BUDDLE FINDLAY
NEW ZEALAND LAWYERS

sapere research group

Final report to the Department of Building and Housing

Review of the application of joint and several liability to the building and construction sector

26 APRIL 2011

CONTENTS

1. EXECUTIVE SUMMARY

1.1 Scope

1.1.1 This report represents the results of the consultants' review of the application of joint and several liability in the building and construction sector. It considers how joint and several liability supports the increased accountability the Government is looking for from participants in the building process.

1.1.2 The report covers: the issues raised in interviews undertaken by the consultants and through desktop research relating to the operation of the rule of joint and several liability, summarises the consultants' insights and conclusions on the impacts of joint and several liability on the sector, and analyses policy options for possible change, and sets out the consultants' recommendations.

1.2 Overall view

1.2.1 We think that the changes arising from the Building Act Review will have a positive impact in addressing many of these issues identified in this report and the Government should monitor their impact in the context of its objectives for the sector. We have also identified issues relating to the way that liability applies (i.e. other than the way that liability is allocated) that could be considered further. We do not believe that a change to the rule of joint and several liability will improve the situation. Rather, other rules for allocating liability look more unpalatable and are only likely to worsen the situation.

1.3 The rule of joint and several liability

1.3.1 The rule of joint and several liability is a rule that applies in various areas of civil law, including to claims in the building sector relating to faulty work.

1.3.2 The rule applies in cases where two or more people are liable for the same loss to a plaintiff through separate negligent acts. Where this occurs, the rule holds both (or all) of the wrongdoers who caused the loss 100 per cent responsible for the loss caused to the plaintiff. The plaintiff is able to bring a claim against one wrongdoer to recover all of their loss. A defendant can then seek a contribution from other wrongdoers.

1.3.3 A study was undertaken for the Department by PricewaterhouseCoopers ("PWC") in 2008 to look into the way in which liability for weathertightness problems has fallen. The report found that territorial authorities in the North Island have carried a larger share of mediation costs than would be the case in a typical adjudication. This indicates that local authorities are carrying some of the share of the liability of other parties who are not present in weathertightness claims. This study also showed that the greatest cost of weathertightness failures falls on homeowners, even after recovery of some of the cost for their loss from other parties.

1.4 Desktop research

1.4.1 From the various New Zealand and overseas reviews, reports and articles we have reviewed, there is no clear argument on fairness grounds to change the joint and several liability rule. The major points from the literature are:

(a) Much of the concern about joint and several liability from a fairness point of view is its impact on defendants whose level of liability is small compared to other joint defendants for jointly caused loss but who end up paying a larger share of the loss because one of the wrongdoers cannot pay their share.

(b) However, one of the arguments against a change from joint and several liability is that other liability regimes such as proportionate liability or capped liability would cause unfairness to plaintiffs, who would not be able to recover part of their loss if one or more wrongdoers were absent.

(c) Thus, on their own, these alternatives would represent a transfer or re-allocation of loss rather than an elimination or reduction of such. There is no material efficiency implication associated with such a transfer, but there are obvious implications for fairness.

1.4.2 The New Zealand Law Commission (the Commission) considered whether joint and several liability should be replaced with another form of apportioning liability and ultimately recommended it should not. It concluded that no sufficiently compelling case to shift away from joint and several liability was made. In reaching this view the Commission was influenced heavily by the effect on plaintiffs that a proportionate liability system could bring with it. It found the idea that an innocent plaintiff could be left to carry an uncollectable share when a defendant is absent as being at odds with the fundamental principle of tort law that says a plaintiff should be made "whole" after suffering loss. It was of the view that on the basis that a defendant's liability is for the whole loss caused by the defendant's wrongdoing, liability should not be affected by the fact that the behaviour of some other party had caused the same loss.

1.4.3 The economics literature is also unclear in that there is no "clear cut" efficiency rationale for favouring a particular liability rule over another. It has been said that joint and several liability could affect efficiency, if one category of defendant in a sector is persistently absent from liability, but other papers find that the case is less well made. The economic case for one rule favouring another also depends on highly context-specific matters, such as the specific circumstances of the industry, contracting arrangements and other contextual factors.

1.4.4 In general, in situations where proportionate liability has been introduced, it has been introduced for reasons other than fairness to defendants. For example, in Australia it has been driven largely by concerns over the unavailability of insurance and the efficiency effects of joint and several liability.

1.4.5 A number of concerns about the operation of joint and several liability (as applied in weathertightness cases) in the building and construction sector, include that:

(a) Particular parties with deep pockets, such as local authorities which have strong capital positions and the power to rate, should not be liable, on an ongoing basis, for costs in excess of their apportioned share of the fault;

(b) It is impacting on the availability and cost of professional indemnity insurance, because a person with professional indemnity insurance can become a ‘deep pocket’ in the event that other parties have ceased to trade;

(c) It is reinforcing incentives for building professionals and trades people to structure their affairs and operate in ways that minimise their exposure through, for instance, the use of project specific companies, or by limiting the scope of their involvement in building work;

(d) It is contributing to defensive and risk averse behaviour by local authorities that is resulting in them seeking more detail on plans, making more inspections, and contributing to greater compliance costs than are necessary.

1.4.6 In counterpoint, submissions also identified that any change to joint and several liability would be a significant change to the law in New Zealand and could leave consumers vulnerable to recovering little to nil cost in the event of the failure of a builder or developer.

1.5 Stakeholder interviews

1.5.1 Interviews with a number of stakeholders in the building and construction sector were undertaken as part of this study. These interviews included representation from Building Control Authorities ("BCAs"), engineers, architects, insurers, a range of building and construction representatives, and some parties representing the interests of consumers.

1.5.2 In general, the consultants note that a wide range of issues were raised in the interviews. Despite some lengthy interviews, however, it appears that many of the issues did not have much depth to them or much evidence to support the claims made. Further, most parties expressed the view that there are a range of issues in relation to liability and that no single solution, such as proportionate liability, would correct the situation.

1.5.3 It also seemed that the extent of knowledge and understanding of joint and several liability is weak and reactive. Conflicting comments emerged which were difficult to reconcile, but which raised the question whether or not the implications of joint and several liability were understood.

1.5.4 Further, it seems that parties take more action to identify liability implications following the discovery of loss/damage than they do prior to any such event. This reactive approach means that exposure to risk is greater than it need be.

1.5.5 Nevertheless, interviewees consistently identified four main problems with the rule of joint and several liability:

(a) *Joint and several liability is unfair*: Joint and several liability was claimed by some interviewees in effect to reward poor practice, assign costs that are out of proportion with responsibility, treat the sector differently in law than other sectors, and favour particular parties over others.

(b) *Joint and several liability creates uncertainty that negatively affects sector performance*: Joint and several liability was claimed to impact on repair work where nobody is willing to assume responsibility, to result in settlements being reached that do not relate to liability (i.e. “second-best” behaviours) and to create tensions in respect of competing objectives.

(c) *Joint and several liability encourages compartmentalism*: We were told that, as a result of the joint and several liability rule, the “cooperative" practices of parties involved in building and construction has changed for the worse. Rather than interpreting and discussing relevant plans and/or designs together in respect of any “buildability” issues, builders are

said to now be taking a strict, “tell me what to do and I will do it” approach, which is not conducive to overall performance.

(d) *Joint and several liability is not well aligned to industry practices*: The rule of joint and several liability is claimed to exacerbate the negative effects of industry features such as informal contracting arrangements, the structure of the industry (i.e. lots of small operators who are self-employed and relatively few employees), the large number of parties involved in a building and construction project (i.e. difficulty determining who is in control of a site), and the complex and bespoke nature of residential construction in New Zealand.

1.5.6 These views, however, were not universally held. For example, parties representing consumer interests disputed that joint and several liability was unfair. Their point was that it is fair for the parties who cause loss or damage to a consumer to bear the cost of that damage, even if that means they carry the liability of other parties.

1.5.7 Issues that were barely mentioned (but were thought to be significant before the project commenced) or where messages differed from what had been previously raised were as follows:

(a) *Joint and several liability creates incentives to avoid liability*: Most interviewees considered that specific techniques and company structures to avoid liability abound in the industry and work to reduce consumer protection. It was generally, considered, however, that this practice would continue to happen (probably to the same extent) under any liability rule. Insolvency of the supplier/ builder was also seen as having little to do with liability rules.

(b) *Risk averse behaviour of BCAs*: Only a few interviewees discussed this in detail and, for most interviews the issue was raised by the interviewer. Where it did come up, risk averse behaviour was not attributed to joint and several liability specifically, but more to the weathertightness problem and few examples of risk averse behaviour were given. Some interviewees considered that any additional care that BCAs are taking is a good thing that would have payoffs in the future.

(c) *Limitation periods*: Only two interviewees specifically mentioned the ten year limitation period and the views were conflicting (i.e. one suggested it should be longer and the other suggested it should be shorter).

(d) *Availability of insurance*: We received some feedback from the insurance industry that the reluctance to offer insurance products in the building and construction sector arises from the small size of the New Zealand market, a concern about the quality of work (and the ability to inexpensively obtain assurance about quality) and the high cost of the weathertightness liability. It does not appear to be because of joint and several liability.

1.5.8 Under detailed questioning, many expressed the view that a proportionate liability regime would need to be seen as part of a package and that other issues such as warranty schemes, cheaper and faster tribunal processes and certification practices all need to be looked at.

1.5.9 A range of other issues were identified in the interview process, which appear to be only tangentially related to the liability regime. These include concerns around the fragmented nature of the industry supply chain, different statutory liability conditions for product suppliers and builders, and generally poor quality outcomes for consumers from the industry overall.

1.6 Views of the Advisory Group

1.6.1 At the first meeting of the Advisory Group, there seemed to be firmly held views that proportionate liability should be introduced. The view was that problems in the sector are either caused by the rule of joint and several liability or are otherwise perversely supporting them. This reflects what has been a reasonably common view in the sector that a change to proportionate liability will be a "silver bullet" and resolve the sector's issues.

1.6.2 As the review progressed, these views seem to have softened. While overall concerns remain about the way that liability has fallen in the sector, the Advisory Group provisionally seemed to accept that a shift to proportionate liability will not solve many of the issues that are said to exist in the sector.

1.6.3 There was also consensus amongst members of the Advisory Group that the changes agreed to by Cabinet in the Building Act Review will result in behavioural changes and will affect positively on responsibilities and accountabilities.

1.6.4 The Advisory Group members acknowledged that many of the concerns over joint and several liability came as a reaction to the problems associated with weathertightness issues. For many, weathertightness problems were the first time that liability for building failure arose and liability was a shock.

1.6.5 Some residual concern remained, however, that joint and several liability has resulted in unfairness in the past and it was commented on that this wouldn't change even with the Building Act review changes. This feeling of unfairness is expressed in a general way – mainly that joint and several liability is unfair to builders, subcontractors, architects, engineers and BCAs. It is not a comparative matter i.e. that it is unfair to builders but not plaintiffs. It was said that the feeling that suppliers have avoided liability may have contributed to the general sense of unfairness.

1.6.6 Some of the members of the Advisory Group believe that misunderstanding of joint and several liability in the sector is rife. Most agreed that the sector is relatively unsophisticated and liability only comes to most minds after damage is discovered.

1.6.7 Views were mixed about the position of BCAs – between those who believed BCAs have become more risk averse and those who did not. Concern was expressed about issues faced particularly by small scale builders and subcontractors.

1.6.8 A view appeared to emerge that a new means of solving disputes for the sector needs to be developed. The Advisory Group commonly discussed the high cost of claims, even in seeking strike out and having to take time away from the tools to fight a claim, and other procedural concerns as pointing to a need for a bespoke system tasked by experts. There was some acknowledgement that a Construction Contracts Act type dispute resolution mechanism could improve the current situation.

1.6.9 A number of other issues were also identified by the Advisory Group as discussed in chapter 9 of this report.

1.7 The impact of joint and several liability

1.7.1 We were asked to consider the impacts of joint and several liability on the building and construction sector in terms of the Government's objectives for the sector.

1.7.2 Overall, we consider that many of the problems claimed to arise from joint and several liability are not actually raised by that rule. Rather, they arise from other factors (e.g. the concern over suppliers and certifiers avoiding liability seems to relate to the duty of care, rather than the rule for apportioning liability) or are not actually occurring.

1.7.3 Having said that, one issue we consider that joint and several liability is contributing to is the concern that some building industry parties are consistently avoiding liability and also abdicating responsibility for taking care in the quality of building work to BCAs. Our view is that this problem arises mostly from the operation of the laws of insolvency and bankruptcy, the regulatory regime in the building and construction sector, and specific conditions arising in the building and construction sector (namely small and undercapitalised builders and building firms). However, joint and several liability is a contributing, or at least an exacerbating, factor. Together, these factors seem to have created some perverse incentives, encourage overly defensive and risk averse behaviour, and frustrate the realisation of the Government's aims for an effective accountability framework.

1.7.4 During the review, strong views were put to us that homeowners were not taking steps to protect themselves from loss, and instead they were taking advantage of BCAs and architects and engineers to pick up the uncollectable share. While we accept that this behaviour is probably occurring, we note that the PWC report shows that the greatest cost of weathertightness failures fall on homeowners, so they certainly have the incentive to protect themselves as much as possible through contractual arrangements, insurance, choosing the correct builder and carrying out proper due diligence on their building projects. We suspect that the problem is that consumers are not well informed about the issues involved in building and construction work and lack the tools to deal with the situation.

1.7.5 In terms of creating positive performance incentives, our principal finding is that the incentive structure associated with joint and several liability does not operate in a smooth and linear manner. The liability rule does not greatly influence behaviour in advance, but affects parties when something goes wrong.

1.7.6 A specific issue was raised with us about compartmentalism, whereby it is claimed that parties in the sector are not acting in a cooperative way. However, we consider that joint and several liability should encourage such behaviour and suspect this issue may arise more from a misunderstanding of joint and several liability, or given the weak incentives that joint and several liability seems to have on *ex ante* behaviour, from either causes. In this case, the unexpected scale and impact of weathertightness may have created an incentive to passivity and consequent reduction of responsibility, or to contain responsibility.

1.7.7 There is a strong sense of unfairness in the building sector about the rule of joint and several liability. In our view, the rule of joint and several liability is not inherently unfair, and seems a fair rule to apply as far as liability between plaintiffs and defendants are concerned. On the other hand, it can be perceived as unfair if one category of defendants is persistently absent, which

there is some evidence of in the building sector, causing the burden to repeatedly fall on other parties. As noted above, however, the rule of joint and several liability appears to only be an exacerbating factor or, at best one factor.

1.7.8 We also note that the feeling of unfairness arises because of the weathertightness liability.

1.7.9 We therefore suggest that much of the unfairness arises from the fact that there was a failure of the building system as a whole rather than of any one party and perception within the sector that the pain should be shared amongst all that participated, whether in the building sector, regulators or as homeowners.

1.8 **The enhanced status quo**

1.8.1 In this review the consultants have been asked to take into account the effects of the Building Act Review changes in their assessment of joint and several liability and any alternative liabilities regime.

1.8.2 The Building Act Review changes create a new baseline for the sector, in which we needed to assess the impact of joint and several liability. The relevant changes include:

(a) Amendments to the purpose section of the Building Act to clarify accountability;

(b) Changes to the consenting framework, to provide for a risk based approach to building work;

(c) The introduction of a requirement for mandatory written contracts for work over $20,000;

(d) The addition of remedies for breach of statutory duties in the Building Act; and

(e) Greater emphasis on the provision of information to consumers and sector players to increase understanding and knowledge.

A new requirement for some building practitioners to be licensed is also relevant.

1.8.3 The consultants believe the net effect of these changes will be significant and will go a reasonable way to improving many of the issues identified in this review. These improvements include:

(a) A likelihood of increased understanding/certainty about rules and responsibilities and therefore liability;

(b) Some parties finding themselves joined less to actions unnecessarily, which could reduce costs;

(c) A reduction but not an elimination, in liability for BCAs;

(d) A change in behaviour as the accountability statements begin to take effect;

(e) A higher quality of building work; and

(f) A reduction in the number of consumers pursuing their claims for building repairs or loss in negligence.

1.8.4 The changes, of course, will not address all of the problems we have identified. These include that:

(a) The changes do not address vexatious joinder or uncollectable shares issues;

(b) Incentives remain to join as many parties to a dispute as possible; and

(c) The changes will not prevent (but could affect the incidence of) BCAs or other professionals from becoming deep pockets.

1.8.5 The next question we considered, therefore, was whether a change to the liability regime would improve the outcomes in the industry, and lead to more efficiency, compared to this baseline.

1.9 **Analysis of the alternative options to joint and several liability**

1.9.1 The alternative options we considered were:

(a) Proportionate liability for all claims relating to building work, with statutory requirements for taking into account the need for warranties or other consumer protection;

(b) A split liability regime that would apply joint and several liability for primary wrongdoers, and proportionate liability for peripheral wrongdoers;

(c) Legislating to make contracting out effective against third parties (with notice); and

(d) Liability caps: involving statutory caps for BCAs, and/or professional standards schemes for all involved in the sector.

1.9.2 The table below summarises our analysis of these options against the status quo.

Option	Pros	Cons	Distributional effect
Proportionate	Better aligned with industry attitudes and practices. Slightly less likelihood of some parties being joined frivolously to actions. Some reduction in the extent to which the liability regime exacerbates incentives to abdicate responsibility to BCAs, or is an incentive itself. Addresses fairness concerns over last man standing. Possibly lower insurance costs for professionals.	Additional costs and complexity. Even fewer incentives to work cooperatively. Risks of uncollectable share pass to homeowners, creating cost and unfairness. Need for introduction of backstop warranty/insurance scheme to make option work (which may be a poor and incomplete substitute to full recovery), with attendant costs for home owners. BCAs still have liability risk and regulatory role/other parties still likely to abdicate responsibility. Increase in uncertainty of outcome due to procedural complexity issues. Overall costs likely to outweigh benefits.	Consumers most likely worse off. BCAs, industry professionals and trades potentially better off.
Split liability regime	Of comfort to minor causers of damage who think they bear a disproportionate share of costs. Gives some protection to consumers/homeowners in relation to the biggest contributor to the damage.	Increases costs considerably, for all parties. Relies on backstop warranty/insurance scheme to mitigate negative consumer effects. Overall costs likely to outweigh benefits.	BCAs, architects and engineers better off, consumers most likely worse off.

Option	Pros	Cons	Distributional effect
Contractual liability arrangements	Relatively low-cost way to achieve efficiency gains (through stronger incentives for parties to consider in more detail what is involved in building projects). Equity/fairness gains from a more certain environment around roles and responsibilities.	Predicated on meaningful and well understood contracts being drafted- effectiveness very limited in the absence of such conditions. Uncollectable share issues are not directly resolved by this option. Does not address BCAs, "last man standing" risks fully.	Could potentially make consumers and industry participants better off (though difficult to see what is in it for consumers). BCAs made (relatively) worse off.
Liability caps	May improve the performance of industry players (particularly if extended to include builders). May reduce uncertainty. Relatively easy to set up industry standards bodies for some (e.g. architects, engineers).	Most likely involves transfer of costs to owners/plaintiffs. Does not appear to address the main issues in the sector at the moment (at least not immediately). Difficult to see major benefits.	Architects, engineers, BCAs (and potentially builders) made better off, consumers less so.

1.10 Conclusions on liability regimes and recommendations

1.10.1 The terms of reference require the consultants to advise the Department if any further changes are necessary to the application of joint and several liability in the building and construction sector in New Zealand, and consideration of proportionate liability and any hybrid approaches and the implications of any proposed changes.

1.10.2 After reviewing the status quo, taking into account the changes agreed to by Cabinet from the Building Act Review and indentifying and assessing the alternatives to joint and several liability, and notwithstanding the earlier statement that joint and several liability, together with other factors, may frustrate the realisation of the Government's aims for an effective accountability framework for the sector, the consultants recommend that joint and several liability should not be replaced.

1.10.3 The current package of proposals in the building reform package is more likely to change behaviour than anything that can be done with the liability regime. It would be worth waiting to see what impacts these changes have. If anything, we think that the Department should then consider what additional changes, other than changes to the way that liability is apportioned, could be made.

1.10.4 It seems to the consultants that, with the changes in the Building Act Review, joint and several liability is better than the alternative options in achieving the Government's objectives for the sector. While joint and several liability may be seen to be inconsistent with the Government's aims for an effective sector, the most efficient and effective way of affecting change in the sector is through addressing the other factors that have been identified. The effects of a change in the liability regime would be marginal.

1.10.5 Proportionate liability may be better aligned with industry practices but it will likely result in additional costs across the industry and create some perverse behaviours of its own. The consultants doubt that industry risk management practices (whether they are working or not) would change in any meaningful way. Moreover, proportionate liabilities are more likely to lead to greater compartmentalisation and a lower level of cooperative behaviour amongst industry players.

1.10.6 Other options identified are a model that distinguishes between "primary" and "peripheral" wrongdoers, and liability caps. The consultants favour neither of these options, for the reasons set out later in this paper.

1.10.7 The final option identified of legislating to make contracting out effective against third parties contracting out arrangement, is superficially attractive, but has many downsides. Its impacts may have little actual practical effect and protection for consumers will be reduced.

1.10.8 While there are some constraints currently on the willingness of insurance companies to offer warranty and other surety products, the consultants do not consider they arise from joint and several liability. We consider that the requirements for written contracts and the proposed disclosure rules in the Building Act Review package, as well as requirements to require some builders to be licensed, may assist. Clarification of accountability, which should also flow from the changes, will also help.

1.10.9 We also make some recommendations in chapter 15 about other issues that the Department might wish to consider.

2. INTRODUCTION

This chapter describes the purpose of this review, provides brief background information, sets out the consultants' terms of reference, and describes the Government's policy objectives as relevant to the review.

2.1 Purpose

2.1.1 Sapere Research Group Limited ("Sapere") and Buddle Findlay have been commissioned by the Department of Building and Housing ("the Department") to undertake a review of the implications of joint and several liability for the building and construction sector. The review is also to consider how joint and several liability supports (or otherwise) the increased accountability that the Government is looking for from participants in the building process.

2.1.2 The review is required to inform the Department's advice to Government on these issues, including whether or not there is a case for change.

2.1.3 Specifically, the Department is required to report back to the Cabinet Economic Growth and Infrastructure Committee on:

(a) Whether any changes are needed to the application of joint and several liability in the building and construction sector, in addition to the proposed changes in the Building Act Review, in order to achieve desired attitudinal and behavioural changes in favour of improved accountability for the quality of building work, and if changes are proposed;

(b) The implications of the proposed changes for consumers and whether or not they would necessitate a mandatory requirement for all proposed residential contract warranties to be backed by a specified scheme of insurance or financial surety;

(c) A recommended approach to providing the specified form of insurance or surety, including a timeframe by which it could be provided, how it would be funded and the costs, benefits and risks that would be associated with its provision.

2.2 Background

2.2.1 The Department of Building and Housing recently completed a major review of the Building Act 2004.

2.2.2 As a consequence of the Department’s review, Cabinet agreed to a series of changes to the Building Act that will clarify and modify legal accountabilities for building work. These changes include:

(a) More clearly signalled accountabilities;

(b) Strengthened contracting arrangements in support of accountabilities;

(c) Providing for a stepped risk-based approach to how building consent and inspection requirements are administered; and

(d) Developing a more nationally consistent and efficient approach to administering regulatory requirements.

2.2.3 The purpose of the changes is to incentivise building professionals to take direct responsibility for the quality of their work and stand behind it, as a prerequisite to improving productivity and efficiency and delivering better quality buildings at reasonable cost. It is also to incentivise owners to take more responsibility for their actions.

2.2.4 The review noted that joint and several liability in negligence cases is an important part of the legal framework in the building and construction sector (as it is in other sectors of the economy). The application of joint and several liability has previously been considered in a general context by the Law Commission (Apportionment of Civil Liability 1998), but its application to the building and construction sector has not been specifically considered.

2.3 **Terms of Reference**

2.3.1 Buddle Findlay and Sapere are required to provide a report to the Department that:

(a) Considers the changes agreed to by Cabinet to the Building Act as they relate to the review;

(b) Considers what joint and several liability was originally designed for and how and why it has been applied in the building and construction sector in New Zealand, with an emphasis on how it works in practice (based on evidence);

(c) Describes the outcomes and impacts of applying joint and several liability to the building and construction sector in New Zealand and the effects that this has had on different parties in practice, including consideration of what the implications are for:

(i) reinforcing an effective accountability framework;

(ii) creating positive incentives for performance (individual and teamwork);

(iii) minimising any perverse incentives;

(iv) reducing the extent of overly defensive and risk averse behaviour; and

(v) the supply of professional indemnity and home warranty insurance;

(d) Advises on the effect of issues associated with the application of joint and several liability to the building and construction sector in New Zealand and forms a view of the significance or importance of these issues to the achievement of the outcomes and objectives that the Government is seeking to achieve from the changes that it has already agreed to make to the Building Act;

(e) Describes approaches taken in other jurisdictions to reinforcing accountability for building work and determining liability for negligence in the building and construction sector, and describes (based on any available evidence) whether or not alternative approaches (including proportionate liability) result in different outcomes and impacts to those described under sub-paragraph (c) above and how they do so. This description should also describe what if any reliance is placed on professional indemnity and home warranty insurance products and why;

(f) Advises on what if any further changes are required to the application of joint and several liability to the building and construction sector in New Zealand including consideration of proportionate liability and hybrid approaches and the implications of any proposed changes on the matters in sub-paragraph (c)(i) to (v) above; and

(g) The impact that any change may have in practice, and the costs and benefits on various parties (including consumers); if changes are proposed, advise on whether associated changes are required to the current agreed approach to providing home warranty insurance, which is based on a legal requirement for a building contractor to disclose what if any surety or financial backing is being offered in support of mandatory warranties.

2.4 The Government's policy objectives for the building sector

2.4.1 The Government's policy objectives for the building and construction sector are to achieve a productive and efficient sector that stands behind the quality of its work. In practice this means:

(a) A sector with the necessary skills and capability to "build it right first time", that takes pride in its work;

(b) A sector that delivers good quality affordable homes and buildings;

(c) A well informed sector that shares information and quickly identifies and corrects problems;

(d) A sector where everyone involved in building work knows what they are accountable for and what they can rely on others for; and

(e) An environment where consumers can make informed decisions and understand the risks and consequences of their decisions.

2.4.2 More specifically, the objectives that the Government seeks from a liability regime are the objectives set out in paragraph 2.3.1(c)(i) to (v) above. In addition, the Department advises that an objective should be to achieve a liability regime that results in a fair outcome.

2.4.3 The Government seeks an accountability framework that is equitable, certain and transparent. The Government's view is that the building "system is out of balance with an unduly heavy reliance on building consent authorities".[1] It wants a sector where each party's responsibility is clear and where each party will stand behind its work, both when things are good and when they go wrong. Moreover, the Government wants an accountability framework that allows homeowners to hold those responsible for any damage or loss they suffer to account. Through making accountability clearer, the intent is to reduce the number of disputes homeowners will face.

2.5 Research undertaken

2.5.1 This review was based on a combination of research methods. The primary input was a series of interviews with key stakeholders from the major sector groupings in the industry.

[1] See www.dbh.govt.nz

2.5.2 The consultants together with the Department also had a number of meetings with an Advisory Group made up of experts with experience and knowledge of relevant aspects of the building and construction sector in New Zealand.

2.5.3 In addition to the interviews, a desktop research process was completed. This process involved summarising relevant literature from the law and economics disciplines as well as policy settings in selected overseas jurisdictions. The intention of the desktop research was to:

(a) Frame the relevant set of questions for the interviews;

(b) Establish key areas of focus and/or gaps in knowledge; and

(c) Provide a platform from which the remainder of the report would proceed.

3. THE RULE OF JOINT AND SEVERAL LIABILITY

This chapter briefly describes the rule of joint and several liability. A more detailed description of the rule, the kinds of situations it applies to in the building sector, the rules relating to contributory negligence and the special limitation periods that apply to liability for building work is set out in Appendix 1.

3.1 The rule of joint and several liability

3.1.1 The rule of joint and several liability is a rule that applies in various areas of civil law. In the building industry, it most frequently arises in cases of negligence relating to faulty building work. It describes the basis on which liability for loss is shared between two or more defendants if they are found to be negligent.

3.1.2 The rule is essentially that each of the guilty parties who are responsible for the same loss to a plaintiff are both "jointly" liable for the loss suffered with the other defendants and "severally" or individually liable for all of the loss. In this paper, these parties will be referred to as "multiple wrongdoers".

3.2 Application in the building and construction industry in New Zealand

3.2.1 In the building industry in New Zealand, the rule of joint and several liability is most common in negligence cases for residential building failures.[2]

3.2.2 The application of the rule may be best explained using a sector specific example. It comes to the attention of the home-owner that the house is substandard and needs to be repaired. As a result the value of the house has halved. The builder, architect, and surveyor who undertook building work on the property were each negligent. The BCA was also negligent certifying the building. These parties would all be several wrongdoers as their separate acts lead to the collective loss suffered by the home-owner. All of these parties would have been aware that if they did their job negligently the building work would be faulty and damage would ensue.

3.2.3 Under the rule of joint and several liability, each of the parties involved in building the house is 100 per cent liable to repay the home-owner. The home owner is able to bring a claim against one of the parties (say the BCA) and seek to recover the full extent of their loss. The BCA can then seek to join the other parties (builder, architect, surveyor) in the initial action by the home owner (which is the most common approach) or can bring a separate action at a later date to seek a contribution from the other liable parties.

[2] In this report, residential buildings are taken to include multi unit dwellings built for residential use.

4. REGULATION OF BUILDING WORK IN NEW ZEALAND

This chapter briefly describes the regulation of building work in New Zealand and the changes to it recently agreed by Cabinet in the Building Act Review, which we describe in more detail in Appendices 2 and 3. This chapter then discusses the extent to which those changes might affect the rule of joint and several liability.

4.1 The Building Code and the role of BCAs

4.1.1 The two key features of the regulation of building work in New Zealand are the use of the Building Code to set requirements for building work and enforcement through BCAs.

4.1.2 The Building Code is a detailed set of rules, set out as a schedule to the Building Regulations 1992. It sets out requirements for how a building and its components must perform as opposed to prescribing how buildings must be designed and constructed. This performance-based approach is a characteristic of the Code.

4.1.3 Almost all building work is required to obtain a building consent before it is undertaken. The building work must comply with the consent, unless a variation is obtained.

4.1.4 BCAs are responsible for issuing building consents, inspecting building work, issuing code compliance certificates or notices to fix, and issuing compliance schedules. In building failure cases where BCAs are sued, negligence in the exercise of one or more of these functions will be alleged.

4.1.5 Although any person (including private bodies) can be a BCA, only local authorities have been registered to date.

4.1.6 The Building Act sets out timeframes for BCAs to make decisions on building consents, although they have the power to "stop the clock" and require further information from the applicant. The test for the grant of a building consent is that the BCA must be satisfied on reasonable grounds that the proposed building work will meet the requirements of the Building Code. This decision is made on the basis of the plans and specifications, and other information, provided by the applicant.

4.1.7 To assist in this process, the Building Act specifies six "means of compliance" with the Building Code. If the proposed building work adopts any of these means of compliance, which are known as "acceptable solutions", BCAs are protected from liability. The statutory means of compliance, however, are far from comprehensive.

4.1.8 Most building work involves the use of "alternative solutions". These are alternative means of complying with the Building Code. It is up to BCAs to determine whether an alternative means of compliance meets the requirements of the Building Code.

4.1.9 Of all the means of compliance with the Building Act, assessment of alternative solutions requires BCAs to exercise the greatest degree of discretion and judgement and is consequently where most risk is incurred. This could therefore be an area where BCAs are seen to be acting in a risk-averse manner.

4.1.10 Another two crucial areas are the inspection of building work and the issue of code compliance certificates. Inspection is usually carried out by a single inspector visiting the site at standard times, to check on compliance with the building consent. A code compliance certificate is issued at the completion of the process, if the BCA considers that the building work complies with the building consent. Many cases of negligence by BCAs have involved allegations that inspections were carried out negligently or that code compliance certificates were issued negligently.

4.1.11 It may be that the introduction of a risk-based consent process will reduce the involvement BCAs have in the building process from their current levels, with a result that the liability risk for councils will reduce accordingly. Provisions in the Building Bill 2010 have been included to specifically address this issue. For example, in relation to work carried out under a low-risk building consent, a BCA will not be under any duty to inspect the building and should not incur liability only because no inspection was made. Whether this will result in an actual risk reduction for BCAs is not clear. Most risk arises for BCAs from non-low-risk work in any case, so this change may make very little material difference.

4.2 Statutory warranties

4.2.1 The Building Act sets out various statutory warranties that apply to all building work and to the sale of household units by residential building developers. They cannot be contracted out of. There are also warranties in the Consumer Guarantees Act 1993.

4.2.2 The Building Act statutory warranties include that all work will be carried out in a proper and competent manner.

4.2.3 The consultants have only identified three cases where the statutory warranties have been applied. These were for relatively minor sums and did not involve latent defects. Feedback from the Advisory Group is that the warranties do not do anything more than codify existing law. Further, the Building Act Review concluded that a problem with the warranties could be the lack of enforcement options. As discussed below, remedies relating to the warranties are to be added to the Building Act.

4.3 Licensed Building Practitioners Scheme

4.3.1 The Licensed Building Practitioners Scheme ("LBP Scheme") provides for the voluntary licensing of building practitioners in seven different categories of building and construction. The Scheme is administered by the Department, which maintains the licensing register. In order to be licensed, prescribed competency requirements must be met.

4.3.2 As noted the scheme is currently voluntary, but this will soon change. The current incentive for practitioners to join is that it offers formal recognition of their competency and experience, which they can use in advertising and as a mark of quality. The LBP Scheme is to be amended to make registration compulsory for particular kinds of building work, most notably work on a building's external envelope.

5. SUBMISSIONS TO THE BUILDING ACT REVIEW

This chapter summarises submissions on the Building Act Review which commented on joint and several liability. These submissions, in large part, lead to this review of joint and several liability.

5.1 Submissions to the Building Act Review

5.1.1 This review of the application of joint and several liability is being undertaken partly because of concerns raised about its application in the building and construction industry in New Zealand. One of the requirements of the review is to examine the points raised in the submissions.

5.1.2 Submissions to the Building Act Review in 2010 raised a number of issues with joint and several liability:

(a) A number of submitters said that joint and several liability encourages risk averse behaviour by BCAs, such as increased compliance behaviour and the setting of other requirements. Specific examples referred to by the Construction Industry Council were:

(i) refusal to accept national competency registrations (e.g. of Chartered Professional Engineers), unless their competency had been assessed by the local authority;

(ii) refusal to accept "Producer statements". Under the Building Act 1991, producer statements were a defined means of providing evidence from building practitioners of compliance with the Building Code;

(iii) failure to meet required statutory timeframes;

(iv) lack of consistency amongst BCAs in relation to information requirements, documentation, and interpretation of the Building Code.

(b) The Construction Industry Council submitted that the consequence of risk falling mainly on BCAs is that the costs of building failure fall on tax payers and increased building consent fees, reassigning the cost of poor design and poor building practices to parties other than those that cause loss.

(c) A number of submitters submitted that joint and several liability does not encourage industry practitioners to face and resolve disputes and does not support practitioners taking responsibility for "getting it right first time".

(d) The Registered Master Builders Federation submitted that manufacturers, design professionals and suppliers need to be accountable like every other person involved in the building industry. The Federation suggested that responsible building companies are being left to meet the whole of the claim, if the designer disclaims responsibility, the product manufacturer and supplier disclaim liability and the specialist trade goes to ground. It was therefore seen as unsurprising that some building companies chose to use the legal mechanisms and fold the company, to start again.

(e) Local Government New Zealand submitted that it is not fair for councils and ratepayers to provide an effective surety for poor work. In order to ensure greater accountability for faculty building work, a rebalancing of liability away from BCAs is required. If local authorities continue to carry the risk, then other parties will not.

5.1.3 There was strong support for proportionate liability, or at least that it be considered as an alternative, by a number of submitters. However, the effective use of other tools such as warranties by all participants, or compulsory insurance, was proposed by some submitters as an adjunct to proportionate liability or by other submitters as an alternative. On the other hand, it was noted that small companies in small professional practices would struggle to obtain surety backing and those companies or practices may be forced out of existence.

