rep 756; 77 ER 821; *Rogers v Rajendro Dutt* (1860) 13 Moo PC 209.

54 *Lyon v Daily Telegraph* [1943] KB 746 at 753, per Scott LJ.

55 *Ibid* at 754.

In town planning law, the consent authorities generally speak for local public interest. In contrast to the decision in the Farley case, in which the advancement of architectural design was held to be an aspect of cultural progress and a matter of public interest,[56] the specialist courts and tribunals hearing appeals on building and town planning matters have increasingly identified public interest as not necessarily consistent with freedom of aesthetic expression in architectural design.

Neighbouring landowners, whose use and enjoyment of their land may be threatened by a proposed development, are in a much stronger position than the public at large to object to the proposal. A neighbouring landowner has no automatic legal right to be heard by the consent authority[57] unless such a right is conferred by statute.[58] However, a landowner threatened with a significant loss of amenity within his or her land does have standing to sue.[59] Mere intellectual or emotional concern does not amount to a significant loss of amenity.[60]

In recent years the common law's lack of concern with the appearance of buildings has been overcome to some extent by the weight given by the courts to the opinions of statutory bodies such as the New South Wales Heritage Council and non-statutory conservation groups, notably the National Trust of Australia. Further, the National Trust and like bodies are now recognised as having standing.[61] Even in the absence of a listing of the building or precinct in question, the expert views of the National Trust carry considerable weight in court.[62]

The protection afforded by the law of defamation to expressions of opinion on matters of public interest, such as the design of buildings, "however mistaken in point of taste that opinion may be",[63] is in contrast to the current restrictions on the designs themselves on purely aesthetic grounds. These restrictions arise from the subjective assessment of design proposals by specialist courts and tribunals in the light of expert evidence and the controlling legislation.

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56 Note 14 *supra* at 14.

57 *Bray v Faber* [1978] 1 NSWLR 335.

58 *Porter v Hornsby Shire Council* (1990) 69 LGRA 101.

59 See for example, *Thorne v Doug Wade Consultants Pty Ltd* (1985) 57 LGRA 41 at 90.

60 *Ibid* at 102.

61 *National Trust of Australia (Vic) v Australian Temperance and General Mutual Life Assurance Society Limited* [1976] VR 592, applying *Attorney General of the Gambia v N'Jie* [1961] AC 617; *McDonald's Properties (Aust) Pty Ltd v City of Collingwood* (1988) ELR 0208; *National Trust of Australia (NSW) v Minister Administering the Environmental Planning and Assessment Act* 1979 (NSW) (1981) 53 LGRA 37; cf *Australian Conservation Foundation Incorporated v Commonwealth of Australia* (1980) 146 CLR 493.

62 *Claude Neon Ltd v Sydney City Council* [1984] LEN 1210.

63 *Soane v Knight* (1827) Mood & M 74; 173 ER 1086.

IV. TECHNICAL COMPETENCE

A. THE TEST OF COMPETENCE

Architects and engineers have a duty to their clients to provide the services contracted for in a reasonably competent manner. The conventional test for negligence in tort and in contract is that stated by McNair J in *Bolam v Friern Hospital*:

> The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.[64]

It is not possible to define with any precision how an architect or engineer should behave to satisfy the required standard of competence.

In *Voli v Inglewood Shire Council* Windeyer J said:

> What an architect must do to avoid liability for negligence cannot be more precisely defined than by saying that he must use reasonable care, skill and diligence in the performance of the work he undertakes.[65]

Professional advice does not come with an implied guarantee of success or a warranty of fitness for purpose.[66] Section 74(2) of the *Trade Practices Act* 1974 (Cth) preserves the common law distinction between work carried out by a construction company providing work or services to a consumer relying on the company's skill or judgement, which is subject to an implied warranty that the work performed will be fit for the intended purpose, and services performed by architects or engineers, which are not subject to such an implication.

This is not to suggest that the courts do not apply rigorous standards in assessing whether architects and engineers have performed with due care and skill. Compliance with recognised practices may not be sufficient to satisfy the standard of competence.[67] Evidence by eminent practitioners that they would have acted in a similar way to an architect or engineer accused of failing to satisfy the standard of due care and skill may assist the court in reaching a decision. Such evidence may not be decisive in the defendant's favour and does not supersede the function of the court to set the standard of reasonable competence.[68]

Recognised practice, Australian or overseas Standards and other published information are all relevant in deciding the standard of reasonable

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64 [1957] 1 WLR 582 at 586.

