The new Building Act

A revolution in building regulations and liability reform

by Kim Lovegrove

The *Building Act* 1993 will introduce significant and innovative reforms into the Victorian construction industry.

The Victorian *Building Act* 1993 (the Act) received royal assent in Parliament on 14 December 1993 and proclamation of the Act occurred on 1 July 1994.

This article summarises and explains the main reforms and most innovative changes of the Act as well as providing a brief history leading to the reforms.

EVOLUTION OF THE ACT

Beginning in 1990, extensive research of both local and overseas (Europe, U.K., New Zealand, Singapore and Hong Kong) legislation was conducted to extract the most effective and utilitarian concepts of building regulations from a variety of regulatory systems. Consequently some overseas concepts were adapted (e.g. 10-year liability capping/decennial liability — France; removal of joint and several liability — certain jurisdictions of the U.S.A., private certification — New Zealand).

In July 1991 the Federal, State and Territory ministers responsible for building regulations met and agreed upon the principles which formed the basis of the legislative drafting instructions. Subsequently the Standing Committee of Attorneys-General agreed to the engagement of the Chief Parliamentary Counsel's Committee to Prepare a National Model Building Bill. The *National Model Building Act* was published in December 1991.

In 1992 the new Victorian *Building Act* was drafted, incorporating some of the reform concepts of the *National Model Building Act*.

MAJOR REFORMS

The new Victorian Act contains several major reforms:

☐ ***A privatised option for the granting of building approvals***

The public can now choose either a council or private sector building surveyor to issue building approvals.

☐ ***Ten-year capping***

The *Limitation of Actions Act* 1958 has been replaced with a ten-year limitation period that commences from the date of issue of an occupancy permit or a certificate of final inspection.

☐ ***No joint and several liability***

The doctrine of joint and several liability will have no application to the jurisdiction of the *Building Act*. The new legal approach, irrespective of the solvency of the co-defendants, will be that once a court has made an award for damages, the court, in assessing a person's liability for damages, will allocate to a defendant no more than his or her judicial apportionment or share.[1]

☐ ***Compulsory insurance***

Building practitioners will have to carry professional indemnity cover as a prerequisite to practice in their field.

☐ ***Registration of building practitioners***

All building practitioners will have to register with the Building Practitioners' Board.

☐ ***Commission***

A new Building Control Commission will be established to replace the Division of Building Control. It will be funded by a statutory levy of 0.064% of the cost of building work.

☐ ***Councils can opt out of building approval***

A council can opt out of building control as long as it enters into an alternative arrangement for the provision of the service.

☐ ***A new owner-builder requirement***

If a commercial owner-builder sells a building within ten years of constructing it, the owner-builder must obtain a report from a prescribed building practitioner. The report will divulge information pertinent to the condition of the building to enable a purchaser to make an informed decision.

These reforms are significant because they are in many respects unprecedented and pioneering within the Victorian context. The *National Model Building Act* has however been largely adopted by the Northern Territory, and some of the liability reforms have been proclaimed in South Australia.

PHILOSOPHY OF THE LEGISLATION

The Act is a package of complementary reform initiatives and elements. On the micro-economic reform front it introduces competition between private and local government building surveyors. This is to expedite the issuing of building approvals. Parity is introduced by deregulating building fees to enable councils to charge competitive rates.

On the liability front, an element of consumer protection is introduced by the inclusion of ten-year capping triggered by a non-contentious start date. Compulsory insurance ensures financially viable defendants in legal proceedings. Rescission of the application of joint liability introduces equitable risk allocation and responsibility for blame.

THE MOST SIGNIFICANT REFORMS

1. ***Liability: the ten-year cap and the clear evidential liability trigger date***

The Traditional Position

The *Limitation of Actions Act* 1958 provides a six-year limitation period for the commencement of legal proceedings. A plaintiff has six years to commence legal proceedings. Ostensibly sensible enough, but for the building industry there were two major problems, namely:

1. international statistics revealed that there was a high incidence of claims detection for buildings older than six years, particularly for defects that took a long time to evolve from the latent to the discernible phase. It was therefore considered by some that a six-year period was inadequate;[2]
2. there was a disparity of judicial opinion as to when the liability period started to run.

In the case of *Pirelli General Cable Works Ltd.* v. *Oscar Faber & Partners*[3] it was held that the cause of action accrues at the time of damage whether the damage is discernible or not.

The conflicting test, the "from when the damage is discernible test," has its origins in *Anns* v. *Merton London Borough Council.*[4] This test has been followed in a line of cases, the most notable recent one being *Pullen* v. *Gutteridge Haskins & Davey Pty. Ltd.*,[5] which held that the cause of action starts to run from "when the damage was manifest and known". Needless to say the two tests are at odds with one another, giving rise to a great deal of plaintiff and defendant angst.

In 1991 the Hon R.A. Dowd, a former N.S.W. Attorney-General, conducted an inquiry into limitation periods. The resulting report revealed that "*Pirelli* was considered to be the applicable case law at the moment although the matter is not entirely settled". The report added that "the present law is unsatisfactory for all of the parties. For the victim of a negligent act or omission the starting date for the reckoning of the period of limitation is the date when the damage