5.1.4 In relation to proportionate liability, concerns were expressed over the fairness to consumers. The Law Society, for example, noted that proportionate liability would leave consumers vulnerable to little or nil recovery for the failure of a builder or developer in the event of their insolvency.

5.1.5 Other mechanisms for establishing accountability that were proposed included a Licensed Building Practitioner ("LBP") scheme/qualification-based sanctions for poor performance with incentives for good performance, enforceable personal and company financial liability for ensuring a reasonable standard of work, or consumer protection through warranties with robust third party backing by means of a surety. It was also noted that changes to accountability and responsibility for building work and its consenting would affect liability.

5.2 **Observations of the consultants**

5.2.1 In relation to the point that joint and several liability does not encourage industry practitioners to face and resolve disputes it is observed that liability does fall on industry practitioners under joint and several liability. Similarly, if suppliers and manufactures are negligent then liability will fall on them as well. Provided all parties who are negligent are present at judgment, then liability will be shared among them, with any negligent practitioner carrying their share of their loss. In theory, therefore, joint and several liability does hold all parties accountable.

5.2.2 The problem may not be with joint and several liability per se but that there are mechanisms for building practitioners to avoid liability (even if this is not directly their intention) even under proportionate liability. This could be because they are personally bankrupt, or do not have sufficient funds to pay any liability, or they operated through a company that also has insufficient funds, is insolvent or might even have been dissolved. The possibility of being liable might provide an incentive for particular structures to be adopted, but this is likely to be the case with any liability system.

5.2.3 Another cause of concern could be that the extent of legal responsibility of some parties differs from the responsibility that other parties perceive they should have. For example, some submitters claim that manufacturers and suppliers are able to avoid liability.

5.2.4 It seems likely that this is occurring because the products they manufacture or sell are intended to work only in specific circumstances, or might be fine as a stand-alone product. It is only if they are used incorrectly, or when they are used with other incompatible products, that a problem might arise. Alternatively, the products may be subject to exclusion or limitations of liability. In any case, this does not seem to be a problem with the way liability is allocated. Instead it could be an issue related to the duty of care or with industry and market subjects.

5.2.5 A further cause of concern over joint and several liability could be the perception that even a party who makes a minor error in one element of a building would be liable for all the damage or loss that occurs in respect of that building, including from errors of other parties. This is not necessarily the case. There are a number of requirements that have to be met before a person will be held liable. The first relates to causation and the fact that a defendant will only be held liable if that person's actions or inactions were a sufficient cause of the loss. Secondly, and more importantly, defendants will only be held liable for all of a loss arising from building failures if it is indivisible. If a Court can say that a defendant's actions only caused some of the damage to a building, but not other damage that also occurred at the same time to the building, the defendant will only be responsible for the first category of damage.

5.2.6 On the other hand, in the leaky homes cases, the loss often is indivisible given the systemic nature of the loss. It may be that this is what has occurred. If so, the issue may not be with joint and several liability but with the rule of causation (which says that any significant cause of loss will suffice for liability; not only main or primary causes). Also it could be that this is an appropriate result.

5.2.7 A number of submissions claimed that joint and several liability encourages risk averse behaviour by local authorities. However, very few examples were given in submissions of risk averse behaviour. Also, it could be that local authorities are doing no more than properly carrying out their responsibilities under the Building Act and some submitters are really only complaining about the fact that this is now occurring.

6. LAW REFORM REPORTS, REVIEWS AND LEGAL AND POLICY ARGUMENTS

This chapter provides a general overview of the Commission's consideration of the rule of joint and several liability (full summary in Appendix 4), summarises previous reviews (full summary in Appendix 5), and canvasses the legal and policy arguments of different liability regimes. It also describes a report on liability prepared by Jonathan Kaye and Martin Jenkins (full summary in Appendix 6).[3]

6.1 Overview

6.1.1 Fairness to a plaintiff is one of the primary justifications used in support of joint and several liability. It is apparent in most of the literature we have reviewed that fairness and justice are relative concepts. As such, fairness is always viewed vis-à-vis fairness to another. Much of the literature is discussed in the context of fairness between a blameless plaintiff and negligent defendants. What is clear is that each type of liability (joint and several or proportionate) is fairer to one group, and less fair to another. Joint and several liability is said to be unfair to deep pockets who are required to carry the responsibility of others' mistakes.

6.1.2 The Commission's 1998 report on the *Appointment of Civil Liability* provides strong arguments against a general shift away from joint and several liability to proportionate liability on the grounds of the unfairness proportionate liability would cause to plaintiffs and the judicial thinking that underpins the rule of joint and several liability.

6.1.3 At the same time, the Commission's report does not completely rule out the possibility of a change to the rule of joint and several liability. It leaves open the possibility of change, either in specific sectors or in respect of particular categories of defendants, such as local authorities. The Commission also highlighted alternative options to joint and several liability, other than proportionate liability.

6.1.4 Procedurally, there is contention between those who believe that joint and several liability is a more efficient system and those who do not. The Commission noted as a strong argument the fact that difficult rules around contribution would not be needed if proportionate liability were introduced. There is disagreement between Professor Davis in Australia and the NSW Law Reform Commission as to which model is more efficient.[4] Proportionate liability is certainly not without its procedural problems.[5] However some reports suggest it gives rise to few issues.

6.1.5 The literature suggests that the arguments around justice and fairness are finely balanced. There will always be a risk in society that persons will suffer injury and a policy question involving a value judgement is required to determine who should shoulder the risk. Currently, it is defendants who are caught in situations where another defendant cannot pay. If a shift to proportionate liability were made, this risk would be carried by the plaintiff. While many agree that joint and several liability is not ideal in every aspect, the reluctance to shift seems to stem

[3] *Report to the Building of Department and Housing on the liability framework work in the building sector*, Jonathan Kaye, Barrister and Solicitor, and Martin Jenkins and Associates Limited 11 June 2009

[4] J.L.R Davis "Inquiry Into the Law of Joint and Several Liability: Report of Stage 2" (1995) ACLN Issue 41; New South Wales Law Reform Commission "Contribution Among Wrongdoers: Interim Report" (NSWLRC R65, 1990); New South Wales Law Reform Commission "Contribution Between Persons Liable for the Same Damage (NSWLRC R89, 1999).

[5] See e.g. Tony Horan "Proportionate Liability: Towards National Consistency" (September 2007), and Barbara McDonald "Proportionate Liability in Australia: the devil in the detail" (2005) 26 Australian Bar Review 29-50.

from a view that it is better than the alternatives at issue, and in relation to proportionate liability that its benefits are not clear.

6.1.6 Following the Commission's reasoning, however, it would be very difficult to justify a change from joint and several liability on the basis of fairness to particular categories of defendants. Any case for change would also need to take into account the economic impact of the rule of joint and several liability and any alternative options, either generally or in a specific industry.

6.2 **Arguments for joint and several liability**

The Commission's views

6.2.1 The Commission's review of the rule of joint and several liability, which it carried out as part of a wider review of the rules of apportionment in civil liability, is important because it is the most recent major consideration of the appropriateness of joint and several liability in New Zealand.

6.2.2 In 1998, the Commission released its final report – *Apportionment of Civil Liability*, which included consideration of the rule of joint and several liability should be replaced by proportionate liability, the problem with the uncollectable contribution, and the cost and availability of insurance.

6.2.3 During the early stages of its review, the Commission acknowledged that there were some persuasive arguments in proportionate liability's favour but nevertheless, did not favour a shift. This view was informed by the effect on plaintiffs of an abrogation of the joint and several rule. The Commission thought it undesirable that a plaintiff should be left to carry the burden of an insolvent defendant, where the plaintiff suffers loss at the hands of others, through no fault of his or her own.

6.2.4 In making its final recommendations, the Commission views became even stronger, with the Commission saying it was of the "*firm view that no sufficiently compelling case for departure from the solidary rule*" was made.

6.2.5 The Commission put considerable emphasis on the point that the whole basis of the law of civil liability is that quantification is determined not by the degree of the wrongdoers fault but by the extent of the injury to the plaintiff. It expressed the view that as a defendant's liability is for the whole loss caused by the defendant's wrongdoing, liability should be unaffected by the fact that the behaviour of some other party has caused the same loss. It said that as between plaintiff and wrongdoer 1, it is irrelevant that the plaintiff can also claim against wrongdoer 2, or that wrongdoer 1 may be entitled to claim contribution from wrongdoer 2.

6.2.6 Interestingly, the Commission stated that if there is injustice and the sums are being recovered from a professional firm whose error is very small in comparison to others, the remedy for such injustice must lie either in an examination of the duty imposed by the law on the professional firm or in the rules of causation. This is significant as it indicates that perceived problems with joint and several liability could in fact be attributable to other factors.

6.2.7 The Commission concluded the paper by making closing remarks about "deep pockets", as the effects on these groups was the driver of reforms overseas. As well as noting the lack of negligence for personal injury in New Zealand, the Commission pointed out that there are various ways of addressing any perceived deep pockets problem without making changes to the rules of contribution:

(a) Professional firms could be permitted to incorporate with limited liability;

(b) The Commission noted that it is remarkable, particularly in relation to auditors, that few professionals "show clients the door". As a result these firms are the authors of their own misfortune;

(c) It would be possible to legislate for a cap on liability; and

(d) As to territorial authorities, "*it is uncontroversial to observe that their liability for the civil consequences of negligent supervision of building is entirely the result of conscious judicial social engineering...*". The Commission said that a statutory revisiting of this topic would, on such a view, be appropriate.

Views of other law reform bodies

6.2.8 The Commission's views were strongly influenced by the reluctance of legislators and reformers elsewhere to move away from joint and several liability. Other law reform literature notes that joint and several liability is only criticised when one of a number of defendants is absent or insolvent so that "deep pocket defendants" are required to cover their share, and the effect this has on insurance premiums for those parties.[6] Where all parties are present and solvent the concerns with joint and several liability do not arise and there is little disagreement that in those cases, provided provision is made for contribution, the rule does not cause any major injustice.

6.2.9 The common law has always been concerned with ensuring that an injured party is fully compensated for his or her loss. This protection informs much of the academic and reform literature assessing the feasibility of the rule of joint and several liability. Assessments of fairness come into play in every piece of legal literature that the consultants have reviewed. It is central to the views of many reform bodies and academics that joint and several liability should be retained. It is this fundamental principle that informs these views on fairness and explains why the reform bodies are uneasy about a move to proportionate liability.

6.2.10 The UK Law Commission, and NSW Law Reform Commission have all found that joint and several liability is the best means of ensuring fairness to a plaintiff. The NSW Commission noted that joint and several liability "*aims to ensure, as much as possible, full compensation for the plaintiff*." Conversely, the UK Law Commission has said that "*full proportionate liability is unfair to plaintiffs because it shifts the risk of a defendant's insolvency from the other defendant to the plaintiff*." A plaintiff may, in such cases, be unable to recover fully for his or her loss.

6.2.11 Notably, and no doubt to some extent influenced by one another, these law reform bodies have been opposed to proportionate liability and have instead recommended the retention of joint and several liability. One body, the Canadian Standing Committee on Banking, Trade and Commerce recommended the introduction of proportionate liability in relation to the issuing of various

[6] NSW Law Reform Commission (1999), above n 2.

financial information issued under federal statutes, but recommended the retention of joint and several liability for individuals who could be classified as "unsophisticated plaintiffs".

6.2.12 The law reform bodies put forward the following arguments in favour of joint and several liability:

(a) The rule is fair as the defendant's liability is for the whole loss caused by the defendant's wrongdoing. It is wrong in law to say that the defendant is not responsible for the whole loss because he or she is only held liable for injury that he or she caused. In tort law, the causal responsibility of each wrongdoer extends to the whole of the plaintiff's injury that results from the actions of the wrongdoer;

(b) In an assessment of a defendant's liability to a plaintiff, the actions of another defendant are logically irrelevant, and its inclusion would have the consequence of reducing a defendant's level of responsibility because another defendant is present. The question about fairness between defendants is a different one to the question of fairness between a defendant and the plaintiff. Even if a defendant may only claim to be five per cent to blame as between himself and another defendant, as between the plaintiff and the defendant he is 100 per cent to blame;

(c) The plaintiff's own actions in entering into a transaction or taking another action, unless in the nature of being contributorily negligent, should not be taken into account as somehow reducing their ability to recover for their injury. As the UK Law Commission noted "*It would be a dangerous precedent for the law to regard a person who enters into a contract with, or takes advice from, someone who has no insurance as being, for that reason, partly responsible for his own loss*";[7]

(d) Between the plaintiff and defendant it is not the level of fault that is measured, instead liability is quantified with reference to the level of injury suffered by the plaintiff. If there is injustice in the levels of damages being recovered by one deep pockets party, then it is the rules of causation or the duty of care that need considering, rather than the rule of joint and several liability.

6.2.13 The point in (a) regarding responsibility is often a central justification and should be explained further. Some say that joint and several liability results in a defendant being held liable for more damage than he or she caused or for which he is responsible, or held liable for actions other than his own actions. If this was the case, it is noted that the law would be unjust. But most of the academic literature challenges this criticism and points out its illogic. As has been noted:[8]

> "*Joint and several liability only applies to injuries for which the defendant herself is fully responsible. She is responsible for the entirety of the injury only if his or her tortious behaviour was an actual and proximate cause of the entire injury. She is not liable for injuries, including separable portions of injuries, to which she did not contribute....*"

This goes some way toward rebutting the argument that a defendant is held liable for more than his or her share; a person will only be liable for those injuries which he or she caused.

[7] UK Law Commission *Feasibility Investigation of Proportionate Liability* (London, 1996).
[8] UK Law Commission *Feasibility Investigation of Proportionate Liability* (London, 1996) at 17.

6.3 **Arguments for proportionate liability**

6.3.1 The proponents of proportionate liability are critical of joint and several liability because of its perceived unfairness to defendants.[9] It is said to be unfair that they are made to carry a risk of potentially unassociated parties becoming insolvent and having to carry their costs. This is particularly said to be the case in situations where a defendant is said to be only marginally responsible. Professor Davis for example claims that "*the fairness or justice of a rule must be questioned when its effect is to place full liability on a defendant who may have only marginally been at fault...*"[10] A common rebuff to that argument is that it ignores the rules of causation and proximity in tort that say that a person will only be held liable for loss they caused, so that the problem may not be proportionate liability itself, but other rules of tort, if there is indeed a problem at all.

6.3.2 Professor Davis attacks the reluctance of law reform bodies to acknowledge that the policy behind full compensation for plaintiffs flows from the origins of the law of tort as a system of law covering personal injury, and not one designed to extend to cases involving pure economic loss. His view is that the law is not always concerned with providing full compensation, particularly in claims involving economic loss. This view is central to his recommendation that the law should shift from a system of joint and several liability to a proportionate liability regime. Davis uses this argument as a reason to distinguish his review (involving only economic loss and property damage) from those of the New Zealand, New South Wales and UK law reform bodies, each of whom had been considering liability across the law of torts, including liability for personal injury.

6.3.3 This argument was dismissed, however, by the NSW Law Commission, which was quick to point that the while there is a distinction to be made between personal injury and other loss, it can be a fine one. It points to the fact that to small investors or homeowners, damage to property can be equally devastating compared with some types of personal injury.

6.3.4 Other arguments put forward that support proportionate liability include:

(a) The fact that a plaintiff will be in the same position he or she would have been in under proportionate liability if he or she had been injured by one insolvent defendant or two. In both cases the plaintiff will not be fully compensated. On this basis it is said the common law does not provide cover in every case. This is a response to the argument that proportionate liability will materially affect the position of a plaintiff;[11] and

(b) That proportionate liability provides the appropriate environment for insurers and professionals in terms of providing and obtaining insurance, which therefore removes much of the risks that plaintiffs would be said to suffer under the proportionate liability rule.

[9] See e.g. Davis (1995), above n 2; and Mary Anne Simpson "Apportionment or compensation? Joint and several liability reconsidered" [1995] NZLJ 407.
[10] Davis (1995), above n 2.
[11] See Simpson (1995), above n 8; Davis (1995), above n 2; and NZ Law Commission "Apportionment of Civil Liability" (NZLC R47, 1998).

6.4 **The Jonathan Kaye/Martin Jenkins Report**

6.4.1 Martin Jenkins Limited and Jonathan Kaye, Barrister and Solicitor, were commissioned by the Department to review possible changes to the liability rules in the building sector. The consultants have reviewed their report, entitled Report to Department of Building and Housing on the liability framework in the Building Sector of 11 June 2009 (the "Jonathan Kaye/Martin Jenkins Report") for this report.

6.4.2 The report was sought by the Department to assist it in advising its Minister on opportunities to better manage risk in the construction sector to minimise the economic cost of building performance failure.

6.4.3 The report noted that from an economic perspective the rule of joint and several liability can have undesirable effects if it results in a particular defendant being consistently liable for the losses of other defendants who are no longer in existence or unable to pay their share of the plaintiffs' loss. Undesirable effects were also seen to arise if deep pocket defendants who are generally only liable for a very small proportion of the plaintiffs loss (say 5%) becoming liable for 100% of the plaintiff's loss because other defendants are regularly unavailable or impecunious.

6.4.4 The report identified that there were two overall issues with the liability regime in the building sector. The first is that the allocation of costs between territorial authorities and other parties for building defects is not aligned with the risk of building failure. It considered that due to a combination of factors territorial authorities are exposed to the various costs of risk taking in the sector but none of the benefits.

6.4.5 Secondly, the report said that between industry participants, risk was not properly proportioned as some participants are more able to manage their risks though the use of company structures and trusts, or to purchase professional indemnity insurance, but others are not.

6.4.6 In relation to the first issue concerning territorial authorities, the report considered various options to alleviate the identified problems. Overall, the report recommended either limiting the duty owed by territorial authorities to initial and subsequent homeowners, or providing them statutory protection from liability in their granting of and issuing of building consents and code compliance certificates.

6.4.7 On the second issue, on the assumption that the duty of care owed by territorial authorities would be limited or that they would be provided with statutory protection from liability for granting and issuing building consents, the paper set out various options for apportioning risk between industry participants. Of those options, the report favoured the introduction of proportionate liability for all industry participants. This was because proportionate liability would provide a better means of allocating the cost of risk taking to those with control over decisions and behaviours contributing to the risk, provide greater certainty as to costs of liability and eliminate deep pockets, and provide the conditions necessary for supply for professional indemnity, home warranty insurance and other risk management tools to grow.

6.4.8 In making this recommendation, the report noted that consideration also needed to be given to implementing other regulatory industry initiatives such as building practitioner licensing, supply and demand for insurance, and accessibility of dispute processes to ensure that consumers would not be worse off.

Observations on the Jonathan Kaye/Martin Jenkins Report

6.4.9 The Jonathan Kaye/Martin Jenkins Report provides a good discussion of the issues relating to liability framework. However, while referring to a number of concerns with the liability regime, it does not discuss the evidence of whether or not there are actual issues or their implications. This may be because the brief from the Department did not require them to undertake such an inquiry.

6.4.10 Regardless, it is important to substantiate the claims that have been made. For example, it is important to check whether or not the liability regime is creating risk averse behaviour by territorial authorities resulting in unnecessary cost, and whether or not the claim that builders and others face greater risk than other parties in the building sector is correct. The consultants' brief in this review has included a requirement to explore the evidence of the impact of joint and several liability.

6.4.11 As part of the review of this report, the consultants also note the following:

(a) The report was prepared almost one and a half years ago. The perceptions of the impact of joint and several liability may have changed over that time, particularly as more weathertightness claims have played out;

(b) Since the report was made, the Department has carried out the Review of the Building Act, and Cabinet agreed to various changes to the regulatory regime. These changes may address some of the concerns that the Jonathan Kaye/Martin Jenkins report identifies;

(c) The report may have dismissed the option of capping liability too readily, by noting that it would only have limited application to protect professional groups. This does not necessarily rule out its application to other groups within the building sector in New Zealand;

(d) The categorisation of the issues in the report into being firstly about the allocation of risk between territorial authorities and other parties and, secondly, the allocation of risk among these other parties, may have limited the options analysis. In particular, the result of this categorisation of issues is that the report did not consider the application of proportionate liability to all parties within the building sector, including local authorities. Rather, it considered firstly only the application for proportionate liability to territorial authorities and, secondly, its application to industry participants other than local authorities; and

(e) It is not necessarily correct to categorise the risk arising from bankruptcy or insolvency of builders and building companies as solely an issue relating to insolvency law. Although the consultants agree that the problem arises from the operation of bankruptcy and insolvency law, it arguably has a particular impact in the building sector and on the risk carried by other parties. It is important to recognise both that it is possibly part of the cause of the alleged increased liability risk carried by local authorities, and that because of this issue proportionate liability could increase the costs faced by consumers.

7. PAST LIABILITY FOR WEATHERTIGHTNESS ISSUES

Much of the concern over joint and several liability seems to relate to the way that liability for weathertightness problems has fallen. A study undertaken for the Department by PWC has researched this issue.

7.1 Liability for building failures falling disproportionately on BCAs

7.1.1 One of the main criticisms of the application of joint and several liability in the building sector, including in some of the submissions referred to above, is that liability falls disproportionately on BCAs. This criticism is supported by the report by PWC to the Department entitled "Weathertightness – Estimating the cost" (21 July 2009), which considered the apportionment of liability for historical weathertightness claims.

7.1.2 The report noted that the consensus of experts interviewed as part of the research indicated that a typical adjudication might find the following legal responsibility for weathertightness issues:

(a) Building parties – 50%;

(b) Designer/architect – 10% to 20%; and

(c) BCA – 20% to 30%.

7.1.3 This is similar to the apportionments found in the cases discussed in Appendix 1 of this report.

7.1.4 The study noted, however, that it is common to find that parties to weathertightness claims cannot be found or are financially unable to contribute to the resolution (not least through a large number of builders and property developers having been liquidated since work was carried out). For example, the PWC report referred to a Departmental internal study from October 2008, which sampled 200 companies named as parties to weathertightness claims. The study indicated that almost a third were in liquidation or had been struck off the Companies Register.

7.1.5 PWC collected data from territorial authorities in the North Island and found that the actual share of mediation costs had historically varied between 40% and 70% of the adjudicated costs, and averages around 45% of the total settlement across single and multi-unit dwellings.

7.1.6 This data indicates that a greater share of the costs of liability for weathertightness issues has fallen on territorial authorities, as compared to what the share of costs could be if all parties were available to share in the cost of remediation. This data supports the claim that local authorities are meeting the share of liability of other parties under the rule of joint and several liability when those other parties are not available.

7.1.7 On the other hand, it does not support the point made by some other submitters that builders and building companies are often left as the "last man standing" in building failure cases, and pick up the liability of other participants.

7.2 Greater costs falling on homeowners

7.2.1 Another important point from the PWC study is that the greatest cost of weathertightness failures falls on homeowners. This is because:

(a) Even if they are successful in legal processes either through the Weathertight Homes Tribunal or the Courts, they might not fully recover all of their costs from other parties, and there could even be a significant shortfall. The report referred to anecdotal evidence suggesting that a single-unit claim for a full reclad would cost the owner around $100,000 despite recoveries from other parties;

(b) If settlement is reached out of Court or through mediation without the overview of the Weathertight Homes Tribunal, it was also estimated that owners do not recover all of their costs; and

(c) There are many cases where the property owner fixes the problem themselves either because the cost is small or the work was completed earlier than the 10 year limitation period in Building Act. In the latter case, homeowners are statutorily barred from making a claim.

7.2.2 The consensus forecast from the PWC report of the economic costs of the weathertightness issue was as follows:

Consensus forecasts of weathertightness economic costs and millions incurred by parties 1992-2020	
Party	**Cost in $ million**
Owner	$7,833m
Council	$2,817m
Third party	$402m
Government	$243m

8. SUMMARY OF ISSUES FROM INTERVIEWS

This chapter contains a summary of the findings from the interviews. We set out summary comment and then discuss the issues from the interviews more fully. The issues raised have been analysed, grouped under descriptive headings and then are commented on. A list of the stakeholders interviewed and the nature of the questions asked in the interviews is included in Appendix 8.

8.1 Structure of issues

8.1.1 Each of the issues is presented under the following headings:

(a) *Proposition*: the name of the claimed issue/problem;

(b) *Dimensions*: how the issue/problem manifests itself, who is affected by the issue/problem and the extent to which they may be affected; and

(c) *Discussion*: the evidence in support of the claims made, alternative lenses through which to view the issue/problem, and an indication of the priority that should be accorded to the issue/problem.

8.1.2 Material under the "Discussion" heading contains observations from the consultants. This is, in part, informed by the desktop research.

8.2 Issue 1 - Fairness

8.2.1 **Proposition:** The current (joint and several liability) rule gives rise to outcomes that are unfair.

8.2.2 **Dimensions:** This issue has by far the greatest dimensionality. In addition to the range of potential areas where fairness is a concern, the issue is further distinguished by fairness in relation to the time dimension - fairness concerns relate almost exclusively to allocation of liability following loss or damage.

8.2.3 The interview process revealed that the greatest level of concern in relation to unfairness centred on the following:

(a) **The consequences for parties involved in a building that has suffered loss/damage:**

This dimension has three sub-dimensions of its own:

(i) First, there is a feeling that there are essentially no barriers to being drawn into proceedings for parties that have had any involvement whatsoever with a damaged building. That is, as it is thought that it is essentially costless to join a party, an incentive exists to bind as many parties as possible to the claim, as opposed to a more targeted and principled approach, based on aspects such as proximate cause. The unfairness cited is the “scatter gun approach” drawing in parties as a matter of course and these parties incurring costs (both directly and indirectly) to defend such claims.

(ii) Second, once joined to the claim, it was said that parties are treated differently, based on circumstances that are unrelated to the cause of action. For instance, parties that have financial resources available either directly or through insurance arrangements (i.e. so-called “deep pockets”) and/or a company presence that is enduring (i.e. so-called “last man standing”) are said to be especially targeted, particularly where there is some likelihood that other parties who may have some liability are impecunious or simply not available. The sense of injustice expressed here is that some parties are being unfairly punished for actions that are either virtuous (e.g. the protective mechanism of risk-sharing through purchase or other arrangement of insurance) or unavoidable (e.g. territorial authorities carrying out their BCA duties do not have available to them the same mechanisms as private companies). Some interviewees, however, strongly questioned the extent to which this is occurring, with one litigation firm stating that they usually find that most potential parties to claims are solvent, and that the "deep pockets" or "last man standing" scenarios are very infrequent.

(iii) The final sub-dimension relates to the perceived unfairness of subsequent apportionment of costs associated with the loss/damage. The claim is that the parties who are financially sound or who are looking to continue trading are burdened with cost shares that bear little relationship to their degree of liability for the actual damage/loss. While the general principle is that payments by certain (wrong-doing) parties are disproportionate to the extent of their wrong-doing, a subtle (but important) distinction should be made between allocations resulting from settlements agreed by mediation/adjudication and allocations determined by the courts.

We understand from the interviews that the vast majority of weathertightness claims are settled outside of court proceedings. Thus, while the claim is that both avenues are inherently unfair to "deep pockets" parties who often find themselves to be the "last man standing", much of that feeling is based on the outcomes of mediation/adjudication processes rather than a court-driven application of the liability rules in place. The unfairness here relates to the perception that certain parties (e.g. territorial authorities and/or professional groups such as architects and engineers) are bearing an inordinate amount of the costs of loss/damage for reasons not related to liability.

Again, however, this claim was questioned by some interviewees. In particular, one interviewee noted that insurance companies and BCAs are very strong in mediations and settlements about keeping within the normal Court-ordered apportionment shares.

Further down the track, it is claimed that insurance conditions are altered for those parties bearing costs under the existing regime. Premiums are increased and/or coverage is restricted as a result of the costs of settlement. This is seen as inequitable given the disjunct between costs and responsibility.

Hypothetical examples

The following text describes hypothetical examples of how the liability regime is seen by some to result in unfair outcomes for some parties. While hypothetical, they are based on typical situations that have arisen in the past, according to interviewees. The examples demonstrate (in an abstract sense) the potentially unfair nature of the operation of joint and several liability in the three sub-dimensions summarised above.

Example 1

A residential construction project is undertaken, with an architect being involved in providing sufficient documentation to obtain a building consent. No construction oversight or monitoring was included in the contract. The architect's details and materials were not included in the construction. The building subsequently leaks and a Weathertight Homes Tribunal process is instigated. The architect obtains an expert report indicating that there was no negligence on the part of the architect. At the mediation, the builder and related sub-trades do not appear and the engineer has a contractual limitation which is effective. In order to avoid the cost and litigation risk involved in defending a joint and several case, the architect agrees to contribute $65,000 to settle the claim, despite the evidence that she was not negligent. As a result of such costs, insurance availability for architects is altered either through restrictions in events covered or increases in premiums, or both.

Example 2

A residential construction project is undertaken with a range of parties undertaking work on the project. The building ends up as a leaky building. The "default" position of lawyers acting for the homeowner is to include as many parties as possible to the action. The builder and sub-trades are insolvent or have disappeared. Any liability that might attach to these parties is effectively distributed to the remaining parties, which are the BCA, engineers and architects (and their insurers). Each of the remaining parties obtains expert advice which estimates that their liability for the loss/damage is 5%, 10% and 10% respectively. However, due to the absence of co-defendants and the rule of joint and several liability, the remaining parties are faced with contributions that far exceed the extent of their estimated responsibility for the loss/damage.

In counterpoint to these views, some strong concerns were expressed about the unfairness that a move to proportionate liability would create for plaintiffs, particularly where they are not contributorily negligent. In this regard, reference was made to the Law Commission report described in chapter 6 of this report.

(b) **How the law treats particular parties in the building and construction sector:**

This issue refers to the apparent ease with which the Tribunal in particular, and possibly the Courts, are looking behind the limited liability company a builder has set up to protect his or her interests, and finding the builder personally liable for the loss caused to the

plaintiff. The claim is that the building and construction sector is treated differently (and therefore unfairly) in relation to other sectors. The example most often cited was that of a builder who operates under a limited liability company structure, but is held personally responsible for damage to a building. Again, the relevant context most frequently mentioned is weathertightness mediation.

In such cases, we have been told that adjudicators readily look around the protections normally afforded by the limited liability regime and attached liability to individuals associated with the company, provided that the individual/s were effectively "on the tools" (i.e. had personally been involved in undertaking work on the building in question). This seems to be the case whether or not the builder in any way intended to assume personal liability for the acts or omissions of the company. Thus, the claim is made that parties in the building and construction sector are unfairly treated, relative to individuals operating in other sectors of the economy who are still protected from personal responsibility by the limited liability regime. In addition, the practice of looking behind the limited liability company is claimed to be related to the size of the company, with smaller parties more likely to lose the protection of the limited liability structure. Thus, there are within-industry issues of fairness to consider as well.

(c) **An inherent bias towards consumer protection:**

This issue again refers to a situation where particular parties are accorded “special” treatment, seemingly to the detriment of others. In this particular instance, it is claimed that the general class of consumers/purchasers/homeowners are the favoured party. The major claim made is that consumers effectively receive unpriced insurance by the operation of the rule of joint and several liability. This claim is based on the understanding that the rationale for joint and several liability is to ensure as much as possible that victims of negligence are able to recover the full extent of their loss, regardless of whether or not the victim may have been responsible for, or at least “connected to” the loss.

Two examples were given:

(i) The first is where a homeowner assumes a role in relation to building and construction but does not assume the responsibilities of that role in the event of loss/damage. The typical case cited involves a homeowner managing the construction of a building by arranging a “labour only” builder, engaging the sub-contractors, and purchasing the materials. In effect, they are the head contractor/project manager. When defects arise (again in the context of weathertightness) the usual practice is for the head contractor to assume liability for restitution and/or settlement. However, cases were cited where builders and other parties were treated as the head contractor despite providing “labour only” services, and the consumer essentially being put to the side (as an innocent party).

(ii) The second concern is more general. It centres on the consumer receiving a type of unpriced insurance from the rule of joint and several liability in the event of loss/damage. The basis of this claim is that consumers pay a certain price for the property they own and therefore, unlike other instances of negligence (e.g. a motor accident), the victim has something of a connection with the loss. The price paid for

the property would reflect the quality of workmanship and materials employed. This price did not include the cost of a ten year guarantee. If a fault occurs, the position of the law is that the consumer/homeowner is the innocent victim, and the nature of the law is such that full restitution of the victims' loss is the objective. Thus, it is said that the unpriced risk that is transferred from the homeowner to the (solvent) parties in the building and construction sector is a form of insurance that has not been paid for by the homeowner (who may have received a generous discount of the price of the property), which is regarded as unfair.

8.2.4 **Discussion:** There was very little clear evidence in support of claims of unfairness provided in interviews with some parties even questioning the extent of the "deep pockets" and "last-man standing" problems. The interviewees who claimed that these problems arise did not provide any information to support their claims. The only evidence that the consultants are aware of is the information from the PWC report, discussed in chapter 7 above. On that basis, we accept that these situations are arising, but we are unsure of their extent.

8.2.5 What is very clear is that fairness concerns arise and are most acutely felt "post-event". In addition, most of the concern expressed by interviewees related to fairness among and between wrong-doers, as opposed to fairness between plaintiff and defendants. While nobody spoken to suggested that homeowners/consumers should not be accorded priority in the event of loss/damage, the majority view from industry players was that this should be dealt with outside of the liability regime or as part of an altered liability regime (e.g. introduction of some form of surety or warranty scheme). Thus, the discussion in the interviews was fairly narrowly focussed and did not really introduce new issues or expand on the relatively common understanding of the issues that existed prior to the project, and as discussed in chapter 5 of this report.

8.2.6 The focus of interviewees appears to us to be on:

(a) Horizontal equity (i.e. the notion that people in similar situations should be treated the same way); whereas

(b) Vertical equity (i.e. the notion that people with different characteristics be treated differently) seems at least as relevant overall. The inclusion of consumer-focussed groups in the interview process did provide a useful counterpoint, however.

8.2.7 Moreover, there appears to be some muddling of cause and effect. For example, one of the claims is that there are no barriers to a large number of parties being drawn into a proceeding. For claims before the High Court, however, parties who consider that they should not be joined in an action can seek strike-out. We are unsure why this has not happened very extensively but understand that it might be because of fear of what might come out in the judgment. Further, the High Court is able to order costs against plaintiffs who are unsuccessful, and take into account the strength of the plaintiffs' case in doing so. This is a disincentive against unnecessarily joining parties although we accept that, for a builder, simply being joined is significantly expensive.

8.2.8 It may be that this issue relates more to proceedings in the Weathertight Homes Tribunal, where the costs involved in seeking strikeout and the high-threshold required to obtain a costs order means that some defendants feel hard done by if they feel they have been unfairly joined to a claim. We understand that the strikeout procedure is used extensively in the Tribunal but the cost

of engaging lawyers and making submissions and appearances is costly. Costs can be awarded by the Tribunal[12] but we have heard that costs are rarely, if ever, awarded against unsuccessful plaintiffs, partly because the threshold in the legislation is so high. If so, the issue identified in paragraph 8.2.3(a)(i) may be caused more by the procedural rules around the Weathertight Homes Tribunal, or the approach of adjudicators to the rules, than the rule of joint and several liability.

8.2.9 The major driver of much of the debate and subsequent concern is the situation of uncollectible shares following loss/damage (i.e. where liable parties are not able to cover their share of the loss/damage and that burden falls on the remaining parties). The stated unfairness largely results from uncollectible shares.

8.2.10 The majority view expressed in the interviews is that setting up particular company structures on a project-by-project basis and related solvency issues are not greatly influenced by the liability regime and would be much the same under an alternative liability rule (although in such cases the cost of the uncollectable share would fall on plaintiffs, unless other arrangements applied).

8.2.11 We question the correctness of the claim that the Courts and the Weathertight Homes Tribunal are piercing the corporate veil. Our review of the cases is that the Courts and the Weathertight Homes Tribunal are instead looking at the circumstances of each case and deciding whether individuals have acted in a way to assume a duty of care, and then being held personally liable in negligence. This is different from the directors of a company being held personally liable for the company's actions. Instead, they are being held liable for their own actions.

8.2.12 It may be correct, however, that this is occurring mostly in respect of smaller companies and in respect of building and construction companies more than other companies. On the one hand this may not be surprising, as small companies rely on the personal skills and reputation of one or two individuals for their work, rather than a large number of employees. In addition, the building and construction sector may be characterised by more small companies carrying out work than other sectors. It arguably should not therefore be surprising that the individuals in such companies face personal liability. On the other hand, it could be that operators of small companies in the building and construction sector are unfairly missing out on the benefits of incorporation as the Courts strive to find remedies for homeowners affected by building failures.

