COMMUNIQUÉ

Newsletter of the New Zealand Architects Cooperative Society Ltd
July 2002

WELCOME TO COMMUNIQUÉ

A MESSAGE FROM THE CHAIRMAN

"Australia, your Liability insurance is about to run out!"

- Will this affect us in NZ?

In the ***1980's*** a similar title graced the cover of Time magazine – "***America, your liability insurance is running out".*** The article that followed under this heading was referring to the unrelenting claims and litigation being experienced in the USA for professional indemnity and public liability actions which were exhausting the financial ability of the professions and the goose that laid the golden egg – ***the insurers***.

Bizarre situations in liability claims existed. Yellowstone National Park was closed to members of the public because the proprietors no longer could buy public liability insurances. Some child wound down the window of the family car in the Bear Park and proceeded to tease the bears with morsels of food. The bear got upset and ripped the child's arm off. The result was the National Park's Public Liability Insurance was cancelled and children and families were denied the opportunity to visit this part of the National Park to observe bears in the wild.

Closer to home, Australia is going through an ***"insurance and liability"*** crisis. Public liability insurance is, for some activities, becoming either too expensive or unobtainable as insurers react to unprecedented claims related to risk exposure and payouts. Professional indemnity insurance is also becoming either too expensive or unavailable exposing the Building Construction Industry, including Architects and Engineers, to the prospect of not being able to carry on in business.

Recent incidents in Australia include the collapse of a Medical Malpractice Insurance Scheme preventing many surgeons from performing surgical procedures; local authorities closing down children's playgrounds because they could not obtain Public Liability and Third Party Liability Insurance. Pictures appeared on the front pages of Australian newspapers showing playground swings padlocked together to prevent their use by children because the local council that owned them could not obtain Public Liability Insurance.

The Association of Consulting Engineers Australia (***ACEA***), the equivalent of New Zealand's ***ACENZ***, reporting of a number of their member firms facing closure because their PI insurance availability had dried up.

It is very likely we could import the same PI insurance difficulties into New Zealand unless we take a very pro-active stand to guard against it.

What are the causes?

While there are some differences with the Australian situation – claims for bodily injury for example – to a large extent other causes are the same (or are likely to be the same).

- Employers of Architects and Engineers, in the main, Developers, Contractors and even Government Departments or Agencies are writing agreements for service that both extend the liabilities of professionals and contain indemnities requiring payouts to them as clients far beyond normal liabilities and beyond the common law duty of care.
- No reasonable or balanced limitations of the liabilities in contract are contemplated. Even for small contracts in Australia the Government Agencies require complete indemnities for all claims and any of their Third Party Liabilities on an *"unlimited"* basis in some cases with a minimum insurance cover up to ***$20 million.***
- The Design Professions and their Liability Insurers are seen as potential *"cash cows"* both by unscrupulous Developers and even by the Courts in seeking huge settlements for damages and exemplary damages.

  As a consequence insurance capital support is lost and liability insurance premiums rise. In the ultimate it is the community that suffers.
- Legislation that was designed to protect Professional Firms in Australia has been ineffective and often in conflict with other forms of Consumer Legislation.
- The lack of sound legislation to address issues such as joint & several liability in favour of proportional liability.
- The intended use by Government Agencies and unscrupulous design-build Contractors of the Professional's Insurance to facilitate the complete transfer of their contractual obligations beyond common law liabilities.
- Successful claims made against Professionals under the Trade Practices Act (Aust.) for errors in professional advice as opposed to demands for compensation based upon actual ***negligent*** acts, errors or omissions – an interesting shift!
- And, of course, the recent unwillingness of Insurers to continue to provide the solutions ($$$$) to the problems with construction projects. (*In New Zealand we are also experiencing similar problems. The proposed revisions to NZS 3910 or NZS 3915 for design-build construction contracts as examples.*)

  (*The recent publicity surrounding leaking & rotting buildings wont help either! Some Insurers already exclude these risks.)*

What can we do about it?