65 (1963) 110 CLR 74 at 85.

66 *Auburn Municipal Council v ARC Engineering Ltd* [1973] 1 NSWLR 513 at 531; *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Constructions Ltd* (1978) 11 BLR 29 at 50.

67 See, for example, *Edward Wong Finance Co Ltd v Johnson Stokes and Master* [1984] AC 296 at 308.

68 *Florida Hotels v Mayo* (1965) 113 CLR 588; *F v The Queen* (1983) 33 SASR 189 at 201.

competence.[69] The reasonably competent adviser has read all reasonably available pertinent technical literature.[70] The reasonably competent architect or engineer continues to read the literature after the construction has started and modifies the design, if necessary, to incorporate new findings about the behaviour of materials and components.[71] If new information about soil conditions on the site comes to light during construction, for example, the engineer responsible for the original design has a duty to modify the footing design if necessary.[72] The reasonably competent practitioner has read and applied all relevant legislation, mandatory design rules and regulations.[73] Departures from advisory standards do not in themselves show incompetence, but a court will look for sound reasons for any such departures.[74]

B. THE DUTY TO ADVISE CLIENTS OF TECHNICAL RISKS

Walter Gropius was apparently oblivious to the problem of snow on roofs in cold climates and even argued that flat roofs needed fewer repairs than tiled or slated pitched roofs because the use of flat roofs eliminated unnecessary surfaces presented to the action of wind and weather.[75] The "apologists of the modern movement", as the English critic and former editor of the influential journal *Architectural Review* J M Richards describes them, had remained silent in the 1930s about the defects in modern buildings - "like white concrete walls that stained in a damp climate, parapets without copings that let rain run down their face, flat roofs that leaked and windows too fashionably large to retain internal warmth ...".[76]

Professional advisers have a duty to inform clients of relevant matters and known technical risks.[77] In some cases it may be difficult to distinguish

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69 *Voli v Inglewood Shire Council* (1963) 110 CLR 74; *Rimmer v Liverpool City Council* [1985] QB 1; *Bevan Investments Ltd v Blackhall and Struthers* [1973] 2 NZLR 45.

70 *Roe v Minister of Health* [1954] 2 WLR 915 at 919.

71 *City of Brantford v Kemp and Wallace Carruthers & Associates Ltd* (1960) 23 DLR (2d) 640; *Edelman v Boehm* (1964) 26 SASR (note) 66; *Victoria University of Manchester v Hugh Wilson and Lewis Womersley* (1984) 2 Const LR 43 at 73; *Brickfield Properties Ltd v Newton* [1971] 1 WLR 862 at 873; *London Borough of Merton v Lowe* (1981) 18 BLR 130 at 132.

72 For example, *City of Brantford v Kemp and Wallace Carruthers & Associates Ltd* (1960) 23 DLR (2d) 640. This obligation ceases when the building has been handed over to the owner: *Rimmer v Liverpool City Council* [1985] QB 1.

73 *British Land Holdings v Wood* (1979) 12 BLR 1.

74 *Bevan Investments Ltd v Blackhall and Struthers* [1973] 2 NZLR 45 at 65-6.

75 Note 21 *supra* at p 24.

76 JM Richards *A Critic's View* in *The Melbourne Architectural Papers* (1971).

77 *Hawkins v Clayton* (1988) 164 CLR 539 at 593, per Gaudron J; *Sacca v Adam* (1983) 33 SASR 429; *Vulic v Bilinsky* [1983] 2 NSWLR 472; *City of Brantford v Kemp and Wallace-*

between failures, poor performance, or normal deterioration of materials or components. Whether the client should be warned of risks of technical failure or poor performance will depend on the state of the art at the time and on the client's brief.[78] A client is entitled to expect that a new building or structure has a life expectancy and maintenance requirements similar to comparable buildings.[79]

The law has stopped short of imposing an obligation on architects and engineers to obtain the informed consent of their clients as is required of medical practitioners.[80] Nevertheless, it is wise to inform the client as fully as possible in order to be able to obtain instructions on the balancing of building life with initial cost, maintenance and running costs with initial cost and risks of innovation with building image and return on investment.

