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Kim addressing the conference

Introduction

- In this presentation I will be discussing the divergent approaches Australia and New Zealand have adopted with respect to liability apportionment and statutory limitation regimes in the building law context. The focus will be upon:

    - Proportionate liability in Australia,
    - Joint and several liability in NZ,
    - limitation periods in both Australia and NZ.
    - Compulsory insurance in some Australian jurisdictions.

What is the distinction between proportionate liability and joint and several liability?

- Building projects are typically undertaken by a multitude of building practitioners When defects arise, liability is often multi-causational the authorship of which is attributable to multiple actors.
    - Proportionate liability operates to 'apportion' liability from an 'apportionable claim' between 'concurrent wrongdoers'- each wrongdoer can only be held responsible for the 'portion' of the damage that it caused, thereby avoiding a situation where the plaintiff can recover it's entire loss from a single defendant.[1]

[1] Australian Government Solicitor, 'Legal Briefing-Proportionate Liability' (Legal article 16/11/2015) <https://www.ags.gov.au/sites/default/files/2022-05/lb20151116-proportionateLiability.pdf>.

- Joint and several liability on the other hand is one "joint" obligation and multiple "several" obligations.[2] Performance by one person discharges all the others of their obligations, however until discharged each individual is liable for the entire obligation.[3] The joint and several liability doctrine ensures that solvent defendants assume the financial liabilities for damages awarded against impecunious defendants and joined parties in circumstances where adjudicated liabilities are visited upon the cohort of responsible co-defendants pursuant to a judicial determination.
    - Typical euphemisms for joint and several liability are:-
        - "deep pocket syndrome"
        - "insurers of last resort"
        - "the last man standing"
- In New Zealand, joint and several liability is the apposite apportionment doctrine and in Australia proportionate liability is the apposite liability apportionment doctrine.

That which is contended as being the advantage of each doctrine

Proportionate Liability

- Fault based apportionment of financial accountability, each party is responsible for paying a portion of the damages equal to their degree of fault.
- It reduces the financial burden on parties who were only minimally at fault as they do not have to assume the financial liabilities of other members of a respondent cohort, regardless of their cohort(s) pecuniosity or lack of.

Joint and Several liability

- Ensures the plaintiff is fully compensated for their losses **provided there is at least one deep pocket.**

Proportionate Liability

For Proportionate Liability to apply

a) the claim must be apportionable;

b) the defendant must be a current wrongdoer; and

[2] Legalvision, 'What does joint and several liability mean?' (Legal article, 21/10/2022) https://legalvision.com.au/joint-several-liability/#:~:text=Joint%20and%20several%20liability%20arises,the%20others%20of%20their%20obligations.
[3] Ibid.

c) proportionate liability must not be excluded. This can be due to:

- intentional or fraudulent conduct.
- where proportionate liability is excluded by other legislation.
- vicarious liability and the liability of a partner.[4]

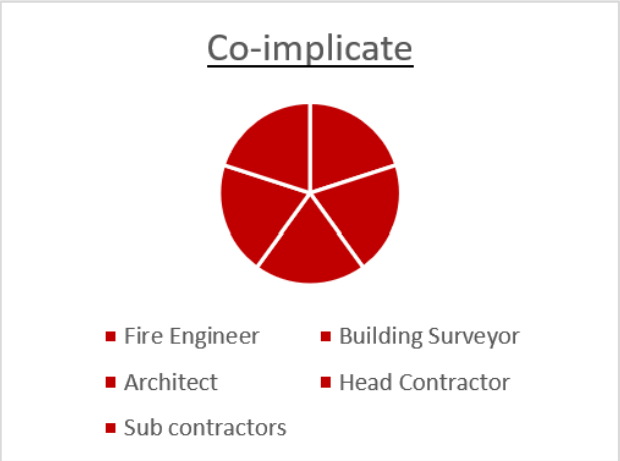
Some observations about proportionate liability in operation

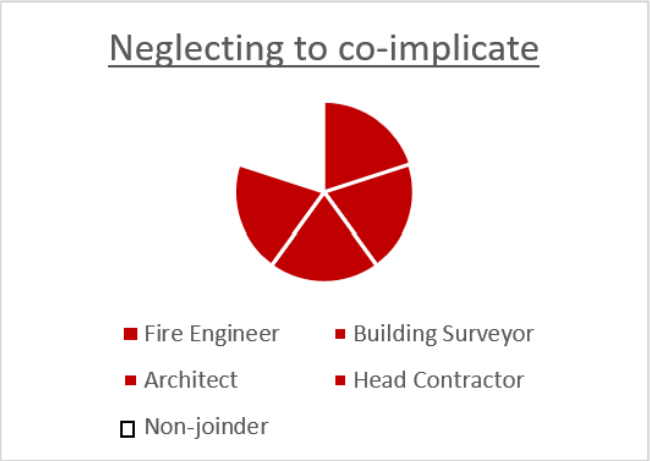
- There are those that contend that proportionate liability laws can be complex and are often resource intensive. Some of the criticism could be evidenced in the original state and territory versions of proportionate liability, in that:
    - When people are initiating legal proceedings, it is critical that they have a clear view on the identification of all responsible actors that are authors of a construction act, error or defect.
    - This may mean that they have to spread the net wide for fear of omitting to implicate a potentially responsible party.
    - The consequences of neglecting to co-implicate a responsible party could mean that there is a gap in the aggregate settlement sum when a judicial determination is handed down.
    - Hence, absent the joinder of all parties responsible, the plaintiff may find themselves 'short changed' when an award for damages is handed down.
    - Notwithstanding the above, it is submitted that these logistical issues concerning joinder would also be in play with the application of joint and several liability where there may even be a greater need to locate defendants that enjoy solvency status in perpetuity.

Hypothetical demonstration of aggregate costs to rectify a $1,000,000 damages award.

- In pie chart number one, all relevant actors are joined, the judge finds that all of the joined parties are culpable and damages are visited upon all 5. The plaintiff will receive damages in full provided they are all solvent.
- In flow chart 2, 5 parties are responsible yet only 4 are joined. The judge hands down a determination where each of the joined parties is found liable in aggregate, but only for 80% of the total damages. The plaintiff in these circumstances would be deprived of 20% of an award by virtue of the non-joinder of a key actor.

[4] Price Waterhouse, 'Proportionate liability' (legal publication, 2016) <https://www.pwc.com.au/legal/assets/investing-in-infrastructure/iif-42-proportionate-liability-feb16-3.pdf>.