8.2.13 In any case, it seems that this issue relates to the scope of the duty of care, rather than the apportionment of loss, and is not an issue for consideration for this review. The consultants note that the issue was considered in the Jonathan Kaye/Martin Jenkins Report.[13] The consultants leave it to the Department to decide whether the issue requires further consideration.

8.3 **Issue 2 - Uncertainty**

8.3.1 **Proposition:** The current (joint and several liability) regime is creating uncertainty that leads to sub-optimal outcomes.

8.3.2 **Dimensions:** Like the fairness arguments discussed above, the particular issue in respect of uncertainty predominantly relates to outcomes and behaviours “post-event.” In one way, the claims around this issue are directly related to the preceding issue. Certain parties are not sure

[12] Weathertight Homes Resolution Services Act, section 91(1).
[13] See from paragraph 6.4 above.

what will happen in the Tribunal or in Court so rather than incur the monetary, time and reputational costs associated with that route, and the possibility that they will end up bearing the majority of costs to rectify damage, parties are looking to "cut their losses" and exit the process at the first opportunity (through the settlement behaviours mentioned above).

8.3.3 A further dimension of uncertainty relates to the situation where damage has been found, though the extent and precise nature of the damage is unclear. The claim is that outcomes are so uncertain under the rule of joint and several liability that parties involved in the work actively avoid going back on site to investigate the damage lest they face the possibility of being responsible for the entire cost of rectification. As a result, remedial work is claimed to end up in a state of limbo, with long delays and procedural costs as the homeowner tries to get the necessary work completed. Further down the track (i.e. even after there has been some form of mediation/adjudication) it was claimed that builders who were not associated with the initial claim in any way remain reluctant to undertake the remedial work in case there is further damage or they are somehow held liable for the work of others. We were told that some industry groups advise builders not to become involved in remedial building work unless there has been a full building survey completed, professional plans and specifications prepared, a building consent obtained, and only if special protections have been written into contracts of engagement. We were also told that some building practitioners have little choice and become involved in remedial work without being able to protect themselves from potential claims.

8.3.4 A further dimension of uncertainty occurs "pre-event" and was specifically mentioned in relation to local authorities (in their roles as BCAs). BCAs are far more aware of the potential for costs to fall on them in building disputes and are claimed to be taking precautionary actions to address that heightened risk (i.e. responding to incentives created by the liability regime to be more cautious).[14] However, they are also being asked to reduce the regulatory burden associated with building projects, *inter alia.* These two forces are in conflict and that tension is claimed to create an atmosphere of uncertainty, which is difficult to manage.

8.3.5 Finally, some interviewees claim that central Government involvement in the leaky buildings crisis has been inadequate and/or ineffective, which adds to the uncertainty many industry players feel. The Government response, however well intended, has been characterised by some as bureaucratic, inefficient and lacking real commitment.

8.3.6 **Discussion:** This issue is less about the existence of a problem and more about its impact. By this we mean that unlike the issue of fairness, which might warrant actions to address if it exists, uncertainty itself is not sufficient for corrective intervention. Good policy making requires consideration of risk and uncertainty, but the policy goal is to manage, rather than eliminate these factors. The trigger for intervention is the effect that the uncertainty has rather than its presence alone.

8.3.7 A possible consequence of the uncertainty claimed to exist is that insurance may become difficult to price (insurance is based on risk as opposed to uncertainty) and therefore either be priced so high as to make cover unaffordable or not be offered at all. As a result, parties that were unable to gain insurance cover may be forced to exit the industry. Similarly, the settlements process

[14] While there were mixed views in the interviews about whether or BCAs were "over-investing" in care, it was very clear that they were doing much more than what they previously did and requiring more of parties involved in building projects.

outlined above may see otherwise reputable and quality-focussed players being deterred from getting further involved (or even entering) the residential development market, with a concomitant lower quality of development than might have occurred under alternate arrangements.

8.3.8 Such market failure is inefficient and may provide justification for a change to the status quo, if proven. A further failure in markets might result from the absence of builders willing to undertake the remedial work necessary to address the weathertightness backlog of claims.

8.3.9 Overall, the evidence to date in support of such market failures is best described as patchy and conflicting. We have been told that builders are more than prepared to stand behind their work (but not the work of others) at the same time as we have been told that builders are not standing behind their work. We have also been told that builders are "running scared" and are not prepared to undertake remedial work, but also told that there are queues of builders waiting in line to get started on the projects.

8.3.10 The comments about the Government response to the leaky homes crises is beyond the scope of this review. We also note that the Government has recently announced a package to deal with the costs of weathertightness, which seems to have been well received. We therefore do not discuss this issue further.

8.4 **Issue 3 - Industry features**

8.4.1 **Proposition:** The current (joint and several liability) regime is not suitable for an industry with idiosyncratic features.

8.4.2 **Dimensions:** Interviewees claimed that issues associated with the joint and several liability regime are exacerbated by particular factors that are unique to the building and construction sector. These factors are summarised below:

(a) The structure of major parts of the industry (e.g. builders) is dominated by small, self-employed operators, who may be under-capitalised.

(b) Residential projects (for which the majority of disputes arise) are generally bespoke in nature and are inherently complex.

(c) A large number of parties are generally involved in the overall project, from design to completion and determining who is "in control" can be difficult.

(d) The overall level of sophistication in relation to business management is low.

(e) Industry standards have evolved and are difficult to change (e.g. the "deal on a hand-shake" culture).

8.4.3 The claim is that the liability regime accentuates problems associated with these features and therefore an alternative system would result in better outcomes for all concerned.

8.4.4 On the other hand, one interviewee group strongly questioned whether there was anything different about the building and construction sector that would justify a change to the rule of joint and several liability only for this sector.

8.4.5 **Discussion:** The relationship between the joint and several liability regime and the industry factors claimed to be issues remains opaque. Consideration of the features suggests that they are not heavily influenced by the liability regime as it relates to negligence. The claim that industry uniqueness provides a justification for having unique liability rules does not appear to be well made at this stage. At best, such claims might be considered as supporting arguments where a separate case has been made that joint and several liability is causing significant harm, which is either reinforced or accentuated by particular characteristics of the industry, but on their own they are not compelling as issues associated with the liability rules in place.

8.4.6 The most important and relevant point to emerge from examining this issue is that the seamless and well functioning linkage between the *ex ante* incentive structure of liability regimes and *ex-post* behaviour thought to exist may be erroneous. The majority view of interviewees, when tested, was that most of these features would remain under any alternative regime and would also be very difficult to change.

8.5 **Subsidiary Issues**

8.5.1 This section considers issues that were either barely mentioned by interviewees (but were thought to be major prior to the project commencing) or where mixed messages were given and it was particularly difficult to determine whether it was actually an issue.

(a) *Ease of avoiding liability.* While some interviewees cited the ease with which liability can be avoided through company structures and/or insolvency, as a particular problem, the majority view was that such practices were not greatly influenced by the liability regime. The incidence of companies being wound up specifically to avoid liability and/or due to insolvency would most likely not change under an alternative regime. In terms of the prevalence of such behaviour, most thought it was very common, while others thought the opposite.

(b) *BCAs being risk averse and overly conservative.* This aspect was only discussed once some prompting of interviewees took place. Evidence as to ways in which BCAs were "over-investing" in care was weak. Some interviewees considered that BCAs' behaviour had changed and was most likely a result of concerns around liability (in the wake of leaky buildings) but that this was a good thing rather than a problem. There was a suggestion this risk averse behaviour may occur more at the building consent stage, as opposed to the inspection or compliance certification issuing stage. While compliance costs and the overall regulatory burden may have increased in the last 10-15 years, this was considered by some to be necessary (i.e. previously BCAs were too lax) and meritorious (i.e. it may serve to improve quality and effectively weed out those who are unable or unwilling to comply).

(c) *Knowledge and understanding of liability regime.* This was a potential issue where mixed messages (predominantly in relation to builders) were given by interviewees. A strongly held view was that most builders do not have a good understanding of the liability rules and how they affect their business, prior to loss/damage occurring. Moreover, their understanding of how the rules are applied once damage has occurred is based on hearsay and rumour. Against this, we also heard that builders are acutely aware of the potential consequences of the liability rules and that is why there is some reluctance to

take any action that might be construed as an admission of liability. A related factor is that much of the focus in the industry seems to be on past events associated with weathertightness, so the link between the liability regime and future industry performance has not been well thought through. Also, it was felt that this issue may be addressed through the changes arising from the Building Act Review.

(d) *Limitation periods.* These were only specifically mentioned twice in the interview process. While relatively complex, reference in interviews was to the ten year long-stop period under the Building Act. One party wanted the limitation period repealed or at least extended to 20 years, while the other party wanted to see the limitation period shortened.

8.5.2 In addition to the liability-related issues above, some broader issues were also mentioned by interviewees. These issues do not seem to relate to the liability regime directly, but provide useful context, so are reported here:

(a) *Poor quality.* Put simply, quality was seen as an issue across the sector. Skill and education levels, the availability and type of training and the general "culture" of the sector could be improved. The manifestation of the gaps mentioned is work that is relatively poor and practices that effectively "lock in" sub-standard performance. A number of measures arising from the Building Act Review were seen as possibly addressing this issue, and as more likely to lead to improvements in quality than a change to the rule of joint and several liability.

(b) *Disjointedness*. This issue relates to liability but not necessarily the system of rules (i.e. joint and several versus proportionate). In essence, there is seen to be a statutory misalignment between product liability and the liability of builders. Business-to-business transactions are governed only by the Fair Trading Act, while business-to-consumer transactions are governed by both the Consumer Guarantees Act as well as the Fair Trading Act. The burden imposed under the respective Acts differs. For example, business-to-business transactions limit liability to the value of the product (providing a limitation of liability for the supplier of products) whereas it is claimed that the Consumer Guarantees Act imposes a greater burden on builders in their relationship with the homeowner. While we were advised that it has been possible to bring pressure to bear on suppliers to effectively extend the extent of their liability (through market forces), a disconnect is still thought to exist which means product suppliers are effectively not bearing their fair share of the liability load.

(c) *Fragmented supply chains.* This issue is related to the one immediately above. It is claimed that there is no smoothly functioning supply chain and uniformity is lacking. Therefore, it is difficult for end users or those closer to the customer to exert pressure on suppliers to elicit change and improve quality. Consistency across the supply chain is thought to be needed for lasting change.

9. FEEDBACK FROM THE ADVISORY GROUP

This chapter sets out our understanding of the feedback from the Advisory Group and comments they have made in response to the findings that came out of the desktop research, the interviews, and our review of the options. Our expression of the aggregate views of the group is our understanding of the "composite" view, even though individual members might have differentiated on details. We also highlight individual views and comments on some issues.

9.1 Our summary of the Advisory Group's position

9.1.1 At the first meeting of the Advisory Group, there seemed to be firmly held views that proportionate liability should be introduced. The view was that major problems in the sector are either caused by the rule of joint and several liability or are otherwise perversely supporting them. This seems to reflect a common view in the sector (although not supported by our interview findings) seems to be that a change to proportionate liability will be a "silver bullet" and resolve the sector's issues.

9.1.2 As the review progressed, the views seemed to change, particularly as the understanding of the issues that face the sector became clearer as a result of our research. All members seemed to recognise that there is no easy option that will address the issues that seem to arise in relation to liability.

9.1.3 Some members of the Advisory Group thought that their concerns, while being real, are not a result of the existence of joint and several liability, but are independent of it. They therefore seemed to think a shift from joint and several liability will not solve many of the problems in relation to liability that exist in the sector.

9.1.4 The Advisory Group members acknowledged that many of the concerns over joint and several liability came as a reaction to the problems associated with weathertightness issues. For many, weathertightness problems were the first time that liability for building failure arose and liability was a shock.

9.1.5 On the other hand, concern remains amongst many members about the way that liability has fallen in the sector to date and many of the members that overall issues of the unfairness remain. This feeling of unfairness is expressed a very general way, that is, that it is unfair for one party to meet the liability of another party for negligence. This unfairness is not being expressed as being felt by any party in particular – it is felt that the unfairness falls on builders, subcontractors, architects and engineers, and BCAs.

9.1.6 The concern over unfairness is also not limited to any particular affect on behaviour. It is more that joint and several liability is "just not fair". One member noted that the support for a shift to proportionate liability stems from the desire to be held liable for no more than a person was actually responsible for. He noted that while proportionate liability may not be the answer, the current system is problematic and a more equitable system must be devised.

9.1.7 Some members of the group have reached the view that there is a wide misunderstanding of both the rule of joint and several liability and proportionate liability in the building sector. Understanding is patchy and extreme examples pervade discussion. Much of the understanding is based on hearsay and misconceptions. There was general agreement that the sector is relatively unsophisticated and that liability is only considered when things go wrong during or after

a build. Many in the sector are unaccustomed to disputes and learn how to deal with liability issues only after the event, when it is too late.

9.1.8 There was a feeling from those members representing builders and contractors that there is (or was) a disconnection within the chain of responsibility and accountability, so that some parties avoided liability for homeowners' losses, whereas other have shouldered most of the responsibility. This was directed primarily at product manufacturers and suppliers, who one person said are "dumping numerous products on the market with little or no education". It was also felt that those who supply certification for those products have unfairly avoided responsibility in the past. It was said that this has fuelled some of the general sense of unfairness in the sector.

9.1.9 One member of the group believed that joint and several liability stifles collaborative and collective building work, which impacts negatively on the sector's efficiency. Because of the way some believe the rule of joint and several liability operates, some industry participants refuse to help others out, or work collaboratively for fear of assuming liability for the other party's share of the work. As a result people do compartmentalised jobs and refuse to work with others.

9.2 Role of BCAs

9.2.1 From the interviews the consultants reported mixed findings about the claim that joint and several liability is causing BCAs to act in a risk averse manner. Some said in the interviews that BCAs' more conservative approach may be a good thing and considered that it may be that they are carrying out their regulatory functions with more rigour. Some members of the Advisory Group questioned this, expressing the view that BCA's timeframes have certainly extended since the leaky building crisis, and that these delays are unacceptable. It was said that the worst delays occur during the building permit issuing phase of a BCA's work, rather than later during the inspection or code compliance certificate issuing phases.

9.2.2 Comment was made at one Advisory Group meeting that BCAs carry too much liability under the liability rules, given their comparative level of involvement in the building when viewed against the role of other parties. Given BCAs are only on site for inspections it was suggested that building contractors should carry more responsibility for compliance with the Building Code and building consents given their constant presence on site. It was suggested that the focus should be on improving builder performance rather than on changing the liability rules.

9.2.3 One member of the Advisory Group spoke of the pressures BCAs face in managing their risk, particularly as far as human resourcing, fluctuating workflows and stretched resources are concerned. We were told that BCAs can be under extensive pressures and that workflows can fluctuate hugely, though it was suggested that these pressures may be relaxed through the changes soon to be made to the Building Act.

9.3 Position of specialist trades

9.3.1 One member of the Advisory Group said he has concerns about joint and several liability relate to the rule's effect on small parties; that is for example those in specialist trades who often work as subcontractors. His view is that:

(a) Small parties do not understand the risks they face (unsophisticated);

(b) They have difficulty in managing their risk (e.g. they cannot obtain professional indemnity insurance);

(c) The costs of applying for strike-out, and waiting for the decision, can have a major impact on their business; and

(d) When small parties bear the "unallocated share" (all or part) the impacts can be catastrophic (as typically they have little capital).

9.3.2 His view is that it is the three major parties (designer, principal building contractor, and Building Consent Authority) who really determine overall building quality – and who will be largely accountable for building quality in future (under the new accountability statements in the Building Act). He said that it is also major parties that are better able to manage risk (at the outset), because:

(a) Designers can obtain professional indemnity insurance;

(b) BCAs have the Riskpool mutual fund (although weathertightness problems are excluded from coverage); and

(c) Often the principal building contractors have control over the quality of inputs (supplies, sub-contractors).

9.3.3 As a result of these factors joint and several liability is reported to have an unduly harsh effect on small parties in the sector.

9.4 **Position of small-scale builders**

9.4.1 Another member of the group was concerned that some of the feedback in the interviews seemed to downplay the extent to which small-scale builders and other tradespeople step up and accept responsibility. This member said that the notion that small-scale builders are winding-up their businesses or ducking responsibilities/liabilities is false. The reasons these parties may not be able to meet liabilities imposed on them by the Courts is because they do not have large amounts of capital to meet large claims, and are therefore insolvent or personally bankrupt. In short, the issue is insolvency not liability.

9.4.2 We were told by some members of the Group of their concerns about some cases where supposed "labour only" builders have been held liable for a project manager type role on the building site, not withstanding prior arrangement that the homeowner would manage the build and the builder would be "labour only".[15] It was suggested that this is unfair, and that it is unrealistic to think that builders will not step in when a homeowner is proving unable to manage a build. The consultants do not see a clear link between this concern and the rule for allocation of liability. It is an effect of tort law generally and the way duties of care are applied by the Courts. The problem arises from differences between what people contract to do, and what they do in practice. This is more a matter for sector education and knowledge of the legal implications of their actions, and in giving builders skills for dealing with homeowners in their contractual negotiations. A change in the rule for allocation of liability would not change the way Courts are applying duties of care.

[15] See more on this point at 8.3.4(c)(i).

9.5 **Building Act Review changes**

9.5.1 There was general consensus amongst members of the Group that the changes agreed to by Cabinet in the Building Act will result in behavioural changes and will affect positively on responsibilities and accountabilities. It was agreed that the minimum contracting requirement and the accountability statements will probably lead to a more accountable and professional sector, without having to make any changes to the liability rules. These views flow from an acknowledgement from members of the Advisory Group that responsibility and understanding of roles has been wanting in the sector in the recent past. Without ex-ante agreement about each party's responsibility, no one involved in a building job considers themselves liable in the event of anything going wrong, or feels responsible to take charge or oversee the work happening on the site.

9.5.2 Having said that, one member stated that he believed the reforms relating to a reduction in responsibility of BCAs is a mistake. It was said that the current system, where the BCA picks up the tab for an uncollectable share, is a good one because the loss is spread amongst the community (and levied through rates). It was said that a shift to a system where a builder is supposed to carry more responsibilities, will result in even greater issues than there are now.

9.6 **Procedural issues**

9.6.1 One member commented that what is needed is a means of ensuring that consumers are protected, while protecting those left in the room from bearing liability that outweighs their responsibility for damage or loss. Capped liability in a joint and several liability regime was put forward as a suggestion.

9.6.2 It was suggested that an alternative dispute resolution process is necessary, staffed by knowledgeable experts to determine liability issues. Procedural issues relating to litigation, and the necessary time and cost of litigation was a recurring theme in conversation, which led to discussion of a fit-for-purpose forum to resolve building disputes.

9.6.3 Others commented that procedural issues need to be addressed in order to improve problems in the sector and inject more confidence into the system. The joinder rules were pointed to as a particular problem. One member said that the cost alone of applying for strike out can be too much for some small parties.

9.7 **Insurance**

9.7.1 The group had mixed views on insurance. One member considered that insurance could be offered and noted that some products are on the market now. Another member pointed out that this is unobtainable for small "one-man-band" builders and other small non-professional operators. In any event, it was generally agreed that it would take probably about ten years bedding in before insurance products would be widely offered on the New Zealand market.

9.7.2 The insolvency rules and practice of winding up companies was an often raised concern for members of the group but most understood that these are longstanding rules that serve some beneficial purpose and that the rules are outside the scope of the consultants' work. Nevertheless it was suggested that work be done in the future to consider whether there are means of controlling practices which are said to abuse the limited liability company protections.

This was suggested particularly for developers who are said to commonly set up companies with an intention to wind them up after work is complete.

10. IMPACT OF JOINT AND SEVERAL LIABILITY ON THE BUILDING SECTOR IN NEW ZEALAND

This chapter discusses the consultants' view of the impact of joint and several liability in the building and construction sector at present, as required by the terms of reference. This chapter is largely a comment on and moderation of the views expressed in the interviews and by the Advisory Group. We organise these comments along the lines of the Government's policy objectives.

10.1 Effective accountability framework

10.1.1 The Government has stated that it wants an effective accountability framework where people stand behind their work, both when things are good and when things go wrong.

10.1.2 In theory, joint and several liability should deliver this outcome by making people liable for all the loss that is reasonably foreseeable from their negligent work.

10.1.3 There are strong views in the sector, however, that joint and several liability results in parties getting drawn into paying more than their fair share (with the implication that other parties are not being held accountable), or being held liable for a potentially large amount of loss where their actions have only been minor, and related to a small aspect of the building work.

10.1.4 From the interviews, it seems that these views arise in part from practical application and experience of resolution processes rather than application of how the law of negligence applies. Under the law of negligence, a person will only be liable if their actions have caused the loss claimed (even if others have also contributed) and there must be a reasonably foreseeable link between the negligent actions and the loss.

10.1.5 Setting that aside, it seems to the consultants that it could be said that joint and several liability is not resulting in an effective accountability framework in the building and construction sector. There is some evidence that BCAs are carrying the burden of other parties not being present. There is also some evidence, although not as strong, that engineers and architects are also carrying some of this burden. For any small builders involved in a dispute, the effect on their businesses is highly significant.

10.1.6 Although the evidence is not completely clear, it appears that the parties most commonly not paying a share of liability for building failures are developers, main building contractors and (to a lesser degree) sub-contractors. The reasons for this seem to be mixed. A number of parties claimed that developers avoid liability through the use of companies (commonly called special purpose vehicles) for specific projects that are dissolved upon completion of the project or are thinly capitalised. In the case of most builders and subcontractors, it appears that the very size of a claim or claims results in insolvency or bankruptcy, without any deliberate attempt to avoid liability, although there appears to be some sentiment that some builders have been deliberate in evading liability.

10.1.7 Further, these parties appear not to have been insured or carried warranty schemes that are still effective upon their insolvency or bankruptcy.

10.1.8 It therefore seems to the consultants that the problem in relation to accountability being complained of arises from an intersection of the laws of insolvency and bankruptcy, the rules of joint and several liability, and specific conditions arising in the building and construction sector. If so, joint and several liability may undermine the accountability framework, or at least be an exacerbating factor.

10.1.9 Another claim made in the review was that the effect of joint and several liability is that plaintiffs are recovering almost all of their loss every time (because of the existence of deep pockets) and this results in plaintiff homeowners failing to take adequate steps to protect themselves from potential losses in the first place. If plaintiffs were aware of the potential of losing out because of an uncollectable share under another liability regime, it is claimed they would do more due diligence before and during building to ensure the potential for future loss is reduced.

10.1.10 Certainly, we did not find evidence of homeowners taking steps to protect themselves from the uncollectable share, by, for example, checking for the financial surety of builders before engaging them or enquiring into their financial viability. There is a strong feeling across the industry that consumers could do more.

10.1.11 On the other hand, the PWC report shows that the greatest costs of weathertight homes claims have fallen on homeowners. Further, the costs of building failure are large for homeowners both in terms of direct and indirect costs. This should create a strong incentive for them to reduce the risk of failure, but they seem to be taking few steps to manage that risk. The reason for this seems to be a lack of knowledge about their liability risk and inadequate tools and skills to address the situation.

10.1.12 A concern expressed by a member of the Advisory Group was that joint and several liability was having an unfair impact on subcontractors and making them afraid to carry out work. We acknowledge that this could be an issue, but have not found evidence it is occurring.

10.1.13 We also question whether it is also more of a problem of subcontractors misunderstanding the rules of liability (i.e. thinking that they will be liable in many more situations than will actually be the case) or of not taking steps to protect themselves (e.g. through contractual arrangements with the head contractor). Nevertheless, joint and several liability could be having an impact.

10.1.14 Another issue raised was that of suppliers and certifiers unfairly avoiding liability for building failures. Without commenting on whether or nor this claim is valid, we consider that the issue relates to the rules relating to the duty of care, rather than the way in which liability is apportioned. It is not therefore an issue for this review.

10.1.15 To some extent therefore joint and several liability may be inconsistent with the package of reforms agreed to by the Government, in that these are geared to reseating responsibility to builders and homeowners, rather than BCAs.

10.2 **Creating positive performance incentives**

10.2.1 The Government wishes to ensure that the liability regime creates positive incentives for performance, both at the individual level and in terms of teamwork.

10.2.2 An important finding is that the incentive structure associated with joint and several liability does not operate in a smooth and "linear" manner. There is some disjointedness between the *ex ante* incentives that it should provide and the subsequent *ex post* behaviour witnessed. In practical terms this means that the joint and several liability rule does not greatly influence behaviour and perhaps is not even thought about, until something goes wrong. Thus, how certain rules play out in reality may significantly deviate from the "textbook" view of how incentive structures affect behaviour. The extent therefore, that the rule of joint and several liability will create positive performance incentives is probably limited.

10.2.3 During the course of this review we nevertheless heard from certain stakeholders that joint and several liability rules discourage the kind of collective approach that is necessary for good quality building and construction. Although the evidence is not clear, we heard that some parties are "compartmentalising" their work, and not being cooperative, because they are in fear of being held jointly liable for someone else's work.

10.2.4 We question why such behaviour, if it is occurring, would be caused by joint and several liability. At least at a theoretical level, joint and several liability should incentivise all parties in a building project to work cooperatively and collaboratively, because of the risk of paying an uncollectable share.

10.2.5 This can be illustrated by considering the question of whether, for a given level of understanding of liability rules, which rule would most likely result in the kind of "joined-up" behaviour thought to matter for quality? In the consultants' view this would be a rule whereby a party is potentially liable (subject to establishment of causation) for the whole of the loss/damage that occurs. Such a rule would, rationally, lead to individuals taking greater levels of care not only for their own work, but also the work of others than an alternative of liability being restricted to the individual's portion only.

10.2.6 Our view is that the problem of compartmentalisation (if it exists) relates more to the level of understanding of liability rules than anything else. The risk-based (rather than performance-based) behaviour appears to be driven by a misunderstanding of joint and several liability and indeed proportionate liability (the major alternative rule suggested). It seems to overlook that a person will not be liable unless they have acted negligently and that they will only be liable for loss that was reasonably foreseeable from their negligence.

10.2.7 More speculatively, this behaviour may arise from a feeling of passivity, in the belief that the best "defence" is the ability to point to others (for the builder, others being the BCA or the architect), as there is little else a person can do to avoid liability. Further, this passivity behaviour may be amplified by the scale of liability for weathertightness defects. If so it again seems to the consultants that the problem is not caused by joint and several liability, but by perceptions of the way that liability (particularly duties of care) arises, a lack of knowledge about how to deal with liability risks, and possibly issues around the rules for finding liability in the first place.

10.2.8 A claim was made by some interviewees that remedial work (as a result of weathertightness claims) was suffering from a shortage of tradespeople willing to undertake the work (for fear of being held accountable for more than "their fair share"). However, there were conflicting stories. Our observation is that there is no clear market failure as such. Moreover, if such a failure does

in fact exist, it is likely to be caused by a reasonably widespread misunderstanding of joint and several liability rather than as a direct result of the rule itself.

10.3 **Minimising any perverse incentives**

10.3.1 In terms of perverse incentives, as mentioned above, claims have been made that the liability regime is creating perverse incentives particularly on BCAs. Claims have been made in interviews and elsewhere that joint and several liability, and the prospect of the BCA picking up the uncollectable share and being the last man standing, is resulting in BCAs being overly risk averse, meaning they are less cooperative than they previously were, and slower in carrying out their regulatory functions.

10.3.2 On the other hand, these claims are disputed by others and there is little by way of substantiating evidence.

10.3.3 Although the evidence that we have seen about this is patchy and weak, we acknowledge that the liability that has fallen on BCAs for building failures (and could fall on them in future) creates an incentive on them to act in a risk averse way, and be very conservative in their regulatory functions. The reason for doing so would be to reduce the likelihood of a building failure occurring at all or the chance of them being held negligent.

10.3.4 Some parties have claimed that the heightened level of regulatory caution by BCAs is a good thing, and will deliver quality outcomes. They see BCAs as acting almost as the quality assurance in a building project; particularly at the point of approval, but also as an inspectorate as the project progresses. We question whether this would be effective or sensible. First, with the limited amount of time that BCA inspectors spend on site, they may not be very effective in monitoring all aspects of quality; it is clearly the role of the builder and architect to be the primary vehicles to ensure quality. Further, this suggests some abdication of responsibility to the BCA for ensuring quality which is inconsistent with the Government's intention of creating stronger incentives on building parties to achieve quality outcomes.

10.3.5 A question for us on both issues, however, is whether this arises because of the risk of carrying the uncollectable share (and the extent to which this is a contributing factor) or simply from the risk of being found liable.

10.3.6 Joint and several liability may also create some perverse incentives when it comes to litigation, although we think these incentives are relatively weak, and the relevant behaviours are driven as much by other factors, particularly the desire to avoid liability at all and to reduce potential exposure to costs of any kind.

10.3.7 An example of such a perverse incentive that could be said to arise from joint and several liability is the incentive that it arguably creates for a plaintiff to cast the net wide and join as many defendants as possible in the hope that one of them will be found liable. Alternatively, if a plaintiff initially sues only one or two other parties, those parties arguably have an incentive to join as many other parties to the action as possible, to reduce the risk of carrying the liability alone. We received many comments that this is occurring in the sector.

10.3.8 To some degree, we question the extent to which this is a problem. If there is a legitimate cause of action against a person, then it seems fair that they are drawn into an action. If there is no legitimate cause of action, then the rules of strike-out and costs orders should address the situation and provide a disincentive to wide joinder (although there are some potential issues with those rules as discussed in chapter 15).

10.3.9 However, it seems to us that the rule of joint and several liability creates some perverse incentive by incentivising the joinder of deep pocket parties who would normally only share a small proportion of liability. In some circumstances, these parties are joined because plaintiffs or other defendants know they will have the means (through insurance or otherwise) to cover the risk of the uncollectable share.

10.3.10 A related issue is the claim that deep pockets are being targeted in litigation. We do not think that "deep pockets" defendants are being specifically targeted. Rather, we see this issue as a manifestation of the feeling that those deep pocket parties are picking up the liability of absent parties and therefore feel they are paying more than their fair share.

10.3.11 Another perverse incentive that we identified in the interviews arises in relation to settlements, with deep pocket parties apparently being incentivised to settle when they otherwise would not, as discussed in paragraph 8.2.3(a)(iii).

10.4 Extent of overly defensive and risk averse behaviour

10.4.1 We made mention immediately above about the extent to which BCAs might be being overly risk averse. We also mentioned the mixed evidence of builders and other tradespeople being less prepared to undertake work due to potential liability issues. These comments apply equally to this policy objective.

10.5 Supply of indemnity and home warranty insurance

10.5.1 Based on interviews and discussions with the Department, we are of the view that the provision of home warranty or other surety products in New Zealand (or rather lack of) has little to do with the existence of joint and several liability in New Zealand. We were told that the reasons these products are not offered generally in the New Zealand market are:

(a) Cyclical (i.e. following an expensive regulatory failure such as the weathertightness crisis there is little appetite to provide products);

(b) A combination of commercial judgment and experience overseas;

(c) The relatively small scale of the New Zealand market; and

(d) Concerns about the lack of central regulation of builders in the sector (e.g. by a licensing regime), and the quality of their work.

10.5.2 Our view on the availability of home warranty insurance is that such a service would be a welcome (and potentially useful) addition to the sector but the merit of the service is not overly influenced by the liability regime. That is, it appears a good idea regardless of the particular liability rule. The changes agreed to already by Cabinet will probably affect the sector for the better in terms of the future likelihood of insurance being provided. Shifts to license some

building practitioners and changes to impose accountability that may push smaller players out of the sector may improve the desirability of the New Zealand market. Yet further changes appear likely to be needed before comprehensive insurance would be offered.

10.5.3 We have also been told by the Department that it has had discussions with overseas insurance companies about the provision of a broad residential building insurance product. Those companies have been willing to provide a product, but only if specific conditions (such as being the only provider in the market, and having a full licensing scheme) can be met. It seems to us that these conditions are related to the issues identified above.

10.5.4 We also note that, despite there being apparent limitations on the supply of home warranty insurance, this does not seem to have resulted in a shortage of builders willing to undertake work.

10.5.5 There were also claims that joint and several liability is pushing up insurance premiums for professionals, such as engineers and architects. While we accept that this may be occurring, we did not find evidence of a market failure preventing professionals from pricing these costs into the costs of their services or that results in them providing otherwise useful advice.

10.6 **Fairness**

10.6.1 Strong claims are made that joint and several liability is unfair.

10.6.2 In the consultants' view there are three aspects of fairness to consider, namely:

(a) The degree of arbitrary discrimination;

(b) The reasons for discrimination are transparent; and

(c) The certainty of outcome.

10.6.3 We do not consider that it is inherently unfair under these objectives that parties who are liable for loss end up paying a share of the liability of other parties who are not present for one reason or another. As a matter of law, the parties who are liable must have caused the loss and the loss must have been reasonably foreseeable. As between the plaintiff and that defendant(s), which is the central issue in a case, the result is totally fair. The parties who raise this issue are concerned about other parties who also caused the same loss but are not sharing in that loss. In our view, there has to be some basis for working out who meets that unrecoverable share. If that other party is not present, it seems reasonable that other parties that cause the loss, should carry it. This is the position adopted by the New Zealand Law Commission and many others.

10.6.4 Accordingly, it seems that the degree of arbitrary discrimination is low (i.e. there is a rational reason for the rules and the reasons are clear).

10.6.5 We further consider that the strong sense of unfairness in the building sector arises because of the unforeseen consequences of weathertightness. It seems that much of the feeling of unfairness arises because the problem arose from a failure of the building system as a whole rather than of any one party, and the pain should be shared amongst all who participated, whether in the building sector, regulators or as homeowners.

10.6.6 Claims of unfairness, however, might justifiably be said to arise if one category of defendants is persistently ended up paying a share of the liability of a particular other class or classes of defendants. As discussed above in relation to accountability there is some evidence that this is occurring in the building and construction sector, although we do not think that joint and several liability is the sole, and may not even be the major, case of unfairness.

10.6.7 In looking at the fairness or otherwise of outcomes under the new baseline, the concept of unforeseen consequences seems relevant to us. To the extent that outcomes are not able to be foreseen or predicted with any certainty, then they may be characterised as unfair. However, where outcomes are foreseeable or known with certainty, then they are probably best characterised as unfortunate. By way of example, joint and several liability provides a good deal of certainty with respect to outcomes for wrongdoers.

10.6.8 In the extreme case, where causation has been proven but all other parties are unavailable or insolvent, the remaining defendant will know with certainty that it is liable for the full loss (notwithstanding contributory negligence on the part of the plaintiff). That such outcomes eventuate is not necessarily unfair (i.e. there are existing mechanisms to address the possibility and the outcome was entirely predictable) no matter how unfortunate.

11. THE STATUS QUO POST EXISTING BUILDING REFORM MEASURES – A NEW BASELINE

11.1 Introduction

11.1.1 This part of the report sets out the likely behaviour of the sector under joint and several, under known changes to the Building Act and regulations. We discuss these changes more fully in Appendix 3 and summarise what we believe are the main effects of these changes on liability regimes in this chapter.

11.2 Summary of changes and the new "baseline"

11.2.1 The Building Act reforms set out a major package of reforms with the overall intent of changing incentives and behaviours in the building and construction sector; particularly in the domestic building and construction sector.

11.2.2 This review of joint and several liability comes out of the Building Act Review. As part of the Building Act Review the Government has already agreed to a number of changes to the Building Act, following the release of a discussion document in February 2010. The consultants are required to consider those changes as part of the review of joint and several liability.

11.2.3 Of relevance to this review, changes include:

(a) Amendments to the purpose of the Building Act to clarify that a purpose of the Building Act is to ensure that owners, designers, builders and BCAs are each accountable for their role in ensuring that building work complies with the Building Code, and the addition of statements of the accountabilities of owners, designers, builders and BCAs in respect of building work to the Act;

(b) Changes to the consenting framework, to provide for a risk-based approach to consenting building work;

(c) The introduction into the Building Act of requirements on building contractors to disclose information pre-contract to consumers and a requirement for mandatory written contracts for all residential building work with a price of more than $20,000. Minimum requirements as to what the contracts must cover will be set out, although substantive requirements will not be specified; and

(d) The addition of remedies for breach of the statutory duties by those carrying out building work. The remedies include an automatic 12 month defect repair period, and a more general requirement to make repairs if a breach of the warranties has occurred.