NZACS and our kindred organisations ***(CEAS for example)*** are keeping a very close watch on developments in Australia because it is inevitable that the difficulties that they are experiencing may also impact on the design professions in New Zealand.

Only a pro-active approach will be effective against such unwelcome trends.

The three main areas that we should target are: –

1. ***to seek changes in the legislation so the design professions and their Insurers are not seen as the only "deep pocket" for the social experiments often inherent in the decisions brought down by the Courts; and***

2. ***effective Risk Management; and***

3. ***only fair & balanced Agreements for Services that reflect our common law duty of care that is reasonably insurable***

With respect to the first point above, ***NZACS*** approaches to date have had very little effect on the lawmakers save our very successful combined lobbying with other professions more than a decade ago for a limitation of liability in time which we achieved in the draughting of the Building Act 1991

The ***ten-year*** long stop on the ability of plaintiffs to commence civil proceedings for compensation for building defects under Act was most welcome.

We must continue our efforts to influence the lawmakers towards a far more just system for the sharing of liability for building defects with the removal of the doctrine of *"joint & several"* liability in favour of a *"proportional"* liability system.

We must also continue to press to achieve a sensible cap on liability in terms of quantum, although politically, this is not particularly in favour at present. Perhaps, if the politicians are made to appreciate the seriousness of the impact of high cost of insurance or no insurance availability on the community they may be persuaded to reconsider the issue.

They were convinced back in the 1960's when they passed the original *"no fault"* Accident Compensation Legislation.

The second area of effective risk management also embraces the third point. Initially we must demonstrate to the public *(clients & politicians)* that the design professions have and can achieve reasonable standards of risk management in their consulting activities.

A Code of Practice

The design professions in Australia are considering a Code of Practice that will establish minimum industry standards sufficiently rigorous so as to mitigate potential risk for the Insurers without imposing high compliance burdens on professional firms. It is the view of ***NZACS***, this has to be approached with a fair degree of caution so as to continue to maintain all of the normal common law defences in providing the services with *"reasonable skill, care & diligence"* and not to increase the common law test for negligence to any higher plane.

Many may recoil from the prospect of a Code of Practice, but it may be better to adopt such a measure from within than to have some complex burden of compliance placed on us from without! (Perhaps by our insurers or worse, by regulation.)

Standing Firm

The other and third point is for the Design Professions in New Zealand to stand firm and together in relation to any externally generated Client Terms of Engagement. Only the *"model conditions"* as negotiated within the industry should be acceptable to the professions – the AAS2 and SF1 documents *(long & short form)* in our case and CCCS or the ***ACENZ/IPENZ*** *(short forms)* in the case of the Engineering Profession.

In effect, Clients often *"shoot themselves in the foot"* by imposing uninsurable commercial risk transfers to us. The security of the very insurance funding they seek may well be unobtainable as a result of their onerous requirements.

Have a look at the ***NZACS*** Website and read the Communiqué Articles referred to above. If you are reading this article on E-mail click on www.nzacs.co.nz and access the articles through the *"Members Only"* Section by entering your Member Number that will be ***AC. . . .*** *(as extracted from your Subscription Notice.)* The password is: ***NZACS***.

"Redlight Indicators"

Seemingly innocent words and superlatives added into the text of Client Prepared Agreements for Services can significantly extend your common law liability beyond your available insurance protection

Be especially wary of the words "*indemnity", "hold harmless"," warrants", "guarantee", "all", "highest", "best", "comply", "ensure", "solicitor/client costs", "in connection with", arising out of"* and *"fitness for purpose"* if they appear anywhere in the text of such Client Prepared Agreements for Services.

These are but a few of the *"red light"* indicators, that should put you on your guard that you are being required to accept commercial risk exposures to your own account that will lie beyond your normal duty of care and your insurance availability. In many instances, you are also possibly being expected to carry such commercial risks for no greater fee than would otherwise apply to a reasonably balanced and fair NZIA Agreement for Services.

Be careful out there.

BJ Dacombe – Chairman

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We welcome contributions from readers, on how they manage risk.