The position is summarised in the judgement of Newey J in *Victoria University of Manchester v Hugh Wilson and Lewis Womersley* as follows:

> For architects to use untried, or relatively untried materials or techniques cannot in itself be wrong, as otherwise the construction industry can never make progress. I think, however, that architects who are venturing into the untried or little tried would be wise to warn their clients specifically of what they are doing and to obtain their express approval.[81]

C. LIABILITY FOR NEGLIGENT MISSTATEMENTS

Clients are entitled to rely on their advisers disclosing relevant information. Thus the duty of care owed by professional advisers to their clients extends beyond being careful to avoid making negligent misstatements. It includes a positive duty to inform clients of relevant matters.[82] In some circumstances architects or engineers who know that builders or subcontractors are making a major mistake on site that is likely to involve them in expense may also have a

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Carruthers & Associates Ltd (1960) 23 DLR (2d) 640 at 655; *Auburn Municipal Council v ARC Engineering Ltd* [1973] 1 NSWLR 513 at 518.

78 *Imperial College of Science and Technology v Norman and Dawbarn* (1986) 8 Const LR 107 at 125.

79 *Victoria University of Manchester v Hugh Wilson and Lewis Womersley* (1984) 2 Const LR 43 at 50; *Imperial College of Science and Technology v Norman and Dawbarn* (1986) 8 Const LR 107 at 124; *Equitable Debenture Assets Corporation Ltd v William Moss Group Ltd* (1984) 2 Const LR 1 at 24.

80 *Nye Saunders & Partners v Bristow* (1987) 37 BLR 92 at 108.

81 (1984) 2 Const LR 43 at 74.

82 *Nye Saunders and Partners v Bristow* (1987) BLR 92; *Brickhill v Cooke* [1984] 3 NSWLR 396; *Pratt v George J Hill Associates* (1977) 38 Build LR 25; *Coleman v Gordon M Jenkins & Associates Pty Ltd* (1989) ATPR 40960; *District of Surrey v Carroll-Hatch & Associates Ltd* (1979) 101 DLR (3d) 218; *Sacca v Adam* (1983) 33 SASR 429; *Lees v English & Partners* (1977) EG 566; *Vulic v Bilinsky* [1983] 2 NSWLR 472.

duty to warn them.[83] There may be an obligation in the case of some structural work needing unusual care in the method of construction for the engineer to ensure that such care is exercised and to prevent the contractor from using procedures liable to be dangerous.[84]

Generally, however, in relation to third parties, the obligation of architects and engineers when giving instructions to contractors or expressing opinions on which third parties may rely to their detriment,[85] does not require advice to be volunteered or a gratuitous service to be performed.[86]

D. LIABILITY FOR LATENT DAMAGE

The problem of latent damage most commonly arises in relation to defects in buildings or manufactured products although, as illustrated by the case of *Hawkins v Clayton*,[87] can result from the delayed consequences of a breach of contract or a tortious act or failure to act in other contexts. As the defects or the damaging consequences are, by definition, hidden from the plaintiff for some time after the breach of contract has occurred or tort has been committed, the date at which the limitation period started to run is often a crucial issue. This will be considered first.

(i) The limitation period in contract

In contract the time begins to run when the breach of contract occurs. No actual damage need have occurred at that time:

> In the case of an action founded on contract, the relevant event which attracts the operation of the statute is the breach of the contract, not when the damage is suffered.[88]

In the case of defective building design, for example, an action claiming damages for breach of the architect/engineer and client agreement must be commenced within six years of the alleged breach of contract by the engineer (or 12 years (in NSW) if the architect/engineer and client agreement is under seal). Of course, the building defect may manifest itself to the building owner well within six years of the breach of contract, thus allowing adequate time within which to commence an action founded on breach of simple contract. It is in cases of latent defects that remain hidden for many years that the limitation period may assume great significance.

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83 *Victoria University of Manchester v Hugh Wilson and Lewis Womersley* (1984) 2 Const LR 43 at 92.

84 Victoria, Report of *Royal Commission into the Failure of West Gate Bridge* (1971) 9.

85 See, for example, *Clay v AJ Crump & Sons Ltd* [1964] 1 QB 533; *Yianni v Edwin Evans* [1982] QB 438.

86 *Seale v Perry* [1982] VR 193 at 283.