11.2.4 Also relevant is that the Department is to provide new information to consumers and providers of building services on the regulatory regime. Building contractors are also to be required to provide specific kinds of information on the completion of the building work. In addition, the Building Code is to be clarified, and changes are to be made to the way the regulatory system is administered to make it more nationally consistent and efficient.

11.2.5 Another change being made, separately from the Building Act Review, is that a number of core building functions will be restricted to licensed building practitioners.

11.2.6 The net effect of this package on the industry is expected to be significant.

11.2.7 Analysing the effect of joint and several liability in the future has to be done in the context of these changes to the building sector regulatory environment, rather than in the status quo, and rather than as currently experienced by sector participants. The changes above establish a new baseline.

11.2.8 The issues identified in the interviews and stated as the problem definition are helpful in this analysis, but also need to be kept in context. They are helpful in that they give a clear reflection of the major systems failure that were faced with previous weathertightness issues. They are also helpful in indentifying ex post effects of those systems failures. However, the feedback from the interviews needs to be strongly contextualised in the environment of a set of major changes in other aspects of the regulatory regime that applies. In short, the problem definition is both difficult to determine as it is considerably tainted with the current effects of a previous regulatory regime, and is therefore opaque in its application to resolving comparative choice in selection of regimes.

11.2.9 The baseline serves as the benchmark against which other options are assessed.

11.3 **Analysis**

11.3.1 We assess the effects of the changes to be positive in addressing some of the issues identified in this review. Despite there being a general lack of detailed knowledge of the changes as a result of the Building Act review amongst interview participants, those who are aware of the changes expressed support for the changes as "heading in the right direction". In particular, we assess the overall package of information disclosure, increased clarity of responsibility, and contracting requirements to be of benefit.

Positive impacts

11.3.2 This option would appear to be better aligned with industry attitudes and practices than the status quo (i.e. it is seen by some as being a fairer system). Therefore it may provide instrumental benefits in terms of industry performance over time (as opposed to more immediate and direct benefits). In addition, over time it is likely to result in more certainty around liability shares for industry players, which might encourage innovation in the sector, thereby improving dynamic efficiency. For some parties (i.e. architects, BCAs) it may result in lower incidence of being joined to actions unnecessarily, so could reduce their costs. For BCAs, it reduces liability but does not eliminate liability; therefore regulatory practice may not change although the consequences of a "failure" will be reduced.

11.3.3 Of all the changes arising from the Building Act Review, the only change that could have a direct impact on the application of the rule of joint and several liability in the building sector is the addition of accountability statements to the Act. This is because that change could affect the application by the Courts and the Weathertight Homes Tribunal of the duty of care to different participants in the building sector, affecting the parties whom could be held jointly and severally liable for building failures.

11.3.4 It is unclear, however, whether this change will have this effect, not least because the Building Act will expressly state that the statements of responsibility are not intended to affect existing legal obligations. It may therefore not significantly change the Court's appointment of loss in

building failure cases. Many interviewees and the Advisory Group, however, considered that the accountability statements would have an effect on behaviour, with consumers likely to take more of a role and professionals realising that they need to also do so, and not abdicating responsibility for quality and compliance with building codes to BCAs.

11.3.5 Apart from that, it seems that the changes arising from the Building Act Review may have some indirect impacts on the application of the rule of joint and several liability and the consequent effects on behaviour that the rule may have. These impacts could arise, for example, because the changes could lead to improvements in the quality of building work, reducing the incidences of building failures and consequently the number of situations in which builders, BCAs and others in the building sector are sued in negligence. Alternatively, some of the changes could lead to consumers pursing alternative remedies for building failures than actions in negligence, including under the default dispute resolution processes under the Construction Contracts Act. Again this will reduce the number of instances in which builders, BCAs and others in the building sector are sued in negligence.

11.3.6 Although the impact on the way that the rule of joint and several liability will apply may be limited, the impacts on the overall responsibilities, roles and the quality of building work are likely to be significant. The intention of the changes is to clarify expectations of roles of different parties, leading to fewer disputes, and disputes that will be more quickly resolved.

11.3.7 We consider that the responsibilities of the builder will be much clearer and homeowners may take more care and seek to resolve disputes more quickly. The new disclosure requirements are likely to inform consumers considerably more and may result in consolidation in the market as homeowners seek greater security of delivery; furthermore, competition on warranty and surety may emerge. The requirements for contracts above $20,000, including that they must deal with specific topics, such as financial surety, will also ensure that matters are addressed up front. In short, before any material construction activity starts, there should be greater understanding of the relative positions of parties, considerable greater clarity around responsibility, informed choice around nature and reputation of the contracting entity. These changes are likely to have significant *ex ante* effects and, when building failures occur, should mean that problems get fixed faster.

11.3.8 Part of the concern about joint and several liability, and certainly the concern the time and cost involved in resolving disputes, seems to be caused by the difficulty in identifying responsibility because of the large numbers of parties involved on building sites. There was also concern about informal contracting. The consultants consider that the requirement for mandatory written contracts will help in addressing these issues, by having a flow-on effect to contracts between head contractors and sub-contractors for other parties. They will also reinforce the overall responsibility of the head contractor. However, it will not fully address these problems.

11.3.9 Taken as a whole, the changes look likely to improve the *ex ante* incentives on parties to consider the roles, responsibilities and relationships that govern a building project. By this we mean that specificity (particularly from written contracts and accountability statements) will be enhanced and uncertainty would be reduced, relative to current practice. There will be a less direct effect on the process for resolving disputes or necessarily the outcomes of such, but indirectly, the enhancements could have the effect of making parties more aware of the consequences of their

actions, and thus alter the behaviour that gives rise to damage/disputes. The particular change relating to the consenting framework should work to ease some of the pressures being felt by BCAs and allow resources to be dedicated to their most important uses.

11.3.10 The changes to the licensed building practitioners scheme should ensure improvements in overall quality of building work, especially in the categories of work where weathertightness issues have arisen and the greatest costs have occurred.

11.3.11 The changes to the Building Code (although their scope is unknown) should assist in making the requirements clearer.

11.3.12 We also think there will be benefits in terms of greater information being provided to participants in the building industry, and to homeowners. If this were to include information on potential liability and the responsibilities of different parties (which is an issue the Department could consider), some of the issues that we think currently arise from a lack of understanding of the liability regime (such as in relation to remedial work and the concerns of subcontractors) or from lack of skills and knowledge about particular issues (e.g. consumers not taking steps to protect themselves) will be addressed.

11.3.13 Overall, the Building Act review and other changes to the regulatory framework strike a reasonable balance between ensuring consumers/homeowners consider carefully what they are entering into, and protecting their interests given information asymmetries. In theory joint and several liability should assist in this by providing strong incentives on all to ensure that all of the parties to the build are jointly taking responsibility with, presumably, greater responsibility on checking and oversight by the site supervisor.

Negative impacts/issues not addressed

11.3.14 As mentioned above, this option does not appear to directly influence all the causes of concern in the industry. While potentially addressing the apparent lack of responsibility for overall quality, the option does not address "vexatious joinder" or "uncollectable shares" issues.

11.3.15 Although the potential for significant and systematic building failures should be reduced, there remain incentives on litigants to join all possible parties that they could recover from. Also, if a building failure occurs, BCAs still stand as the final "deep pocket" should all or some other parties disappear. The incentives around settlement, although we think they are relatively weak, will also remain.

11.3.16 While the statements of accountability and the changes to the consenting framework will have positive effects, the consultants do not seem them as totally removing the behaviour of BCAs in granting building consents and that of other parties in deferring to the processes that the BCAs run.

11.3.17 In addition, the "information improvement" nature of the changes will create additional compliance requirements for industry members. In an industry characterised by significant numbers of "one-man bands" and relatively slim margins, this additional burden will be more acutely felt than in other sectors.

11.3.18 Long-term results could be that there will be a gradual evolution in the industry away from one man bands to, at first, clusters of contractors and then, also, to corporate builders better able to manage quality and carry risk. However, this will take time and quality could suffer in the meantime.

11.3.19 While written contracts are an improvement on “hand shake deals” they are rarely complete (i.e. bounded rationality often leads to incomplete contracts) and thus there is a risk that they may be less effective than intended. This is something the Department may wish to keep under review.

11.3.20 It seems to the consultants that some of the issues in this review arise from a lack of business expertise or inability to deal with consumers' demands. An example is the position of labour only subcontractors unintentionally ending up in a project management role and therefore taking on more responsibility than they intend. The measures coming out of the review do not seem to address this issue. In any case, this seems more a matter for industry led programmes than Government intervention.

Fairness effects

11.3.21 In the consultants' view, the potential for unfairness to occur will not change under the baseline from the present situation, but the number of incidences in which it may arise may reduce as the incidences of building failures and the number of cases of negligence should reduce.

11.4 Summary and overall fit with policy objectives

11.4.1 The baseline should provide benefits in terms of efficiency, but they are likely to be instrumental as opposed to direct. There are likely efficiency gains (in terms of enabling informed consumer and industry participant choices from written contracts, reductions in cost and uncertainty from consenting framework changes) and there may also be equity impacts (i.e. written contracts may impact on “fairness” issues in terms of liability). Most impacts are likely to be felt indirectly.

11.4.2 Overall, this option provides a relatively solid platform for the future (as opposed to being designed to remedy problems in the past). However, it will not address all of the problems identified in this review. In particular, while it will go some way to reducing the emphasis on the role of the BCA, it does not remove all the incentives that currently apply.

12. THE PRIMARY ALTERNATIVE – PROPORTIONATE LIABILITY

12.1 Introduction

12.1.1 This chapter of the report sets out the major alternative liability regime to joint and several liability identified by interviewees.

12.2 Description of option 1: proportionate liability

12.2.1 This option would replace the rule of joint and several liability with a type of statutory proportionate liability regime for all building related actions.

12.2.2 Under such a system defendants who are found jointly liable for loss would each have their liability limited to an amount that reflects the proportion of the plaintiff's loss that the court considers just, having regard to the extent of each defendant's responsibility for that loss and damage. This means that judgment may not be given against a defendant for a sum greater than the amount apportioned to them, and since each defendant bears its own share, no contribution or indemnity may be obtained from other wrongdoers.

12.2.3 In considering what is "just" the court will likely have regard to a combination of each wrongdoer's culpability and causative importance. As it was explained in one Australian case "*it is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination*".[16]

12.3 Major features of proportionate liability

12.3.1 Proportionate liability regimes enacted overseas have taken on many forms and there are a number of different policy decisions to be made about aspects of a regime that determine how it will work in practice. The consultants have reviewed the report *Proportionate Liability: Towards National Consistency*[17] that makes a number of recommendations that are aimed at making the Australian State's proportionate liability regimes more certain, effective and nationally consistent. Based on the recommendations in that report, the consultants have assumed for the purposes of this report that a proportionate liability regime in the New Zealand building sector would contain the following essential features:

(a) The regime would cover claims involving a failure to exercise reasonable care, whether under contract, tort or statute, in respect of claims involving the same damage caused by multiple parties in respect of building work. For the purposes of this report the consultants have assumed that the definition of "building work" in the Building Act would apply, but the exact scope of building work covered would be a matter for further development as part of the implementation of a proportionate liability regime.[18] Some of the claims where a failure to exercise reasonable care might arise include:

(i) a breach of a duty of care;

(ii) a breach of implied or express contractual terms to exercise reasonable care;

(iii) a breach of statutory duties to take reasonable care; and

[16] *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529, 532.
[17] Tony Horan *Proportionate Liability: Towards National Consistency,* September 2007.
[18] Building Act 2004, s7.

(iv) a breach of implied warranties to deliver services with due care and skill.

(b) Any wrongdoer who issued by the plaintiff would be under a duty to notify the plaintiff of any other wrongdoers the plaintiff has not joined but that the defendant considers has caused the plaintiff's loss. The sued wrongdoer would not have to notify those other wrongdoers of the proceedings.

(c) It would then be a choice for the plaintiff to decide to sue other wrongdoers. The rationale for this is given in the *National Consistency* report:[19]

> The plaintiff can make pragmatic, strategic decisions about the costs and benefits of joining more defendants. The plaintiff may decide not to pursue a claim against that party because the costs are greater than the benefits.

We note that in Victoria, it is up to the defendant to join other wrongdoers to the proceedings so he or she can limit his or her proportion of responsibility for the plaintiff's loss, with reference to the liability of the other wrongdoers. This approach has some drawbacks, including that plaintiffs have little control over proceedings. It is not favoured by the consultants. It should be the plaintiff's responsibility to join parties to proceedings and the defendant should not be detrimentally effected from exercising its right not to join other wrongdoers.

(d) To control the possibility of endless successive proceedings being brought against other wrongdoers, provision should be made to strongly encourage the plaintiff to join as many parties as possible to the initial proceedings.

(e) It would be up to each defendant found liable to prove to the court that he or she is only responsible for a proportion of the plaintiff's loss, and not the whole loss.

(f) The Court would be required to consider the responsibility of absent wrongdoers (whether or not they've disappeared, died, or been declared insolvent) in order for the regime to efficiently function. This is consistent with the recommendation in the *National Consistency* report. As a matter of procedure, under such a model the defendant would be required to lead and plead evidence against other defendants and absent wrongdoers, in seeking to reduce their own liability. This is consistent with the general approach in Australia.[20] As Professor Barbara McDonald has noted:[21]

> ...if a defendant wishes to have the benefit of a limitation on liability, then the defendant should bear the onus of pleading and proving the elements of that limitation...If the onus is on a defendant to plead and prove a defence under limitations of actions statutes then, by analogy, the onus should be on the defendant to prove the limitation of liability under apportionment legislation.

[19] Tony Horan *Proportionate Liability: Towards National Consistency,* September 2007, para 286.
[20] Tony Horan *Proportionate Liability: Towards National Consistency,* September 2007 para 145.7.
[21] Barbara McDonald "Proportionate Liability in Australia: the Devil in the Detail" (2005) 26 Australian Bar Review 29.

(g) There would be some exclusions where the rule of joint and several liability would apply rather than proportionate liability. In Australia these are claims that cover intentional or fraudulent conduct, claims involving particular legal relationships (e.g. joint partners), and cases where the parties have contracted out of proportionate liability.

(h) Provision would be made for parties to contract out of proportionate liability so that joint and several liability would apply. In Australia, Queensland prohibits contracting out, WA, NSW and Tasmania expressly permit it, and the other states of the Commonwealth are silent on whether it is possible to contract out. Allowing individuals to contract out preserves contractual agreements entered into by the parties and allows room for negotiation.

(i) The regime should only apply to building work that is carried out after the proportionate liability regime enters into force. This is important in the interests of certainty and fairness to enable parties to assess their risks and liabilities before any building work is carried out and to manage their affairs in the knowledge of the liability rules that will apply. This is consistent with the approach to the implied warranties in the Building Act which only apply to contracts entered into after that Act entered into force.[22]

12.4 **Backstop home warranty insurance essential**

12.4.1 When proportionate liability was introduced in Australia in the building sector, it went hand-in-hand with the introduction of home warranty insurance or other consumer protection. Home warranty insurance is mandatory in many States including NSW and Victoria.[23]

12.4.2 We believe that home warranty insurance, or some other means of protecting homeowners from the possibility of suffering loss at the hands of an impecunious party, should be mandated if proportionate liability is introduced in New Zealand in relation to building work. If proportionate liability is not accompanied by such an insurance or home warranty scheme, it will have an unfair impact on consumers and would be very unlikely to be acceptable. We have assumed that such measures would form part of proportionate liability.

12.4.3 At a minimum, insurance should:

(a) Cover losses arising from non-completion of building work or the negligence of parties involved in the building work;

(b) Be backstop in nature, so that it only applies where cover cannot be claimed from the party responsible for the loss, whether through death, disappearance or insolvency; and

(c) Have a finite limitation period of at least 10 years, the same as the limitation period in the Building Act.

12.5 **Example of how proportionate liability may play out**

12.5.1 Under this option, a standard building dispute claim could play out as follows: A family discovers its house is a leaky home. The builder is insolvent and cannot pay any money towards any judgment. The plaintiff chooses to sue the Council for its loss. The Council considers that, if it is

[22] Building Act 2004, s 396.
[23] See further Appendix 6

found negligent for a building defect, the architect who designed the building is also negligent. The Council, as a defendant, is under a duty to notify the plaintiff family of the existence of the architect and the architect's potential responsibility for the family's loss. For tactical reasons, the family decides not to sue the architect. During the proceedings the defendant produces evidence to counter any claim it has liability for the plaintiff's loss, and in the alternative brings evidence to show that it is not the only partly responsible for that loss, with reference to the comparative responsibility of the other wrongdoers. If the Council is found to have caused loss to the plaintiff, the court will make judgment against it for an amount that is just, taking into account its views on the comparative responsibility of the architect and the builder. If the Council's liability is found to be 25 per cent of the total loss, the builder's share will be covered by insurance (as the builder is insolvent). It will be up to the family to decide if it then wants to bring subsequent proceedings against the architect whom it earlier chose not to join.

12.6 **Analysis**

12.6.1 This option represents a substantial change in the liability regime. As such, we have analysed it in more detail than other options – in terms of the scale of change but also the relevant dimensions of change.

12.6.2 We consider that this option would largely affect things in an *ex post* sense (i.e. after loss has occurred). While there are likely to be both *ex ante* and *ex post* effects, given the disjoint between *ex ante* incentives and *ex post* behaviour considerable caution should be exercised in ascribing changes to the latter from the former. An *ex post* focus results in emphasis being given to the distribution of liability from loss/damage rather than the behaviour giving rise to such loss/damage.

Positive impacts

12.6.3 The main arguments in support of this option concern “fairness” issues in relation to “deep pockets” defendants (who often turn out to be “last man standing” in any action). Certainly, this option will result in those parties not carrying the uncollectable share, and their total contribution to building failures will be reduced. This will address that fairness concern.

12.6.4 This change in the appointment of liability may affect how litigation proceeds. In this regard, we see some benefit in that the number of parties will be sued or joined to a case is likely to reduce. To the extent that plaintiffs may consider that traditional deep pockets parties (such as BCAs and professional services firms such as architects and engineers) will not be worth pursuing to any extent as their shares of loss may be limited. The same may apply in respect of other parties such as subcontractors.

12.6.5 It is difficult, however, to know what the likely joining behaviour of plaintiffs and co-defendants will be with any precision. The motivation on plaintiffs to sue a large number of parties or, alternatively, on defendants to join a large number of parties to an action may arise in large part by the prospect of reaching a settlement without going to actual trial. To the extent that this continues to be the case (i.e. all parties know that the probability of a defendant settling to avoid going to court will not materially alter) then the practice of suing/joining seeming peripheral parties may continue, even under this liability rule.

12.6.6 Nonetheless, it is reasonable to assume that more discretion will be exercised by plaintiffs and defendants than is now the case and some parties who may have been joined previously at the margins of the case will now not be (at least in the initial round).

12.6.7 In Australia, the introduction of proportionate liability was seen a necessary to ensure the ongoing provision of insurance to the building and construction sector. If this was a problem here, then there might be benefits from the introduction of proportionate liability in terms of insurance cover being provided in areas it is currently not (e.g. weathertight issues) and across a wider range of building industry participants. This would mean less likelihood of insolvencies and bankruptcies, and possible improvements in quality through measures implemented by insurers.

12.6.8 We are very uncertain, however, that proportionate liability would result in the wider provision of insurance. The information gathered in our interviews is that insurers' reluctance to provide insurance is due to the small size of the New Zealand market and issues with quality of building work. Information from the Department is that insurers have said they would be prepared to offer wider insurance products only if they are given a monopoly over the market, which the Government is not prepared to do.

12.6.9 Proportionate liability could lead to a reduction in insurance premiums for deep pockets, such as architects and engineers. However, assuming that insurance markets are functioning efficiently, those costs would be transferred to homeowners, who would then carry the risk of the uncollectable share in one way or the other.

12.6.10 Another possible impact is that, as BCAs will not cover the risk of the uncollectable share, they will be less risk-averse and not over-regulate. Even if this is occurring (as noted above, the evidence of BCAs acting in this way is unclear), we have doubts a change in the liability regime will have this affect. BCAs will still face liability risk and will also feel responsibility as the regulatory agency and as a result of public and political pressure to take care in their regulatory building tasks. We doubt that their behaviour would change.

12.6.11 Another claim is that proportionate liability will result in builders and other building industry professionals stepping up and taking more responsibility for the quality of work, and not relying on BCAs for this through the building consent and inspection process. We do not think that proportionate liability will have this effect, as the incentives on BCAs seem largely unchanged as discussed above.

12.6.12 In terms of the costs of proceedings, it is possible that proportionate liability as described above will make the process of joining defendants more efficient and result in less defendants being joined. This is because the plaintiff has the option of joining one of the building sector parties and, if that building sector party believes other parties are also liable, he or she must notify the plaintiff. Given that the building sector party is likely to have better knowledge than the plaintiff about what when on at the site, the process of searching for potentially liable parties is likely to be more efficient and parties who did not cause the loss are less likely to be joined.

12.6.13 These savings in terms of proceedings, however, are likely to be outweighed by other costs in the process.

Negative impacts/issues not addressed

12.6.14 During the course of this work we heard from stake stakeholders proportionate liability would better support collective action by all parties involved in the project than joint and several liability. We do not support that view. Even if joint and several liability is discouraging cooperative behaviour (which we doubt) we think that proportionate liability would be even worse. Under proportionate liability there is less incentive than under joint and several liability to consider (or care about) the actions of other parties in an *ex ante* sense, when the resulting impact on you is less under a proportionate liability rule. This suggests that lower levels of care might eventuate under this option than the (enhanced) status quo. Lower levels of care might not be restricted to building practitioners, but could also spill over into less active supervision and management of them by BCAs.

12.6.15 Considering next the important steps in the process of resolving claims for loss/damage, we think that, for the most part, proportionate liability is likely to move costs around between plaintiffs and defendants. For example, the costs of joining parties would now fall more consistently on plaintiffs than at present, as they can currently choose to sue only one tortfeasor and then leave that tortfeasor to join other parties.

12.6.16 A possible cost that will arise for plaintiffs is that proportionate liability may result in the recovery of less of their loss than joint and several, because they decide it is not worthwhile suing parties whose share of loss is minor. This is not covered by insurance.

12.6.17 There are also two sets of procedural costs that we think will increase. First, plaintiffs will now need to weigh up the costs and benefits of joining parties to the action than at present. Such a calculation is likely to be based on the expected value of joining respective parties (i.e. the (estimated) probability of success multiplied by the size of the (estimated) contribution of each party). In our view, the costs of this will be greater than the possible reduction in costs faced by tortfeasors, who will now not need to do this analysis themselves.

12.6.18 Second, there will be more effort and time spent in any proceedings on the question of the relative liability of the parties. At present, this is a relatively quick step at the end of a case, between the remaining parties. Under proportionate liability it becomes a much more formal step. This is true not only for preparation of any case (on the plaintiff and defendant's side) but also in the proceedings themselves, where defendants need to lead and plead their case relative to other defendants (and absent wrongdoers). The additional complexity and volume of information required suggests that litigation costs for defendants under this option would rise.

12.6.19 Backstop mandatory home warranties or some other form of consumer insurance are also a possible source of cost benefits. Currently the consumer/homeowner receives an implicit form of backstop insurance through the operation of joint and several liability, so proportionate liability would lead to additional costs to consumers/homeowners. While they would receive the benefit of coverage against insolvent or unavailable defendants as a result of the backstop insurance, that is a benefit that is already provided to them at the moment.

12.6.20 As discussed, above, insurance companies are generally reluctant to provide wide-ranging insurance, in the building and construction sector. It is therefore likely that the Government will have to step in and provide the backstop insurance. This is likely to be more costly that it being provided by the private sector, and more costly that the current implicit form of insurance.

12.6.21 The impact of insurance on (potential) defendants' behaviour is difficult to ascertain. On the one hand, it may drive growth in the extent of unscrupulous practices (e.g. the liquidation of special purpose companies, or disappearance overseas) as parties who might undertake such actions may feel a degree of comfort that they are not leaving consumers and/or other industry players "in the lurch". On the other hand, the presence of a warranty/insurance scheme may not have any material effect on such behaviour. That is, industry players are indifferent between a scheme whereby the costs of their actions are picked up by other industry players (under joint and several liability) or by underwriters of home warranty/insurance schemes. Our assessment is that the latter is much more likely: the presence of a mandatory home warranty/insurance scheme will not alter the incidence of sharp practice by industry practitioners in any material way.

12.6.22 It is difficult to see that this option is the answer to concerns about the practice of settling claims for sums that exceed what might have resulted had the case gone to trial. These are essentially commercial decisions made by (predominantly) professional groups and their insurers to avoid litigation cost and uncertainty. In addition, they are decisions made for reputational reasons (i.e. to keep the firm out of the headlines). As discussed above, the costs of any litigation are not likely to be altered significantly under this option, while at least some of the uncertainty around outcomes will also remain. Similarly, reputational aspects associated with being involved in litigation will not be affected by this option. Thus, to the extent that the current settlement practices were related to the avoided costs of litigation (rather than an assessment of the likely damages), then this option would not appear to have any material effect, other than perhaps reducing the settlement quantum (although the work required to establish absolute and relative liability would likely erode much of that benefit).

Fairness effects

12.6.23 The consultants consider that proportionate liability is likely to lead to results that are perceived as more fair than joint and several liability, only if an adequate backstop insurance or warranty scheme is able to be implemented. This is a major qualification, however, and even then it seems that proportionate liability could be seen as unfair to plaintiffs.

12.6.24 It seems to the consultants that, on the measures of fairness referred to in paragraph 10.6.2, proportionate liability merely shifts the impact between the parties:

(a) Under proportionate liability, there is less certainty of outcome for the plaintiff, as it will have to sue all tortfeasors successfully to recover loss whereas under joint and several liability it only needs to be successful against one defendant. The risks for them are that a defendant is not available to be sued, that there is a disjunction between the Courts finding that particular defendant's liability is limited and what the actual liability of other parties is, and whether it is worth the cost of suing to recover a small share. However, there is greater certainty of outcome for the defendants as they should, once precedents are established, be able to predict their likely liability.

(b) Under proportionate liability the arbitrary unfairness caused by the uncollectable share shifts to plaintiffs rather than defendants.

12.6.25 Backstop insurance or warranties would largely resolve both these issues for plaintiffs by providing greater certainty of outcome and less arbitrary unfairness, by protecting against the costs of the uncollectable share. As discussed above, it seems likely that the Government will need to step in and provide such backstop insurance or warranty. If it is not provided, then the consultants consider that proportionate liabilities would be seen as more unfair than joint and several liability, and would not be acceptable to the community.

12.6.26 Backstop insurance or warranties, however, would not remove all the uncertainty of proportionate liability for plaintiffs. Proportionate liability therefore could still be seen as unfair, even if backstop insurance or warranties are available.

12.7 Summary and overall fit with policy objectives

12.7.1 It is difficult to see meaningful efficiency benefits as a result of this option relative to the status quo. Even in the presence of mandatory warranty/consumer protection insurance, we conclude that this option makes homeowners/consumers worse off. Some (not all) industry participants would potentially benefit from this option, but that is not immediately clear. The costs of this option do not appear to be outweighed by the benefits. The effectiveness of the option is therefore questionable.

12.7.2 In terms of the Government's policy objectives identified, the option may have benefits in terms of minimising vexatious joinder (though this could probably be achieved through other means), and aligning liability with the Government's objectives for accountability (but does not fully address this issue). We think it would have limited impact on responsibility for overall quality.

12.7.3 The option merely transfers the cost and unfairness of uncollectable shares as opposed to addressing the issue. The feasibility of this option in its entirety (i.e. with some form of warranty/insurance scheme) is itself questionable given the acknowledged difficulty (and cost) in setting up suitable warranty/insurance schemes.

13. MODIFICATIONS TO JOINT AND SEVERAL: PERIPHERAL WRONGDOERS, LIABILITY CAPS

13.1 Introduction

13.1.1 This part of the report sets out possible modifications to the joint and several liability regime. The two options that we look at are:

(a) Different liability rules for primary and peripheral wrongdoers; and

(b) Liability caps for either the BCA, and/or for professionals.

13.2 Option 2: Different liability rules for primary and peripheral wrongdoers

13.2.1 **Description:** This option involves the introduction by statute of proportionate liability only for peripheral wrongdoers, whose comparative responsibility for the plaintiff's loss is low. Joint and several liability would remain for primary wrongdoers, who would come within the definition of those considered to be primarily at fault for the plaintiff's loss. If one primary wrongdoer is absent, other primary wrongdoers (if any exist) would be responsible for the absent primary wrongdoer's proportion of the fault. This option is a hybrid option that applies different liability rules for "primary" and "peripheral" wrongdoers.

13.2.2 This option is based on a proposal described in the Ontario Law Commission's review of joint and several liability as it applies under its Business Corporations Act, and is in place in Minnesota and other American States.[24]

13.2.3 A key issue is the threshold for distinguishing between primary and peripheral wrongdoers. This is ultimately a policy question and any distinction made may be arbitrary.

13.2.4 In Minnesota, any party with more than 50 per cent responsibility is subject to the rule of joint and several liability. Those less than 50 per cent responsible are only proportionately liable for any loss they cause with other wrongdoers. This threshold is high, and based on the relative proportion of loss between different parties being awarded in New Zealand in leaky building cases,[25] a threshold of thirty per cent or more would likely be more appropriate in New Zealand. A fifty per cent threshold could mean that no party is a primary wrongdoer and therefore that the plaintiff carries all the risk of a party being absent, which could be a large proportion of the loss. The consultants have therefore taken this 30 per cent threshold for the purposes of this review.

13.2.5 We have assumed for the purposes of this report that where proportionate liability applies it would have the features discussed in section 12.3 above. Insurance or home warranty products may also be necessary under this option. As with proportionate liability, it would apply only to building work carried out after it is introduced.

13.2.6 **Example:** Taking the scenario above at paragraph 9.4.4 as an example, liability could fall as follows: The builder is 60 per cent liable and if he had been solvent, would have been a primary wrongdoer. The architect and the BCA are found to be 15 and 25 per cent liable for the loss and would be considered peripheral wrongdoers. If:

[24] Law Commission of Ontario *Joint and Several Liability under the Ontario Business Corporations Act* – Consultation Paper (Toronto, April 2010)
[25] Weathertightness – Estimating the Cost, Report to the Department of Building and Housing, PricewaterhouseCoopers, 29 July 2009

(a) The architect is absent, the builder, as a primary wrongdoer who is subject to joint and several liability, would pick up the architect's share, so would pay 75 per cent of the loss. The plaintiff will be 100 per cent compensated. The BCA will have to pay no more than 25 per cent of the loss, reflecting its level of responsibility;

(b) The builder is absent, as peripheral wrongdoers, the BCA and the architect would not be required to contribute to the uncollectable 60 per cent share. The builder's share of the loss would be carried by the plaintiff (but may be covered for this loss by insurance or a home warranty); and

(c) There was another primary wrongdoer involved, so that responsibility was split, 30/30/25/15, and the architect with 15 per cent responsibility is absent, both primary wrongdoers, as joint and severally liable parties, would share between them the architect's uncollectable 15 per cent. This would bring their totals to 37.5 per cent responsibility each.

13.3 **Analysis**

13.3.1 This option appears to focus mainly on the *ex post* distribution of liability following loss/damage (with the implicit assumption that a different rule after the loss/damage would somehow lead to improved performance and altered behaviour prior to any loss/damage).In essence, it assumes that defects giving rise to loss/damage are a given and that liability rules have little direct influence over the incidence of such events. Similarly, the option emphasises equity (i.e. fairness among wrongdoers) over efficiency.

Positive impacts

13.3.2 Many of the effects of proportionate will apply to this option as well.

13.3.3 The option may improve the situation in respect of identifying and allocating responsibility for faulty work and may reinforce the intentions of the Building Act amendments.

13.3.4 It therefore seems likely to provide some degree of comfort to parties who currently consider that they are bearing a disproportionate share of the costs of remedy (e.g. BCAs, architects and engineers). It may also give some protection to consumers/homeowners in relation to recovery from the biggest contributors to loss (although reliance on some form of insurance is still required in order to address uncollectable shares issues).

13.3.5 This option will also mean that peripheral wrongdoers are not exposed to the risk of the uncollectable share. This will principally benefit professionals and subcontractors, who are the most likely parties to be found as peripheral wrongdoers. For professionals, this should result in a decrease in insurance costs. For subcontractors, the change is unlikely to have any real impact, as for many of them the viability of their businesses are likely to still be severally affected by a claim against them as a peripheral wrongdoer (and we have not found significant evidence that they face a high level of risk of the uncollectable share at this time).

Negative impacts/issues not addressed

13.3.6 This option will have many of the same negative effects as proportionate liability, although in some cases those impacts could be more significant.

13.3.7 For instance, the additional costs in relation to establishing the precise proportions of liability will rise significantly. Complexity around determinations will also add to costs. In fact, these costs are likely to be exacerbated under this option even compared to proportionate liability, as attention turns to the last 1 per cent around whatever threshold is decided to constitute primary wrongdoing. That is, resources expended arguing around the threshold will be non-linear in nature and would centre on the threshold (perhaps at the expense of determining overall liability shares).

13.3.8 The option is also likely to require complicated joinder rules and consequently require complicated decisions on the approval to litigation or other forms of recovery for loss. This aspect is likely to be material in terms of how the option operates. There is a high risk of duplicated efforts and cyclical processes.

13.3.9 In addition, this option relies on the existence of backstop home warranty/insurance schemes to safeguard the position of homeowners/consumers, with the risks and costs discussed above.

13.3.10 The intention of this option appears to be based on protecting a consumer from the possibility of uncollectable shares where the missing party is a significant contributor to the loss (i.e. primary wrongdoer). In reality the benefit to the consumer is only material in the case of two or more primary wrongdoers being identified and at least one of these parties still remaining solvent or in the picture.

13.3.11 The option is likely to increase costs considerably, for all parties involved in building work. Unless there is a warranty/insurance scheme in place, the consumer/homeowner may be left no better off under this option than the status quo, and in some cases, may be substantially worse off.

13.3.12 **Summary and overall fit with policy direction:** like proportionate liability, the costs and complexity likely to result from this option are likely to outweigh significantly any benefits that might result. On the face of it there are some equity/fairness benefits, but the efficiency impact is likely to be negligible. Moreover, the effectiveness of the option (for the consumer) is dependent on a set of particular circumstances which may not necessarily arise. Some parties, to the extent it is proven they are peripheral, will stand to benefit from reduced financial exposure to loss/damage arising from negligence.

13.4 Option 3: Liability caps

13.4.1 **Description:** This option involves two sub-options: a liability cap for BCAs and a liability cap as part of a professional or industry group standards scheme. One or the other could be implemented, or both. Both schemes would involve the introduction of a cap on the amount of damages that can be claimed against a negligent party. Caps generally apply regardless of the level of loss suffered by a plaintiff. There are a number of ways to cap liability, including by:

(a) A single fixed monetary amount;

(b) A percentage of the total cost of the services provided; and

(c) A percentage of the total cost of the loss being claimed by the plaintiff.

13.4.2 Both sub-options would apply in relation only to building work that is carried out once the cap applies, for the same reason as explained in paragraph 12.3.1(i).

13.4.3 **Liability cap for BCAs:** This option involves a statutory cap on liability for all BCAs in connection with their regulatory functions under the Building Act. This would address concerns of BCAs that as deep pockets they are bearing a proportion of the costs for building loss that far exceeds their claimed level of responsibility.

13.4.4 **Liability caps as part of professional or industry group standards schemes:** Another option would be professional group or industry group specific liability caps, with qualification depending on professional or industry members meeting performance standards and other requirements. An overarching regulatory body would be responsible for supervising industry groups in the regulation of their members. The regulatory body would be responsible for the approval of standards schemes developed and submitted by professional and industry groups. These would cover minimum insurance requirements, risk management and consumer protection measures and would cap liability. These regulatory systems exist in all Australian States. The rationale for these schemes is that they require occupational associations to improve their professional standards and protect consumers by implementing robust risk management strategies and adhering to professional indemnity insurance standards. They in turn reward such practices by limiting the occupational liability of members of occupational associations.

13.4.5 In Tasmania, for example, the Professional Standards Act establishes the Professional Standards Council, which supervises the preparation and approval of professional standards schemes from industry groups.[26] These cover occupational standards, risk management strategies, and insurance or asset holding requirements, and also limit the legal liability of members. Currently, the legislation requires that any cap approved under the legislation must be more than $500,000. For example, Engineers Australia has a scheme in place that sets caps on liability for delivery of professional services by its members. To qualify for the benefits under the scheme, such as the liability cap, members must carry insurance or hold assets exceeding a specified amount and have robust risk management practices in place to protect consumers.