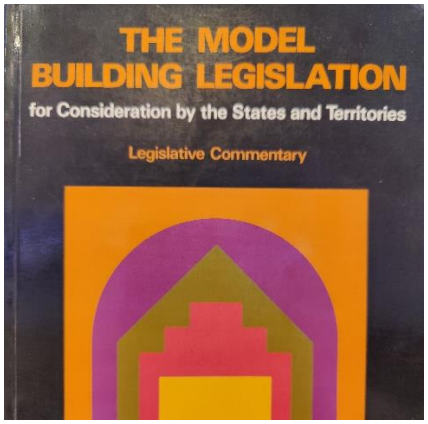


- Because only 4 parties were joined and found liable for $800,000 there has been a short fall of $200,000 due to the non-joinder of a key actor.

History of proportionate liability evolution in Australia.

- Codification of proportionate liability first appeared in Australia in 1990 when the Australian Uniform Building Regulatory Co-ordinating Council commissioned a consultancy to generate the National Model Building Act. The "NMBA" was published in 1991. The model act was drafted by the NSW Offices of Parliamentary Counsel at the behest of the Australian Chief Parliamentary Counsels' Committee having received the sanction of the Australian Attorney General.
- The concept was proffered with the ultimate intention of creating a more balanced and fair liability apportionment landscape.
- The NMBA proportionate liability template was adopted in the Victorian Building Act 1993 and joint and several liability was replaced by the now subsumed section 131 of the Building Act 1993.
- The NMBA was designed to remove the 'overweight assumption of risk' by solvent concerns when the adjudicated liabilities of insolvent parties were visited upon them; an assumption of risk that is part and parcel to the British based joint and several liability doctrine.

If you refer to **appendix 1**, we have included the passage from the "The Model Building Legislation" that quotes verbatim the rationale that underpinned the proportionate liability reform.



The precise words were in the NMBA were as follows.

Section 180:[5]

- *(1) After determining an award for damages in an action, a court is to apportion the total amount of damages between all persons who are found in that action to be jointly and severally liable for those damages, having regard to the extent of each persons responsibility for the damage.*
- *(2) The liability for damages of a person found to be jointly or severally liable for damages is limited to the amount apportioned by the person by the court.*

- The concept was not native to Australia. The writer when he headed up the team that developed the NMBA looked offshore to identify jurisdictions where proportionate liability applied.
- Coinciding with the introduction of state and territory legislated proportionate liability, was the introduction of compulsory registration and insurance for key actors in both Victoria and the Northern Territory.
- It is this writer's strongest contention by way of reiteration that proportionate liability should not be introduced absent the paramount complement of compulsory insurance for key actors.
- When proportionate liability was first legislated in Victoria under s131, some of the operational issues brought before the Courts were:
    - Whether proportionate liability applied on the basis that the dispute was a "building action", as defined under section 129 of the Building Act 1993,[6] and

[5] Kim Lovegrove et al, *The Model Building Act: For Consideration by the States and Territories* (Federation Press, 1991).
[6] Tony Horan, 'Proportionate liability: Towards national consistency' (Legal Publication, 09/2007) <http://www.justice.tas.gov.au/__data/assets/pdf_file/0017/113624/Horan_Report.pdf, 22;>. Australian Rail Track Corporation Ltd & Anor v Leighton Contractors Pty Ltd & Anor [2003] VSC 189

- Procedural complexities primarily arising from the requirement (similar to the current Victorian PL provisions) that a defendant is only entitled to limit it's liability under PL by reference to other 'defendants' who had been joined as parties to the litigation. [7]
- There was a tendency for defendants to join a multitude of extra parties as defendants in order to limit their liability. This resulted in an expansion of litigation, delay in prosecution and resolution, and greater difficulties in reaching settlements because of the increased number of participants.[8]

- The question in regards as whether one has to join multiple parties to joint and several and liability proceedings may be unresolved. Having said that the paramount objective of proportionate liability is to provide holistic and fair apportionment of liability, which is achievable with compulsory insurance upon publication of a judicial determination. That is the paramount and overriding objective of the proportionate liability/compulsory insurance scheme. Yes, there may be joinder complications, hence the need to use skilled practitioners to ensure that all relevant parties are captured within the wing space of the co-defendant cohort

Initial state versions that promulgated proportionate liability provisions

- In the early/mid 90's, the initial proportionate liability sections were introduced, however most have since been repealed by other superseding proportionate liability provisions:
    - Vic- *Building act* 1993 s131 – repealed
    - NSW- *Environmental Planning and Assessment Act* 1979 s109ZL – repealed
    - ACT- *Construction Practitioners Registration Act* 1998 s26(1) – repealed
    - NT – *Building act* 1993 s155 – repealed.
    - Tas – *Building Act* 2000 s252 – repealed.
    - SA- *Development act* 1993 s72- remains current. While the current SA Act applies PL to cases where a defendant is liable, all other PL Acts refer to 'apportionable claims', rather than to liability.[9]

[7] Tony Horan, 'Proportionate liability: Towards national consistency' (Legal Publication, 09/2007) http://www.justice.tas.gov.au/__data/assets/pdf_file/0017/113624/Horan_Report.pdf, 22; NBD Bank v South Italy Tiling SA And Anor [1997] SADC 3596

[8] Tony Horan, 'Proportionate liability: Towards national consistency' (Legal Publication, 09/2007) <http://www.justice.tas.gov.au/__data/assets/pdf_file/0017/113624/Horan_Report.pdf>, 84.

[9] Tony Horan, 'Proportionate liability: Towards national consistency' (Legal Publication, 09/2007) http://www.justice.tas.gov.au/__data/assets/pdf_file/0017/113624/Horan_Report.pdf, p13

Current Acts and convergence of approaches

	VIC *Wrongs Act 1958* s24AI	NSW *Civil Liability Act* s35	QLD *Civil Liability Act* s31	WA *Civil Liability Act* s5AK
Commencement	Action commenced post 1/1/2004	Claim arises by 26/7/2004 and action by 1/12/2004	Action commenced post 10/3/2005	Claim arises after 1/12/2004
Contract Out	No (but silent)	Yes	No	Yes
Apportionment to absent wrongdoer	No (except when dead/wound up)	Court may	Court may	Court Must
Is defendant obliged to inform plaintiff of other wrongdoers?	No	Encouraged. Failure to do so could make them liable for costs by the plaintiff.	Yes (obliged)	Encouraged. Failure to do so could make them liable for costs by the plaintiff.

This information in this table is sourced from Minter Ellison article footnoted below.[10]

Current Victorian proportionate liability legislation: Wrongs Act s24AI

- Australian example Victorian Wrongs Act.