87 (1986) 5 NSWLR 109 (NSW Court of Appeal); (1988) 164 CLR 539 (High Court).

88 *Hawkins v Clayton* (1986) 5 NSWLR 109 at 115, per Kirby P.

If the architect's or engineer's duties include the periodic inspection of the work during construction and the issuing of certificates, the date of practical completion may be the appropriate starting date of the limitation period.[89] During construction an architect or engineer has a duty to inform the client of any defects in the design, taking into account any relevant new information.[90] After issuing the notice of practical completion the superintendent's powers to instruct the builder to rectify defects not previously drawn to the builder's attention are curtailed.[91] Nonetheless it is not until the final certificate has been issued that the superintendent hands over the building to the proprietor in a contractual sense. In *Edelman v Boehm*, there is the following passage:

> Conceding that a breach of contractual duty will give a right of action at the point of time when it occurs, without proof of damage, it remains to consider what is the breach of duty when negligence is alleged. In our opinion, it is not 'negligence' in the abstract. The allegation is that, as a result of the defendant's lack of care or skill, the plaintiff has failed to get that for which she bargained. Such a failure, if it occurred, may be a breach of duty which can, for the purposes of the statute, be said to occur at the time when the defendant advised the plaintiff that the builders' contract had been satisfactorily performed and that she should accept the house, as the house that she had engaged him to design and arrange for.[92]

On this analysis the date of the final certificate would be the latest possible starting time for the limitation period in contract.

(ii) The limitation period in tort

When does the cause of action "accrue" in tort? For a decade after Lord Denning's decision in *Dutton v Bognor Regis United Building Co Ltd*[93] the English courts struggled to resolve this question in a series of cases dealing with latent building defects, culminating in *Pirelli General Cable Works Ltd v Oscar Faber & Partners*.[94] The House of Lords in *Pirelli* came to the conclusion that, with the possible exception of buildings so defective as to be doomed from the start, the cause of action in tort accrued when physical damage actually occurred to the building. It did not matter that the damage could not be discovered when it occurred. Thus in *Pirelli* the action against the engineers responsible for the negligent design of a tall factory chimney was held to be statute barred: it was established that damage to the chimney must have occurred more than eight years before the writ against the engineers was issued.

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89 See *London Congregational Union Inc v Harriss and Harriss* [1988] 1 All ER 15.

90 *Brickfield Properties v Newton* [1971] 1 WLR 862 at 873; *London Borough of Merton v Lowe* (1981) 18 BLR 130 at 132; *Edelman v Boehm* (1964) 26 SASR 66 (note) at 73-4; *Equitable Debenture Assets Corporation Ltd v William Moss Group Ltd* (1984-85) 1 Const LJ 131.

91 *Qantas Airways Ltd v Joseland and Gilling* (1986) 6 NSWLR 327.

92 (1964) 26 SASR 66 (note) at 73-4.

93 [1972] 1 QB 373.

94 [1983] 2 AC 1.

Lord Fraser of Tullybelton, in his judgement, expressed the hope that Parliament would "soon take action to remedy the unsatisfactory state of the law on this subject". Parliament's response was the enactment of the *Latent Damage Act* 1986 (Eng). The rationale of this "doomed from the start" concept, introduced in *Pirelli* by Lord Fraser (with whom all other members of the House of Lords agreed), has proved to be elusive.

The time for the commencement of the limitation period in connection with a latent building defect has yet to come before the High Court of Australia for direct consideration, but Gaudron J in her judgement in *Hawkins v Clayton* spoke of the "doomed from the start" concept:

> Pirelli has nothing to say as to the time of accrual of a cause of action for economic loss which is sustained otherwise than in consequence of or in conjunction with physical damage to property. The brief reference to a building 'doomed from the start' seems to have been intended to enable a plaintiff to bring action before physical damage actually occurred, as was allowed, for example, in *Junior Books Ltd v Veitchi Ltd* [1983] 1 AC 520. Perhaps what his Lordship had in mind was that a cause of action in negligence for economic loss sustained in consequence of or in conjunction with a defect to property accrues when the property sustains damage, unless actual financial loss is sustained at an earlier time. The subsequent decision of the House of Lords in *Ketteman v Hansel Properties Ltd* [1987] 1 AC 189, in which it was claimed unsuccessfully that the buildings there in issue were doomed from the start, throws no further light on the question of accrual of a cause of action for economic loss sustained otherwise than in consequence of or in conjunction with physical damage to property.[95]

