Lawyers invaluable for microeconomic reform

*By Professor Kim Lovegrove**

For microeconomic reform to be truly effective, it should be allied with law reform, as it is only through changing the law that one can convert the idea into the system that gives effect to the idea.

Accordingly lawyers can play a pivotal role in not only legislative drafting but legislative crafting.

The author has found that effective microeconomic reform is best engineered when the rationale is based upon empirical, fact-based comparative research and analyses rather than theoretical or hypothetical. A case in point was in the early nineties when the author headed up a team in Australia that developed a National Model Building Regulatory Reform template (National Model Building Act).

Seven Australian jurisdictions adopted much of the template and one of them, Victoria, established a practitioner registration system, key features of which have been incorporated into the New Zealand Building Act.

The team was given the task of devising a system that would streamline dispute regulation systems, expedite building approvals and turnaround time (to remove consent bottlenecks), improve practitioners' skill sets and reform liability regimes.

To do this, dramatically different and new legislation was introduced in the nineties. Resulting from this new law:

- a system of private building certification was introduced so that private building surveyors in competition with councils could issue building and occupancy permits;
- building practitioners were compelled by law to be registered and insured – it was recognised that private certifiers would need a watchdog body to ensure that they did not compromise their statutory duties on account of economic incentivisation to take the wrong path;
- joint and several liability was replaced with proportionate liability; and
- a 10-year period for the initiation of legal proceeding was established.

The result

By changing the law in a number of jurisdictions, the policy aims found their way into acts of parliament and profound and systemic change occurred in seven Australian jurisdictions. In the case of Victoria:

- the freeing up of the building permit process culminated in building permit approval times dropping from an average of weeks and worst case scenario of months to days;
- the introduction of proportionate liability culminated in fair allocation of accountability between practitioner co-defendants and the new system of compulsory insurance enabled plaintiffs for the first time to have the guarantee of insured construction work – consumer plaintiffs had insurance and defendants "copped" no more than their share of responsibility;
- the registration system that has grown to cover 24,000 building practitioners provides a quality and disciplinary regime that has improved skill sets over the years and has also flushed out the recalcitrant; and
- 18 years after the Act was established, the reforms have remained intact and the act pioneered comprehensive tort reform in Australia in the early third millennium when proportionate liability was introduced uniformly in many non-construction related sectors.

Why was the reform successful?

We were able to engineer the support and ratification of the nine Australian building regulatory ministers and the nine Attorneys-General. The support was forthcoming because the philosophies that underpinned the reforms were robust and manifested the complements of economic improvement and improved public safety. The decision-makers were able to sell a reform concept where one could "have the cake and eat it too", which eased parliamentary passage.

The team comprised seasoned construction technicians and open-minded lawyers, with expertise that had been fashioned for the task.

The team was given a blank canvas and was pretty much able to give effect to the fashioning of world's best practice. From a law reformer's perspective this was as close to Camelot as it gets. This blank canvas was what made the experience so successful.

Vital also was a preparedness to change the regulatory status quo. Consistent with this was the establishment of a research rigour that was heavily focused on international comparative analyses and a lack of self-consciousness and provincialism in importing philosophies based upon the offshore tried and true. Proportional liability was imported from some US jurisdictions and 10-year liability capping was imported from the Napoleonic Code. Private certification was a local invention.

However without the ability to change the law, change would have remained a hypothesis or an idea rather than culminating in reality. As the project director of the consultancy, the writer coordinated the legal reform team and, in conjunction with a senior civil servant, the policy and reform team.

The law reformers worked in cohorts with the policy drivers from idea, fleshing it out, consultation, governmental endorsement, parliamentary assent, to implementation. The continuity and retention of key personnel from "cradle to grave" ensured that the law reformers gave effect to the aims of the legislature.

Another decisive ingredient was a determination to be heavy on the empirical and the tangible and light on the theoretical.

We were in the very fortunate position of being able to go back to the drawing boards with a mandate to advise on changing the whole system if necessary. Most acts of parliament are the product of incremental metamorphosis, regulatory tuning so to speak.

Less common are new acts of parliament that replace previous acts of parliament. The National Model Building Act evidenced the latter and in circumstances where a reforming jurisdiction is intent on total system overall it provides a useful reference point.

It also provides a model where lawyers and policy formulators, through the cross-fertilization of their skills, can become effective enablers of micro economic reform.

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