13.4.6 For the purposes of this report, the consultants have assumed that a New Zealand professional standards scheme would take the following form:

(a) Legislation would establish a new professional standards body to supervise professional and industry bodies in the regulation of their members;

(b) The standards body would initially set criteria and application guidelines for professional and industry groups to adhere to in order to qualify for a professional standards scheme. This would include minimum insurance requirements, risk management strategies and other quality assurance measures, and criteria and amounts for liability caps;

(c) Professional groups or industry groups would determine universal criteria in a standards scheme which would be submitted to the standards body for approval;

(d) The standards body would assess the professional standards schemes and recommend to the relevant Minister that schemes that satisfy its criteria are approved. Before approving a scheme it would be legally reviewed, peer reviewed by a properly qualified person and notified in newspapers; and

[26] Professional Standards Act 2005 (Tas).

(e) The approved professional and industry groups would self-regulate their affairs and administer the schemes on behalf of their members. In order for individual members of the professional or industry groups to qualify for a liability cap they would have to adhere to the criteria set down by their regulatory body.

13.4.7 In Australia, the schemes generally only apply to professionally regulated groups, such as surveyors, engineers, accountants and building consultants (who are regulated by the Australian Society of Building Consultants). The consultants cannot see in theory why such schemes could not be established for builders as well. The key is that there would need to be an approved professional or industry body for builders with all the necessary licensing and risk management procedures in place.

13.5 Analysis of liability cap on BCAs

13.5.1 We find it difficult to predict what the effect will be of a liability cap on BCAs. A concern identified in this review is that BCAs may now be incentivised, as the "deep pockets" and, potentially, "the last man standing", to be overly attentive and overly detailed in the checking and validation process. An inadvertent consequence of this could be a tendency to rely on the BCA for quality control rather than quality control being an integral part of the standard industry processes.

13.5.2 The question is therefore whether a move to cap the BCAs' liability would likely be successful in changing behaviours. The BCA will likely still need to be incentivised with a material share of the potential liability and it will continue to manage itself in a prudent manner with close oversight from insurers.

13.5.3 A consequence for consumers is that the current system of implied insurance from BCAs will no longer be there. If there is a missing share, the council will be taking up only part of that share. Therefore, if this option were implemented, it is likely that there would have to be another initiative to encourage a more explicit insurance product, either through professional bodies, through trade organisations or through direct intervention in the consumer market.

13.6 Analysis of liability caps for professional/industry groups

13.6.1 This option seeks to influence *ex ante* behaviour through *ex post* measures in a more direct way than other options. In effect, the liability cap is the payoff for enhanced standards, practices and precautions. The intent of the option would be to reduce the prospect of catastrophic losses for those parties operating under such a cap, although it is not clear that losses of such magnitude are prevalent or are likely to become so in New Zealand.

13.6.2 Liability caps are a quantitative tool that substitutes for normal market actions. That is, by providing the "reward" for good behaviour in an administrative or regulatory sense, the cap substitutes for other market-based rewards such as additional revenue and reputational enhancement. While further analysis is required, the option gives rise to the prospect of outcomes that seem perverse: firms who, by virtue of their superior standards and conduct, may be less likely to require protection or find themselves in predicaments that expose them to significant liability risks, are afforded the protection of a limit on liability.

13.6.3 If membership of an industry body was not compulsory, then additional complexity is introduced into the system in terms of consumer choice:

(a) From the consumer perspective, membership of the body may be construed as a signal of quality.

(b) However, a liability cap may send the opposite signal; that the party is signalling concern at the possible extent of liability and looking to reduce their exposure to that.

13.6.4 Such mixed signals may confuse consumers and ultimately lead to little real change.

13.6.5 Setting up appropriate standards bodies will be easier for some (e.g. architects and engineers) but potentially more difficult for others such as builders and sub-contractors, which could result in significant costs.

13.6.6 The option would appear to transfer risk from parties better able to deal with the loss/damage to parties that are arguably much less able to cope (i.e. owners/consumers). In addition, depending on the nature of the cap, behavioural change may not eventuate (i.e. if the cap is too high, it ceases to be useful, while if it is too low it merely results in a transfer of costs to the owner/consumer).

13.6.7 This option has little direct effect on uncollectable shares issues and does not impact greatly on joinder rules. However, it will assist “deep pockets” defendants in the industry and their insurers in terms of the maximum expected liability they might face in the case of a building defect. In saying this, insurance is an industry based on experience and large numbers of small claims are as costly as small numbers of large claims, so the actual effect on insurance and the commercial practices associated with settling outside of court rooms would most likely continue.

13.7 **Summary and overall fit of liability cap with policy direction**

Liability caps for BCAs

13.7.1 The possible consequences of such an option are difficult to predict. It is unclear whether BCAs would act in a less risk-averse way if a cap was put in place to limit their liability, and it is questionable whether this is desirable. Caps could have negative effects for consumers if they meant that an uncollectable share would be carried by a homeowner. On its own, other than possibly improving the position of BCAs, this option will do nothing to solve the issues identified, and may result in other unintended problems.

Liability caps for professional groups

13.7.2 This option affects current market based incentives and rewards "good players". However, it addresses only a limited range of the issues we have identified and it could have negative effects for consumers. It appears to transfer risk from those able to deal with it, to those who are not (such as homeowners).

13.7.3 The option does not seem consistent with the Government's policy expectations that people will be held liable for their negligent actions, and sends mixed messages about parties having to stand behind their work.

14. ALLOWING CONTRACTUAL LIABILITY ARRANGEMENTS

This chapter sets out a possible option of allowing parties to contract for different liability options than more fully than is currently available. This is our fourth and last option.

14.1 Description

14.1.1 This option involves providing in legislation:

(a) That if a contract for the carrying out of building work excludes liability in negligence of the party carrying out the building work and any subcontractor to that party, those exclusions of liability are effective against any subsequent owner of the building; and

(b) A mechanism to allow for notification of third parties (namely subsequent home owners and building buyers) if original parties have contracted out of joint and several liability, thereby binding the third party to the exclusion of liability.

14.1.2 It is possible as a general rule of contract and tort law that a person can limit or otherwise exclude his or her liability in tort by contract. In the building sector, those who engage in building work under a contract with the owner of the building (e.g. project managers, architects, engineers, and main building contractors) are therefore generally able to limit their liability in tort in the contract, provided of course that this is agreed by both parties.

14.1.3 At present, however, such contracting out is most unlikely to be effective against parties who are not a party to the contract. Thus, any contracting out of liability is not generally effective against subsequent purchasers. Also, it is not always effective in excluding liability of third parties, such as sub-contractors. Option 4 overcomes these limitations.

14.1.4 A key issue for this option is the potential unfairness to third parties (such as subsequent homeowners) who did not agree to the limitation on liability. As noted above, this option would involve a mechanism to allow pre-purchasers to have notice of the liability limitation before purchasing a property.

14.1.5 In 2010, as part of the Building Act review reforms, Cabinet agreed to a policy proposal to require homeowners to provide the details of the building contractor and details of any surety to the relevant territorial authority at the completion of a building project, in order to make it easier for subsequent homeowners to locate and pursue the original building contractor if things go wrong with their home.[27] A consequential amendment was agreed, to the legislation concerning land information memoranda (LIMs), that would require this information to be provided by a territorial authority in a LIM. A LIM is a document issued by a territorial authority such as the Council (which contains information on any land within the territorial authority district). Anyone may apply for a LIM. Under the current legislation LIMs must include, amongst other things:[28]

(a) Information concerning any consent, certificate, notice, order, or requisition affecting the land or any building on the land previously issued by the territorial authority (whether under the Building Act 1991, the Building Act 2004, or any other Act); and

[27] See CAB MIN (10) 27/10 at 11.10/ 12.
[28] Local Government Official Information Act 1987, s 44A.

(b) Information concerning any certificate issued by a building certifier pursuant to the Building Act 1991 or the Building Act 2004.

14.1.6 Given the decision to provide for disclosure of sureties in LIMs, it does seem to us a big step to also provide for notification of liability through a LIM, although further policy work may be necessary before this option could be adopted.

14.1.7 In any provision limiting liability it would be imperative that the parties make clear their intentions as to liability. It is likely the Courts would still attempt to read down provisions that limit liability so parties would need to ensure they clearly set out and in full the limitations on liability that they wish to apply to any arising liability in respect of the building work, what it applies to, and to who.

14.2 **Analysis**

14.2.1 This option has the potential to impact on *ex ante* incentives as well as *ex post* behaviour.

Positive impacts

14.2.2 Given that this option essentially strengthens (and extends to third parties) existing instruments or avenues available to contract out of liability in tort, there is potential for efficiency gains in the building process (through incentives for parties to consider in more detail what it is they are signing up to) as well as equality/fairness gains from a more certain environment around roles and responsibilities.

14.2.3 Provided that the contract is complete (i.e. well written, contains all relevant terms, is unambiguous, and considers contingencies) and understood and accepted by the parties to it, then the most immediate effect of the option is to provide a greater degree of certainty for parties to the contract. This enhanced certainty would have positive impacts on the behaviour of industry participants in terms of quality and perhaps innovation. Rather than being "stand-offish" as a result of fear concerning liability effects, to the extent that liability is clearly delineated and bounded in the contract, then building practitioners would be better able to provide their services with a sense of comfort, without the possibility of large liability exposures hanging over them. This is particularly relevant for smaller operators, who tend to be under-capitalised.

14.2.4 Notwithstanding the above, the intent of this option appears to be directed at clarifying *ex-post* outcomes. Again, to the extent that the contract is complete and the parties agree to the terms and conditions, then there would appear to be efficiency benefits as well as equity ones (i.e. it is a relatively low-cost method of allocating liability and the parties know what's coming in the event of loss/damage).

Negative impacts/issues not addressed

14.2.5 Writing, monitoring and enforcing contracts is no easy task. The literature on incomplete contracting (due to bounded rationality, opportunism, relationship-specific investments and other cost considerations) abounds with examples of contracts that seem at first glance to be complete but require significant renegotiation, entail significant monitoring and do not align incentives in any material way. Thus, there are (often substantial) costs of contracting.

14.2.6 Given such costs, any benefits from this option must assume (or require) the parties to the contract to be rational. A willing-seller-willing-buyer scenario involves parties being fully informed and understanding the detail of what they are signing. In that respect, the option may strengthen incentives for consumers/homeowners to become better acquainted with more of the detail around building projects, which may ultimately lead to better decision-making. However, we are concerned about the extent of information asymmetry and issues of relative power (i.e. consumers do not make building decisions with significant costs attached very frequently and would not be expected to know all that is required to construct a useful contract). We do not think that the Building Act Review changes will remedy all these problems, so they would still be a significant barrier to this option.

14.2.7 The positive effects that may eventuate from this option are predicated on meaningful and well understood contracts being drafted and the agreement of two or more parties to the agreement. The effectiveness of the option would be very limited in the absence of such conditions. It is also not immediately clear what the consumer/homeowner has to gain from contracting out of joint and several liability.

14.2.8 The option does not directly address the issue of insolvent or disappearing parties. Even if apportionment of uncollectable shares is stated in the contract, if the contracting party itself is insolvent or disappears, then the contract has little effect.

14.2.9 As is proposed, the main beneficiaries of the option are main building contractors. Parties with no direct contractual relationship with a homeowner will not be able to limit their liability. One party that would not benefit in any way is the BCA, which has no ability to contract-out of its functions and may end up in a similar position as at present in the event of loss/damage and the contract is unable to be enforced. BCAs would likely continue to be “last man standing”. Similarly, subcontractors have some ability through the main building contractor to limit their liability, and the option recognises this possibility.

14.3 Summary and overall fit with policy objectives

14.3.1 This option has potential to be a relatively low-cost way to ensure that accountabilities between consumers and parties, carrying out building work for them are clear and reflect the particular circumstances of each situation. However, the realisation of these benefits relies on the quality of the contract written and the equality of bargaining power and information symmetry between consumers and more informed counterparties and thus has some risks.

14.3.2 We therefore consider that these benefits may not be realised, and there is a strong possibility that consumers could be much worse off than under the enhanced status quo, without any improvement in the quality of work.

14.3.3 The option also does not address other issues, particularly the "last man standing" position of BCAs, and the incentives on behaviour that it creates.

15. ADDITIONAL CONSIDERATIONS

This chapter summarises additional issues identified in our review that the Department may wish to consider further.

15.1 Other issues

15.1.1 In the course of this review the consultants have become aware of the following issues that the Department may wish to consider, in order to make further changes and further improve the building regulatory context:

(a) **Suing parties/joinder rules:** There is broad concern in the industry that the threshold for suing/joining parties to a building dispute is too low, or that the disincentives against doing so are ineffective. While some acknowledged strike-out as a possibility, we received comment that costs related with strike-out alone can be too much for some in the sector. Further, while the ability to award costs in cases before the Weathertight Homes Tribunal exists, we were told that orders are rarely made and that the threshold for a costs order is too high. We leave it to the Department to decide whether it wants to look at this issue more closely.

(b) **Small building companies and personal liability in tort:** We received comment from some interviewees that the Courts and the Weathertight Homes Tribunal are too readily finding directors of small (usually one-man-band) building companies personally liable in tort on the basis of their involvement in the building work. The consultants point out that this is not a result of joint and several liability but of the application of a duty of care developed by the common law (i.e. the Courts). Nevertheless, concern remains that some builders do not benefit from limited liability benefits afforded to other companies.

(c) **Alternative comprehensive dispute resolution:** Some members of the Advisory Group suggested that an alternative to Court or litigation based dispute resolution would be an improvement for the sector. They envisaged a low cost, efficient and specialist service for resolving building disputes. The consultants are aware of the policy agreed to by Cabinet requiring the inclusion of a default Construction Contracts Act dispute resolution clause in mandatory written contracts (requiring consequential amendments to the Construction Contracts Act). The consultants recommend that, after a reasonable period, the Department evaluate the up-take of this means of dispute resolution and consider whether this is sufficient.

(d) **Education and training:** The consultants are of the view that much of the animosity towards joint and several liability stems from a misunderstanding of how joint and several liability applies, coupled with a general low level of understanding of liability and the legal implications of actions. This is more so for the trades than professionals, but it may be the case for some professionals too. The Department, as part of the Building Act review, has undertaken to provide more information to those in the sector and has begun a process of reviewing the Building Code, to make it more comprehensible and accessible. In designing the new information programmes the Department might wish to look at the issues identified in this review. In addition, the consultants think the sector itself would benefit if it did more to self-educate, to provide its members with a greater understanding of the business and

legal environment. A greater understanding of those matters should improve confidence, which in turn will result positively on efficiency and productivity in the sector.

(e) **Informal contracting:** It was said during the interviews that the informal nature of contracting in the sector is resulting in uncertainty around liability. Lack of *ex ante* agreement about responsibilities is no doubt partly responsible for issues facing the building sector. The minimum contracting requirements are intended to improve this and may have a flow-on effect to contracting between head-contractors and sub-contractors. The consultants recommend the Department assess the effect of the minimum contracting requirement after some initial bedding in, to understand whether these improve the situation. If it does not, other regulatory tools may need to be implemented.

(f) **Homeowner never "fully" recovers:** There is some suggestion that homeowners who suffer loss never fully recover. This is because of the time and cost involved in resolving disputes. This is connected to (c) above. The consultants recommend the Building Act Review changes be evaluated in the future to access whether they are having the desired outcomes.

APPENDIX 1: THE RULE OF JOINT AND SEVERAL LIABILITY

1. Historical development of the rule[29]

1.1 The rule of joint and several liability is a long-standing common law rule.[30] It is useful to trace the development of the rule to explain the rationale for it.

1.2 Traditionally at common law, those who commit torts[31] (usually called tortfeasors) who were liable in respect of the same loss, could be either "joint" tortfeasors or "several" tortfeasors. Joint tortfeasors were those parties who commit the same tort that causes the same loss, whereas several tortfeasors are responsible for separate torts that cause the same loss. Joint liability was therefore said to arise where there was concurrence in the act or acts causing the loss. Several liability was said to arise where there was a coincidence of separate acts which by their conjoined effect caused loss.

1.3 Historically, it was important to distinguish between these two groups of wrongdoers but as a result of statutory provisions and decisions of the Courts over the past 60 years or so, the distinction is now largely moot.

1.4 For example in relation to those jointly liable, judgment against one defendant entirely discharged the other(s), even if the plaintiff was unsuccessful in his or her claim. It was possible in these cases that a plaintiff could be left without a remedy. This rule, and the rule that a formal discharge of one wrongdoer discharged the rest, were based on the notion that since there was joint liability there was only one cause of action. This rule no longer exists except in relation to a compromise.

1.5 In the case of several concurrent wrongdoers there were as many causes of action as there were defendants. Consequently, they could not be joined in a single action and had to be sued separately in turn until the plaintiff had recovered all the damages sought. Judgment against one wrongdoer did not release the others.

1.6 In both cases the parties were liable in solidum which meant that they were each responsible for the whole of the damage, meaning a plaintiff could enforce a judgment against whoever they chose.

1.7 Until the introduction of the Law Reform Act 1936, the rule of joint and several liability had extreme consequences for defendants. This was because a wrongdoer who had paid the entire judgement debt was not able to bring a claim against other wrongdoers to make them pay their share of the damages. In other words, there was no means of seeking a contribution. The rule was justified on the basis that seeking contribution was seen as an attempt to recover part of a penalty which had been imposed for a wrongful act.

1.8 At the beginning of the twentieth century it was apparent to law makers that the common law had lost its way and was causing serious injustice in its application. This is perhaps unsurprising given that the common law had always struggled to recognise that more than one party could be responsible for causing a particular loss. This struggle also meant that contributory negligence on the part of the plaintiff (discussed further below) was an absolute bar to recovery.

---

[29] Much of this historical information is taken from the Law Commission's preliminary paper *Apportionment of Civil Liability* (NZLC PP19, 1992) ch 1.
[30] Common law refers to law made by Court decisions over a period of time as opposed to statute law passed by Parliament.
[31] Torts are legal wrongs, such as negligence.

1.9 The effect of the Law Reform Act 1936, modelled on UK reforms at the time, was to remove the no contribution rule, and allow concurrent wrongdoers in tort to claim from other wrongdoers a contribution of the damages they were found liable to pay.[32] This reform was confirmed entirely to the law of tort.

1.10 From this point on the law has remained largely unchanged.

2. Implications of the rule for recovery of loss

2.1 Under the rule of joint and several liability, multiple wrongdoers are "severally liable" which means that each can be held responsible for the full amount of loss suffered by a plaintiff, regardless of the proportion of the loss each was responsible for.

2.2 The rule means a person who suffers loss at the hands of multiple wrongdoers can bring a claim against any of those individuals as if they were solely liable to recover the total amount of the loss suffered (subject to the limit that a plaintiff can never recover more than the total loss suffered). In such a case, it is up to the wrongdoer who is defending the claim to join the other wrongdoers or to pay to the plaintiff the full amount of the loss and then recover "contribution" from the others towards any amounts paid. This decision is usually made on the basis of the legal chances of success against any such other parties and their ability to meet any judgment.

2.3 In practice, a plaintiff will join as many parties to an action that it thinks necessary to recover the full loss suffered. If the plaintiff is successful, the Court will apportion the loss between all the defendants. The plaintiff's decision on whom to join is usually made on the basis of both the legal chances of success and the ability of those parties to meet any judgment that might be awarded.

2.4 There is, however, no rule requiring that all parties be joined by a plaintiff and given the rule of joint and several liability, a plaintiff can bring a claim against one wrongdoer to recover the full loss.

2.5 Another implication of the rule of joint several liability is that, if a wrongdoer is not available (e.g. because they may be a company that has been dissolved) or are unable to pay their apportioned share of the loss (e.g. because they are bankrupt or insolvent), their share of the loss is met by the other wrongdoers in the case. This is because, while all the wrongdoers may be jointly liable for the loss, each wrongdoer remains separately liable as well for the full amount of the loss as well.

3. Application in the building and construction industry in New Zealand

3.1 In the building industry in New Zealand, the rule of joint and several liability is most common in negligence cases for residential building failures.[33]

3.2 The essential elements of a claim in negligence are:

(a) The existence of a duty of care between the plaintiff and the defendant;

(b) A breach of that duty; and

(c) Loss to the plaintiff as a result of that breach that could have been foreseen by the defendant.

[32] Law Reform Act 1936, s 17.
[33] In this report, residential buildings are taken to include multi unit dwellings built for residential use.

Who has been held to owe the duty of care?

3.3 The basis on which a duty of care in New Zealand is determined has been developed in the common law by the Courts. Whether a duty exists depends on the fact scenario of every case. The Court will consider a number of factors including particularly the nature of the relationship between the plaintiff and the defendant.

3.4 The Court of Appeal has laid down a two-stage test to be applied by the Courts in New Zealand to decide whether a duty of care exists in any particular case.[34] The initial enquiry is "internal" and looks at factors specific to the parties, particularly the proximity of the parties and the nature of the relationship. The second "external" enquiry looks at policy factors that weigh for or against the imposition of a duty on the particular facts and the consequences of doing so for New Zealand law more generally.

3.5 Notwithstanding this case-by-case approach, there are some general categories of relationships that can be said with a level of confidence to give rise to a duty of care.

3.6 In the building and construction sector, the following categories of individuals and bodies are commonly held to owe a duty of care of some nature to the current and future owners of residential buildings:

(a) **Builders:** Builders who carry out residential building work have long been held to owe a duty of care to the building owner for whom they are carrying out work and also to subsequent purchasers.[35] The obligation is to take reasonable care to build the dwelling, to build the dwelling competently, and to build it in accordance with the building permit and the relevant Building Code and bylaws. This duty exists concurrently with any contractual duty the builder owes to the owner in respect of the work undertaken, subject to the terms of the contract (if any) between the builder and the homeowner which may exclude or limit liability.

If the building work is contracted for by a company, the company will owe the duty of care. It is also possible, in such situations, that the individual builder or builders within the company will owe a duty of care, depending on the extent to which they are seen to take responsibility for the building work, as discussed below in paragraphs 3.7 to 3.10. In situations where building work is contracted for by a head contractor, who then contracts with a number of sub-contractors, the head contractor will owe the broad duty of care described above. The subcontractors may also owe a duty of care as described in sub-paragraph (e) below.

Owner/builders have been held to owe a duty of care to subsequent owners as described above.

(b) **Building consent authorities:** In New Zealand, BCAs owe a duty of care to owners of residential buildings and subsequent owners in discharging their statutory functions.[36] The duty is to take reasonable care in (relating to residential buildings):

(i) issuing building consents;

[34] *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA).
[35] See, for example, *Chase v De Groot* [1994] 1 NZLR 613, 619 (HC).
[36] See, for example, *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, 524 (CA), *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC), *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479, para 220 [HC], *North Shore City Council v Body Corporate 188529 [2010] NZCA 64, North Shore City Council v Attorney General* [2010] NZSC 125.

(ii) carrying out building inspection; and

(iii) issuing of code compliance certificates.

The New Zealand Courts have long recognised that local authority inspectors (and in turn the councils who employ them) may be liable to owners and subsequent purchasers for defects in residential building caused or not prevented by them through negligence.

As a general rule, we have been told that liability of a BCA in "leaky building" cases is split 80/20, with 20 per cent of the liability attributed to the BCA. The other 80 is shared amongst the main building contractor(s), and if relevant, designer(s) and developer(s).

(c) **Designers:** Designers of buildings (e.g. architects and engineers) owe a general duty of care to exercise reasonable care and skill in designing buildings to avoid foreseeable loss to owners and subsequent owners who may suffer loss as a result of their negligence. Where the designer is also engaged to supervise or observe the carrying out of the work, the designer will also owe a duty in regards to that work as well.[37]

(d) **Developers:** The extent to which a developer owes a duty of care depends on the level of the developer's involvement in the building work. A duty of care to building owners and subsequent owners is likely to exist if the developer or development company is:

(i) directly involved or controlled the building process. For example, this could involve planning, supervising or directing the work; and

(ii) is generally involved in the business of constructing dwellings.

(e) **Subcontractors:** Subcontractors are parties such as electricians, plumbers and plasterers who are contracted by the main contractor to carry out specialised works on the building. Labour-only subcontractors are also commonly engaged. The liability of subcontractors in negligence is a little unclear, but it appears that they will be liable if they assume particular functions or tasks, and responsibility for those functions of tasks. For example, sub-contractors who were responsible for framing, installation of windows and erecting gib board have been found to owe a duty of care to the original buyers.[38]

(f) **Project managers:** It is clear that a project manager can owe a duty of care in tort to owners and subsequent owners of properties. The scope of the duty, however, can vary as a result of the different roles project managers play in building and construction arrangements. A project manager is under a duty to ensure that the workmanship on a site is adequate. It has been held in at least two cases that, as a minimum, project managers must carry the burden of responsibility for not taking adequate steps to ensure that those under them achieved the required standard (of building work).[39] Provided the facts of the case so allow, a project manager will be responsible for supervising workmanship unless someone else is appointed to the supervisor role.

[37] See *Bowen and Another v Paramount Builders (Hamilton) Ltd and Another* [1977] 1 NZLR 394, 397 (CA).
[38] See *Body Corporate No 114424 v Glossop Chan Partnership Ltd; John Edward Boyd v Joan McGregor* HC Auckland CIV-2009-404-005332, 17 September 2010. See also the recent High Court case *Findlay and Others v Auckland City Council* HC Auckland CIV-2009-404-6497, 16 September 2010, which followed the approach in *Boyd v McGregor*.
[39] See eg *Coughlan v Abernathy* HC Auckland CIV 2009-004-2374, 4 May 2010, at para 108.

(g) **Suppliers:** Although there have been few cases where suppliers of building materials have been held liable for building defects, liability has been imposed by the Courts where suppliers' instructions, recommendations and warnings as to the use of a product have been negligently inadequate.[40]

Duty of care of individuals

3.7 As discussed above, if a building company has been contracted to carry out building work, it is possible that individual builders within the company will also be held to owe a duty of care in addition to the duty of care owed by the company. The same scenario can also apply in respect of the other categories of building sector participants discussed above.

3.8 Factors that will be relevant to deciding whether an individual will owe a duty of care include the personal involvement of the person in the building work and whether there has been an assumption of responsibility separate from the liability of the company.[41]

3.9 A report from Hazelton Law to the Department describes a number of cases where the Courts or the Weathertightness Homes Resolution Service have found that a director has held himself out as assuming personal responsibility for the acts of a company. In particular, it notes that a personal duty of care is more likely to be found where the director is also the builder and the owner of the company, and has been directly involved in the building project and in control of it.[42]

3.10 Anecdotally, comments from the Advisory Group indicate that the Weathertight Homes Tribunal is quite willing to hold directors and even employees of companies liable in negligence for building failures, even if the work was carried out through a limited liability company. This is apparently common in respect of small closely-held building companies.

Duty of care in respect of commercial buildings

3.11 It is possible that a duty of care will be owed by some or all of the above parties in respect of commercial or non-residential buildings. There are, however, relatively few incidences where the Courts have considered the question of whether a duty of care arises in commercial cases. In the cases reviewed by the consultants, the Courts have yet to impose a duty of care in this context. The Courts have said that is because:

(a) Commercial building owners have a greater ability to protect themselves by contractual relationships with the builders, engineers, and architects involved in the project, than residential building owners;

(b) Councils will generally not have the resources, nor their inspectors the qualifications, to second-guess the work of architectural and engineering contractors employed by a commercial property developer;

(c) Architects, engineers and others are involved in the building process to provide professional services for a fee. Councils are involved in the process because they are required, as a

[40] *Milne Construction Ltd v Expandite Ltd* [1984] 2 NZLR 163 (HC).
[41] Eg see *Rolls Royce New Zealand Ltd v Carter Holt Harvey* [2005] 1 NZLR 324 (CA).
[42] Hazelton Law "Home Warranty and Professional Indemnity Insurance Project – Liability Analysis" (Report produced for the Department of Building and Housing, October 2006) at 15.

matter of law, to satisfy themselves principally as to the safety of the building for its occupants and users;

(d) Residential owners are exposed to far more to risk than commercial owners as they do not commonly engage engineers or architects; and

(e) If architects, engineers and others are to be excluded from owing a duty of care in a commercial development, it would be difficult in principle to maintain a duty of care on behalf of councils.[43]

3.12 Feedback from the Advisory Group is that disputes over the construction of commercial buildings do arise, and often result in payment of compensation from the construction company to the building owner. The consultants note, however, that there have been few cases involving negligence in relation to commercial building failures. This may be because commercial parties are more likely to settle disputes out of Court, such as by mediation, so that the incidences of Court ordered resolutions are lessened. It may also be because it is likely that the parties will have more comprehensive contracts in commercial cases than in residential situations, and therefore that disputes are dealt with under contract law rather than negligence.

3.13 The consultants are carrying out this review on the basis that a duty of care could arise in respect of building and construction work in commercial buildings, and therefore that the rule of joint and several liability could apply in such situations.

What is meant by foreseeable loss?

3.14 In tort, a party will only be liable for loss that could foreseeably result from negligent work. This issue is tied up with the concepts of proximity and remoteness that seek to ensure parties are not held liable for damage or loss for which no reasonable person would ever have made provision for and to avoid holding persons liable for loss that is so unforeseeable that holding them liable for it would be unreasonable. Essentially, the legal test involves asking whether or not the loss is "reasonably foreseeable" or whether there is a "foreseeable risk" that it could occur. A foreseeable risk is one that "would occur to the mind of a reasonable man and one he would not brush aside as farfetched".[44]

3.15 What is important to note in this context is that defendants will only be held liable for loss that was a reasonably foreseeable consequence of the breach of the duty of care. Loss that is too remote or that would not enter the mind of a reasonable man as being a risk arising from work will not give rise to liability.

3.16 It is also important to stress that the rule of joint and several liability only applies in cases involving the same loss to a plaintiff. Take the following example of four men, acting individually and not in concert, who each strike a man one after the other and as a result of his injuries he suffers shock and is detained in hospital for one month and loses a month's wages. In this case, each is liable to compensate the plaintiff for the whole loss of earnings. But, if there are four distinct injuries, each of the defendants will only be held liable for the particular injury he caused.

[43] *Three Meade Street v Rotorua District Council* [2005] 1 NZLR SC4 (HC).
[44] *Overseas Tankship (UK) Ltd v the Miller Steamship Co Pty Ltd (The Wagon Mount (No2))* [1967] 1 AC 617 (PC).

3.17 What is often material is whether the damage is factually divisible. Where it is not, defendants will be jointly and severally liable. Typical cases in the construction sector in which a number of parties are responsible for the same damage include those in which two design teams have worked together to design a building, or those in which a foundation was negligently laid and then certified by a council, which subsequently subsides causing loss to the building owner.

4. Contributory negligence

4.1 A plaintiff who sues another for negligence, yet who has failed themselves in some respect to take reasonable care to protect their own interests, could find a defendant or defendant's claiming the defence of contributory negligence against them. If the claim is successful, the Court may apportion responsibility for loss between the plaintiff and defendant(s) under the Contributory Negligence Act 1947.

4.2 In the building context this means that a home owner who sues in negligence against, for example, a BCA, a builder, or a designer, could find themselves liable to carry some responsibility for the damage done to their home.

4.3 Some cases in which this is arisen in the residential building sector in the past include claims that the owners were aware of potential defects at the time of purchase and therefore voluntarily accepted the risk that further defects would arise, or that purchasers failed to make adequate enquiries that would have been made by a reasonable purchaser.

4.4 The application of contributory negligence in the building sector was recently examined in the High Court by Ellis J in the case of *Findlay v Auckland City Council.*[45] From the case it is clear that in assessing a plaintiff's contributory negligence, it is necessary to view this as against all persons who were responsible for the plaintiff's loss, not only against the defendants who are party to an action.

4.5 The application of the rule of contributory negligence is one factor effecting the apportionment of liability in the sector and will be considered as part of the consultants' review.

5. Apportionment for loss

5.1 Apportionment of liability between multiple wrongdoers does not take place according to any statutory formula. It is "not a mathematical exercise but a matter for judgment, proportion and balance".[46] Like other aspects of civil cases, the level of damages a party may be ordered to pay is subject to appeal. This provides for oversight and ensures some consistency of approach.

5.2 The Weathertight Homes Tribunal and courts are yet to establish a standard procedure for determining liability in leaky home cases. The first step in most cases seems to involve identification of the building defects and damage. The liable parties will then be identified and responsibility for the defects and damage will be determined.

5.3 The High Court decision in *Findlay v Auckland City Council* provides a useful example of, first, the process of apportioning liability, and second, how some discrete pieces of damage can be attributed to individual parties. The case concerned a leaky home in Remuera, Auckland. The

[45] *Findlay and Sandelin v Auckland City Council and Anor* HC Auckland CIV2 009-404-6497, 16 September 2010.
[46] *Findlay v Auckland City Council* CIV 2009-404-6497, at para 87.

Council granted a building consent and subsequently conducted 19 inspections of the property. The total cost to the damage was approximately $450,000. The Council, as first defendant, joined the builder, Mr Roy Slater, as the second defendant. Ellis J noted that others would have been joined to this action had they been able to be located or were still in business.

5.4 The case is interesting because of its consideration of contributory negligence. The plaintiff, Mr Findlay, acted as project manager on the build and was consequentially held to be contributorily negligent. The High Court held that, through Mr Findlay's failure to employ a project manager, and then his failure, having assumed the role himself, to manage, coordinate and oversee the work done by different contractors he departed from the standard of a reasonable person in his position. Ellis J concluded that Mr Findlay's shortcomings could be valued at no more than 40% of the total cause of the damage.

5.5 The High Court, having concluded that Mr Findlay was responsible for 40% of the loss, then undertook the task of apportioning the remaining liability. Ellis J, having earlier outlined the three causes of damage, identified Mr Findlay, Mr Slater and the Auckland City Council as the three liable parties. Mr Findlay, as noted above, was held to be liable through contributory negligence, for 40% of the total damage. The builder, Mr Slater, was not involved with the installation of the concrete and was subsequently not held to be liable for such damage. His liability for the two other causes of damage was set at 49% with a total liability allocation of 38.4%. The Auckland City Council was the remaining party and was held to be liable in all three categories of damage. Its liability came as a result of shortcomings in the inspection process and the issuing of consents. The total for the Council was in line with the established law at 21.6%.

5.6 We have been told, as a general rule, that the liability of a BCA in a leaky building case is 20% of the total liability. The remaining 80% is shared amongst the main building contractor(s), and, if relevant, designer(s) and developer(s). The Weathertight Homes Tribunal, in the cases of *Smith v Wellington City Council*[47] and *Yoon v Ahn*[48], considered the 20% apportionment. Both cases noted that the 20% split was standard but had been extended as high as 35% in some cases. The adjudicator in the *Smith* decision emphasised the importance of each case being treated on a case by case basis. In the *Smith* decision the adjudicator held that the level of negligence demonstrated by the Council was higher and was subsequently apportioned to be 31% of the total liability.

5.7 The case of *Lee v Napier City Council*[49] dated 19 March 2010, demonstrates the rule of joint and several liability in practice. The Lee family, 9 months after moving in, found that they had a leaky home. The family pursued a claim against the Napier City Council, Mr Beattie the alleged developer/project manager/builder, Mrs Beattie, the alleged developer/project manager/builder and the trustees of the Beattie Family Trust. The Tribunal held the Napier City Council to be negligent through shortcomings in its inspection process. The Tribunal held that defects should have been noted by the Council because they were not built in accordance with the consented plans. In addition to the Council, Mr Beattie was also held to be jointly and severally liable as the developer and project manager.

[47] *Smith v Wellington City Council* (WHRS, 00989, 6 August 2007, Adjudicator: AMR Dean).
[48] *Yoon v Ahn* (WHRS, 02437, 20 September 2007, Adjudicator: AMR Dean).
[49] *Lee v Napier City Council* [2010] NZWHT Auckland 8.

5.8 Claims against Mrs Beattie, and the Beattie Family Trust were dismissed. The Tribunal held that the total quantum of the costs was $416,016.80. The Tribunal, in apportioning the liability, set the Council's responsibility at 20% and the Arklow Trust (Mr Beattie) at 80%. In line with these apportionments, the Council was ordered to pay $416,016.80 with an entitlement to recover a contribution of up to $332,813.40 from Mr Beattie. Mr Beattie was ordered to pay $416,016.80 with an entitlement to recover a contribution of up $83,203.40 from the Council.