WRONGS ACT 1958 - SECT 24AI:

Proportionate liability for apportionable claims

(1) In any proceeding involving an apportionable claim—

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and

(b) judgment must not be given against the defendant for more than that amount in relation to that claim.

(2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim—

(a) liability for the apportionable claim is to be determined in accordance with this Part; and

(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

[10] MinterEllison 'How is apportionment of responsibility assessed?' (Legal publication) <https://constructionlawmadeeasy.com/construction-law/chapter-21/how-is-apportionment-of-responsibility-assessed/>.

(3) In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up.

- Australian construction lawyer and Victorian Civil and Administrative Tribunal sessional member Tony Horan contends that the original Australian proportionate liability laws did not expressly define the underlying purpose of the legislation. However, it appears that the original national legislative policy intended to limit the liability of 'deep pocket' defendants to their apportioned liability to a plaintiff, so that their professional indemnity (PI) insurance would not be required to cover the liability of other impecunious defendants.[11]
- In so far as the shaping of the proportionate liability rationale with regards to the NMBA that predated said section 24A1, Tony Horan is entirely correct with regards to the rationale that underpinned the original incarnation of proportionate liability as evidenced by the following passage in the book, The Model Building Legislation for Consideration by the States and Territories[12] (edited and co-authored by the presenter at page 126).

    - *"There is limitation on liability for persons jointly and severally liable. It will be incumbent on the court to apportion the amount of damages between all persons found liable but no party will have to pay any more than their judicially apportioned percentage.*
    - *There is also a provision that will enable the regulations to dictate classes of building practitioners who will have to carry professional indemnity cover. This provision bears testimony to the fact that at present in many instances, plaintiffs are frustrated by the inability of defendants to pay their portion of a judgement. It is envisaged that the regulations will make it obligatory for building practitioners such as engineers, architects, and surveyors to carry professional indemnity cover at all times to enable them to meet their financial obligations to aggrieved plantiffs".*

- NSW, Tas and WA are permitted to 'contract out' while QLD prohibits contracting out. Other jurisdictions are silent.

[11] Tony Horan, 'Proportionate liability: Towards national consistency' (Legal Publication, 09/2007) http://www.justice.tas.gov.au/__data/assets/pdf_file/0017/113624/Horan_Report.pdf,

[12] Kim Lovegrove et al, *The Model Building Act: For Consideration by the States and Territories* (Federation Press, 1991), 126.

- The Victorian *Wrongs Act* expressly allows contracting out in a number of it's other provisions; no explicit reference may suggest that it is prohibited in PL.[13]

With regards to the application of proportionate liability judgement regard should be had to a specific factual matrix:

- The Victorian Lacrosse decision confirmed the apportionment principles[14] of factual enquiry. Judge Woodward pointed out that judgement should be made in regard to a "specific factual matrix"; all relevant facts- **not** purely the contractual terms.[15] This means the relative importance of acts in question in causing the plaintiff's loss, and culpability (not moral blameworthiness) but the degree of departure from the required standard.[16]

Joint and several liability as applied in NZ

Law Reform Act 1936

17- Proceedings against, and contribution between, joint and several tortfeasors

(1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—

***(a)** judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage:*

***(b)** if more than 1 action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, civil union partner, de facto partner, parent, or child of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise), the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action:*

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[13] Australian Government Solicitor, 'Legal Briefing-Proportionate Liability' (Legal article 16/11/2015) <https://www.ags.gov.au/sites/default/files/2022-05/lb20151116-proportionateLiability.pdf>.

[14] *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492.

[15] *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T & Ors* [2021] VSCA 72.

[16] Pennington v Morris (1956) 96 CLR 10; David Denton, 'Economic loss or damage to property and the proportionate liability regime' (legal publication) < http://www.davidhdenton.com/uploads/2/3/1/2/23125402/economic_loss_and_damage_and_the_proportionate_liability_regime.pdf>.

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

- Unlike clear legislative enunciation of the proportionate liability doctrine in various statutes in Australia, there does not appear to be any equivalent statutory enunciation and definition of joint and several liability in NZ. Rather this is determined by common law[17] and there is "passing" reference to 'joint and several tortfeasors' in section 17 of the Law Reform Act 1936.[18]
- Mention is made that is more in the nature of an 'aside' rather than a definition. If NZ is intent on continuing with joint and several liability in the long term, codification of the common law rule by way of legislative definition would serve a useful purpose. Furthermore, it is not easy for the layperson to locate apposite statutory insight mindful of the fact that, that which exists is found in the Law Reform Act rather than a dedicated Wrongs Act or liability apportionment statutory instrument.

The application of the doctrine in New Zealand

- Joint and Several liability allows a plaintiff to recover the full amount of damages from any one defendant, even if that defendant was only partially responsible. This is euphemistically known as "last man standing" rule.
- New Zealand territorial authorities and insurers have opined that this has led to unfairness after the leaky building crisis.
- The harshness of joint and several liability on a defendant is abrogated to some degree by section 17 of the *Law Reform Act 1936*, which limits recoverable damages to those awarded in any first action.

[17] Law Commission of New Zealand, 'Review of Joint and Several Liability' (NZ legal policy publication, 11/2012) <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP32.pdf>.
[18] Ibid.

- The "release rule" applies in that release of one joint tortfeasor discharges all others.[19]

In New Zealand, there is a long-standing debate about joint and several liability

- In New Zealand, there is a long-standing debate about joint and several liability[20] and whether this scheme should be replaced with proportionate liability.[21] This question was put to the New Zealand Law Commission by the New Zealand government in 2011; a key catalyst to this being the NZ leaky building crisis.
- In 2014, the Commissioner of the report and president of the New Zealand Law Commission Hon Sir Grant Hammond gave recommendations concerning the NZ joint and several liability and proportionate liability argument, concluding:

    - "There are a number of alternatives to joint and several liability, but we have concluded that none were sounder in principle. For example, proportionate liability can deliver cost benefits to defendants but this could only be done by putting claimants at a much greater risk of ineffective compensation".[22]
        - *The presenter notes that, his Honour contends that proportionate liability delivers cost benefits to defendants in circumstances where the claimant is at risk of ineffective compensation. The presenter submits that this contention may not be a given, particularly in circumstances where proportionate liability is compensated by mandatory insurance of key actors.*

