tice of nominating specialist subcontractors which are to be engaged by the contractor for specific components of a project.

6. I.Arb.A LIST OF CONCILIATORS AND MEDIATORS

As was mentioned in Issue #1 (see item 9.), the Institute of Arbitrators, Australia has decided to become more actively involved in alternative dispute resolution. Further to this decision and an ADR training course held by the Institute in October, 1988, the Institute has now published a list of conciliators and mediators in a booklet entitled "List Of Conciliators And Mediators (Edition No1 - November 1988)".

This development places the Institute of Arbitrators in the ADR arena along with the Australian Commercial Disputes Centre and several other organisations such as the Law Society of NSW. The American Arbitration Association has provided ADR services for some time now and it would seem a logical development for its Australian counterpart to follow suit. The industry should benefit from this development.

The Institute has a proposed clause for insertion in contracts, where mediation or conciliation is the preferred method of resolving disputes. This clause is as follows:

> "If any dispute or difference arises between the parties to this contract they will consider resolving it in accordance with The Institute of Arbitrators Australia Rules for the Conduct of Commercial Conciliations."

Copies of the Institute's Conciliation Rules and List of Conciliators and Mediators is available from your local Chapter of the Institute of Arbitrators.

7. DRAFT SAA HOME BUILDING CONTRACT

The Standards Association of Australia has published a draft home building contract for public review, prior to finalisation. The draft is entitled **"Draft Australian Standard General Conditions of Contract For Domestic Construction Without An Architect In Attendance"**.

Although the closing date for comments is March 1989, from experience, SAA committees usually give late comments full consideration, provided that they are not so late that committee work is too advanced to do so. Interested readers who were not on the SAA's mailing list should contact the SAA to obtain a copy of the Draft. Those wishing to use the Draft as a contract prior to finalisation should contact the SAA with respect to permission to do so.

The SAA committee, which prepared the Draft, was chaired by John Sharkey of Weigall + Crowther, Solicitors, Melbourne and was established after an SAA Conference on Home Building Contracts in 1986 found that there was a need for a National Standard on construction of domestic homes. The SAA organised this Conference in response to a formal request from the South Australian Minister Of Consumer Affairs that the SAA prepare a standard form contract for domestic building work.

The S.A. Department of Public And Consumer Affairs had been concerned for some time about problems experienced by prospective home owners with building contracts in use in South Australia. In response to these concerns, the Department carried out an investigation and in 1985 published a report entitled "Proposals Paper On The Reform Of Home Building Contracts". One of the recommendations in this report was for the preparation of a fairer standard form contract to replace those then in use in South Australia.

The features of the contract will be discussed in a future article in the Newsletter, when the SAA has finalised and published the Draft. After publication of the finalised Draft, SAA intends to proceed with the preparation of a companion contract covering alterations and additions to existing homes.

8. ARCHITECT'S CHECKLIST

The Royal Australian Institute of Architects has published a checklist system for all in-office aspects of architectural design, documentation and project administration. Called **CHECKIT! - Project Quality Record**, the system includes a progress reporting system based on the checklists.

CHECKIT! can be customised for particular projects by indicating in a check-box whether the particular checklist item is appropriate for the project. Additional checklist items unique to the particular project may be added.

The system comes in a plastic binder with tabbed cardboard checklist sheets designed for repeat use on more than one project and a pad of Project Quality Reports for insertion in each checklist category.

CHECKIT! organises the tasks common to most projects into sequential phases of a typical project, commencing with "Pre-Agreement" and continuing through to "Post Contract Evaluation". There are 26 phases in all, with up to 28 tasks per phase.

According to the introductory comments **CHECKIT!**, purposely does not include many of the tasks that architects would routinely do anyway; it is designed to prompt attention to the coordination aspects of managing a project. The system is particularly designed to assist less experienced team leaders in taking care of the diverse tasks required by an architectural commission.

The concept is an excellent one, which has been well thought through and executed. The system deserves and no doubt will receive great support. In fact, the concept appears so good that one wonders whether it wouldn't form a good model for the development of similar management check systems for other disciplines in the industry, such as for project and construction managers, design and construct contractors, engineers and quantity surveyors.

The system should assist architects in the establishment and implementation of risk management.

Copies of **CHECKIT! - Project Quality Record** are obtainable from the RAIA Practice Division at $45, plus $6 for handling and postage. Cheap at twice the price!

9. BUILDING BRITAIN 2001

The U.K. National Contractors Group commissioned Reading University's Centre For Strategic Studies In Construction to prepare a Report on action required by the U.K. construction industry to remain competitive domestically and internationally through to the start of the next century.