6. **Liability in contract**

6.1 As well as liability in negligence, certain parties in the building and construction sector are also subject to obligations that arise in contract. Parties that are commonly subject to contractual obligations include main building contractors, architects and other project managers.

6.2 The sorts of contracts include:

(a) Sale and purchase agreements;

(b) The professional service contracts;

(c) Construction contracts;

(d) Contracts as amended by statutory warranties.

6.3 Parties that may have obligations to home owners in contract include builders, designers, subcontractors, architects, developers, and previous homeowners.

6.4 The New Zealand Courts have recognised the extent of a duty of care owed by particular party in the building sector, may be affected by the contract they have with the owner of the building. This is both the case with express provisions in contracts, and provisions implied into them. For example, in the case of *Findlay and Others v Auckland City Council,* Ellis J agreed with the appellant's counsel that the extent of any tortious duty owed by a builder to a homeowner can be said to be concurrent and coextensive with the contractual duties that were owed by the builder to the owner. The contract in this case was particularly vague and provided little detail of how the building work was to be carried out. In the case, the Court imposed a duty on the builder to construct a house not only in accordance with the plans but competently and in accordance with reasonable standards.

6.5 This case illustrates two points. First, that a Court will look beyond the immediate terms of a contract in determining the scope of a duty of care owed by one party to another. Secondly, it illustrates that the boundaries of a duty of care can turn on the particular terms of a contract decided between the parties.

6.6 Only a person who is party to a contract can enforce any contractual duties. This means that a subsequent homeowner will not be able to enforce/sue a builder for failure to meet contractual obligations to a previous homeowner, except for a matter relating to the warranties implied into building contracts under the Building Act. These contracts apply as if the new owner entered into the contract with the builder. A subsequent home owner may, however, have a contractual right of remedy against a previous home owner if the vendors warranties in the sale and purchase agreement have been breached.

6.7 Joint and several liability applies in cases involving multiple wrongdoers who have breached a contract. The contribution provisions in the Law Reform Act, however, do not apply in claims involving breach of contract.

7. Effect of limitation periods

7.1 The extent to which liability can arise is limited by limitation periods set out in legislation. For building work, this involves a reasonably complicated set of rules under the recently enacted Limitation Act 2010, the Limitation Act 1950, the Building Act 2004, the Building Act 1991, and the Law Reform Act 1936. Moreover, a 10 year limitation period applies to claims under the Weathertight Homes Resolution Services Act 2006.[50]

7.2 These Acts affect not only when a person who has suffered damage can make a claim against a party, but also when wrongdoers can be joined to any claim by other wrongdoers. While consideration of changes to limitation periods is not within the consultants' terms of reference, it is important to keep in mind that the limitation rules that apply in the building and construction industry already mean that a significant degree of the costs of building failure falls on homeowners.

10 year long-stop Building Act 2004

7.3 There is an absolute 10 year long-stop period in the Building Act. This means that a plaintiff cannot sue a wrongdoer more than 10 years after the date of the act or omission which would have otherwise given rise to the action (section 393(2) of the Building Act 2009 and previously, section 91 of the Building Act 1991).

7.4 For an action in negligence against a territorial authority, the date of act or omission is the issue of the code compliance certificate (section 393(3)(a)). For other parties typically involved in building work, the 10 year long-stop period typically runs from the date that they undertook the building work (i.e. in the case of the architect, the date they provided plans, in the case of builders, they date they undertook building work.)

7.5 The 10 year long-stop period in the Building Act, introduced in 1991, tempered the common law concept of reasonable discoverability. Reasonable discoverability potentially meant that a claim could be brought many years after the completion of the building work (provided the damage was only discoverable within 6 years before bringing the claim). The 10 year long-stop gave recognition to respondents' plight that, because faulty building work may not become apparent for some time, liability could potentially arise many years after building work is completed. For building work, therefore, there is already a significant limitation on when a building industry participant may be liable, compared with other sectors.

6 year limitation period, Limitation Act 1950

7.6 However, the normal limitation rules under the Limitation Act 1950 also apply to building work in addition to the 10 year long-stop in the Building Act (section 393(1)). Under the Limitation Act, a plaintiff cannot sue a wrongdoer more than 6 years from the date on which the cause of action accrued (section 4). For a cause of action founded on the tort of negligence, the cause of action will accrue when all elements of the tort have occurred: a duty of care exists, it has been breached, and this has led to damage occurring. Case law has established that the element of damage will

[50] Weathertight Homes Resolution Services Act 2006, section 14.

accrue, for the purposes of section 4 of the Limitation Act, only when the damage would have been reasonably discoverable by a prudent owner, i.e. when the owner knew, or should have known, of the damage. There is significant New Zealand case law on when this will occur, particularly where a house has been on-sold.

Interaction between Limitation Act and Building Act

7.7 The interaction of the Building Act 10 year long-stop and the 6 year limitation period in the Limitation Act is set out in a number of cases, and although complicated, is reasonably well understood in the building sector. An example of how these rules work together is set out below:

(a) A home-owner who discovered faulty building work 8 years after the house has been completed could take a claim in negligence against the builder for the work. The 6 year limitation period under the Limitation Act 1950 would start running from when the damage was reasonably discoverable (year 8). The claim, however, would have to be brought within the 10 year long-stop period in the Building Act. The home-owner would therefore have only another two years to make a claim before the 10 year long-stop period would prevent the claim.

(b) A home-owner who discovered faulty building work 1 year after it had been completed could take a claim in negligence against the builder for the work. The 6 year limitation period under the Limitation Act 1950 would start running from year 1 (the time when the damage was discovered). At year 7, the claimants right to take a claim would expire, as the Limitation Act period had expired, despite the fact that the 10 year long-stop period had not been exceeded.

(c) A home-owner who discovered faulty building work 11 years after it had been completed, could not take a claim in negligence against a builder for the work, as the 10 year long-stop period would have been exceeded. In this case, the 6 year Limitation period under the Limitation Act would not apply as the 10 year period in the Building Act had already been exceeded.

3 year and 6 year notice periods, and 15 year backstop under the Limitation Act 2010

7.8 A new Limitation Act was passed in 2010, and will come into force on 1 January 2011. As with the Limitation Act 1950, the new limitation rules under this Act also apply to building work in addition to the 10-year long-stop in the Building Act. The new Limitation Act introduces three limitation periods, the "primary period", the "late knowledge period" and for claimants based on either when the work was a 15 year back-stop. Given the 10-year back stop in the Building Act, only the "primary period" and the "late knowledge period" are relevant to building work. These are:

(a) **The primary period:** The period 6 years of when the act or omission occurred on which the claim is based (the claim's primary period); or

(b) **Late knowledge period:** The period 3 years from when the claimant gained knowledge or claimant ought reasonably to have gained knowledge of a number of statutorily specified fact. The late knowledge period, however, only applies if the claimant can prove that, at the close of the start date of the primary period, they did not know and ought reasonably not to have known of the statutory specified facts.

7.9 The Select Committee that considered the Limitation Bill considered extending the Building Act longstop from 10 to 15 years but resisted the temptation to make this change.

Interaction between Limitation Act 2010 and Building Act 2004

7.10 The interaction between the Limitation Act 2010 and the Building Act 2004 will be slightly more complicated than between the old Limitation Act and the Building Act.

7.11 To illustrate, take the case of a house-owner who realises that building work is faulty within 6 years of the work having been completed. If the house-owner fails to take the claim within that 6 year period, he or she can only take the claim by proving that he or she was not aware and could not reasonably have been aware immediately after the work was completed (i.e. the close of the start date of the primary period) that the work was faulty. If this can be proved, the homeowner has 3 years from the date the faulty work was discovered to make a claim.

7.12 However, this late knowledge period is subject to the long-stop period under the Building Act 2004. Therefore, if the home-owner did not discover the faulty building work until 9 years after it was completed, the home-owner will only have 1 year to make the claim.

Claims in contribution

7.13 For claims in contribution the rules are:

(a) Section 17(1)(c) of the Law Reform Act 1936 provides that where damage is suffered by any person as a result of a tort, any tortfeasor liable in respect of that damage may recover a contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage.

(b) For work carried out prior to 1 January 2011, section 14 of the Limitation Act 1950 states for the purpose of any claim for a sum of money by way of contribution, the cause of action accrues at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim. Section 4 of the Act then provides that an action cannot be brought if more than 6 years has passed from this date.

(c) For work carried out on or after 1 January 2011, the Limitation Act 2010 amends this approach. Under section 34 of that Act, it is a defence to a claim for contribution if the joined wrongdoer can establish that the date on which the claim is filed is at least 2 years after the date on which the first wrongdoer's liability to the person who suffered loss is quantified by an agreement, award, or judgment.

(d) In addition, as discussed in *Dustin v Weathertight Homes Resolution Service,* claims for contribution under section 17 of the Law Reform Act 1936 were held to be subject to the 10 year limitation period in the Building Act 1991.[51] This also applies in the case of the 10-year period in the Building Act 2004. Claims for contribution can therefore only be made up to 10 years after the act or omission that caused the loss.

[51] *Dustin v Weathertight Homes Resolution Service* HC Auckland CIV-2006-404-276, 25 May 2006.

APPENDIX 2: REGULATION OF BUILDING WORK IN NEW ZEALAND

(References in this Appendix to sections are to sections of the Building Act 2004, unless indicated otherwise.)

1. Organisations that have statutory building control functions

1.1 There are four main organisations that have statutory building control functions:

(a) Building consent authorities;

(b) Territorial authorities;

(c) The Chief Executive of the Department of Building and Housing; and

(d) The New Zealand Fire Service.

1.2 The roles and functions and obligations are contained in the Building Act, (with the exception of the Fire Service). A brief description of each is set out below.

Building Consent Authorities (BCAs)

1.3 Building consent authorities undertake the "bread and butter" building control functions. They:

(a) Review applications for building consents and issue building consents;

(b) Inspect building work for which a building consent has been granted;

(c) Issue code compliance certificates or notices to fix; and

(d) Issue compliance schedules (section 12(1)).

1.4 In the building failure cases where BCAs have been sued, the plaintiff most commonly sues the BCA for negligent exercise of one or more of these building control functions.

1.5 To be a BCA, an organisation must be accredited by a building consent accreditation body, which assesses each applicant authority against certain accreditation standards (sections 192, 249). The accreditation standards assess how a BCA exercises its statutory functions, its policies and processes, and the controls it has in place (Building (Accreditation of Building Consent Authorities) Regulations 2006). The BCA must also be registered by the Chief Executive of the Department of Building and Housing (sections 7, 191).

1.6 The Building Act requires a territorial authority (i.e. a city council or district council) to act as the BCA for its district (section 212 of the Building Act). All territorial authorities went through the process of becoming accredited as building consent authorities in 2005-2006. No other bodies have yet become registered by the Chief Executive as BCAs. Regional authorities must be accredited and registered in respect of claims (section 241 of the Building Act).

Territorial authorities

1.7 In addition to acting as BCAs, territorial authorities have other building consent functions under the Building Act. These functions relate to the more unusual and less frequently exercised building control functions, such as the issue of PIMs (Project Information Memorandum), waivers and

modifications of the Building Code, certificates of acceptance, compliance schedules, administering the annual building warrant of fitness regime and enforcing functions in relation to dangerous earthquake prone or insanitary buildings (section 12(2)).

1.8 These functions, while an important part of building control, are not frequently subject to litigation on the basis that the territorial authority has carried out its role negligently. The TA is also not required to be accredited to perform these functions.

Chief Executive and the Department

1.9 The Chief Executive and the Department of Building and Housing have a number of roles under the Building Act. The main functions that relate to building control are:

(a) Approving compliance documents (section 24);

(b) Prescribing eligibility criteria for, and issuing, national multi-use approvals (sections 30F, 402(ka));

(c) Setting standards for accreditation of BCAs (section 402(t)); and

(d) Issuing warnings and bans (section 26).

2. **Buildings, building work and the Building Code**

2.1 All building work must comply with the Building Code (section 17).

2.2 The definition of building work covers a wide range of work. It is defined as any work for, or in connection with, the construction, alteration, demolition, or removal of a building. It includes site-work and prescribed design work (section 7). The definition of a building is also very broad, and encompasses almost anything constructed and includes temporary, moveable constructions, and minor construction works such as fences or walls (section 8). Specific buildings and parts of buildings, however, are exempted from the section 9 definition of a "building".

2.3 The New Zealand Building Code is a schedule to the Building Regulations 1992, which continues in force despite the repeal of the Building Act 1991 (section 415). The Code itself is largely unchanged since 1991. It prescribes functional requirements for buildings and the performance criteria with which buildings must comply with in their intended use:[52]

> "*The New Zealand Building Code is a performance-based code. Rather than telling people exactly how to build, it sets out objectives to be achieved.*
>
> *For example, one of the objectives is to 'safeguard people from illness or injury which could result from external moisture entering the building'…*
>
> *The Code does not prescribe construction methods, but gives guidance on how a building and its components must perform as opposed to how the building must be designed and constructed.*

[52] *Consumerbuild: http://www.consumerbuild.org.nz/publish/bact/buildingact-nzbuildingcode.php*

The Building Code is divided into clauses, and each clause begins with an objective like the one above. Specific performance criteria for each clause then describe the extent to which buildings must meet those objectives."

3. **Building consents**

3.1 Almost all building work is required to get a building consent (section 40). This is because the cumulative effect of the definitions of "building" and "building work" mean that almost any form of construction or alteration work on almost any structure is considered building work. The only significant exceptions to this requirement are set out in Schedule 1 of the Building Act, which generally exempts more minor building works, and sections 41 and 43.

3.2 Before commencing building work, a person must apply to a BCA for a building consent (section 44). The applicant is required to provide the BCA with the plans and specifications that the BCA requires and any other information the BCA reasonably requires, amongst other things (section 45(1)(b)(ii) & 45(1)(c)).

3.3 When an application is made, a BCA must grant or refuse the building consent within 20 working days of the application being made (or 10 working days if the application is in relation to a national multi-use approval) (section 48(1A)). However, a BCA has the ability to "stop the clock" and require further information from the applicant, if necessary. The statutory timeframe is suspended until the BCA receives the information it has requested (section 48(2)).

3.4 A BCA must grant a building consent if it is satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application (section 49(1)). It is for the applicant to provide the BCA with enough information to allow the BCA to satisfy itself that the proposed building work complies with the Building Code, rather than for the BCA to undertake work to ensure that the building will comply with the Code.

4. **Statutory means of compliance**

4.1 The Building Act lists six means/methods that a BCA must accept as establishing compliance with the Building Code (section 19). The four methods that are most commonly used are:

(a) A compliance document (acceptable solution/verification method) (which is a regulation issued by the Department of Building and Housing that sets out how the performance criteria in the Building Code are met);

(b) A determination from the Chief Executive as to whether something complies with the building code;

(c) A product certification issued by the product certification body approved by the Department of Building and Housing; and

(d) A national multiple-use approval issued under section 30(f).

4.2 A BCA is not liable for anything done or omitted to be done in good faith in reliance on any of the above documents (section 392).

5. **Alternative means of compliance**

5.1 The Building Act allows BCAs to accept other means of establishing compliance with the Building Code. However, when assessing a building consent application, a BCA cannot require work to achieve performance criteria additional to, or more restricted than, the Building Code (section 18).

5.2 Typically a building consent application does not exclusively use the statutory means of compliance. Instead, the applicant usually applies with a mix of some approved elements and what is known as an "alternative solution". This is not a term that is used in the Building Act, but is frequently used in the industry. Department of Building and Housing guidance material describes it as a method of complying with the Building Code that is not one of the prescribed methods in the Building Act.

5.3 An alternative solution can include a material, component or construction method that differs completely or partially from those described in the compliance documents. It can be a minor variation from a compliance document, or a radically different design and construction approach.

5.4 An applicant may choose an alternative solution for design aesthetics, performance, cost effectiveness, to overcome a specific site problem or where there is no compliance document that covers the construction.

5.5 When it receives a building consent application involving an alternative solution, the BCA is required to assess whether the proposed solution meets the requirements of the Building Code by exercising its own technical judgment.

5.6 The Department of Building and Housing has issued some guidance on how building consent authorities and applicants can provide enough evidence to support an alternative solution. A BCA may have regard to this information (section 19(2)). This guidance lists quantitative or qualitative measures that a BCA can take to verify compliance with the Building Code, as follows:

(a) Comparing the alternative solution in the building consent application with approved methods of compliance for meeting the Building Code. This is really only possible where the alternative solution is only a minor variation from a compliance document. If it is a radically different design and construction approach, this approach is usually not effective;

(b) Using calculations, test method, test results, models, simulations of building methods and products that are published but that are not contained in the Compliance Documents to assess compliance;

(c) Comparing a product proposed to be used in the building consent application with product previously accepted by a BCA;

(d) Comparing the building consent application with a determination issued by the Department;

(e) Reviewing trade literature, or the manufacturer's literature if it is a proprietary document, which may contain technical data;

(f) Determining whether there is a current appraisal certificate that describes how compliance with the Building Code is achieved;

(g) In-service history of the alternative method or product that that proves compliance (for example, whether the proposed material has been used in a similar application on a similar site);

(h) Assessing the actual conditions on site and assessing whether there is any proof that arises from local environmental conditions of code compliance (for example, a very sheltered site that is supported by meteorological or horticultural evidence); and

(i) Determining whether there is expert evidence, such as peer review of the proposed solution or opinions obtained from credible organisations.

5.7 The Department of Building and Housing guidance also states:

> "*The documentation for the proposed alternative solutions must contain sufficient evidence to show that the identified performance criteria of all relevant clauses will be met. The amount of evidence may be significant. The building consent applicant's word that it will work will usually not be sufficient.*"

6. Inspections

6.1 Every building consent issued by a BCA is subject to the condition that the BCA is entitled to inspect building work. Inspection is defined as the taking of all reasonable steps to ensure that building work is being carried out in accordance with the building consent (section 90).

6.2 In practice, BCAs often issue standard inspection times that coincide with stages of the building process (such as foundations, pre-line inspection, etc). Inspection is usually carried out by a single inspector, visiting the site.

7. Code compliance certificates

7.1 At the completion of building work, the building owner must apply to the BCA for a code compliance certificate.

7.2 If this application is made in the required form and accompanied by the required material, the BCA must determine whether to issue a code compliance certificate. The test is whether the building work complies with the building consent issued for the building, amongst other things (section 94). Before issuing a consent, BCAs carry out a final inspection to ensure that the work is carried out in accordance with the consent.

7.3 In practice, it may be necessary or desirable to vary from a building consent during building work, where a building owner's preferences or conditions change. In some instances, substituting a product will not affect code compliance. However, in other instances, varying certain sorts of building works or building products may have a significant effect on code compliance.

7.4 Variations from a building consent should be notified to the BCA. In practice, this is not always done as the builder/building owner often considers that the variation is minor, and does not affect code compliance. However, if the variation affects code compliance and is picked up by a BCA, the issue of a code compliance certificate can be delayed either while a variation to the building consent is sought or the BCA issues a notice to fix and the departure in the building work from the building consent is remedied.

8. **Statutory warranties**

8.1 The Building Act implies certain terms (warranties) into any contracts entered into post 2004 for:

(a) Building work on one or more household units; or

(b) The sale of one or more household units by or on behalf of a residential property developer (a residential property developer is defined very broadly).

8.2 These warranties cannot be contracted out of (section 396) and no-one may give away the benefit of any of the warranties (section 399). Furthermore, an owner of a building who is not party to the contract of building work may take proceedings for breach of any of the warranties as if they were a party to the contract (section 398).

8.3 Section 397 sets out the warranties that are implied into the contracts. The warranties provide:

(a) That building work will be carried out:

(i) in a proper and competent manner;

(ii) in accordance with the plans and specifications set out in the contract;

(iii) in accordance with the building consent;

(iv) in accordance with all laws and legal requirements with reasonable care and skill; and

(v) completed by the date specified in the contract or within a reasonable time if not specified;

(b) That all materials supplied for use in the building work will be fit for purpose and new (unless other than stated in a contract);

(c) That household units will be suitable for occupation on completion of the work; and

(d) That the work will be fit for a particular purpose, if that purpose was specified in the contract.

8.4 The warranties apply to the person or company under the contract that carries out the relevant building work (which is very broad: see paragraph 2.2 above) and to residential property developers on the sale of any household units by, or on behalf of, the developer.

8.5 The warranties have been applied in two Disputes Tribunal hearings and in one District Court case reviewed by the consultants. The fact that the statutory warranties applied in each case was not a matter for disagreement, and appears to have been taken as a given in every case. The cases did not involve latent building defects and only involved comparatively small sums of monies. Most other cases that have been considered by the Courts and the Weathertight Homes Tribunal relate to building work undertaken before the Building Act 2004 was enacted. In some of those cases, the warranties have been used to illustrate Parliament's expectations as to the performance obligations of building industry participants, or to illustrate the distinction in both the common law and statute between owners of residential units and commercial buildings.

8.6 The main practical issue with the warranties that is discussed in commentary appears to be that frequently the original development company is no longer in existence. Therefore notwithstanding the warranty, homeowners can still be left out of pocket.

8.7 The consultants intend to seek information in the consultation and interviews on whether the warranties are seen as effective in making building practitioners and developers responsible for their work.

9. Licensed Building Practitioners Scheme

9.1 The final element of the regulatory regime to mention is the Licensed Building Practitioners Scheme (LBP Scheme). This is administered by the Department, which, amount other things maintains the register of LBP Scheme. The Scheme seeks to promote, recognise and support the development and maintenance of professional skills and behaviour in the building construction industry. The LBP Scheme provides licences to practitioners working in seven different subcategories of building and construction. These licence classes are:

(a) Design;

(b) Site;

(c) Bricklaying and block laying;

(d) Carpentry;

(e) External plastering;

(f) Foundations; and

(g) Roofing.

9.2 The Scheme is currently voluntary. In order to be licensed, building practitioners must meet certain competencies prescribed in rules. The competencies for each class of licence were developed by industry working groups. Industry working groups, in establishing the competencies, sought to replicate the skills and knowledge that a competent person with sound experience in the building and construction industry would be able to demonstrate.

9.3 Licensed practitioners derive a number of benefits from membership to the LBP Scheme. The LBP status offers formal recognition of competency and experience within a chosen field. Practitioners are, in turn, able to use the LBP status within their own advertising and as personal "mark of quality" in their work. Finally, the Scheme will be supported by an "active advertising and promotional programme to consumers" with the intention, presumably, to raise the Scheme's profile and make licensed practitioners the practitioner of choice for consumers.

APPENDIX 3: CHANGES ARISING FROM BUILDING ACT REVIEW 2010

1. **Overview**

1.1 Of relevance to this review, the Building Act and regulations will be amended to:

(a) Clarify the respective accountabilities and responsibilities of designers, builders, BCAs and consumers;

(b) Make changes to the consenting framework;

(c) Introduce requirements for pre-contract disclosure;

(d) Require a written contract between builders and homeowners for all building work over $10,000; and

(e) Introduce new legal remedies (including a 12 month defect repair period).

1.2 In addition, the Government has agreed that more information will be provided to consumers and providers of building services on legal issues and that the Building Code will be amended, and make changes to the Licensed Building Practitioners Scheme.

1.3 These areas of change are described and discussed in more detail below.

2. **Changes in relation to accountability**

2.1 A key part of the changes arising from the Building Act Review is that the Government agreed to amend the purpose and principles provisions in the Building Act to clarify that a purpose of the Building Act is to ensure that owners, designers, builders and BCAs are each accountable for their role in ensuring that building work complies with the Building Code.

2.2 The Government also agreed to include in the Building Act statements of the accountabilities of owners, designers, builders and BCAs in respect of building work. These statements are likely to provide that:

(a) Building owners are responsible for:

(i) obtaining any necessary consents, approvals and certificates, and ensuring any notices to fix are complied with;

(ii) if they carry out building work themselves, ensuring that the building work complies with the building consent and (if any work is not covered by the consent) the Building Code.

(b) Designers who prepare and advise on plans and specifications in relation to a building consent are responsible for ensuring their advice and the plans and specifications will result in the building work complying with the Building Code if the building work is carried out in accordance with the advice, plans and specifications.

(c) Builders or any other persons who carry out building work are responsible for:

(i) ensuring that the building work complies with the plans and specifications accompanying the building consent; and

(ii) ensuring that any building work not covered by a building consent is carried out in accordance with the Building Code.

(d) BCAs are responsible for:

(i) issuing a building consent, if the relevant criteria in the Building Act are satisfied;

(ii) checking whether building work (except low risk building risk as discussed below) has been carried out in accordance with a building consent by carrying out, as applicable, the inspections, prescribed inspections, or sampling, testing and inspection in accordance with the agreed quality assurance system required by the Building Act;

(iii) issuing a consent completion certificate if the relevant criteria in the Building Act are satisfied; and

(iv) issuing a notice to fix for any contravention or failure to comply with the requirements of the Building Act.

2.3 These accountability statements, and the purpose and principle statements, are likely to be used by the Courts when interpreting the Building Act. It is therefore possible that these changes will affect the extent of the duty of care owed by different parties in the building sector. For example, the changes clarify that designers are responsible for ensuring that their designs meet Building Code requirements. This means that they cannot assume that builders will construct to the Building Code without the necessary detail. The changes also clarify that both builders and designers cannot rely on BCAs to identify and correct inadequacies in their work. These effects could lead to a reduction in the future of the number of instances in which BCAs are held liable for building failures, reducing the overall level of risk to them, and increasing the situations in which other parties are held liable.

2.4 The statements of accountability, however, are not intended to specify the legal obligations of owners, designers, builders or BCAs in respect of building work. Indeed, the Building Act will expressly state that the statements of responsibility are not intended to affect existing legal obligations. Rather, the statements of accountability are intended to be a guide that provides an overview of the relative responsibilities of owners, designers, builders and BCAs in respect of building work.

2.5 The specific legal obligations of persons carrying out building work in any particular instance can be quite complex. It is not possible to reflect accurately that complexity in the accountability statements. The Building Act will therefore also acknowledge that persons carrying out building work are also subject to legal obligations in other Acts, various professional obligations depending on the nature and extent of the professional licensing the person may be subject to, the provisions of the relevant contract or contracts that may apply to the building work, and tortious duties of care.

2.6 The changes to the purpose and principle provisions of the Act and the addition of the statements of accountability may therefore not have any real affect on the duty of care owed by different parties in the building and construction sector.

2.7 Moreover, even if the changes to the purpose and principle provisions of the Act and the introduction of the statements of accountability extend the duty of care owed by parties other than BCAs and reduce the scope of the duty of care on BCAs, it seems likely that plaintiffs would still seek to sue BCAs in cases of building failure. If nothing else, this would cover the risk of one of the other defendants not being available to meet judgment.

2.8 On the other hand, the Advisory Group considers that the accountability statements could have a significant effect on behaviour. Their feeling is that the accountability statements could result in a cultural shift in terms of builders and designers taking more responsibility for building work and not relying so much on signoff from BCAs. The result might be that the quality of building works improves resulting in less building failures.

2.9 Accordingly, although the proposed changes to the purpose and principles of the Building Act and the additional statements of accountability are unlikely to change the legal application of the duty of care and the rule of joint and several liability in the Building Act, at a practical level that could result in a reduction of the instances of building failure in future, reducing the number of instances in which claims are made against BCAs, builders, designers and others in the building industry.

3. **Changes in relation to consenting framework**

3.1 As described above, currently nearly all building work requires a building consent. This will change under the proposed amendments to the Act and will significantly impact on the building control work that BCAs will undertake.

3.2 Three categories of "low-risk" work will face an amended consents and inspection process. Under these changes:

(a) Some low-risk work will not require a building consent. In effect this will mean adding to the class of building work already exempt from the requirement to get a building consent in Schedule 1 of the Act;

(b) Other low-risk work that is undertaken by a licensed building practitioner will have a streamlined consenting process (e.g. a notification rather than application process, as automatic consent is contemplated). No inspection work will be required; and

(c) Remaining low-risk residential work will have a prescribed consenting process and inspections. Consents will not be "automatic" but reliance will be placed more on licensed building practitioners than BCAs.

3.3 The above three changes will mean that BCAs will not consent, inspect, and certify building work as frequently as they do now. In theory, this will reduce their exposure to liability in negligence as the number of instances in which they have to exercise their statutory functions will be reduced. However, at present, this kind of low risk work does not often give rise to building failures, and very little litigation is taken against councils in respect of the consenting of such work.

3.4 In practice, it is therefore unlikely that BCAs will face a significant reduction in their risk as a result of the changes to the consenting process for low risk work. This is consistent with the purpose of the amendments which is to remove low-risk work with compliance costs that are greater than the risk of the work being done in a manner that is not in compliance with the Code. On the other

hand, by taking work away from BCAs, any risk averse behaviour that they may have been exhibiting in respect of such works will be completely avoided.

3.5 Moderate to high risk residential building work and some small commercial buildings will continue to be consented and inspected by BCAs under existing consent processes.

3.6 Most cases where BCAs have been liable in negligence have involved this kind of building consent, inspection, and certification work. As the process for consenting, inspecting and certifying this work will not change, it will still be possible for BCAs to be liable in negligence for errors in the consenting process for such work, in the same way they are now.

3.7 Building work for large commercial buildings will have an altered consenting process, where the BCAs will be entitled to rely on professionals (architects, engineers) when determining code compliance. While this is a change from current processes, at present BCAs do not face a significant risk of being held liable for negligence in respect of the consenting process for such work.

3.8 Accordingly, the consultants consider it unlikely that the changes to the consenting framework will reduce the risk that BCAs will face liability in negligence in respect of faulty building work. Therefore, it seems unlikely that this change will affect the incentives currently created by the liability regime.

4. **Requirements to disclose information pre-contract**

4.1 The agreed changes to the Building Act include a number of amendments to encourage more formal contracting arrangements and to ensure that building contractors provide more information to building owners before building work commences.

4.2 Prospective building contractors (whether a company or an individual) will be required to provide to the consumer, prior to an offer of contract, information on each of the following:

(a) The skills, qualification and licensing status of those building practitioners who will do the work;

(b) Dispute history of the building practitioners – i.e. the outcome of any formal dispute ruling or Court judgment (only information which is already in the public arena, and limited to the previous 10 years);

(c) What, if any, surety or insurance backing is available for the building work; and

(d) Information about the company (if the building contractor is a company) including:

(i) how long the company has operated;

(ii) what role each director will play in the project; and

(iii) any previous breaches of relevant regulatory requirements, based on information which is in the public arena and limited to the previous 10 years.

4.3 At the same time, the Act will require that a simple checklist be provided by the prospective building contractor to the consumer, prior to the contract being signed. The checklist would:

(a) Prompt the consumer to ask important questions;

(b) Explain a building contractor's legal obligations and the consumer's reciprocal obligations;

(c) Outline the risks of paying a contractor ahead of work being completed;

(d) Summarise dispute resolution options; and

(e) Refer the consumer to sources for further advice and information.

4.4 The addition of these requirements to the Act will not directly affect the application of the rule of joint and several liability in the building sector, but could have indirect impacts.

4.5 The purpose of requiring this information is to allow consumers to be better informed, which may enable them to make choices about the experience of building practitioners and the risks in building work before engaging a building contractor. This could increase the likelihood that they will engage building contractors who have the skills and knowledge to carry out the work, and ensure consumers are better informed in negotiating contracts.

4.6 This could result in an improvement in the quality of building work in the future, reducing the likelihood of building failures. In turn, this could reduce the extent to which parties in the sector face liability. The extent to which this will occur, however, is unclear.

4.7 Another effect of this change is that it could result in a greater protection for consumers in contracts with builders, and in the inclusion of dispute resolution procedures in such contracts. The possible impact of these effects is discussed below.

5. **Mandatory written contracts**

5.1 It is proposed to amend the Building Act to require written contracts for all residential building work in excess of $20,000 price. The contracts will need to include, as a minimum:

(a) The names and address of the parties;

(b) The date the contract is agreed;

(c) The signature of both parties;

(d) A description of the work to be carried out;

(e) The timeframe for the project;

(f) Details of the contract price;

(g) A summary of the warranty and remedy obligations on the seller, and the reciprocal obligations on the buyer;

(h) The process that will be followed if a dispute arises;

(i) Details of what, if any, surety or insurance backing that is available; and

(j) The process for varying the contract.

5.2 There also will be a requirement that the written contracts provide for disputes to be addressed through an adjudication process under Construction Contracts Act 2002, if the dispute has not been resolved through conciliation or mediation. The parties will be able to choose another process by mutual agreement, and set that out in the agreement.

5.3 Apart from this provision relating to the Construction Contracts Act the Building Act will not specify substantive requirements under the requirements above. Thus, for example, the parties could agree on any dispute process they wish (including no process) and on any surety or insurance arrangements (including to have none) that they wish.

5.4 These changes will not directly affect the application of the rule of joint and several liability in the building and construction sector but could have indirect impacts.

5.5 The purpose of requiring written contracts is to encourage building practitioners and consumers to enter into comprehensive contracts that set out clear commitments and obligations on each party, the risks attached to the project, how these will be managed, and what will happen in the event of a dispute. It is hoped that these changes will make it easier for consumers to hold building contractors to account and to obtain remedies when a problem emerges. The extent to which this will occur, however, is likely to depend on the extent to which consumers recognise these risks, work out ways to address them, and their ability to have these measures reflected in their written contracts.

5.6 Feedback from the Advisory Group is that this change will lead to better contracting practices in the industry. They consider that the result will be that more disputes will be taken under contract than in negligence. Their view is that this will lead to the more efficient resolution of disputes and avoid some of the problems that are said to arise from the rule of joint and several liability.

5.7 In the consultants' view, it seems likely that the requirement for mandatory written contracts will lead to better contracting practices. This should mean that the contractual responsibilities of builders will generally become clearer. In turn, this may mean that it is likely that they would be sued under contract for building failures than in negligence. The extent to which this will occur, however, is unknown. Moreover, it seems to the consultants that consumers will still sue in negligence, provided that option is not precluded by the contract, and would still pursue negligence actions against BCAs.

5.8 The consultants also consider that the quality of building work may improve, as the expectations of consumers and the obligations on builders will be clearer. This improvement in quality should lead to less incidences of building failure. However, as noted above, it is difficult to predict the extent to which this will occur.

6. Additional remedies for consumers

6.1 Additional remedies are also to be provided to consumers. These remedies will involve:

(a) A set of general remedies available to consumers where building contractors have breached the implied warranty and other contractual obligations, (subject to a 10 year limitation period). The remedies would include:

(i) the repair of defects by the building contractor or a substitute builder;

(ii) the replacement of defective building elements;

(iii) the provision of compensation where replacement or repair is not possible; and

(b) An automatic 12 month "defect repair period", where there is an obligation on the building contractor to repair any defects notified by the homeowner within the first 12 months. The remedy obligations would be stronger during this period than the remaining nine years of the legal warranty and remedy period. The policy reason for the 12 month 'defect repair period' is to reduce the cost-efficiency of poor performing building contractors and incentivise owners to notify and remedy defects before they worsen.

6.2 The general remedies and the "defect repair period" will also apply to the sale of built buildings from developers to subsequent owners and from owner-builders to subsequent owners.

6.3 Reciprocal obligations are proposed for consumers, reflecting existing common law. These are that a building contractor's warranty or remedy obligations could be reduced or voided in cases of:

(a) Misuse or negligent damage by the consumer;

(b) Failure to carry out reasonable maintenance; and

(c) Failure to advise the building contractor of any apparent defect within a reasonable period of its discovery.

6.4 The general remedies are intended to provide means of enforcing the implied warranties in the Building Act. It is hoped that this will strengthen the legal obligations on building contractors to remedy any damage they have caused, and send clearer signals to the building sector and the Courts in this regard. The reciprocal obligations on building owners may mean that they take more care themselves and promptly deal with any defects directly with the builder, rather than taking later action against other parties. The 12 month defect repair period is also intended to have a similar effect to general remedies.

6.5 The introduction of the statutory remedies does not change or directly affect the law of negligence nor the rule of joint and several liability, but could have an indirect effect on the potential liability of builders and BCAs in negligence for two reasons.

6.6 First, more cases for breach of the building warranties could be taken in the future against building contractors, rather than in negligence against BCAs simply because these remedies are available. This will mean that the rule of joint and several liability will apply in fewer cases. Also, it could reduce the number of instances in which homeowners seek recovery from local authorities, as they can take action under these remedies instead.