[19] L Kinkel et al, 'New Zealand Guardian Trust Co LTD v Kenneth Stewart Brooks and Others' (1995) *Journal of Financial Regulation and Compliance 3(3)*, p290.
[20] Law Commission of New Zealand, 'Review of Joint and Several Liability' (NZ legal policy publication, 11/2012) <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP32.pdf>.
[21] Timothy Bates, 'Joint and several liability- should it be replaced with proportionate liability?' (Legal Opinion article, 12/6/2018) <https://buildingtoday.co.nz/2018/06/12/joint-and-several-liability-should-it-be-replaced-with-proportionate-liability/>.
[22] Law Commission of New Zealand, 'Law Commission Recommends Joint and Several Liability be Retained' (Legal Publication, 24/6/2014) https://www.lawcom.govt.nz/news/law-commission-recommends-joint-and-several-liability-be-retained

- *Further, the "overweight" assumption of liability on the part of solvent defendants can prejudice the solvency sustainability of parties that otherwise would have remained solvent, but for the assumption of financial liability of the insolvent(s).*

2014 New Zealand Law Commission Recommendations

1. Retaining joint and several liability

- "On this issue, the Commission comes down in favor of the innocent party. Unless there is some substantial reason of public policy that demands adjustment, parties who have actually caused the harm are the parties who should bear the risk"
- "There was no sound evidence that suggested Proportionate Liability more economically efficient to the wider community"

Presenter submits

- *It is noted that the commission is quoted as coming down in favor of the 'innocent' party. This raises a couple of issues.*
  - *What if the plaintiff is contributorily negligent? This can often be a factor in play in building disputes where the plaintiff has engaged in owner/builder workmanship or has taken it upon themselves to carry out certain contract works. Is such plaintiff therefore an innocent?*
  - *A minor actor who is found joint and severally liable and is compelled to go overweight on the assumption of financial accountability of major actors is also an innocent (as it were). This is because the minor actor is innocent with respect to the generation of defects that were caused by other actors. Yet, is effectively punished for the mishaps of the party responsible.*
  - *It is submitted that the word innocent is not an exclusive descriptor and the plaintiff is not the only innocent.*
  - *The presenter is somewhat at a loss here as he cannot offer an informed opinion on the conclusion that "There was no sound evidence that suggested proportionate liability more economically efficient to the wider community" as he has not sighted the material that supports this contention and is not able to locate any apposite research findings.*
- *But, there may be a converse argument, namely that insurers of last resort (ie: local government) are funded by the wider community and if a council under the doctrine of joint and several liability assumes the*

financial liabilities of the impecunious, then the wider community (ie: the rate payer) will bear the brunt of the application of that doctrine.

- *This issue is now very much in play as local government finds it increasingly difficult to obtain insurance in volatile markets that are negatively impacted upon by building related calamities.*

2. Relief for Minor Defendant

- "As Joint and Severable liability can be harsher on minor contributing defendants, it was recommended that courts have discretion to relieve a minor defendant from this full burden, made on a balance of the interests"

Presenter submits

- *Absent the statutory codification of this recommendation that minor defendants should be relieved of some of the burden, courts will be in a most invidious position in trying to define that which relieves a minor defendant from the full burden.*
- *Any attempt to rule on point would be at grave risk of appeal, as every co-defendant would endeavor to contend that they were minor actors, not major actors.*
- *Furthermore, joint and several liability does not really operate along these lines, as technically a minor defendant may assume the liability of an entire cohort of major actors if the balance of the respondent cohort are insolvent, and for better or worse, that is integral to the 'functional DNA' of the doctrine.*
- *Joint and several liability does not discriminate in terms of liability weighting of defect authorship, it forces a minor actor to assume the liabilities of all defendants that are insolvent by virtue of the minor actors' solvent status.*

3. Supplementary contribution

- "Although any liable defendant can be required to pay the full loss, contribution requires other liable defendants to reimburse a defendant"

- "The commission recommends parties more fairly share liability for uncollected shares among available and solvent defendants. Currently, the defendant first pursued by the plaintiff pays a greater proportion; the commission recommends that this cost be shared proportionality"

4. Building Sector Specific Recommendations

- "Whilst solvent defendants are sometimes forced to meet uncollected liability shares of absent defendants, it could find no evidence of a systematic problem that would create economic efficiencies to justify the introduction of proportionate liability"

Presenter submits

- *The presenter reiterates that he is informed that a great many councils are finding it very difficult to either procure insurance or in circumstances where they are successful in procuring insurance are confronted with exorbitant premiums.*
- *It is submitted that the application of joint and several liability in terms of it's 'victimization', as it were, of solvent defendants and the compelling of their assumption of the financial accountability of others, creates grave economic efficiencies that negatively impact upon the financing of the vital organs of local government and the broader community through higher premiums and absent the availability of insurance, higher rates. This means that in the case of the latter the rate payer (an innocent player) in effect becomes the self-insurer.*
- *In a country that is having to navigate the headwinds of major environmental calamites (be they seismic or tempest in recent times) serious questions have to be raised about the immediate viability of a doctrine that is not designed for these most uncertain of times.*

- "Building consent authorities differ from other potential defendants as they do not enter the market voluntarily, cannot adjust fees based on risk and their resources make them attractive defendants. Therefore, their liability should be capped."

Presenter submits

- *It is submitted that caps can only be introduced by way of statute, for instance just like a 10-year liability cap. The writers are not privy to an alternative capping mechanism and it is unlikely that courts would take it upon themselves to impose caps at common law.*

- "The report concludes: "The unfairness of the proportionate liability system is that the risk of the uncollected share will be carried by a party, the plaintiff, who has not actually responsible for the loss. Our conclusion is that the asserted "unfairness" of joint and several liability to some defendants is, at best, overstated"

Presenter submits

- *The contention that the unfairness of joint and several liability is overstated is not established and is a very debatable issue. The idea of whether it is unfair depends on whether one is looking through the respondent, plaintiff, local government (rate payer lenses) or insurer lenses.*
- *As far back as 1991 in Australia it was identified that "there is mounting dissatisfaction with the inequitable consequences of the doctrine of joint and several and current tortfeasor liability. Those primarily victimized are pecunious defendants, more often than not local councils and insured architects and engineers - council officers have become particularly cautious in exercising their responsibilities and discretions, in order to minimize the prospect of litigation. (Pg 34 The Model Building Legislation – The Project Directors Commentary page 35 hybrid publishers.)*

Limitation Periods

New Zealand joint and several limitation periods

- The apposite "10-year limitation" period is s393 of the *Building Act* 2004:

393 Limitation defences
(1) The Limitation Act 2010 *applies to civil proceedings against any person if those proceedings arise from—*
(a) *building work associated with the design, construction, alteration, demolition, or removal of any building or the manufacture of a modular component manufactured by a registered MCM who is certified to manufacture it; or*
(b) *the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building or the modular component.*
(2) However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.
(3) For the purposes of subsection (2), the date of the act or omission is,—