The Report studies the current position of the industry, future change and sets out an action plan. **Building Britain 2001** is of interest and relevance to the industry in Australia. The Report makes the following comments under the heading **"Contracts"**:

> "The contractual issues to be resolved by the industry have never been easy but the present situation in the UK

is confusing and wasteful.

The desire for standardisation based on industry-wide negotiations in committee has created standard forms of contract that are very detailed and very flexible, indeed, too flexible. They allow design to be incomplete at the tender stage, and they allow clients to change their minds during the construction phase. Such flexibility is frequently the source of conflict and delay.

Modern funding arrangements with their high interest charges and risk premiums are, however, less flexible. The desire for certainty and speed in both private and public sectors is becoming paramount, and this is coupled with a need to minimise the exposure to risk.

Until recently the 'Standard Form' was the only standard form and was used and understood by everybody. Today the JCT produces 11 "standard" forms, with other organisations such as the ICE, PSA and ACA producing their own. To keep up to date with even the "standard" forms, which are constantly being amended, is a major occupation. Even then the chances of being sent a "one off" form of contract are high, as is the chance that a "standard form" will be heavily amended.

It is inevitable, therefore, that many members of the industry are carrying out their duties with little or no understanding of the main building contract and their role within that contract. In too many cases the contract is brought out only when problems occur and the participants discover that the role they were carrying out was not that described in the contract documents.

The JCT Standard Form (currently JCT 80) has undoubtedly led to much money and time being wasted on mud-slinging and back-protecting within the building industry. Most clients now recognise this and some are in search of a replacement. However, this is not easy to find and most clients have now realised that no one solution fits every project.

The current favourite, at least in terms of the rate of growth in its use, is design-build. This approach now accounts for 20% of non-housing output by numbers of contracts. However, management contracting, construction management, project management and fee contracting have all been tried extensively.

Design-build is interesting when compared to management contracting. A very high percentage of management contracts are carried out by major contractors on large projects whereas design-build is used on a larger number of small projects being carried out by small or medium sized contractors.

The "JCT with contractor's design" form is extensively used. This is in no small part because it provides a straightforward allocation of responsibility - the contractor is responsible for the design and construction.

Experience suggests that where a straightforward form of contract is available it will rapidly gain popular usage ...

There is desperate need for simplicity and economy of wording, meaning and intent. It is clear from examinations of contract conditions in other countries that this confusion and the lack of clear lines of responsibility are avoidable. For example we can point to the kind of directness and clarity the Japanese achieve in their General Conditions of Construction Contract (November 1966). This document comprises just 30 articles and 10 pages. Its philosophy is embodied in Article 1: 'The Owner and the Contractor shall perform this Contract sincerely through cooperation and in good faith'."

The Report makes the following comments under the heading **"Single-Point Responsibility":**

> **"Key message: Give clients a service with single-point responsibility**
>
> Clients want completion on budget, on time, and value for money but above all they rightly expect their buildings to work properly when they are delivered.
>
> There is a need for single point responsibility where the risks and responsibilities for the finished building are clearly defined and carried by the party best suited to carry the responsibility, with a fair return.
>
> This is not a plea for design and build contractual arrangements, merely for further evaluation of how the industry does business. A completely new approach might be to copy the idea of the Japanese enterprise groups where collections of companies are bound together by cross-directorships and financial interest.
>
> Hence we might join John Laing plc in the same enterprise group as Scott, Brownrigg and Turner (the integrated design practice) and the HAT Engineering Group. The companies trade as separate independent companies but they have a loose association.
>
> A long term relationship helps the development of better understanding and provides a framework for providing single-point responsibility.
>
> **Action**
>
> Companies should consider how they can give clients single-point responsibility and they should explore new ways of working to achieve this.

In its action plan, under the heading **"Building Contracts And Contractual Disputes"**, the Report states:

> **"Key message: Stop meddling with the standard forms of contract**
>
> The consultative bodies for the industry have invested heavily in time and effort to produce standard forms of contract for traditional and many new methods of procurement. While clients are increasingly demanding more customised contracts, the level of onerous and ad hoc amendment to standard forms is confusing to all the parties and tends to generate an adversarial approach which can and does lead to disputes. Over the past twenty years, loss and expense contractual claims have attacked British industry like a cancer.
>
> The fault lies in the industry's attitudes. We think in the short term; we value short-term profits rather than long-term relationships. We must stop regarding the tender price as merely another stage of the negotiations. Clients need certainty.
>
> **Action**
>
> Companies must develop a new approach to con-

tracts, recognising the damage caused by contractual claims. Rather than using our best legal brains to advise on a dispute after it has happened, we would be better advised to use our legal advisers much more widely prior to signing the agreement. Meddling with the standard forms is unhelpful and leads to disputes.