The decision in *Junior Books* has been variously interpreted by the English Courts as an application of the *Hedley Byrne* principle[96] (by Lord Keith in *Murphy v Brentwood District Council*[97] and by Robert Goff LJ in *Muirhead v Industrial Tank Specialities Ltd*)[98] and as a case of damage to the plaintiff's property (by Lord Templeman, with whose speech Lord Keith of Kinkel and Lord Roskill (who had himself given the leading speech in *Junior Books*) agreed, in *Tate & Lyle Food Distribution Ltd v Greater London Council*)[99]. In *Muirhead v Industrial Tank Specialties Ltd* Robert Goff LJ treated *Junior Books* as a case in which, on the particular facts, there was considered to be such a

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95 (1988) 164 CLR 539 at 600.

96 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. This and subsequent cases, notably the High Court's decision in *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225, firmly established the principle that economic loss caused by acting in reliance on negligent advice is recoverable in tort, provided parties are in a sufficiently proximate relationship.

97 [1991] 1 AC 398 at 466.

98 [1986] 1 QB 507.

99 [1983] 2 AC 509 at 530; cited in *Muirhead v Industrial Tank Specialities Ltd* [1986] 1 QB 507, per Robert Goff LJ at 526; see also *Simaan General Contracting Co v Pilkington Glass Ltd* [1988] 2 WLR 761 at 776, cited in *Pacific Associates Inc v Baxter* [1989] 2 All ER 159 at 177, per Purchas LJ.

close relationship between the parties that the defendant could, if the facts pleaded were proved, be held liable to the plaintiff.[100]

Particularly since the decision of the House of Lords in *Murphy v. Brentwood District Council*,[101] it is difficult to regard *Junior Books* as other than an isolated English instance of an award of damages in tort for economic loss not arising from a negligent misrepresentation but from a negligent act of a subcontractor, against whom the plaintiff had no claim in contract, resulting in damage to the property actually supplied by it to the plaintiff.[102]

Even before the House of Lords in *Murphy v Brentwood* had overruled *Anns v Merton London Borough Council*[103] and made clear its opposition to allowing the opening of the floodgates of claims in tort for economic loss outside the *Hedley Byrne* principle, Dillon LJ in his judgement in the *Simaan* case had said that he found it "difficult to see that future citation from the *Junior Books* case can ever serve any useful purpose".[104]

In Australia *Junior Books* perhaps does not present exactly the same conceptual difficulty for the High Court as it did for the English courts. The High Court has left open the possibility of claims in tort for economic loss outside the *Hedley Byrne* category, albeit in situations where there has been a degree of reliance by the plaintiff on the defendant.[105]

The attraction of dispensing with the discoverability test as the House of Lords did in *Pirelli* is that it accords with the policy of protecting potential defendants from being "vexed by stale claims".[106] This gives no comfort to potential plaintiffs, however, and in *Hawkins v Clayton* in the New South Wales Supreme Court (Court of Appeal) Glass JA alluded to some of the shortcomings of the common law in the area of latent defects:

> It is clearly an unjust situation that time should run against a plaintiff ignorant of his rights but as Lord Reid said in *Cartledge v E Joplings & Sons Ltd* [1963] AC 758 at 772 the mischief cannot be remedied by admitting an exception to common law principle but only by legislative amendment. Such an amendment has been introduced with respect to personal injury by the *Limitation Act* 1969 (NSW), s 57, but its terms cannot extend to property damage or financial loss.[107]

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100 [1986] 1 QB 507 at 528.

101 [1991] 1 AC 398.

102 The English terminology of plaintiff and defendant is used here. As *Junior Books* was a Scottish appeal the parties were pursuer and defender rather than plaintiff and defendant.

103 [1978] AC 728.

104 [1988] 2 WLR 761 at 778.

105 *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 at 574-5, per Stephen J; see *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 461-2, per Mason J; cited in *F W Nielsen (Canberra) Pty Ltd v P D C Constructions (ACT) Pty Ltd* (1987) 71 ACTR at 7, per Kelly J.

106 First report of the Law Reform Commission on the *Limitation of Actions* (LRC 3) October 1967 at 133; cited in *Hawkins v Clayton* (1986) 5 NSWLR 109 at 118, per Kirby P.