(a) *in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and*

(b) *in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.*

However, the 10-year longstop does not always apply to contribution claims

BNZ Branch Properties Limited v Wellington City Council[23]

- This 2021 High Court decision found that the previous 10-year longstop position of s393(2) of the *Building Act* 2004 will not always apply to contribution claims:[24]
- This turned on the interpretation of the above Act, as explained in the conclusion of the case:
    - *"The conclusion that the longstop provision in the Building Act is "as plainly worded as it is possible to be" that in using the phrase "civil proceedings", Parliament endeavored to capture "every form of civil proceeding regardless of its source or makeup" and that if Parliament had intended s 91(2) or s 393(2) to apply only to claims between a plaintiff and a defendant, it would have used wording to make that fact clear"*[25]
- In this case,[26] BNZ branch properties bank sued Wellington council in relation to defects seeking damages in excess of $100m. The council sought to add the Beca group who provided structural engineering services. Beca argued the words "civil proceeding" in s393(2) of the Building Act meant to capture "every form of civil proceeding" but this was rejected by the court, who stated this was unlikely parliament's intention when considering s393 of the Building Act, s17 of the Law Reform Act and s34 of the Limitation Act.
- This decision opens up the potential for a much longer tail to litigation as contribution claims at any point up to 2 years after the main litigation has concluded are within the time limit, reducing the finality intended by the 10 year long stop.[27]

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[23] *BNZ Branch Properties Limited v Wellington City Council* [2021] *NZHC 1058*

[24] Cecily Brick, 'Contribution Claim Against Third Parties For Negligence Not Barred by the 10-year Longstop Period in the Building Act' (Legal article) <https://www.feelangstone.co.nz/news/2021/6/14/contribution-claim-against-third-parties-for-negligence-not-barred-by-the-10-year-longstop-period-in-the-building-act>.

[25] *BNZ Branch Properties Limited v Wellington City Council* [2021] NZHC 1058, [67].

[26] *BNZ Branch Properties Limited v Wellington City Council* [2021] *NZHC 1058*

[27] Cecily Brick, 'Contribution Claim Against Third Parties For Negligence Not Barred by the 10-year Longstop Period in the Building Act' (Legal article)

- This decision was very advantageous for building owners and for any party who undertakes relevant building work late in the construction process. Where those parties were previously left responsible, they can now seek contribution from other liable parties, even if their actions were more than 10 years ago.[28]

Limitation periods in NZ

- The New Zealand Limitation Act 2010 deals with acts or omissions and gives 6 years for claims to be brought.[29] However, the Building Act S393 imposes a further absolute limit of 10 years for building claims. S393 reads:

- *"no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based".* The words "act or omission" have been problematic, as demonstrated by:

    - **When time starts**: in *Johnson v Watson*- The suggested argument was that original faulty building work meant that the builder is under a continuing duty to remedy it through to completion, and there is a continuing "omission" until that date. This suggests the source of the duty of care and "omission" is the contractual obligation.

      This, in turn, raises an argument as to whether the completion of the works is the date of practical completion, actual completion, or conclusion of the maintenance period. However, in a standard residential contract with no retentions the obligations are arguably concluded when the works are completed.

    - **For a subcontractor completing specific works:** Judge Bell in *Wigglesworth v Auckland Council* said:

      "It is when a contractor goes "off duty" or "off task" that it is the latest point from which time would begin to run against that particular contractor, whether completed adequately or not. There can be useful signposts when a contractor may go "off task". For example, if the contractor stops work on the site, leaves the site and does not return, that would be a sign that he was "off task".

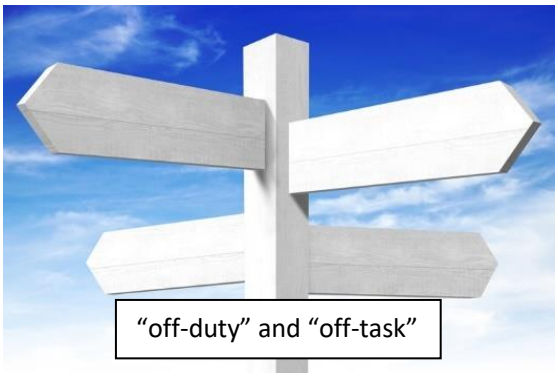
<https://www.feelangstone.co.nz/news/2021/6/14/contribution-claim-against-third-parties-for-negligence-not-barred-by-the-10-year-longstop-period-in-the-building-act>.

[28] Josh Taylor, 'New Zealand: Building defects & limitation update' (Legal article 9/6/2022) <https://www.mondaq.com/newzealand/construction-planning/1200418/building-defects-limitation-update>.

[29] *Limitation Act 2010* (NZ), 11(1).

The reasoning behind this is that any negligence on behalf of a subcontractor arises through that worker's acts or omissions, such acts or omissions which generally only occur at such stage that the contractor is actually involved in the building works. The situation may not be so clear if the sub-trader's works are partially completed and then not finally completed until the end of the building project,[30] which can be common.

- As can be observed, this ambiguity and the current NZ "case-by-case" approach can overly complicate the matter and confuse many. These complications have been resolved in Victoria by "10 years from issuance of occupancy permit s134".
- The presenter very much sympathizes with the challenges confronting the Bench in trying to ascertain when the aforesaid limitation period starts to run. His Honour Bell makes mention of "signposts" or notions of when the contractor goes "off-duty" or "off-task" as being indicators of when the ostensible 10-year period starts to run.



- It follows that there could be a lot of conflicting expert opinion and contentious evidence adduced to verify when the contractor went "off duty" or "off task" to provide the requisite evidential elements of the signpost.
- It is the type of provision that has given birth to tremendous uncertainty that is attended by much evidential risk.
- The vagaries of this vexed liability trigger date were very avoidable if regard had been had to the concept of the 10-year liability cap in the Victorian Building Act or the concept of "decennial liability"; a rather ancient liability construct derived from the Napoleonic Code.

[30] Law Alliance NZ, 'The 10 year long-stop period under the Building Act 2004- What does it mean for you?' (Legal article 11/12/2017) <https://www.lawalliancenz.co.nz/articles/item/19-the-10-year-long-stop-period-under-the-building-act-2004-what-does-it-mean-for-you.html>.