6.7 Second, although it is unclear at this stage how the remedies in relation to breach of warranties and liability in negligence cases will interrelate, it is possible that the remedies will lead to BCAs being held liable in negligence less often. This can be illustrated by using the example of a case that involves both a breach of implied warranty by a builder and negligence on behalf of a BCA. If the warranty action against the builder were successful, then the preferred remedy under the Act will be repair by the builder or an alternative builder. This would cure the defect – there would be no need to pursue the BCA and the builder would be unable to join the BCA because the cause of

action against the builder was not in tort. If the building owner had joined the BCA originally, a Court may not apportion the loss between them for the same reason.

6.8 On the other hand, the effectiveness of the statutory remedies will be dependent on the relevant building practitioner or property developer under the contract being available to exercise the remedies against it. The introduction of the remedies does not address the problems that are claimed to arise if the building practitioner is not available to take action against or to carry out remedial work.

7. **Provision of information to consumers and sellers**

7.1 Guidance material to assist consumers and sellers of building services to comply with the warranty and remedy requirements and the reciprocal obligations on consumers will be published by the Department. In addition, building contractors will be required to give the consumer documentation of any specific maintenance requirements for particular elements of the building, and copies of any significant product warranties, at completion of the building work.

7.2 The purpose of providing this information is to provide more information to consumers and sellers about the way the warranty remedy requirements apply. This could increase their use, reducing the extent to which builders, BCAs and other parties are sued in negligence and, therefore, the impact of the joint and several liability rule.

7.3 The other change that could have an impact is the requirement on builders to provide consumers within documentation or specific maintenance requirements. This could lead to better maintenance, reducing the likelihood of building failures occurring and, therefore, the number of incidences in which builders, BCA and other parties are sued in negligence.

8. **Clarifying the Building Code**

8.1 The Building Act review identified that building professionals, trades people and building contractors have difficulty identifying and understanding the Building Code and associated documents. The Government is therefore shortly to make decisions to better specify performance requirements and improve the presentation of the code and associated documents relating to fire safety, timber durability, noise and signage.

8.2 In addition, a work programme has been agreed between the Minister and the Department over the next three years to review various aspects of the Building Code, as follows:

(a) Reviewing definitions, building classifications and aspects of Building Code clauses relating to natural light, sanitation, personal hygiene, access, durability and hazardous substances that have been raised as issues in submissions to the review to ensure clarify and consistency with the Building Act and other legislation;

(b) Reviewing Building Code clause B1 (structural stability) and supporting documents relating to steel and timber design methods, timber quality, and secondary structural elements;

(c) Reviewing and developing wall cladding and roofing solutions (Building Code clause E2 external moisture);

(d) Reviewing the performance requirements for internal moisture and ventilation;

(e) Clarifying insulation requirements for additions and alteration work; and

(f) Reviewing and developing guidance material for practitioners on the interpretation of Building Code clauses and the building science principles they need to consider to satisfy each Building Code clause, to promote the use of innovative solutions.

8.3 These changes to the Building Code may result in better compliance by building practitioners as they may find it easier to understand the requirements of the Building Code and identify the steps that they should take to comply with it. The amendments to the Building Code may also improve enforcement of the Code by BCAs by making it easier to define the requirements against which they are required to assess buildings. Both these factors could impact on the extent of building failures in the future, and the extent to which claims in negligence against different parties to the building process are made. It is, however, very difficult to predict these impacts.

8.4 The Building Act Review also identified that a barrier to understanding how the Building Code system functions is the use of the term "compliance document". As discussed above, the Building Code specifies the minimum performance requirements that must be achieved for building work but it does not prescribe how the building is to be built. The Department has published compliance documents which set out either acceptable solutions or verification methods for each technical clause of the Building Code. These compliance documents prescribe one way, but not the only way, of achieving compliance with the Building Code.

8.5 Feedback from the review strongly suggested that the term "compliance document" is perceived as meaning the methods set out in the document that must be followed. This perception is perceived as a barrier to innovation. The Government has therefore agreed to amend the Act to remove the term "compliance document" and refer only to acceptable solutions and verification methods, terms that are better understood and already defined in the Act.

8.6 As with the changes to the Building Code discussed above, the change in respect of compliance documents could also make compliance with the Building Code easier, and simplify enforcement. Again, this is a difficult impact to predict.

8.7 Various other programmes to improve consumer and building industry awareness of the different legal requirements and remedies are also proposed. These could impact on consumer behaviour, but the consultants do not expect them to have a significant impact.

9. **Changes to the Licensed Building Practitioners Scheme**

9.1 As noted above, the LBP Scheme is currently voluntary. The Government has announced that, from March 2012, a number of core building functions will be restricted to licensed practitioners only. This is not strictly a change flowing from the 2010 review as it is considered to be a continuation of the reforms introduced by the Building Act 2004. Details of the type of work that will be restricted is yet to be released, but the Department of Building of Housing has indicated that it will include:

(a) Design and construction of a house or small to medium sized apartment's primary structure (e.g. foundations and framing) to ensure that the building can withstand vertical and horizontal loads;

(b) Design and construction of a house or small medium sized apartment's external envelope (e.g. roofing and cladding) to ensure that the building is weathertight; and

(c) Design of the fire safety system (e.g. sprinklers, fire alarms) for small to medium sized apartments to ensure people are adequately protected from the danger of smoke and fire.

9.2 These restrictions go to the core activities of a practitioner working within the building and construction industry. The restrictions will place a significant limit on the type of work a non registered building practitioner can legally undertake.

9.3 These changes to the LBP Scheme will not directly affect the rule of joint and several liability, but could have indirect effects by leading to better quality work and less likelihood of failures in respect of the restricted types of work (which are the areas that seem to have created most weathertightness problems). If this occurs, then the number of instances in which builders, BCAs and others will be sued for building failures will be reduced. The extent to which this effect might occur, however, is unknown.

10. **Nationally consistent building consent system**

10.1 The Government has agreed that changes need to be made to the administration of the building regulatory system to achieve a more nationally consistent and efficient building consenting system. The detail of the changes has not yet been worked out. Rather, the Department, in consultation with local government representatives and central government agencies has been directed to prepare a report on the detail of a preferred approach to improve the performance of the building regulation system. This report is due by June 2011 and will be considered by the Cabinet Economic Growth and Infrastructure Committee.

10.2 The problem with the current building consenting system was said to stem from the diversity of consenting agencies and the lack of consistency between them. Currently New Zealand is serviced by 75 different building authorities processing around 70,000 consents per year. This averages out to less than 1,000 per agency per year. This structure was developed at a time when local authorities set and administered regulatory requirements. The building consent system, however, has gradually been standardised by central government. Examples of this standardisation can be seen through the setting of performance requirements for buildings and the licensing of building practitioners by the Department of Building and Housing.

10.3 The relevant Cabinet paper stated that the adoption of a more consistent and efficient system could reduce consent production costs by an estimated 40 per cent and save around $250 million over the first five years. The Cabinet paper highlighted a number of areas in need of regulatory reform, these include:

(a) Accessible and nationally consistent building consent application requirements and processes for consumers;

(b) Consistent interpretation of national building performance requirements and associated building consent decision processes;

(c) Timely, responsive and predictable services for consumers;

(d) Efficient use of scarce specialist skills, capital and other resources;

(e) Administratively efficient and cost- effective system performance;

(f) The ability to quickly and effectively implement and respond to changes in Building Code requirements and associated building consent and other regulatory requirements;

(g) Effective use of local information on building performance and regulatory compliance to inform and modify national polices, building performance requirements and other regulatory settings; and

(h) Seamless integration with resource management and local planning, and other related activities.

10.4 Although not yet determined, the changes to the administration of the building regulatory system seem unlikely to directly affect the rule of joint and several liability. However, one of the complaints about joint and several liability is that it incentivises BCAs to engage in risk averse behaviour by imposing excessive regulatory requirements. The changes could prevent this from occurring, although whether or not this will occur will not be known until the changes are decided on.

APPENDIX 4: NEW ZEALAND LAW COMMISSION'S CONSIDERATION OF JOINT AND SEVERAL LIABILITY

1. The Commission's consultation paper

1.1 The New Zealand Law Commission (the Commission) released a consultation paper *Apportionment of Civil Liability* as part of its comprehensive review of the rules of general civil liability, as they apply in cases where the acts or omissions of two or more persons give rise to loss or damage.

1.2 In the paper the Commission's focus included the following matters relevant to this review:

(a) The apportionment of plaintiff fault (contributory negligence on behalf of a claimant) in a civil claim;

(b) Whether or not the common law rule of joint and several liability should be replaced by proportionate liability;

(c) The problem of the uncollectible contribution (where for example a defendant is insolvent or otherwise absent); and

(d) The cost and availability of insurance.

It also considered whether the rules of contribution needed to be extended.

1.3 The Commission noted that as far as it was aware, all of the Commonwealth jurisdictions deriving their legal systems from England had joint and several liability, with the exception of British Columbia. It went on to list numerous reports that concluded that joint and several liability should be retained.

1.4 From that point it discussed in depth the divergence from the rule in the United States, caused primarily as a result of the ever increasing level of damages awarded by juries and the cost and effect of those on insurance.

1.5 Before considering options for reform in New Zealand the Commission briefly outlined the, sometimes competing, objectives of tort law. Noting that the topic is the subject of disagreement amongst academics it suggested that these objectives include compensation, punishment, deterrence, prevention of unjust enrichment, allocation of moral blame, distribution of losses and minimisation of risks. It also noted the need to consider public benefit, fairness, certainty and specificity of obligation.

1.6 The Commission focused in particular on three principles or objectives, each of which explains in part why joint and several liability was developed by the Courts:

(a) **Compensation:** This has been a fundamental consideration. The maxim *resitutio in integrum* says that a plaintiff should be made "whole" for any loss suffered, and therefore compensated for the full amount of loss. The importance of compensating a plaintiff is central to the Commission's paper. It notes, however, that countervailing policy considerations, including time and cost, has made it apparent that compensation cannot, on its own inform this area of the law.

(b) **Deterrence:** Rules and their sanctions are designed to encourage people to prefer some courses of action over others. Setting rules and penalties at the "correct" level create incentives for individuals to act in a particular way and avoid acting in another, where those acts are not beneficial to society in general. This assumes that some acts or events which cause loss to a person should be allowed, where the cost of prevention outweighs the benefits. Setting the rules correctly allows the setting of boundaries between preventing acts or events that are too expensive and allowing acts or events for which it is cheaper for society to allow it to happen.

(c) **Loss spreading:** The concept of loss spreading is consistent with both or either compensation or deterrence. It fits a compensation analysis, because it purports to ensure that losses are met by those best able to afford them. And, because losses are so met, it satisfies economic and philosophical requirements for the arrangement of affairs in the interests of public good.

(d) **Setting rules to fairly spread loss is a difficult task:** It requires, at a minimum, an assessment of the general ability of each group of parties in society and their ability to cover loss.

1.7 In laying out these objectives, the Commission acknowledges that in practical terms some of these objectives may not be able to be fulfilled. The cost of insurance, it said, was one factor that would affect the extent to which each of these objectives could be achieved.

1.8 The Commission admitted that improving legal rules is not enough. It acknowledged that encouraging the assumption of self-responsibility, the education of consumers and clarification of duties may all result in a more positive outcome. It also acknowledged that more fundamental reforms that were not within the scope of the Commission's review may be more effective than a change from joint and several liability (such as comprehensive state insurance schemes as opposed to changes to the litigation process).

1.9 The Commission then considered options for reform. It noted that the proponents of proportionate liability had some strong arguments in their favour. It also noted as attractive the argument that it is unfair that a defendant, whose level of responsibility for injury caused is low, could be required under the joint and several rule to account for all of the injury.

1.10 Another point that carried weight with the Commission was its view that introducing a rule of proportionate liability would not be a large step given some of the changes that have occurred in the common law as amended by statute in the last 70 or so years.

1.11 The Commission pointed out that with proportionate liability the plaintiff bears the loss arising from an insolvent or unavailable defendant in multiple party claims, as the plaintiff must presently do if a sole defendant is unavailable.

1.12 A further factor that attracted the Commission towards a shift to proportionate liability was that it would not lead to a need for complicated rules about joining defendants, compromises between one defendant and the plaintiff, limitation periods, and the apportionment of liability between defendants.

1.13 In considering insurance, the Commission makes the point that no one has successfully argued that the joint and several liability rule has significantly increased insurance costs.

1.14 The following further factors were considered by the Commission:

(a) The removal of the rule that precludes a plaintiff who was not 100% free from fault from recovering against a defendant opens the door to the Court being more inclined to add up the relative responsibility for each party, including a plaintiff;

(b) The fact that in *solidum* liability may increase insurance costs because an insurer has to take into account the possibility of a client being held liable in solidum when setting its premiums (but the Commission acknowledged this as a weak argument); and

(c) The fact that personal liability does not arise in the case of personal injury in New Zealand (because of ACC) and, as a result, the policy consideration concerned with seeing those injured being fully compensated for their losses does not apply as it does in countries where personal injury litigation is a major source of civil Court consideration.

1.15 Notwithstanding these arguments, the Commission was not in favour of a shift. This view was influenced by the reluctance of legislators and reformers elsewhere to move away from joint and several liability. More significantly, its view was also informed by the effect on plaintiffs of an abrogation of the rule. The Commission stressed a number of times throughout the paper the reluctance of the common law to move away from the objective of fully compensating a plaintiff for his or her loss.

1.16 The Commission also pointed out that proportionate liability gives rise to practical difficulties such as the difficulty that a Court will not be able to apportion liability unless it knows how many people are liable to the plaintiff. There are also issues about whether or not those people would need to be or could be joined. It noted that these problems do not apply under joint and several liability.

1.17 In place of a full shift to proportionate liability and to overcome some of the perceived injustices that were said to arise in cases where one defendant was insolvent or otherwise absent, the Commission recommended that a mechanism be created to allow a defendant to apply to the Court to reapportion uncollectable contributions in cases where it is found one party was not able to pay its share. This would include a reallocation of liability against the plaintiff, if the plaintiff has in some way contributed to the loss. The effect of the change would have been to share an uncollectable loss amongst the remaining parties (the present wrongdoer and the plaintiff).

1.18 Other changes proposed by the Commission in the paper were:

(a) The extension of the right to contribution amongst defendants whatever the basis of civil liability; that is in contract, a breach of statutory obligation and breach of fiduciary duty of trust;

(b) The extension of the concept of contributory negligence beyond the field of tort (for example in contract); and

(c) A means of apportioning fault that assesses the plaintiff's contributory fault in percentage terms as against all defendants together, and that the residual damages as reduced should then be the subject of apportionment in contribution between solvent defendants.

1.19 To implement these changes, the Commission proposed a new *Civil Liability and Contribution Act*. This was annexed to the paper with commentary. The proposal would have replaced parts of the Judicature Act 1908, the Crown Proceedings Act 190, the Contributory Negligence Act 1947, and s 17 of the Law Reform Act 1936.

2. The Commission's Final Report

2.1 The Commission's final report was published in May 1998.

2.2 Part of the delay in issuing this report (since the Commission issued its preliminary paper in 1992) arose from the Commission's desire to observe possible changes to the liability rules in Australia, after the 1994 release of the inquiry into joint and several liability by Professor JLR Davis and his subsequent 1995 report. Both reports recommended the abolishment of the rule of joint and several liability in favour of a scheme of proportionate liability for all tort actions involving economic loss or damage to property. The Davis recommendations were supported by the New Zealand Law Society and the Institute of Chartered Accountants here in New Zealand who saw their members as "deep pockets" who were disadvantaged by the solidary rule.

2.3 The Commission ultimately concluded that it was of the "firm view that no sufficiently compelling case for departure from the solidary rule" was made. It held the view that, on the basis that a defendant's liability is for the whole loss caused by the defendant's wrongdoing, liability should be unaffected by the fact that the behaviour of some other party has caused the same loss.

2.4 The Commission took the view that as between plaintiff and wrongdoer 1, it is irrelevant that the plaintiff can also claim against wrongdoer 2, or that wrongdoer 1 may be entitled to claim contribution from wrongdoer 2.

2.5 The Commission believed that the attacks on solidary liability can be boiled down to the contention that it is unjust that some defendant's liability should exceed their share of responsibility for a plaintiff's loss. It pointed out however that the counter to this argument is that consideration of wrongdoer 2's liability in an assessment of the liability of wrongdoer 1 introduces an irrelevant consideration.

2.6 The Commission put considerable emphasis on the point that the whole basis of the law of civil liability is that quantification is determined not by degree of the wrongdoer's fault but by the extent of the injury to the plaintiff. As between a plaintiff and wrongdoer it is not fault that is measured but the level of injury to the plaintiff, and there is no reason why this should not continue to be the case just because there was more than one wrongdoer involved.

2.7 Notably, the Commission stated that:

> "*If there is injustice in substantial sums being recoverable from a professional firm whose error is very small when measured against the heinousness of the conduct of a now insolvent wrongdoer who has also caused the loss, the remedy for such injustice must lie either in an examination of the duty imposed by the law on the professional firm or in the rules of causation applied. Either way such injustice is neither consequent on nor reason for changes to the rules of contribution.*"

2.8 This is significant as it indicates that problems with joint and several liability could be attributable to other factors.

2.9 The Commission also pointed out the procedural difficulties that could arise in cases where there are multiple defendants.

2.10 The Commission went on to state in its report that it had considered a middle ground to cover some professional bodies known as "reducible liability". The effect of this would be to give a judge a wide discretion to reduce the amount of a defendant's liability in such a manner and for such reasons as they consider just. The Commission had little appetite for the proposal and considered it would have the effect of "throwing everything into the lap of the judge".

2.11 As an alternative to this middle ground proposal, the Commission acknowledged the sector specific approach that had been taken in the building sector in some Australian States, but gave no indication of its views on the matter.

2.12 In relation to its proposal in the earlier paper to give the judge a power to apportion unobtainable contributions amongst the parties, including the plaintiff, the Commission did a turn-around on its earlier proposal, on the basis that the rational for allocating part of the liability to the plaintiff was flawed.

2.13 The Commission concluded the paper by making closing remarks about "deep pockets", as the effects on these groups was the driver of reforms overseas. As well as noting the lack of negligence for personal injury in New Zealand, the Commission pointed out that there are various ways of addressing any perceived deep pockets problem without making changes to the rules of contribution:

(a) Professional firms could be permitted to incorporate with limited liability;

(b) The Commission noted that it is remarkable, particularly in relation to auditors, that few professionals "show clients the door". As a result these firms are the authors of their own misfortune;

(c) It would be possible to legislate for a cap on liability; and

(d) Regarding territorial authorities, "*it is uncontroversial to observe that their liability for the civil consequences of negligent supervision of building is entirely the result of conscious judicial social engineering...*". The Commission said that a statutory revisiting of this topic would, on such a view, be appropriate.

APPENDIX 5: THE JONATHAN KAYE/MARTIN JENKINS REPORT

1. Scope of the report

1.1 Martin Jenkins Limited and Jonathan Kaye, Barrister and Solicitor, were commissioned by the Department to review possible changes to the liability rules in the building sector. Their reports entitled Report to Department of Building and Housing on the liability framework in the Building Sector of 11 June 2009 (the "Jonathan Kaye/Martin Jenkins Report"), was reviewed by the consultants for this report.

1.2 The Jonathan Kaye/Martin Jenkins report was sought by the Department to assist it in advising the Minister of Building and Construction on opportunities to better manage risk in the construction process to minimise the economic cost of building performance failure. The concern with the application of risk in the construction process arose because of concerns about the operation of liabilities rules in the building sector including:

(a) The increase in risk and liability facing "deep-pocket" territorial authorities, the limited opportunities they have to manage that risk, and the resulting overly risk averse behaviour by territorial authorities that may be adding unnecessary costs, and constraining innovation and development;

(b) The additional risk faced by territorial authorities through the operation of liability rules such as the rule of joint and several liability and the ability of other parties to manage (and sometimes avoid) liability by the use of company structures;

(c) The increase in risk facing builders and others, their inability to access indemnity insurance, or manage their risk through the use of company structures (as builders who are company directors will be personally liable if they undertake building work and builders also owe a range of non-delegable duties of care to owners and subsequent purchasers);

(d) The information asymmetry that prevents consumers from making well-informed decisions about the quality of houses they buy and the limited options they have to manage risk associated with house purchases.

The report considers, in addition to the application of joint and several liability, other issues such as the application of duties of care and limitation periods.

2. Capped liability

2.1 Among other things, the Jonathan Kaye/Martin Jenkins report described the capped liability schemes in Australia (see above), but did not consider further any possible changes to liability rules in the building sector involving capping liability. This was because New Zealand had not experienced the same concerns as Australia regarding the availability of professional indemnity insurance, and excess awards of damages (which is driven largely by personal injury litigation in Australia). The report also assumed that any capping schemes in the building sector would have only limited application to particular professional groups subject to a particular scheme under professional standards type legislation.

3. **Issues with joint and several liability identified in the report**

3.1 In relation to the rule of joint and several liability, the Jonathan Kaye/Martin Jenkins report noted that from an economic perspective the rule can have undesirable effects if it results in:

(a) A particular defendant (most likely a "deep-pocket") being consistently liable for the losses of other defendants who are no longer in existence or unable to pay their share of the plaintiff's loss; and

(b) "Deep-pocket" defendants who are generally only liable for a very small proportion of the plaintiff's loss (say 5%) becoming liable for 100% of the plaintiff's loss because other defendants are regularly unavailable or impecunious;

3.2 In particular, the report noted that the duty of care imposed by the Courts on territorial authorities, when combined with the rule of joint and several liability, the power to rate, and their inability to manage risk of liabilities from limited liability company structures (such as CCOs) resulted in them becoming deep-pockets for liability claims. It said that this resulted in a structural misalignment in the building sector between those who benefit from risk-taking (product manufacturers, professions, trades and consumers) and those who face the costs or risk-taking (BCAs and others). This misalignment was seen as exposing territorial authorities (in exercising the duties of BCAs) to the costs or risk-taking but not the benefits.

3.3 The report also noted that this misalignment reduced the extent of risk-taking behaviour by other parties, including consumers. Problems identified in the report arising from this structural misalignment were that:

(a) Consumers, builders and other trades and professions rely on BCAs to identify risks of non-code compliance rather than taking direct responsibility themselves;

(b) Territorial authorities face incentives to be very risk averse in their granting of building consents and issuing of code compliance certificates;

(c) Innovations that might otherwise lead to improved economic performance (and other benefits) are stifled, because too much emphasis is placed by territorial authorities on risk minimisation;

(d) Demand for and supply of home warranty insurance and guarantees and other risk management tools is suppressed because of reliance on territorial authorities as de facto guarantors; and

(e) Consumers face high costs in getting redress;

3.4 In addition, the Jonathan Kaye/Martin Jenkins report said that the current liability regime did not result in a proper apportionment of loss between industry participants (i.e. other than territorial authorities). This was said to be because some are more able to manage their risks through the use of company structures and trusts, or to purchase professional indemnity insurance. It was also said to be because some industry participants, such as subcontractors to builders, are exposed to lighter liability rules.

3.5 In contrast, the report noted that builders, developers, project managers and others undertaking building work are generally unable to take advantage of the limited liability structure of a company because they will be personally liable for any breach on the duty of care they owe to the building owner and subsequent purchasers. Further, the report also noted that builders do not generally hold professional indemnity insurance as it is not widely available to those undertaking building work. The report therefore considered that there were not gaps in the liability of those undertaking building work.

3.6 The report referred to a perception that builders are able to avoid liability for defective building work. It expressed the view that this perception is misplaced because builders and others who undertake building work are already subject to a wide range of liability rules.

3.7 The Jonathan Kaye/Martin Jenkins report also noted that this perception is more likely to arise from the fact that builders will often find it difficult to satisfy judgments against them for defective building work and thus seem to avoid liability. However, it noted the reality that this meant that those builders will have been bankrupted and their companies liquidated. It said that trying to protect homeowners from the insolvency of builders is a quite distinct issue from the appropriate apportionment of risk and liability within the building sector, and should not be confused with risk and liability issues. It said that there will always be other competing creditors with greater priorities, and even if priority is obtained for homeowners' claims there will often be insufficient funds to meet any judgment against the build up or the building company.

3.8 On the basis of the above analysis the report identified that were two overall issues with the liability regime in the building sector:

(a) That the allocation of costs between territorial authorities and other parties for building defects is not aligned with the risk of building failure; and

(b) That between industry participants, risk was not properly proportioned.

4. **Options considered in the report and recommendations**

4.1 In relation to the first issue, the Jonathan Kaye/Martin Jenkins report considered the options of:

(a) Retaining the status quo of territorial authorities (as BCAs) acting as the "deep-pockets" a defendant;

(b) Abolishing the duty of care owed by BCAs or provide statutory protection for BCAs from the duty of owed; or

(c) Adopting proportionate liability for BCAs.

4.2 Overall, the report recommended either limiting the duty owed by BCAs to initial and subsequent homeowners, or providing them statutory protection from liability in their granting of and issuing of building consents and code compliance certificates.

4.3 The report did not favour the introduction of proportionate liability for BCAs only, as it considered that this will result in other parties with PI insurance (mainly professionals) becoming deep-pockets for liability claims, threatening the supply of PI insurance and further reversing risk tolerance across the sector.

4.4 On the assumption that the duty of care owed by BCAs would be limited or that they would be provided with statutory protection from liability for granting and issuing building consents, the paper the set out the following options for apportioning risk between industry participants (i.e. other than BCAs):

(a) Extending proportionate liability to all parties carrying out building work;

(b) Limiting liability of directors of companies who carry out building work;

(c) Making all company directors whose companies engage in building work liable for that worker; and

(d) Abolishing non-delegatable duties of care owed by builders and imposing on subcontractors a duty of care to building owners and subsequent purchasers;

4.5 The Jonathan Kaye/Martin Jenkins report favoured the introduction of proportionate liability for all industry participants as it would:

(a) Provide a better means of allocating the cost of risks taking to those with control over decisions and behaviours contributing to risk;

(b) Provide greater certainty as to costs of liability and eliminate deep-pockets; and

(c) Provide the conditions necessary for supply of professional indemnity, home warranty insurance and other risk management tools to grow.

4.6 The report also noted that proportionate liability should result in increased certainty for insurers that could contribute to the increased willingness to supply personal indemnity and warranty insurance products.

5. **Related initiatives**

5.1 In making the above recommendations, the report noted that consideration also needed to be given to implementing other regulatory and industry initiatives such as builder practitioner licensing, supply and demand for insurance, and accessibly of dispute processes. This was because the proposed changes would result in professions, trades and consumers potentially being exposed to more costs, and territorial authorities to fewer. Unless consumers, professions and trades were able to manage the risks leading to these costs, the report considered that consumers would be worse off. In particular, the report noted that:

(a) Builder practitioner licensing would provide a means of insuring that building trades and professions have the skills and capabilities necessary to make appropriate risk-taking decisions. It considered that it would be important for skilled and capable professions and trades in a position to take on greater responsibility from BCAs;

(b) Professional indemnity and home warranty insurance would provide a useful means of managing the costs of risk-taking, but the willingness of insurers to provide these products depends on their confidence in the sector and their ability to estimate risk and costs associated with risk. In addition, insurance providers may not feel confident without the greater certainty provided by proportionality;

(c) Greater accessibility of dispute resolution measures or ensure the efficient allocation of costs associated with building defects and failure would be important. The report noted that a feature of building regulatory regimes overseas is the existence of an accessible specialist disputes resolution body for building claims.

APPENDIX 6: ALTERNATIVE OVERSEAS LIABILITY REGIMES

1. Australia - overview

1.1 There are certain features of building regulation that are similar between Australia and New Zealand. There are also a number of differences. For one, proportionate liability is now a feature of the Australian civil liability landscape. Liability reforms were originally made in the building sector in several states but more recently, all states have introduced proportionate liability to apply to all civil claims involving pure economic loss or damage to property (but excluding personal injury). Home warranty insurance is compulsory in some states (e.g. Victoria and New South Wales), and registration is often compulsory for persons in the building sector.

1.2 This appendix canvasses the background to the changes to the liability rules in the building sector in Australia in the mid 1990s and sets out briefly the building regulatory mechanisms in Victoria and NSW as background. Focus is given to Victoria and NSW as these states' schemes were models in many respects. Consideration is also given to some of the factors that lead to the replacement of building sector specific proportionate liability rules with those that apply universally to all civil claims involving pure economic loss or damage to property.

Key reasons for Australian reforms

1.3 The challenges facing the building industry in Australia in the mid 1990s were said to include:[53]

(a) A costly and lengthy building approvals process;

(b) Liability implications for different parties (e.g. builders and architects), including liability for "economic loss", joint and several liability, and apparently perpetual liability for negligence;

(c) Attempts by local authorities to limit their liability;

(d) The implications of the use of performance building codes;

(e) Regulatory obstacles to innovation; and

(f) Concerns about consumer protection and the adequacy of home warranties.

1.4 In the late 1980s the State Premiers' Conference established the Building Regulation Review Taskforce, with a mandate to assess the Australian building industry against economic efficiency outcomes. The aim was to eliminate inefficiencies which detracted from competitiveness. Amongst other problems, the Taskforce found that the liability provisions in force at the time (joint and several liability) threw undue financial risk on local authorities and led them to take a divided approach to the regulation of building. The Taskforce recommended the introduction of a 10 year long stop liability rule, a liability rule that apportioned liability in proportion to responsibility, and exclusion of local authorities from liability where they do not have the responsibility for certification. In addition, the Taskforce recognised the special nature of residential buildings and recommended several steps to protect these – including licensing of builders and tradesmen and compulsory insurance, along with an oversight body in each State.

[53] Greg Lambert "Australian Building Regulation and Liability Reforms" (Sept, 1999).

1.5 These recommendations were included in the uniform model building codes released in 1991 by the Australian Uniform Building Regulations Coordinating Council. The major reforms included in the model Building Codes were:

(a) Dispute resolution for matters relating to building regulation;

(b) Private certification;

(c) Liability reforms, including a limitation period and reform of the joint and several liability laws in favour of proportionate liability; and

(d) Insurance – compulsory insurance to cover the liability period.

1.6 Legislation implementing the model codes was passed in many states. Each state differed in what was ultimately adopted, including a shift to proportionate liability. The Victorian legislation was said to be a benchmark that many States subsequently followed. The Victorian and NWS legislation are discussed below. No changes were made in Queensland and Western Australia.

2. The Victoria experience

The current Victoria building regime

2.1 In Victoria most people who work in domestic building and carry out work worth more than $5,000, must register with the Building Practitioners Board. Those who must register as building practitioners include:

(a) Building surveyors;

(b) Building inspectors;

(c) Quantity surveyors;

(d) Draughtspersons;

(e) Commercial builders;

(f) Domestic builders; and

(g) Demolishers.

2.2 To register, a person must have the required qualifications, knowledge and expertise, and carry domestic building insurance (formally known as builders warranty insurance). The Building Practitioners Board registers individual builders, not businesses and companies.

2.3 Building practitioners must enter into "major domestic building contracts" for building work worth more than $5,000. Building work including the building of a new home and associated work, renovations and alterations, the preparation of plans and demolition. The contracts must:

(a) Set out in full all the terms of the contract;

(b) Give detailed descriptions of the work to be carried out under the contract;

(c) Include plans and specifications;

(d) State the contract price;

(e) Set out details of the insurance required under the Building legislation;

(f) Give clear advice about the 5-day-cooling-off period; and

(g) Set out warranties implied into the contract.

2.4 Builders must take out domestic building insurance for a customer for work worth more than $12,000. Domestic building insurance will provide for cover for a homeowner if, before work is completed by a registered practitioner, he or she dies, is declared insolvent, or disappears. The insurance covers costs of up to $200,000 to fix structural defects for 6 years, and non structural defects for 2 years. This insurance is last resort insurance. Unless a builder is dead, insolvent, or has disappeared, the builder is required to complete the building work or pay any costs awarded against them.

2.5 Other types of insurance that may be required are:[54]

(a) Professional indemnity insurance (required for building surveyors, inspectors, engineers and architects);

(b) Public liability insurance; and

(c) Structural defects/builders indemnity insurance.

2.6 Domestic building insurance is provided through a State underwritten scheme, administered by the Victorian Managed Insurance Authority (VMIA). From 2009, insurers of domestic building work must be designated to do so. VMIA is a statutory authority that provides risk and insurance services to Victorian Government. Previously, builders were insured by private insurers offering building insurance products. It appears that the need to provide a state underwritten scheme arose out of the insurance crisis caused by the collapse of HIH insurance in 2001. HIH was the major underwriter of home warranty insurance in all jurisdictions of Australia.

2.7 Under the Domestic Building Contracts Act 1995 warranties are implied into every contract concerning domestic building work. The warranties cover the quality of building work and materials, legal compliance, and that work will be carried out with reasonable care and skill. It is not possible to contract out of these warranties. The warranties apply to the building work for 10 years and transfer to the new owner if the property is sold within this time.

2.8 Owner/builders are also subject to regulation in Victoria. Owner/builders take on many of the responsibilities of a registered builder and accept any associated financial risk. If an owner/builder sells their property within six years of completing building work, they must provide a defects inspection report and take out domestic building insurance for work over $12,000.

2.9 There is also a 10 year long-stop limitation period in Victoria.

[54] http://www.buildingcommission.com.au/www/html/303-what-type-of-insurance-is-required.asp

Proportionate liability in Victoria

2.10 The major elements of this regime were introduced by the Building Act 1993 (VIC). This Act also introduced proportionate liability, abolishing the rule of joint and several liability in the building and construction sector.

2.11 The provision that removed the joint and several liability rule in Victoria read as follows:[55]

> "*Despite anything to the contrary in the Wrongs Act 1958, a person found to be jointly or severally liable for damages in a building action cannot be required to contribute to the damages apportioned to any other person in the same action or to indemnify any such other person in respect of those damages.*"

2.12 Whether a dispute was a "building action" was the focus of a significant amount of analysis in many cases.[56] If it was not a building action, then joint and several liability applied, which meant there was a significant benefit for a plaintiff who could avoid proportionate liability if a party was insolvent.

2.13 The proportionate liability rule applied to actions in tort for damages for economic loss and rectification costs that resulted from defective construction of building work or other work carried out under the Act. The changes meant that a Court could not order a person severally or jointly liable for damages in an action to contribute to the damages apportioned to another person.

2.14 At the time the proportionate liability amendments were introduced to the Victorian Parliament, the rule of joint and several liability was referred to as unfair and was said to be giving rise to a "deep pockets syndrome". There appears to be little public information on the policy work that informed these reforms, but comment was made that proportionate liability would introduce "a far more equitable and responsible allocation of risk. It was said that "no defendant would be liable for more than his individual apportionment", which would mean that some involved in the building process would not have to bear the responsibility of liability for the mistakes of other defendants.

2.15 Mention was also made of the view that the existence of the joint and several liability rule had driven up insurance premiums as insurers struggled with the added risk caused by the uncertainty of joint and several liabilities. A move to proportionate liability was said to be an incentive for insurers to stay in the building sector.

2.16 One report observed that the reforms to liability rules were part of an integral package of parts that were each required in order for the new scheme to work.[57] For example, compulsory insurance was a critical element in the introduction of private building certifiers – to ensure there would be sufficient funds to cover potential liability. Limitations on liability were also seen necessary as a means of making insurance affordable. Regulation and insurance of other building practitioners was also seen as necessary to ensure plaintiffs were not left out of pocket where a defendant is insolvent or absent.

2.17 Notable issues that the provisions gave rise to include amongst others the rules concerning the joining of defendants (joinder rules) and the effects of a settlement agreement between a plaintiff and one of the defendant parties.

---

[55] Building Act (Vic), section 132.
[56] See e.g. *Australian Rail Track Corporation v Leighton Contractors Pty Ltd* [2003] VSC 189.
[57] Greg Lampert "Australian Building Regulation and Liability Reforms" (Sept, 1999).

2.18 The Jonathan Kaye/Martin Jenkins report[58] notes that the proportionate liability reforms were more or less delivered on the promise to insurers to provide them with greater certainty to enable them to calculate risk. The report, however, warns against taking this as authority for the notion that proportionate liability laws would be a success if transplanted to New Zealand. It says that changes concurrently made to the scheme in Australia heavily reduced the need to rely on liability rules – and argues that one of the ironies of the shift to proportionate liability is that the introduction of insurance, coupled with mandatory licensing, has resulted in all parties being able to pay their share. It says that this means that the rule of joint and several liability is never called on to apportion costs in excess of a parties "individual" level of responsibility. The report also states that the comprehensive disputes settlement services in Victoria go a long way to ensuring that home owners can resolve their disputes without the need for costly litigation.