107 (1986) 5 NSWLR 109 at 123-4, per Glass JA.

In *Hawkins v Clayton* Kirby P and Glass JA applied the rule from *Pirelli*. McHugh JA (as he then was) did not. In his view the remarks of Wilson and Deane JJ in *Sutherland Shire Council v Heyman*[108] showed that it was "by no means probable" that the approach of the House of Lords in *Pirelli* would prevail in Australia.[109]

On appeal to the High Court Brennan J said that there was "no reason to doubt the applicability of the orthodox view" that most causes of action for negligence first accrue when the plaintiff first suffers damage caused by the defendant's breach of duty.[110] Gaudron J expressed the view that:

> it may be appropriate to speak of a cause of action in negligence for economic loss sustained by reason of latent defect as accruing when the resultant physical damage is known or manifest, for as was explained by Deane J in *Heyman* (1985) 157 CLR 424 at 505 it is only then the actual diminution in market value occurs. If, on the other hand, the interest infringed is the physical integrity of property then there is a certain logic in looking at the time when physical damage occurs, as was done in *Pirelli*.[111]

Of the remaining three High Court judges in *Hawkins v Clayton* only Deane J dealt with the point, although Mason CJ and Wilson J expressed agreement with the substance of his judgement in this respect. In the view of Deane J, in cases of third party claims for damages for latent building defects, in the absence of consequential collapse or physical damage or injury, the only loss which could have been sustained by the owner was the economic loss "which would be involved if and when the defect was actually disclosed or became manifest".[112]

Thus, as far as building defects are concerned, the majority of the High Court of Australia in *Hawkins v Clayton* seems to favour the discoverability test for claims brought in tort, which was rejected by the House of Lords in *Pirelli*. On the basis of the High Court remarks on latent building defects it can be conjectured that on the same facts as *Pirelli* the plaintiff would have won on the argument that it had suffered economic loss by relying on the advice of a consulting engineer. There is the requisite degree of proximity between engineer and client. Assuming concurrent liability in contract and tort, the engineer would be liable to the principal in tort. A third party plaintiff's loss would also fall into the category of economic loss but be unrecoverable in tort, even though the action would not be statute barred.

As *Hawkins v Clayton* was not a case of a latent building defect all of the High Court judges' remarks on the applicability of *Pirelli* in Australia to latent building defects are obiter. However, Justice Deane's view that latent building defects commonly give rise to purely economic loss is consistent with his

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108 (1985) 157 CLR 424.

109 (1986) 5 NSWLR 109 at 144.

110 (1988) 164 CLR 539 at 561.

111 *Ibid* at 601.

112 *Ibid* at 587.

opinions in *Sutherland Shire Council v Heyman.*[113] The remarks of Gaudron J on *Pirelli, Junior Books* and *Ketteman* indicate the difficulty of distinguishing between economic loss and actual damage encountered in recent latent building defect cases. So too, do the references in the leading judgement of Deane J (with whom Mason CJ and Wilson J expressed general agreement) to economic loss in relation to building defects show the intractable nature of the problem of latent building defects. The test for the commencement of the limitation period in some cases may call for distinguishing between economic loss caused by latent defects to property and physical damage or injury arising from secondary building defects caused by the primary defects. In other cases latent building defects will fall into the economic loss category, with the limitation period not commencing to run until the defect is discoverable.

In England the problem of the anomaly of latent damage has been "cured, or at any rate mitigated" by the *Latent Damage Act* 1986.[114] It is submitted that legislation is needed in Australia to deal with the problem of defining a limitation period for actions to recover damages for latent building defects. Although a limitation period of, say, 12 years from the date of practical completion for all building defects, whether discoverable or not within that time, may be as arbitrary as the present system, such a statutory cap on actions has the merit of putting all proprietors on an equal footing, avoids the problem of distinguishing economic loss from property damage and does away with the potentially difficult issue of establishing when undiscoverable damage first occurred. As discussed below, the interests of owners can be protected by project insurance.