Nz leaky homes and limitation periods

- In situations where people do not realise they have a claim (common in construction defects, especially leaky homes), the Act provides 3 years from when the claimant knew (or ought to have known) that a claim had arisen:

S11, Limitation Act 2010:

(2) It is a defence to a money claim to which this subsection applies if the defendant proves that the date on which the claim is filed is at least—
*(a) 3 years after the late knowledge date (the claim's **late knowledge period**);*
*(b) 15 years after the date of the act or omission on which the claim is based (the claim's **longstop period**).*

- The 2022 case of *Rea v 360 degrees limited*[31] provides guidance towards the "late knowledge" requirement for the "ought to have known"[32] test.

Rea v 360 Degrees Ltd [2022] NZHC 916.

- The plaintiff's owned a property in Auckland with serious building defects and sued the council. The property had been inspected by a building surveyor and 31 defects were identified in March 2015. In March 2016 a further engineering report identified structural and weathertightness defects. Further defects were reported in March 2019; whether these were the same as previously identified was a point of dispute.
- The plaintiffs filed their claim in September 2021 and the council sought to strike this out due to being time barred as this was 6 years after the code compliance certificate was issued, the last act of the council, as well as the late knowledge period under the act.
- The plaintiffs alleged the start date was actually March 2019 when the second building surveyors report was received, as the magnitude was unrealized until then. They also claimed that negligent or erroneous advice kept them from lodging a claim.
- The court noted of the 19 defects, 12 were in earlier reports, and held that once they received the engineers report in May 2016, they had sufficient knowledge of the defects and loss (in property's value) and consequently were barred.

10 Year Limitation Period Victoria

BUILDING ACT 1993 - SECT 134

Limitation on time when building action may be brought

[31] *Rea v 360 Degrees Ltd* [2022] NZHC 916.
[32] *Limitation Act 2010* (NZ), s14 (1).

(1) Despite any thing to the contrary in the **Limitation of Actions Act 1958** *or in any other Act or law, a* building *action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the* building work *(whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the* certificate of *final inspection of the* building work.

(2) Despite subsection (1), a building *action may be brought more than 10 years but less than 15 years after the date of issue of the occupancy permit in respect of the* building work *(whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the* certificate of *final inspection of the* building work *if—*

(a) the building *action is a* cladding building action*; and*

(b) the building *action has become or becomes prohibited on or after 16 July 2019 but before 1 December 2023 by this section as in force at any time before the commencement of section 49A of the* ***Building Amendment (Registration and Other Matters) Act 2021*** *.*

(3) In this section—

"cladding building action" means a building *action in connection with, or otherwise related to, a product or material that is, or could be, a non-compliant or non-conforming* external wall cladding product*.*

- Before the 10-year cap was introduced in the *Building Act 1993*, uncertainty existed about when six-year limitation of actions act started to run
    - Certain lines of legal authority stated time begins to run from when damage occurs.
    - Others paid homage to the 'from when the damage was discernible' (infinity plus six) test.
        - This culminated in unnecessary litigation and forensics to figure out when the damage occurred, a fraught concept at the best of times.
- The Remedy: 10-year liability capping from the issuance of the occupancy permit/certificate of final inspection
    - This removed the uncertainty associated with the liability trigger date.
    - The conflicting lines of legal authority that sought to resolve timing conundrums and discovery of damage was resolved.

Section 131 of the Building Act 1993 followed the NMBA 10year liability cap template s185:

NMBA s185: Limitation on time when action may be taken

(1) An action is not maintainable by a plaintiff or another person claiming on behalf of a plaintiff if it is brought after the end of a limitation period of 10 years running from the date on which the cause of action first accrues.

(2) The cause of action accrues on the date of the issue of the occupancy permit in respect of the work or, if an occupancy permit is not issued, on the date of first occupation of the building concerned after completion of the work.

If you refer to appendix 2 we have included the passage from the "The Model Building Legislation" that quotes verbatim the rationale that underpinned the limitation of action reform.

Compulsory insurance

Compulsory insurance in some Australian jurisdictions

- In some Australian jurisdictions, "broadchurch" registration and compulsory insurance exist for key practitioners. Victoria has regulations which demonstrate the best practice on point, as they ensure that key actors responsible for key construction deliverables are required by law to be insured. These key actors are stated below and also include residential builders, who are required to cover home warranty cover by law.
- This is designed to complement the operation of proportionate liability in that it ensures that those that are responsible for defects are all captured in the registration and insurance net. This gives voice to the 1991 NMBA aspiration in section 187 that stated:

- *"The regulations may require classes of building practitioners (such as engineers, architects and building surveyors) to have such professional indemnity or other insurance as the regulations may satisfy".*[33]

Victorian Act

BUILDING ACT 1993 - SECT 135

Order requiring insurance

(1) The Minister may, by order published in the Government Gazette—

(a) require building practitioners in specified categories or classes of building practitioners or any part of a class or category of building practitioners or any persons in a specified category or class of engineers engaged in the building industry to be covered by insurance; and

(b) require specified classes of persons to whom section 137B or 137D applies to be covered by insurance for the purposes of that section; and

(c) specify the kinds and amount of insurance by which building practitioners and persons in each specified category or class or part of a category or class are required to be covered.

(2) An order under subsection (1) or subsection (4) must state the date of taking effect of the order which must not be earlier than one month after the date of publication of the order in the Government Gazette.

(3) The Minister may in a particular case vary any excess specified in an order under subsection (1) if the Minister is satisfied that it is appropriate to do so.

(4) The Minister may, by order published in the Government Gazette, amend or revoke an order made under subsection (1).

(5) The Minister may consult with the Authority before making an order under this section.

(6) For the purposes of this Act, a person is covered by the required insurance if—

(a) the person holds the required insurance; or

(b) the building work carried out by or on behalf of the person is covered by the required insurance; or

[33] Kim Lovegrove et al, *The Model Building Act: For Consideration by the States and Territories* (Federation Press, 1991), 131.

(c) in the case of a person who manages or arranges the carrying out of domestic building work, the work carried out by the person and the building work which the person manages or arranges is covered by the required insurance; or

(d) the person is not a party to the required insurance but is specified or referred to in the insurance, whether by name or otherwise, as a person to whom the insurance cover extends.

(7) In this section "insurance" includes—

(a) professional indemnity insurance;

(b) a performance bond;

(c) a guarantee;

(d) an indemnity;

(e) public liability insurance;

(f) insurance relating to a particular building work project;

(g) insurance taken out by any body or person which relates to the work of a building practitioner or an engineer engaged in the building industry;

(h) any agreement or instrument in the nature of an item set out in paragraphs (a) to (g).