Future contract practice must, therefore, concentrate on the product to be delivered and establish clearly the roles of design, management, and site assembly. Once the roles and responsibilities are established within a consistent project strategy, the liability for execution (or failure) will be unequivocal."

10. WAGE CLAIMS/NATIONAL WAGE CASE

As the assumptions of the Federal Government's last budget are one by one proved wrong, so the 1989 wage-fixing scenario becomes more and more uncertain.

In September last year, things appeared reasonably predictable. There would be tax cuts in July which would remove pressures for a general wage increase. Wage increases for particular industries would only be available if substantial progress had been made in implementing changes under the "structural efficiency" principle.

That orderly procedure is getting less and less likely. Unions in more and more industries are realising that "structural efficiency" is a difficult concept, and that it is not easy even to identify the sort of issue which should be discussed, let alone achieve substantial change. At the same time there is growing support for a general wage claim based on traditional cost of living grounds.

The situation is still very fluid. Much will depend on the Federal Government's position on tax cuts, and on the outcome of the Arbitration Commission's review of the wage-fixing principles which is to begin soon.

It is expected that the unions are likely to claim two elements:

- an unconditional across-the-board increase in the second half of 1989;
- a further increase in the second half of 1989 based on industry restructuring.

There may also be concerted efforts to increase the prevailing level of site allowances later this year. It is too early to predict the extent to which this will be a co-ordinated national campaign.

11. OPERATING LEASES

Due to the importance of leasing and financial arrangements to the construction industry, particularly in relation to plant and equipment, in this article Sydney solicitor John Hewitt considers the leasing implications of one of the new accounting standards.

There is a widely held conviction amongst many members of the corporate and financial fraternity that they have been drawn into a "paper chase" by Australia's beloved official bureaucracies. One of the trying issues is the understanding and application of the accounting standard ASRB 1008, which relates to leases and how they are to be shown in a set of financial accounts.

The problem for the lessee (i.e. the user of the leased asset) is that all leases, other than operating leases, must be shown on the balance sheet. This is in stark contrast to previous reporting requirements.

As an illustration, assume that a company with issued share capital of $5 million leases $10 million worth of equipment which, in turn, it hires to a third party which guaranties an income stream.

In pre-ASRB 1008 times, the balance sheet would carry a note on the amount of lease payments that were due in future years, but would not show the $10 million asset or the corresponding liability on the face of the accounts.

In ASRB 1008 times (i.e. from January 1, 1988) the asset is shown net of depreciation, whereas the liability is shown on the full pay-out figure. In other words, after one year the asset may have been depreciated down to $8 million whereas the pay-out liability may well be $9.5 million.

The problem in the post-ASRB 1008 example is that the lessee's gearing ratio is approximately 195 per cent. This (irrespective of the revenue stream generated by the asset) will directly affect the company's ability to raise further credit.

A solution is to remove the liability from the balance sheet by writing an operating lease. This new lease form differs in a number of ways from the traditional finance lease. Without going into the finer details, one can simply follow the rule that, with an operating lease, the lessee has no rights or obligations over the asset at the end of the lease.

The lessee no longer pays out a lump sum at the end of the lease in order to own the asset. Instead, the lessee purely rents the article for the term, after which it is returned to the lessor (the finance company) in good working order and repair. By giving up the rights to such an asset, the lessee loses the "upside" resale profit potential on the residual. But the lessee also achieves the desired off-balance sheet goal, with the added advantage that the lessee carries no residual risk.

The finance company (lessor) will be the party taking that long term residual risk, which will be a very real risk if the market value declines to below the residual value written into the lease.

The problem is to find lessors willing and able to take asset positions at the end of the lease term. No bank or finance company wishes to own or become a dealer in used assets.

The lessor may turn to the supplier of the equipment for some form of buy-back agreement, but in the majority of cases these days the supplier will decline. Why? You've guessed it - quite apart from the commercial risk, the supplier does not want to load its balance sheet.

A solution to the lessor's residual problem appears to lie with the insurance industry taking the residual risk. There is at least one Australian company, Asset Underwriting Pty Ltd specialising in placing residual value insurance cover.

Asset Underwriting's insurers will guarantee a future residual value on an asset whereby the lessor is protected against any major diminution of asset resale values.

Peter Wedgewood of Asset Underwriting says, "the role of the insurer is to remove the contingent risk of residual loss from the lessor's own balance sheet, without taking commercial risk in future resale values. For example, if traditionally an asset sells for 60 per cent of its original value after a four-year period, Asset Underwriting would probably insure at a 40 per cent level."

Real property naturally falls into a different category, as real property value underwriting can be in the 85 per cent of costs bracket.