NEW LIABILITY RULES SEVER TRADITIONAL LINKS WITH BRITISH LAWS

New Property - Building and the Law

By KIM LOVEGROVE

A CONFERENCE speaker once said that "the Building Act 1993 liability reforms have severed the British judicial umbilical chord". He added that the reforms heralded a radical departure from traditional case law, much of which is British based. In addition, they represent a cultural change, because much of the liability concepts are now based upon French "liability decennial" laws.

The new liability laws are indeed revolutionary and pioneering. They deviate from the traditional and troublesome approach to liability law that has been a legacy of many years of unrewarding case law debate and plaintiff and defendant angst. Foremost, they establish a new legal logic.

The major reforms are a 10-year liability limitation period, commonly referred to as the "10 year cap". Second, joint and several liability is now replaced with proportionate liability where no defendant pays more than their proportion of damages.

Before the introduction of the 10-year cap, practitioners were effectively at risk of being sued in perpetuity for defective building work. This was reinforced in the High Court case Bryan versus Maloney, where a builder was sued more than a decade later by a third successor in title.

The reforms were prophetic in that those with carriage of the reforms predicted that future case law could generate such perpetuity exposures. With the 10-year cap, building law suits now have to be initiated within 10 years of issue of a building occupancy permit. Ten years hence, a statutory guillotine severs the right to issue legal proceedings for defective building work. Actions for bodily injury or fatality are, however, excluded. The net effect is clarity.

A 10-year period was chosen for two reasons. There were legislative precedents, namely, countries that had adopted the Napoleonic Code. Second, international statistical analyses revealed that there where virtually no claims dating back more than nine years. It was considered that the figure was sensitive to public-minded dictates.

It is worth noting that Building Occupancy Permits have a new legal significance. They provide documentary evidence that the building is fit for occupation and are evidence of a non-contentious trigger date for the 10 year liability period. Such clarity bodes well for the insurance industry because it enables insurers to forecast and quantify construction liability risk. It also augers well for practitioners because they know the duration of their exposure to law suits.

It is a pity that five of the eight states and territories do not have a 10-year cap. Practitioners in these jurisdictions bear the full brunt of Bryan versus Maloney and are at risk of being sued decades later. Coupled with the lack of effective insurance cover,

they are in a much higher risk environment than Victoria, NT and SA (who have introduced the 10-year cap).

The second significant liability reform involves the removal of joint and several liability, or the deep-pocket syndrome as it is often called. This iniquitous doctrine provides that solvent parties in multi-defendant proceedings often assumed liabilities of insolvent parties because each defendant is severally liable for the other.

The doctrine encouraged the practice of "scatter gun" law suits, where plaintiff lawyers sued a wide cast of practitioner defendants in the hope of finding an insured defendant who could pay up.

Councils became popular defendants and came to be known as "insurers of last resort". This was because councils, by virtue of the rating system, had significant financial resources. The doctrine was the bane of the insurance industry because insurers frequently became defacto underwriters for insolvent parties. An example was insured engineers and architects who often assumed the liability of insolvent builders if they had the misfortune of being joined in the same legal action.

Joint and several liability was rendered inoperative by the Building Act 1993. It is replaced with proportionate liability. Easily explained, it means in any building action, a court, in assessing a liability for damages, will allocate to a defendant no more than his or her judicial apportionment. The apportionment will be based upon the individual's contribution and responsibility for fault.

It is worth noting that the Federal Government has released a discussion paper investigating the possibility of blanket removal of the doctrine. Such talk did the rounds when we developed the Model Building Act in 1991 yet to date only Victoria, the NT and SA have removed its application.

These liability reforms have historic significance because they evidence a radical departure from traditional Australian and British approaches to liability law. They have, nevertheless, been well received by consumers and practitioners alike. This is because they have introduced a more equitable approach to liability apportionment.

Kim Lovegrove, building contracts lawyer.