No	Category of Building Practitioner	Class of Building Practitioner	Kind of Insurance Required
1	Building surveyor		A professional indemnity insurance policy
2	Building inspector		A professional indemnity insurance policy
3	Quantity surveyor		A professional indemnity insurance policy
4	Engineer	1.1 Civil engineer 1.2 Mechanical engineer 1.3 Electrical engineer 1.4 Fire safety engineer	A professional indemnity insurance policy
5	Draftsperson	1.1 Building design (architectural) 1.2 Building design (interior) 1.3 Building design (services)	A professional indemnity insurance policy
6	Builder	1.1 Demolisher (low rise) 1.2 Demolisher (medium rise) 1.3 Demolisher (unlimited)	A public liability insurance policy
7	Erector or supervisor (temporary structures)	1.1 Class 1 1.2 Class 2	A public liability insurance policy

[34]

- This is an example of a VBA insurance requirements from the Government gazette which updates the Orders of required insurance for building practitioners. A full example can be seen here.
- In Victoria, this system has been in practice since 1993 and the same registration insurance regime was promulgated in the Northern Territory that same year.

COMPULSORY INSURANCE IN NSW

The Home Building Act 1989, Part 6 sets out the NSW insurance requirements, but the main section is below

92 Contract work must be insured

(1) A person must not do residential building work under a contract unless—

(a) a contract of insurance that complies with this Act is in force in relation to that work in the name under which the person contracted to do the work, and

[34] Victoria Government, Victoria Government Gazette, <https://www.vba.vic.gov.au/__data/assets/pdf_file/0005/137777/Building-Practitioners-and-Endorsed-Building-Engineers-Insurance-Ministerial-Order.pdf>.

(b) a certificate of insurance evidencing the contract of insurance, in a form approved by the Authority, has been provided to the other party (or one of the other parties) to the contract.

(2) A person must not demand or receive a payment under a contract for residential building work (whether as a deposit or other payment and whether or not work under the contract has commenced) from any other party to the contract unless—

(a) a contract of insurance that complies with this Act is in force in relation to that work in the name under which the person contracted to do the work, and

(b) a certificate of insurance evidencing the contract of insurance, in a form approved by the Authority, has been provided to the other party (or one of the other parties) to the contract.

The situation is similar in NSW to Victoria in that:

- A licensed builder or tradesperson requires home building compensation (HBC) cover for each project over $20,000.
- This used to be called 'home warranty' insurance. It is intended to protect homeowners as a last resort if the building work is unable to be completed or to fix defects.[35]
- There are statutory minimum limits of professional indemnity cover required for certifiers.[36]
- "adequate" insurance for:
    - Registered design practitioners
    - Registered principle design practitioners
    - Registered building practitioners
    - Registered professional engineers
- "adequate" is insurance that complies with the regulations[37] against any liability as a result of providing a mandatory declaration or design/construction work OR be part of another arrangement approved by the regulations which provides indemnity

[35] NSW Government, State Insurance Regulatory Authority 'For Builders and Tradies' (State government information) <https://www.sira.nsw.gov.au/insurance-coverage/home-building-compensation-insurance/getting-home-building-compensation-insurance#:~:text=If%20you're%20a%20licensed,building%20work%20or%20fix%20defects>.

[36] *Building and Development Certifiers Regulation* 2020 (NSW)

[37] *The Design and Building Practitioners Regulation* 2021

against such liability.[38] Further determining factors of "adequate" can be made in The Design and Building Practitioners Regulation 2021, s77(2).[39]

Recommendations and Conclusion

Recommendations

- With respect to the application of the joint and several liability doctrine in NZ, the writers do not in some material respects agree with the law reform commission recommendations.
- This view is underscored by the fact that some of the recommendations brings to bear an undue assumption of financial accountability upon solvent defendants.
- They go overweight on reliance on the capacity of local government to effectively underwrite the liabilities of the impecunious. The cost of such "de facto underwriting" places an immense burden on local government in terms of accessing cover and accessible funding of the insurance premium. This burden of course "trickles down" to the rate payer.
- In addition, with the increased climatic volatility that is further stressing local government resources at all levels, the joint and several liability doctrine is becoming increasingly prejudicial and at odds with emerging challenges for the country. It may be on the cusp of being a redundant doctrine in terms of its practical sustainability.
- Having said that, it is the writer's contention that joint and several liability should only be jettisoned if a good practice proportionate liability model like that of the Australian state of Victoria exists where key practitioners are required to be insured by law to ensure that:
    - On the one hand aggregated adjudicated liabilities can be borne by insured defendants to relieve the plaintiff of any risk associated with uninsured liabilities, and
    - The allocation and "divvying up" of financial liability is commensurate with the responsible authors.
- With respect to the 10-year liability cap, the problems and vagaries associated with s393 of the New Zealand Building Act, will continue to challenge jurists and continue to be the bane of litigants as the limitation period trigger mechanism is so very cryptic.
- There is however a solution, simply, import the "decennial liability" concept manifest in the Napoleonic code and the antipodean neighbour Victoria and promulgate a provision

[38] For design practitioners see section 11 of the The Design and Building Practitioners Regulation 2021; for principal design practitioners see section 14 of the Act; for building practitioners see section 24; for professional engineers see section 33.
[39] *The Design and Building Practitioners Regulation* 2021, s77.

that states that the 10-year liability period will start to run from the date upon which the territorial authority issues a code compliance certificate.

- Were this to occur there would be a clear, non-contentious liability trigger whereby 10 years after issue of the code compliance certificate the ability to initiate legal proceedings, is to borrow French vernacular “guillotined”.
- With regard to insurance, it is the presenter’s strongest contention that insurance of key actors should be mandatory and proportionate liability should be introduced simultaneously. It is in the presenter’s experience that insurers and local government are understandably more attracted to proportionate liability, from a sustainability point of view, as they do not have to go “overweight” on the assumption of risk of insolvent parties that were never “their insured”.
- Joint and several liability is better for the plaintiff than proportionate liability when mandatory cover of key actors is not in play if within the defendant cohort there is a “big pocket” such as a council or an insured respondent.
- However proportionate liability, notwithstanding some of the well aired joinder logistical challenges, if combined with compulsory insurance of key actors, is in this presenters’ submission the liability apportionment “gold standard” from both a consumer and respondent perspective.
- When the writer has been retained by the World Bank to advise reforming jurisdictions in China and Africa he commends this liability and insurance construct as being international best practice.

Presenter and co-author

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Researcher and co-author: Cameron Wade, senior paralegal at Lovegrove and Cotton and final year law student.