The semantic contortions displayed in the English case of *London Congregational Union Inc v Harriss and Harriss*[115] give as clear an indication as *Pirelli* of the need for legislation. The primary design defect in that case was a drainage system with no safeguard against the sewer discharging. This resulted in the plaintiff's church hall being flooded on 11 occasions between practical completion in January 1970 and mid 1975. A majority of the Court of Appeal found that the plaintiff's action against the architects was not statute barred. Secondly, the architects had negligently failed to require a damp-proof course to be inserted between steps leading down to the hall entrances and the adjacent walls. As a result, moisture penetrated the brickwork and eventually damaged the plaster on the inside wall. It was in the resolution of this relatively minor point, where the claim against the architects was found, on appeal, to be statute barred, that the law showed itself to be unable to provide a wholly satisfying solution. It was necessary to fix a date at which the damage occurred. The judge at first instance had to base his decision on expert evidence:

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113 (1985) 157 CLR 424 at 503-5.

114 See *D W Moore & Co Ltd v Ferrier* [1988] 1 All ER 400 at 411, per Bingham LJ.

115 [1988] 1 All ER 15.

> The experts gave evidence that it might take one or two years for moisture to penetrate the brick walls, which were 14 inches thick.
>
> There is nothing wrong with water entering bricks. Bricks are permeable things and they admit and [exude] water. So damage resulting from the lack of damp-proof courses would not occur until the damp reached the plaster. The expert evidence makes it peculiarly difficult for me in this case, since a year from practical completion might be outside the limitation period, but two years would be within it.[116]

The judge found in favour of the building owners on the basis that the architects had not proved that the damage occurred outside the limitation period. The Court of Appeal allowed the architects' appeal on this point; it was for the plaintiff building owner to prove that the damage occurred within the limitation period. Thus the negligent architects were liable for the damage caused by the defective drains but not for the damage caused by the omitted damp-proof course.

(iii) Latent damage, limitation periods and project insurance

A comprehensive solution to the related problems of limitation of negligence actions arising from latent building defects, and the desirability of maintaining insurance protection would be a combination of statutory provisions defining the limitation period for latent defects, compulsory insurance for all consultants, and project insurance in the owner's name. These are included in the proposals for law reform put forward by the RAIA.[117]

A discussion paper released in 1991 by the New South Wales Attorney General's Department, entitled *Latent damage, limitation periods and project insurance* puts forward a number of possible models for legislation. The paper contains the following assertions:

> The cause of action in contract accrues on breach; the cause of action in tort accrues on damage.

and

> [latent damage] clearly poses considerable problems for its victims, who may be held to be time-barred without ever realising that they have a cause of action.

As has been pointed out recently, the first proposition is something of an oversimplification.[118] The second proposition is true of claims based on breach of contract but for claims in tort, at least as far as latent building defects is concerned, is at odds with the view of the majority of the High Court in *Hawkins v Clayton.*

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116 [1985] 1 All ER 335 at 343; [1988] 1 All ER 15 at 28.

117 *Professional Liability in the Building Industry* (1988) August RAIA Memo.

118 Business Law Committee, "Latent Damage, Limitation Periods and Project Insurance" (1991) 29 *Law Society Journal* 33.

E. LATENT DAMAGE AND ECONOMIC LOSS

(i) Liability in tort for economic loss

The question of liability in tort for economic loss inevitably arises in many cases of latent damage. Either because the damaging consequences of a breach of contract have been hidden for many years or because the plaintiff is a third party, there is no basis for a claim in contract. It is then necessary to examine the nature of the damage suffered and the relationship between the plaintiff and the alleged tortfeasor to decide if the plaintiff has a claim in tort.

Under the principles established in *Donoghue v Stevenson*[119] the negligent manufacturer of a defective article is liable in tort for resulting personal injury or damage to property. There is "no liability in tort upon a manufacturer towards the purchaser from a retailer of an article which turns out to be useless or valueless through defects due to careless manufacture".[120] In a case such as *Pirelli* a claim in tort against engineers whose negligence has caused their client to suffer economic loss only arises because of the client's reliance on the advice given as part of the engineers' retainer. The economic loss is recoverable under the *Hedley Byrne* principle[121] unless statute barred.[122]

(ii) The "complex structure" argument

In *Dutton v Bognor Regis Limited Building Co Ltd*[123] Lord Denning, for public policy reasons, made the unfortunate jump "from liability under the *Donoghue v Stevenson* principle for damage to person or property caused by a latent defect in a carelessly manufactured article to liability for the cost of rectifying a defect in such an article".[124]

The same thinking can be seen in the decision of the House of Lords in *Anns v Merton London Borough.*[125] The House of Lords, in *Murphy v Brentwood District Council*[126] has now recognised that the damage in *Anns* was purely economic, not physical damage as characterised by Lord Wilberforce, and that the High Court's approach in *Sutherland Shire Council v Heyman*[127] (in which it declined to follow *Anns*) was correct.

