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

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actually occurs, and time will start to run even if the damage is not discernible . . . It is by no means an easy matter to assess and is subject to disagreement among the experts as to when a latent defect becomes latent damage, given that the damage is not necessarily discovered."[6]

THE NEW LAW

Section 134 of the Act ousts the jurisdiction of the six-year liability cap of the *Limitation of Actions Act* 1958. It provides that "the trigger date," or the date for the commencement of the limitation period, is the date upon which the "Occupancy Permit" or the "Certificate of Final Inspection" is issued. This is a clear and non-contentious date, providing unequivocal evidence of commencement of the limitation period.

Section 134 also provides that "the duration of the liability period for the initiation of a building action to do with any claim for damages due to defective building work is 10 years from the issue of an Occupancy Permit or a Certificate of Final Inspection. For humanitarian reasons, the liability period does not include any cause of action for death or bodily injury."[7]

2. ***Joint and several liability — no application of the doctrine to the Building Act***

Previous Law

Under joint and several liability, a financially viable defendant has to pay the entire multi-defendant award if the co-defendants are insolvent, irrespective of his or her degree of responsibility. Naturally, insured and responsible practitioners have failed to understand why they should bear the risk and ultimate liability for insolvents.

Calls for reform have been frequent and sometimes vitriolic. As Justice Rogers, Chief Judge of the Commercial Division of the Supreme Court of N.S.W., said: "we need to go back and look at the question of entirety of fault and how you should compensate for default. In my view these matters cry out for change and reform and we would be letting down those who are going to follow us and the community in which we live if we don't learn from the mistakes of the past."[8]

The New Law

Sections 131 and 132 introduce limitations to the application of the doctrine of joint and several liability to the jurisdiction of the Act. The court must apportion liability between the defendants on a just and equitable basis. No defendant has to pay for or provide indemnity for anyone else's liability under the award, irrespective of the co-defendants' capacity to pay their portion of liability. The plaintiff's position is protected by the compulsory insurance requirement.

3. ***Compulsory insurance***

Section 135 empowers the Minister to publish orders in the *Government Gazette* requiring that certain classes of building practitioners carry professional indemnity cover, other liability cover, a performance bond or be insured with an appropriate insurance scheme. The wording is designed to provide flexibility with regards to the type of cover which can be obtained in the market-place. It also recognises that new insurance products come on to the marketplace and accordingly the legislation has to be sufficiently malleable to cater for the creation of innovative policies.

Building practitioners are defined in s.3 of the Act as including building surveyors, building inspectors, quantity surveyors, engineers, draftspersons, persons responsible for building projects and builders not engaged in domestic building.

Although architects are not defined as building practitioners, s.3(i) provides that they have to comply with Part 9, which makes it compulsory for them to carry appropriate cover.

Hence one of the most important criteria for registration relates to insurance. Most of the above classes of practitioners will have to carry professional indemnity cover. The contents of the gazetted insurance requirements will be worked out in consultation with the associations that represent the classes of practitioners.

4. ***Mandatory registration of building practitioners***

Part II provides for the establishment of a Building Practitioners' Board which will be responsible for the registration, supervision and monitoring of practitioners. It will remain a register of building practitioners to ensure that practitioners carry professional indemnity cover.

An applicant will be eligible for registration if he or she holds the appropriate qualification, is of good character and can produce evidence of insurance cover. Registration has to be renewed annually and must be accompanied by payment of an annual fee. At the time of registration the practitioner has to provide evidence of an insurance policy that will remain in force for the next twelve months.

5. ***Privatised alternative to building approval***

The introduction in Part 6 of a totally-privatised alternative to building approval is one of the most profound changes to the statutory regulation of building approval. The private sector building surveyor is given the power to "step into the shoes" of the traditional building surveyor.

The private building surveyor can be engaged by an applicant to issue building permits, carry out inspections and issue occupancy permits and certificates of final inspection. The private building surveyor's decisions will have the same effect as that of the council building surveyor. Once the applicant has chosen a surveyor, he or she cannot alter his or her choice except in extreme circumstances by applying to the Commissioner.

There are additional functions afforded to a council building surveyor which are denied to a private building surveyor. If a client refuses to abide by a building order issued by the private building surveyor, the matter of non-compliance is referred to the Commissioner. The private building surveyor does not prosecute the client. Similarly the private building surveyor only issues notices or orders on his or her client, not on the public at large.

6. ***Council opt-out***

Under Part 12, ss.213-214, councils are given a range of options for the contracting-out of their building control functions. They can enter into an arrangement to transfer those functions to a private building surveyor, another council, the Commission or a regional corporation. This means that a council can totally divest itself of the functions of building approval and enforcement.

CONCLUSION

The Act was proclaimed on 1 July. The changes are profound and the post-proclamation era will be vastly different to the legislative environment which preceded the new Act. The legislation is intrusive in a positive sense and will affect the provision of general legal advice to a far greater degree than the previous *Building Control Act*.□

Footnotes

1. See *Lovegrove on Building Control*, The Law Printer, 1994, p.99. **2.** *Id.*, pp.90-95. **3.** [1983] 2 A.C. 1. **4.** [1978] A.C. 728. **5.** [1993] 1 V.R. 27. **6.** From the report of the consultative committee appointed by the Hon J.A. Dowd as published in the appendix to *The Model Act for Consideration by the States and Territories — Legislative Aims and Options*, AUBRCC, 1991, p.120. **7.** For further discussion see *Lovegrove, op. cit.*, p.94. **8.** "Experts mull over the AWA case" (1992) 8 *Company Director* 23-4.