Peer reviewed by: NZ based construction lawyer Duncan Anderson

Appendix 1

Kim Lovegrove et al, "The Model Building Legislation for Consideration by the States and Territories" *Australian Uniform Building Regulations Co-Ordinating Council* (1991), p32.

The liability reform proposals

One of the most innovative aspects of legislation concerns liability reform. These reforms could profoundly change the contemporary and traditional approach to liability and will have ramifications that may go far beyond the strict ambit of the Building Bill.

There are two main thrusts to the reform:

1. the establishment of certainty in respect of time limitations for law suits;
2. the reform of joint and several liability.

Limitation periods typically run for 6 years. The course of action in contract accrues on breach, and in tort on damage.

In tort, the English case of *Pirelli General Cable Works Limited v Oscar Faber Partners* [1982] AC 1 held that the cause of action in a claim in tort for negligence in the design or workmanship of a building accrues at the date of damage, whether that damage is discernable or not. The case is considered to be applicable law in Australia, although the matter is not entirely settled.

I will now quote from one of the publications I edited and authored, *The Model Building Act- For Consideration By the States and Territories- Legislative Aims and Options*:

"The conclusion is that the present law is unsatisfactory. For the victim of the negligent act of omission, the starting date for the reckoning of the period of limitation is the date when the damage occurs, and time will start to run if the damage is not discoverable.

Potential plaintiffs may find themselves barred from taking legal action before they knew, or could even be in a position to know, they had suffered damage.

Potential defendants are handicapped because they have no way of telling in advance how long they may be at risk of legal proceedings. As damage may not occur until many years after the building is erected, the parties involved in the construction of the building may remain liable for an indefinite and virtually unlimited time. This presents a particular problem in obtaining insurance."

The report also quotes from a 1988 Royal Institute of Architects report where it was suggested that the most important requirements in relation to limitation periods were that the period be:

- sufficient to ascertain when the cause of action accrues and therefore when the limitation period commences;
- long enough for most defects to become apparent;
- sufficiently limited for it to be practicable to obtain insurance cover for the whole period;
- not be so long that records and witnesses be unavailable or unreliable.

It was also noted that some plaintiffs suffered from an unfortunate misconception that they should "enjoy" the right to be able to sue indefinitely.

The fallacy of the "right" is illustrated by the fact that:

- after 10 years or so, many companies are no longer in existence;
- of those that remain, many will have paid up capital of no more than $2.00;
- if there has been divestiture of assets, the company will effectively be worthless;
- because insurers find it virtually impossible to quantify the risk, the potential defendants are not able to afford insurance cover.

On page 55, of the report it was stated that:

"the irony of it is that the consumer would avail itself of more protection if a 10-year liability cap was introduced, as this would enable insurers to quantify risk, premiums would most likely then be lower, professional indemnity insurance would return to favor and consumers would have financially viable defendants."

On the same page, it was stated:

"insurers to the Association of Consulting Engineers of Australia, CE Heath, advise the national building construction council that, although the vast majority of claims were discovered within 7 years if the incident, claims outside that time span did occur. It mentioned that in some cases it was almost impossible to mount a defense within reasonable cost constraints because invariably documents had long since been destroyed and the staff involved had no recollection of events or, alternatively had either left the practice or had died."

On page 120 of the appendix to the Report (provided courtesy of the Attorney General's office of New South Wales) it was stated:

"Present law is unsatisfactory to all parties. For the victim of a negligent act, the starting date for the reckoning of the period of limitation is the date when the damage actually occurs, and time will start to run even if the damage is not discoverable……

Against a backdrop of universal disquiet regarding the current law, we gave consideration as to how best to address the current tortfeasor dilemma. It was decided to come up with legislative certainty both in respect of commencement of the limitation period and expiration of the limitation period.

We are confident that this has been achieved through the liability provisions in part 10. Section 185 is the most cogent section in this regard.[40]

Appendix 2

Kim Lovegrove et al, "The Model Building Legislation for Consideration by the States and Territories" *Australian Uniform Building Regulations Co-Ordinating Council* (1991), 34.

Limitation on Liability of Persons Joint and Severally Liable

There is mounting dissatisfaction with the inequitable consequences of the doctrine of joint and current tortfeasor liability. Those primarily victimised are a pecunious defendants, more often than not local councils and insured architects and engineers.

Often the inclusion of a council defendant is motivated by the plaintiff's "street wise" nous that irrespective of the financial viability of any of the other defendants, if liability can be attached to the council, even if it is nominal liability, the council have to pay up to 100% of the award.

Many plaintiffs in building cases will join councils or local authorities as additional defendants.

Council officers have become particularly cautious in exercising their responsibilities and discretions, in order to minimise the prospect of litigation. This in turn causes delays in the approval process.

Insurers have no option but to charge substantial premiums as they are cognisant of the potential liability of their clients for 100% of any given claim, irrespective of whether their defendant client may only be nominally liable.

On page 58 of the Model Building Act, it was stated that the "office of Local Government Report states that it is not consistent with any public interest approach that councils should continue to bear the amount of risk that they currently do, especially in circumstances where other parties, often professionals, paid to carry out the work, are at fault. Accordingly, the law should be amended to limit the contribution recoverable form local authorities….."

[40] Kim Lovegrove et al, 'Model Legislative Provisions and Commentary' *Australian Uniform Building regulations Co-Ordinating Council* (1991), p33.

In the case of *Murphy v Brentwood District Council* Lord Oliver said:

"there may be reasons and social policy from imposing liability on the authority. But the shoulders of a public authority are broad enough to bear the loss because they are financed by the public at large."

There has been increased pressure to limit the liability of local authorities and insured defendants to know more than their judicially apportioned contribution. It is now considered that the public authority or local authority does not have "sufficiently broad enough shoulders" to be the loss. Councils do not have freedom of choice in relation to functions they undertake, and neither do they have flexibility in setting fees which would reflect the real costs of those activities or the costs of insuring against risks arising from it. In addition, a council is unable to determine its liability and debts by going into voluntary liquidation and starting again.

The office of Local Government Report concluded that there is a strong case to be made for councils warranting special consideration in relation to their liability a joint tortfeasor.

Against the above backdrop we have elected to exempt the operation of the doctrine, whereby it will be incumbent on judges to apportion liability contribution, so that a party found liable for a given percentage will need to pay no more than the given percentage.

"The section that governs the exclusion of the operation of the doctrine is s180"[41]

[41] Kim Lovegrove et al, 'Model Legislative Provisions and Commentary' *Australian Uniform Building Regulations Co-Ordinating Council* (1991), p34.