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119 [1932] AC 562.

120 *Murphy v Brentwood District Council* [1991] 1 AC 398, per Lord Keith of Kinkel at 465.

121 *Hedley Byrne & Co v Heller and Partners Ltd* [1964] AC 465; *L Shaddock & Associates v Parramatta City Council* (1981) 150 CLR 225.

122 See *Murphy v Brentwood District Council* [1991] 1 AC 398, per Lord Keith at 466

123 [1972] 1 QB 373 at 396.

124 Note 122 *supra*, per Lord Keith at 465.

125 [1978] AC 728.

126 [1991] 1 AC 398.

127 (1985) 157 CLR 424.

In *D & F Estates Ltd v Church Commissions*,[128] Lord Bridge, in attempting to reconcile the *Anns* decision with pre-existing principle,[129] suggested that in the case of a complex structure, or complex chattel, damage to one element of the structure caused by a hidden defect in another part may qualify to be treated as damage to other property. Lord Bridge suggested, obiter, that a house could qualify as a complex structure, but he did not apply the theory to find in favour of the plaintiff. In *National Mutual Association of Australia Limited v Coffey & Partners Pty Ltd*,[130] a case concerning liability for cracks in a building caused by defective footing design by the defendant engineers, the "complex structure" argument also failed to convince the judge that the plaintiff had a cause of action against the engineers. At one point in his judgement Derrington J seemed to interpret the view of the House of Lords on complex structures to be confined to a "complex" of several buildings in which damage to one caused by defects in another would be classified as property damage, not pure economic loss. Later he said that there would need to be a reasonably clear distinction between the elements of the building to support a claim of separate damage to other parts of the "complex structure". In the case before him it did not matter, he said, whether the damage appeared in different parts of the building. The position was the same in each case provided the building that was affected was that for which the work was done by the engineers. This, with respect, seems to be correct.

The issue in the *National Mutual* case was confined to the question of whether the plaintiff had a reasonable cause of action. On appeal the Full Court held that, as the decision of the House of Lords in *D & F Estates* that pure economic loss is not recoverable as damages for negligence is in "fundamental conflict with the line of authority in the High Court commencing with *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'*,[131] it cannot be regarded as a secure basis for the resolution of a problem which arises in litigation in this court".[132]

While it is true that *Caltex* leaves open the possibility of a claim in tort outside the *Hedley Byrne* principle, the relevance of *Caltex* to the facts of the *National Mutual* case is rather difficult to discern. As far as latent defects in structures or chattels are concerned, it is submitted that the High Court has not indicated that it will apply the *Caltex* principle to allow the recovery of damages in tort for the reduced value of a structure or chattel resulting from a hidden defect.

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128 [1989] 1 AC 177 at 207.

129 Note 122 *supra*, per Lord Keith at 470.

130 Unreported, Supreme Court of Queensland, Derrington J, 12/12/89.

131 (1976) 136 CLR 529.

132 Unreported, Supreme Court of Queensland Full Court, Macrossan CJ, Kelly SPJ, Connolly J, 30/08/90.

The House of Lords in *Murphy*, in overruling *Anns*, has at last changed the complex structure theory into a workable formula. Lord Jauncey made it clear that a house could not be a complex structure, nor could any building, except in so far as integral components built by one contractor cause damage to other parts of the structure or where defects in ancillary equipment, such as boilers or electrical installations, give rise to damage in the *Donoghue v Stevenson* category.[133]

Thus, the High Court and the House of Lords now seem to agree that third parties affected by latent building defects which have not caused personal injury or damage to some identifiably separate part of the building, or to adjoining property, are extremely restricted in their right of recovery against the negligent designer. Effectively, there is no common law basis for recovery of such economic loss in tort for purchasers, in the absence of reliance on some misrepresentation before purchase about the condition of the building.

133 [1991] 1 AC 398, per Lord Jauncey of Tullichettle at 497.