2.19 The proportionate liability provisions in the Building Act were repealed when universal proportionate liability was introduced in Victoria. The new provisions are found in the Wrongs Act 1958.

3. New South Wales

The current NSW building regime

3.1 Statutory warranties apply in NSW and are implied into contracts made since the statutory requirement came into force.[59] These resemble in many respects the warranties found in the New Zealand Building Act 2004. The terms relate to minimum standards of building work, the quality of materials and a warranty that the building is fit for dwelling. As with the New Zealand warranties, the warranties can be enforced by subsequent home owners and cannot be contracted out of.

3.2 In NSW it is mandatory to hold a contractor licence to contract, subcontract or advertise to do residential building work where the total cost of labour and materials is more than $1000. Building companies are also subject to licensing requirements. A failure to obtain a proper licence is an offence which can lead to a fine and an unlicensed contractor or subcontractor is unable to enforce a contract for the work against the other party.

3.3 Home building licensees are subject to a range of obligations, including:

(a) A requirement to provide a written contract for residential building work where the combined labour and material costs exceed $1000;

(b) A cap on the amount of deposit that can be requested from a customer;

(c) A requirement to carry home warranty insurance for work over $12,000 for each dwelling; and

(d) A requirement to maintain standards of professional development including requirements to undertake continued education.

3.4 Home building contracts must be signed for all building work over $1,000. A written contract must contain, at a minimum:

[58] See Appendix 5.
[59] Home Building Act 1989, Part 2C.

(a) A sufficient description of the work to be carried out;

(b) Building plans and specifications;

(c) Relevant warranties required by the Home Building Act 1989 (which are implied into the contract even if they are included in its terms);

(d) The contract price;

(e) A note about the contractor's obligation to give a certificate of home warranty insurance;

(f) A statement setting out the cooling off period of 5 business days within which the homeowner may cancel the contract;

(g) A requirement for the builder to provide the homeowner with a copy of the Consumer Building Guide; and

(h) A clause stating that the work will comply with relevant building legislation.

3.5 Home warranty insurance needs to be provided by builders or tradespeople before they take any money from a homeowner under a residential building contract and before starting any work under that contract. Home warranty insurance is required to be obtained by the builder where the contract price is over $12,000 or, if the contract price is not known, where the reasonable market cost of the labour and materials involved is over $12,000. There is no legal requirement for home warranty insurance where the contract price does not exceed $12,000. From 1 March 2007, home warranty insurance policies must provide cover of at least $300,000. Claims for incomplete work are limited to 20% of the contracted price (up to a maximum of $200,000 for policies issued between 1 May 1997 and 28 February 2007 and from 1 March 2007 onwards up to a maximum of $300,000).

3.6 Cover is provided for loss arising from non-completion of work for a period of 12 months after the failure to commence, or cessation of, the work. For policies issued from 1 July 2002 onwards, cover for all losses is provided in the event of death, disappearance or insolvency of a builder or tradesperson. Cover for loss arising from defective work is provided for a period of six years from the date of completion of the work or the end of the contract for the work, for loss arising from a structural defect, and two years for loss arising otherwise than from a structural defect.

3.7 Owner/builders are also subject to regulation in New South Wales. Notably, owner/builders who decide to sell their homes within six years after the completion of doing building work, are required to take out home warranty insurance where the market value of the whole project (including labour and materials) is valued at over $12,000.

3.8 Since 1 July 2010, the New South Wales Self Insurance Corporation, trading as the New South Wales Home Warranty Insurance Fund, has been the sole provider of home warranty insurance in NSW. The Home Warranty Insurance Fund is established by the NSW Government. Home warranty insurance premiums are deposited in the fund and it is used to pay home insurance claims. QBEI Insurance Limited and Calliden Insurance Limited were appointed as insurance agents of the New South Wales Self Insurance Corporation, through a contractual arrangement.

3.9 Under the Home Building Act 1989 (NSW), all building disputes must be submitted to alternative dispute resolution, a service offered by the Office of Fair Trading. If this fails a person can complain to the Consumer, Trader and Tenancy Tribunal, which has jurisdiction to hear 'home building' disputes, valued at up to $500,000.

3.10 We have been told that in NSW all building disputes are bought against home building licensees in the first instance. It is apparently up to the licensed builder to join other parties. We have been unable to pin-point the source of this practice, and are unsure whether this is a legislative requirement or something carried out for practical reasons.

Proportionate liability in New South Wales

3.11 The major elements of this regime were introduced in New South Wales by the Environmental Planning and Assessment Amendment Act 1997 and came into effect on 1 July 1998. The package of reforms that included a system of proportionate liability with respect to "building actions" and "subdivision actions". The latter changes were made to reflect the belief that defendants still had to pay for defective work and plaintiffs still needed to be fully compensated for their losses.

3.12 The reforms in 1997 and 1998 were part of a package of changes in response to widespread concerns that had emerged about the operation, planning and development of building and building processes. Briefly put, there was a desire to cut through unnecessary red tape.

3.13 The reason why these liability reforms were made in NSW is not clear from the NSW Parliamentary debates at the time of the amendments. However, it is likely the changes were driven by similar concerns as those identified by the Taskforce in the late 1980s.

3.14 The proportionate liability provision in the Environmental Planning and Assessment Act 1997 applied to any defendant found jointly and severally liable for the damages awarded by a Court in a proceeding for loss or damage arising out of or concerning defective building work. The provision applied to any defendant regardless of the extent of their fault or whether the plaintiff was contributory negligent. The provision removed the need for a defendant to contribute to the damages apportioned to any other person in respect of the same proceeding.

3.15 It was later noted by the NSW Law Reform Commission report that one problem with the legislation was that some litigants were able to circumvent the regimes that apportion liability as those engaged in building litigation usually rely, in addition to actions in contract and tort, on misleading and deceptive conduct provisions, which made no provision for contribution.[60] As a result, the liability regime was not watertight.

3.16 In the building sector, there are reported to be few cases in NSW invoking the proportionate liability rules over the years. The Jonathan Kaye/Martin Jenkins report suggests that the impact of the liability provisions may be minimal because:[61]

(a) All parties are required to carry insurance and this is backed up by the "last resort" home warranty insurance run by the Government;

[60] New South Wales Law Reform Commission "Contribution Between Persons Liable for the Same Damage" (NSWLRC R 89, 1999).
[61] *Report to the Building of Department and Housing on the liability framework work in the building sector*, Jonathan Kaye, Barrister and Solicitor and Michael Laws, Martin Jenkins and Associates Limited 11 June 2009, at 49.

(b) There is very accessible and upfront consumer advice and a very effective building disputes resolution service, meaning that parties are less likely to end up in litigation; and

(c) All building practitioners are required to be licensed, are subject to entry requirements based on their qualifications, and are subject to a disciplinary and penalty regime for work that fails to meet statutory requirements.

3.17 As in Victoria, NSW now has universal proportionate liabilities for civil claims involving pure economic loss or damage to property.

4. Universal proportionate liability and changes at the Australian federal level

4.1 In 1994, Professor JLR Davis undertook a review of the rules of joint and several liability for the Commonwealth and NSW Attorneys General. Professor Davis recommended the scrapping of the rule of joint and several liability in favour of a proportionate liability rule. His reasons are explained later in this report. Significant opposition was received when proposals were floated to implement Davis' recommendations. The proposals were rejected in both Victoria and NSW (including by the NSW Law Reform Commission which recommended that joint and several liability be retained).

4.2 In 2002, the issue of liability once again became the topic of consideration, after a policy working group recommended the introduction of proportionate liability in respect of audit services. This was said to be a means of softening up the "hardened" insurance market where auditors were suffering from increasingly high premiums and claiming the rules were set unfairly against them as "deep pockets". The difficulty auditors faced in obtaining indemnity cover was said to be a symptom of wider problems in the Australian insurance market at the time.

4.3 The problems in the insurance sector continued, and in 2003 States' Ministers of Finance revisited the question of liability as it applied throughout the civil law, not only in relation to auditors. One report suggests that the issue was reconsidered because of the effects the insurance crisis was having on consumers in obtaining insurance at a reasonable rate, and the subsequent consideration by many groups of the withdrawal of services. The Ministers undertook to "work urgently towards developing a nationally consistent model for proportionate liability for economic loss". The introduction of proportionate liability was linked directly to the issue of the provision of personal indemnity insurance.[62]

4.4 Proportionate liability reforms were made in each state and at the federal level during 2002 – 2004. It seems that these did not receive much attention. Since these reforms were enacted, concerns have emerged about the effect of the changes. These relate to the effect of the reforms on contractual responsibilities (as they may allow parties to avoid contractually agreed allocation of risk), inconsistencies between state regimes and federal Acts, and uncertainties about the application of the provisions.

4.5 One report suggests that the proportionate liability reforms came in on the back of two other reforms, each of which was designed to overcome a particular perceived defect in the law.[63] The first was the wave of changes introduced state-by-state to address issues with medical negligence insurance and public liability insurance. The second is that of commercial law reform changes designed to address issues thrown up upon the collapse of large insurers such as HIH. It is

[62] See e.g. Tony Horan "Proportionate Liability: Towards National Consistency" (September 2007) at 33.
[63] Professor Barbara McDonald "Proportionate Liability in Australia: the devil in the detail" (University of Sydney, October 2006) at 2.

suggested in the same report that proportionate liability was "snuck in" or otherwise a trade-off, as its effect is to reduce, not strengthen, the liability of many professionals, which gave rise to the crisis in the first place.

4.6 The same report goes on to question the reforms in light of the multiple reports recommending joint and several liability be retained and surmises that strong professional lobby groups and the insurance sector were instrumental in having the reforms enacted.[64]

5. **Australian National Consistency Report**

5.1 In 2007 the National Justice CEOs Group engaged Tony Horan, from DLA Phillips Fox, to undertake a comparative analysis of the proportionate liability schemes in force in each State and at the Federal level, primarily to highlight the differences between them with a view making the schemes more workable, consistent and certain.[65]

5.2 As well as a useful background to the enactment and operation of the proportionate liability provisions in each State, the report contains 28 recommendations which are directed towards achieving greater consistency of the current legislation and others at specific anomalies within individual Acts.

5.3 The following are identified in the paper as being unresolved aspects of the various proportionate liability regimes, or otherwise as provisions of the regimes that vary widely from state to state:

(a) The definitions of "apportionable claim" and "concurrent wrongdoer";

(b) How states regard non-parties when apportioning liability;

(c) Exclusions of certain classes of cases (e.g. agency or vicarious liability or claims for personal injury);

(d) The ability to contract out of proportionate liability, and what is required to do so;

(e) Cases involving one wrong-doer settling or compromising with the plaintiff; and

(f) Various procedural issues – joining, appeals, summary judgment applications.

5.4 Horan notes, that in almost every State, the underlying justification given in support of the introduction of proportionate liability is that it provides a necessary precondition for professionals to obtain cost effective and comprehensive insurance cover. In the absence of proportionate liability, where joint and several liability arises, it was stated over and over that personal indemnity insurance was unavailable.

5.5 Notably, Horan recommends that the scope of the provisions in every State be clawed back so that they only apply to the professionals who were said to be experiencing problems with indemnity insurance.[66] After analysing the underlying rationale for the introduction of proportionate liability in each State, he reached the finding that limiting proportionate liability would align with the various governments' desires to enable professionals to obtain indemnity insurance, and at the same time

[64] Professor Barbara McDonald "Proportionate Liability in Australia: the devil in the detail" (University of Sydney, October 2006) at 4.
[65] See e.g. Tony Horan "Proportionate Liability: Towards National Consistency" (September 2007).
[66] See e.g. Tony Horan "Proportionate Liability: Towards National Consistency" (September 2007), rec 2.

would overcome some of the problems that have been identified with the legislation having such a long reach.

5.6 The report also considers the complexities and uncertainties that have arisen as a result of the more prescribed nature of the provisions, which shifted from being relatively short provisions to ones that now attempt to address thorny issues of procedure and practice. While the issues are slowly being judicially resolved, their existence has created a cost and complexity that was supposed to have been reduced by the adoption of proportionate liability rules.

Consistency Report Review

5.7 The consistency report was reviewed by Professor Davis.[67] Davis did not address Horan's recommendation to limit joint and several liability to professionals carrying indemnity insurance. Instead, Davis took the recommendations made by Horan and turned them into more detailed recommendations to assist in aligning the proportionate liability regimes in each state.

6. Capping of liability

6.1 Capping of liability involves the enactment of a statutory provision that limits the maximum amount of damages that may be awarded against a particular defendant.

6.2 Examples of capping schemes include the capping schemes for professionals in Australia. Although not specific to the building and construction industry, these are relevant as they apply to professional groups, such as architects and engineers, who operate in the sector. In addition, these regimes provide a possible alternative option to joint and several liability.

6.3 The key feature of the capping schemes is that they set a monetary limit on the amount of liability that can be found against a particular professional. In return for a cap on liability, members of the scheme are subject to a number of measures, such as:

(a) A minimum level of indemnity insurance;

(b) Risk management and quality assurance programmes;

(c) Entry requirements and ongoing education and training requirements;

(d) Compliance programmes, disclosure requirements in respect of disclosure to clients; and

(e) Provisions for the handling of complaints against members and discipline.[68]

6.4 As noted above, some professional groups within the building and construction industry have their own schemes such as valuers, professional engineers, and professional surveyors. Capping also applies in Australia in respect of personal injury actions.

[67] J L R Davis "Proportionate Liability: Proposals to Achieve National Uniformity" (2008).
[68] *Report to the Building of Department and Housing on the liability framework work in the building sector*, Jonathan Kaye, Barrister and Solicitor and Michael Laws, Martin Jenkins and Associates Limited (11 June 2009).

7. British Columbia (BC)

General application of joint and several liability

7.1 In British Columbia, the common law rule of joint and several liability is amended by sections 1 and 2(c) of the Negligence Act 1996 so that a plaintiff who has contributed to the loss/damage he or she has suffered can only recover "severally" against another person who has caused them loss/damage. This means that defendants are only responsible for a portion of the damage equal to their degree of fault.

7.2 Otherwise the rule of joint and several liability applies (except for variations in individual municipalities as discussed below). Section 4 of the Negligence Act preserves the rule of joint and several liability where a plaintiff has not contributed to the loss/damage they have suffered. In this situation, a plaintiff can recover from all the defendants jointly and severally (*British* Columbia *Court of Appeal in Leischner et al v West Kootenay Power and Light Company, et al. (1986), 70 BCLR 145).*

7.3 The rules set out in sections 1 and 2(c) of the British Columbia Negligence Act are an amended form of proportionate liability that has been floated by the New Zealand Law Commission and bodies overseas.

Municipal variations in liability for faulty building work

7.4 In Canada, building regulation falls within a provincial, rather than federal jurisdiction. Therefore even though there is a national Building Code it can be amended by provincial and municipal authorities. British Columbia has its own Building Code. This Building Code is further amended or supplemented by many municipalities.

7.5 In British Columbia, municipalities are responsible for enforcing the Building Code and any local bylaws. Under common law rules, municipalities can be held liable for acts or omissions that result in losses to building owners, occupiers, and subsequent owners.

7.6 Municipalities have also been held liable in leaky condo cases such as *Strata Plan NW3341 v Delta (Corporation) 10*, where the BC Court of Appeal imposed liability on the Municipality of Delta for failing to ensure that the Building Code was adhered to and the drawings submitted for approval were detailed enough.

7.7 However, there are statutory provisions in BC that limit municipality liability. At a state wide level, municipal authorities are protected from liability protection if a registered professional has given assurances of Code compliance (i.e. where building plans were certified by a Registered Professional (architect or engineer) that has been recognised by the municipality).

7.8 More significantly, in Vancouver, the amendment of the Charter of the City of Vancouver in 1995 eliminated all liability of the city of Vancouver for inadequate inspection of building work.

Suggested reforms

7.9 Reform of the rule of joint and several liability has twice been considered in British Columbia.

7.10 The first instance arouse from the "leaky condo" crisis of the late 1980s – 1990s.

7.11 In April 1998, a Commission of Inquiry was established to focus on the issue of leaky condominiums and accountability to home buyers for faulty condominium construction. The report of the Commission (commonly called "the Barrett Report" after its author) was issued in June 1998.

7.12 The report found that building failure was the result of a combination of factors that are not dissimilar to those that contributed to the weathertightness crisis in New Zealand: a wet climate, largely unregulated building industry, inadequate regulatory oversight, monolithic cladding materials, and complicated, new, high-risk building designs.

7.13 In 1998, the Barrett report found that the joint and several responsibilities for municipalities were onerous, and that the differences between other municipalities and Vancouver was unacceptable. It recommended the joint and several liability of a municipality be removed by amending specific municipal legislation.

7.14 It made this recommendation based on its view of the role of municipal authorities in approving and inspecting building works. In summary, it noted that while municipal authorities were partly responsible for inadequate inspection and approval work, they were not responsible for ensuring that construction work was code compliant. Furthermore, the report noted that the Building Code was "intended primarily to ensure that health and safety standards for building are met, not to guarantee overall construction quality". The report stated:

> "*It is the provincial government's role to establish codes and standards, while it is the developer's role to ensure that construction complies with standards. The registered professional (architect or engineer) has the responsibility of designing the building and ensuring field reviews are undertaken during construction. The role of the building official is to monitor the process*."

7.15 From our investigation to date, it is unclear whether the report's recommendations have been adopted. We are continuing to investigate this.

7.16 The second review of joint and several liability in British Columbia was a general review undertaken in 2002, when the Ministry of the Attorney General of British Columbia released a consultation paper questioning whether joint and several liability should be legislatively modified or abolished. The Ministry cited concerns of unfairness where one or more wrongdoer is insolvent, and noted concerns of "deep-pocket" defendants paying awards that are out of proportion to the degree of fault. It also noted however the risk of under-compensation for plaintiffs under proportionate liability.

7.17 Submissions on the review were received, However, the review option was not pursued further. At the moment, we have not been able to find information explaining why the review option was not pursued but are continuing to research this.

8. **United Kingdom**

General application of joint and several liability

8.1 In the UK joint and several liability still applies. Section 1(1) of the Civil Liability (Contribution) Act 1978 allows a wrongdoer to claim contribution from any person liable in respect of the same

damage (jointly or otherwise). This rule applies regardless of whether the wrongdoer is liable in tort or for breach of contract or for any other wrong.

8.2 However, if a plaintiff has entered into a contract with one wrongdoer that excludes liability in respect of any loss suffered, this has the affect of also limiting the contribution between wrongdoers.[69]

Suggested reforms

8.3 On several occasions, the UK has considered whether to reform joint and several liability. Commentators have suggested that the source of the debate was, as in Australia, rising insurance costs.[70]

8.4 By the 1980s professional indemnity insurance cost in the UK had increased threefold. A report released in 1989 by the UK Department of Trade and Industry[71] recommended that the introduction of proportionate liability, except in the case of personal injury, be seriously considered. This report was followed by another two reports; one in 1994 by Government and Industry, the *Constructing the Team* or "Latham report"; and the 1996 UK Law Commission report *Feasibility Investigation of Joint and Several Liability.*

8.5 The Latham report noted that joint and several liability posed risks to deep-pocketed defendants in the construction industry in particular and recommended that liability in construction cases, other than personal injury, be limited to "a fair proportion of the plaintiff's loss, having regard to the relative degree of blame".

8.6 However, the UK rejected any move to proportionate liability in the UK Law Commission report of 1996.

8.7 Since then, it does not appear that any serious consideration has been given in the UK to changing the rule of joint and several liability. However, it is potentially important to note that the extent of liability of local authorities for faulty building work in the UK differs from the situation in New Zealand.

Building sector participants liability for faulty building work

8.8 As in New Zealand, developers and builders, architects and engineers in the UK may all be found jointly and severally liable for loss in respect of faulty building work.

8.9 By contrast to the position in New Zealand, a local authority's duty of care is far more restricted. In the exercise of the statutory functions of building control, local authorities are not generally liable if the building when finished is defective in quality or is a source of economic loss.[72] This reflects a general consensus in England and Wales that pure economic loss in tort is not generally recoverable.

8.10 The Jonathan Kaye/Martin Jenkins report surmises that the Court's reluctance to extend the rights of recovery for homeowners against local authorities must be seen in the context of the UK's

[69] *Co-operative Retail Services Limited v Taylor Young Partnership* (2002) UKHL 17, [2002] 1 WLR 1419 (HL).
[70] Prof Doug Jones, International Construction Law Review, *"Proportionate Liability – Reform or Regression?*"
[71] *Professional Liability: Report of the Study Teams* or the "Likierman" report.
[72] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

regulatory framework. In the UK there is an extensive national building regulation warranty and insurance scheme through the National House Building Council's "Buildmark" scheme.

9. **United States**

9.1 The nature of building regulation differs greatly between American States.

9.2 According to the American Tort Reform Association (ATRA), the rule of joint and several liability is "neither fair, nor rational, because it fails to equitably distribute liability". ATRA supports a shift to proportionate liability. It reports that currently 40 states have modified joint and several liability. In 2002, 18 states had abolished the rule in its entirety, while 21 had significantly modified it.

9.3 While this provides a useful high-level comparison, there are two reasons to be cautious in drawing comparisons with US laws. First, the US still use jury trials for many cases; second, the high damages awards that are advanced (which do not occur here) resulted in severe hardship to defendants, such that the rule of joint and several liability had to change.

APPENDIX 7: LAW AND ECONOMICS ARGUMENTS

1. Law and Economics Arguments

1.1 This Appendix considers insights from the academic literature in economics. Rather than an extensive review of all relevant literature, we provide an overview of the key articles that consider alternate liability rules in general and the operation of joint and several liability in particular. The content is pitched in as accessible a manner as possible.

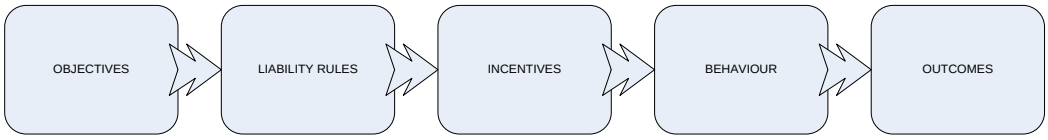
1.2 We will use the insights gleaned from the literature as a basis for the analytical framework used to evaluate the application of joint and several liability in the building and construction sector later in the review.

2. Introduction

2.1 While the general discipline of economics has much to say about the nexus between individual behaviour and market outcomes, the most relevant paradigms would appear to be law and economics, game theory and principal-agent theory. In terms of the former, analysis of joint and several liability in the context of the building and construction sector sits across contract, tort and (more broadly) property law.

2.2 Before considering specific insights from the literature, we set out a stylised representation of the relevant concepts. Such conceptual understanding is important not only for the practical assessment of costs and benefits, but also because much of the material contained in the economics literature is abstract in nature. Figure 1 shows there are five high level concepts. We describe each individually below, but it is important to note that they operate together (i.e. there are feedback loops and interactive effects at play).

Figure 1: Stylised conceptual framework



(a) *Objectives* – relate to what we are trying to achieve. In economics, the most relevant objective is most often some sort of efficiency. By efficiency we mean economic efficiency- an optimal allocation of economic resources in society.

(b) *Liability rules* – the rule or set of rules that govern the interaction between agents both in an *ex ante* (pre-event) and ex *post* (after event) sense. Such rules effectively allocate responsibility in the event of loss (damage) occurring in the interactions of agents in society.

(c) *Incentives* – the structure of rewards and/or harms that result from (amongst other things) consideration of the likely outcome of the application of the relevant liability rule/s.

(d) *Behaviour* – while liability rules dictate the "rules of the game" it is the "play of the game" that is most important. This is represented by the behaviour (i.e. actions) of agents. In economics, it is assumed that the behaviour of agents is heavily influenced by the incentives the agents face.

(e) *Outcomes* – what actually happens as a result of the interplay of the preceding factors. This is effectively a measure of the extent to which objectives are being achieved.

2.3 Already, we start to see the potential for tension. The rules of law do not always consider economic efficiency, and certainly do not necessarily accord it significant priority in terms of goals. The concept of equity is most likely to be at least as important. Thus, principles around just outcomes may take precedence over empirical assessment of resource allocation. While the discipline of law and economics aims to better integrate the different perspectives, it is worth noting that tensions may linger.

3. Specific articles

3.1 The most relevant place to start this summary is an article written in New Zealand. As part of the review of liability rules undertaken by the New Zealand Law Commission in 1992, two Auckland University economics professors, Conrad Blyth and Basil Sharp, were approached to provide economics input. A published version of their analysis was contained in the Victoria University Law Review.[73]

3.2 Blyth and Sharp (1996) considered the doctrine of solidary liability (i.e. joint and several liability) and its alternatives to determine which rule affords potential wrongdoers the best incentive to take appropriate levels of care. They employ a stylised market for care, where a number of parties are involved in the supply of and demand for levels of care. The market equilibrium is found at the point of intersection between respective demand and supply curves, setting a particular price for care and a quantity of care in the market.

3.3 First, using a contract setting, they examine the incentives provided to the agents involved in particular transactions (which include the construction of a building) in the context of a loss being suffered by one agent (e.g. the owner/purchaser of a building). Given other agents involved in the transaction are aware of the consequences of not fulfilling contracts and the application of a particular rule apportioning liability, what would their levels of care be and how would those levels compare to the contracted or customary levels of care operating in the market?

3.4 Extending the analysis to the case of negligence and concurrent liability, Blyth and Sharp make use of a simple model to compare the relative efficiency of different liability rules, using the underlying concepts of incentives and efficiency. One liability rule is relatively more economically efficient than others if it provides better incentives for potential wrongdoers to take levels of care that minimise total social costs – which are the sum of both precaution and loss (damage) costs. The incentives driving behaviour (i.e. the level of care provided by the agent) need to be well understood by all parties. This in turn depends very much in practice on the Courts adopting consistent standards for required care and acting consistently in the award of damages.

3.5 Using this simple mode, Blyth and Sharp (1996) compare solidary liability (both with and without contribution from other wrongdoers) to proportionate liability. In addition, they make specific comment on the role of insurance, "deep pockets", and the incidence of costs. They drew the following conclusions around what economic analysis has to say about the relative economic efficiency of alternative rules of legal liability:

[73] Blyth C and Basil Sharp (1996) "The Rules of Liability and the Economics of Care" VUWLR 26, pp.91-108.

(a) Efficiency requires that all defendants exercise levels of care which minimise total expected cost. Total expected cost is the sum of the possible loss (damage) arising from a particular event and the costs associated with providing care.

(b) Incentives are the key (given the importance of expected/*ex ante* costs as opposed to *ex post/*realised costs). A liability rule will provide incentives for potential injurers to choose particular levels of care.

(c) With several potential injurers and no likelihood of a missing defendant, proportionate liability provides the incentives for total cost minimisation, provided damages are correctly assessed and according to relative fault.

(d) Solidary liability with no contribution increases the expected costs that each party would face when deciding the level of care to take and hence is less economically efficient than proportionate liability. The additional costs arise out of the uncertainty over the allocation of damages between the joint wrongdoers (tortfeasors).

(e) Solidary liability with contribution reduces (and may eliminate) this uncertainty and hence reduces the expected costs of the potential tortfeasors compared with the no contribution situation.

(f) In theory proportionate liability is neither more nor less economically efficient than solidary liability with contribution. This conclusion assumes that the expectation of contribution eliminates all the uncertainty regarding the allocation of damages, that there are no "deep pockets", and that the costs of litigation under solidary liability with contribution are similar to those under proportionate liability. Reality may suggest otherwise.

(g) The effect of the possibility of an absent co-defendant on the incentives for the remaining defendants depends on the subsidiary rule used to allocate the absentee's share. Proportionate liability is economically efficient, and is similar in terms of efficiency, to solidary liability with contribution (subject to the point above).

(h) Solidary liability applied in the case where deep pockets exist, does not produce the incentives which provide an efficient outcome. Deep pockets create an incentive for other potential tortfeasors to lower their standards of care because the likelihood of their facing damages is reduced. Plaintiffs may also reduce their level of care. The response of deep pockets (e.g. more building regulations) creates further inefficiencies.

(i) For some deep pocket industries a change to a proportionate liability rule would alter the incentives to adopt economically efficient levels of care. On the other hand, the circumstances which produce the phenomenon of the deep pocket (other than the liability rule itself) may themselves be susceptible to change or reform, and may be an alternative to the adoption of a proportionate rule.

(j) Proportionate liability contributes to economic efficiency because the potential injurer's liability for damage is measured by that injurer's level of responsibility or degree of fault (i.e. the extent to which the actual level of care departs from the economically optimal level). This rule, combined with insurance cover for negligent defendants and against the

possibility of a missing or insolvent defendant, provides the incentives for economic efficiency.

3.6 Other articles are less certain over the efficiency implications of one rule over the other. That is, they generally find that there is no strong argument (efficiency-based or otherwise) in favour of proportionate liability in place of joint and several liability. For instance, David Goddard QC and Liesle Theron reviewed the law and economics literature in relation to the relative efficiency of the two liability rules and concluded that:[74]

(a) There is no clear case for adopting a rule of proportionate liability in place of joint and several liability across the board;

(i) proportionate liability generally creates the same incentives to take precaution as solidary liability, and is neither more nor less efficient. Proportionate liability can be more efficient if certain special factors are present in the context of a particular industry or liability regime, but the extent of this difference is unclear;

(ii) there are strong corrective and distributive justice reasons for preferring solidary liability to proportionate liability;

(iii) there are more targeted methods of addressing concerns about the potential inefficiency of solidary liability in particular fields (see next point below).

(b) The most promising avenue for addressing the concerns raised by some professional and industry groups about the effect of joint and several liability, in a manner that is both efficient and just, may be to ensure that it is possible for potential defendants to limit their liability, or provide for it to be proportionate rather than solidary, by means of a contract or disclaimer in appropriate cases. The default rule would remain solidary liability, but this could be modified by agreement or by limiting the assumption of responsibility in certain cases.

3.7 While concluding that the case for the wholesale adoption of proportionate liability is not well made, Goddard (2004) does concede that there may be some efficiency justification for adopting an alternative regime in a particular industry (e.g. construction). The general message is that "*it is not possible to say with any confidence that one or other regime is generally preferable, from an efficiency perspective. There are* circumstances *where proportionate liability may be more efficient than solidary liability, though the extent and practical importance of the difference in efficiency is unclear, and the same is probably true in reverse (though the circumstances in which solidary liability is superior may be less common in practice)*" (paragraph 17, p.6).

3.8 In terms of the basis for considering Blyth and Sharp's (1996) analysis to be faulty, Goddard (2004) claims that the former did not take into account a standard result of economic analysis of law that incentives to take care, and expected care levels, are not affected by errors by a Court in assessing damages (unless those errors are very significant), or by uncertainty as to quantum of liability within fairly broad limits. Incentives are however affected by errors made by a Court in setting the required level of care, or by uncertainty as to the required level of care.

[74] Goddard D and Liesle Theron (2004) "Joint and Several Liability: Literature Review" Draft Memorandum to the Ministry of Economic Development, December.

3.9 In discussing the possibility of one or more joint wrongdoers being expected to be absent or insolvent, Goddard states that both "*liability rules create incentives for parties to take the same level of care, if liability is fault-based and the Court sets an efficient standard of care (where the cost of precaution plus expected harm is minimised overall, for each injurer)*" (paragraph 9, p.3).

3.10 The intuitive explanation provided by Goddard relates to discontinuities in expected costs at the point where the required care is not taken. There is a "jump" or threshold effect, such that these costs are significant whether the expected liability is for the whole of the victim's loss or only part of the victim's loss. Again, there may be cases where the incentives between liability rules may differ, which are exacerbated by the presence of risk-aversion and differing levels of expected solvency. In the case of a potential injurer who is both solvent and risk averse but expects other potential injurers to be absent or insolvent, more will be spent on precaution under solidary liability. This increase in precaution is a waste of society's resources and would be reduced, though not eliminated, by a proportionate liability rule.

3.11 It is less clear how significant the likely increase in precaution is between the two regimes. The evidence of impact on insurance premiums as between the two regimes is ambivalent,[75] which according to Goodard (2004) "*raises some questions about the practical impact of the different regimes on expected costs of litigation, and thus about the practical impact on precaution levels*" (paragraph 14, p. 5).

3.12 Moreover, Richardson (1999) also claims that important flow-on benefits in terms of deterrence might result from the higher accident or insurance costs associated with joint and several liability.[76] These are so-called "gatekeeper functions" where potential injurers are in a better position, relative to the plaintiff, to monitor and control the conduct of potential co-injurers.

3.13 The prospect of higher costs for potential gatekeepers (e.g. auditors or territorial authorities) increases the incentive for them to operate as gatekeepers and so minimise their exposure to the risk of liability. As well as the incentives for more efficient (alternative) care and activity levels by gatekeepers themselves other benefits might be the reduction in the risk of sub-optimal deterrence by absent or insolvent wrongdoers and the possibility of better information availability as to what parties might be high risk.

3.14 Richardson (1999) considers it conceivable that some groups who "*currently face significant insurance costs are responding efficiently in their treatment of high risk clients in a way they did not have to when insurance premium were lower*" (p. 94). The benefits of promoting this efficient gatekeeper function may outweigh the net costs (if any) in insurance terms associated with joint and several liability.

3.15 More widely, much of the analysis of liability rules is based on updates to pioneering work conducted 30 years ago.[77] The classic case involves dumping of waste by multiple parties. In addition, there are other elements that are not directly relevant to the New Zealand situation, including personal injury liability, and established set-off rules (when the plaintiff settles with one defendant and litigates against another). Nevertheless, key findings have emerged from the

[75] Richardson m (1998) "Report on the Economics of Joint and Several Versus Proportionate Liability" Victorian Attorney-General's Law Reform Advisory Council, Expert Report 3, August.
[76] Richardson M (1999) "Perspectives on Joint and Several Tortfeasors and Liability for Economic Loss" in Richardson, M;Hadfield, G (ed), The Second Wave of Law and Economics, pp. 86-99.
[77] Landes W and Richard Posner (1980) "Joint and Multiple Tortfeasors: An Economic Analysis".

literature, which all point to some difficulty in concluding one rule is unequivocally better than the other on efficiency grounds.

3.16 Lewis Kornhauser and Richard Revesz have produced a series of articles examining the impact of joint and several liability relative to (non-joint) alternatives.[78] The major dimensions of interest in these articles are deterrence and settlement (i.e. what effect does the liability rule have *ex ante* and *ex post?)*. As is fitting their law faculty credentials, they also consider fairness.

3.17 In a nutshell, Kornhauser and Revesz[79] conclude that "*from the perspectives of inducing deterrence and inducing settlements, and promoting fairness, there is no dominant relationship* between *joint and several liability and several only liability. From a deterrence perspective, the comparison between the two rules turns on the levels of solvency of the defendants. In contrast, from settlement and fairness perspectives, the comparison turns on the correlation of the plaintiff's probabilities of success against the defendants*."

3.18 Regardless of the degree of correlation between a plaintiff's prospects of success against two defendants, the value of a claim under joint and several liability exceeds that value of corresponding claims under a regime of several-only liability. As a first approximation then, joint and several liability sets a higher price on malfeasance and consequently should have a greater deterrent effect than several only liability.[80] The probability of success (and indeed the solvency of defendants) is exogenous to plaintiffs. In sum, there is "no clear winner" in these analyses, and the degree to which one liability rule is favoured over another is determined by factors specific to an industry, case or jurisdiction.

[78] Kornhauser L and Richard Revesz (1989) "Sharing Damages Among Multiple Tortfeasors". Yale Law Journal 98, pp.831-884. (1990) "Apportioning Damages Among Potentially Insolvent Actors" Journal of Legal Studies 19, pp.617-651. (1993) "settlements Under Joint and Several Liability" New York university Law review 68, pp.427-493. (1994a) "Multidefendant Settlements: The Impact of Joint and Several Liability" Journal of Legal Studies 23, pp.41-76. (1994b) "Multidefendant Settlements Under Joint and Several Liability: The Problem of Insolvency" Journal of Legal Studies 23, pp517-542. (1990) "Apportioning Damages Among Potentially Insolvent Actors" Journal of Legal Studies 19, pp.617-651. (1993) "Settlements Under Joint and Several Liability" New York university Law review 68, pp.427-493. (1994a) "Multidefendant Settlements: The Impact of Joint and Several Liability" Journal of Legal Studies 23, pp.41-76. (1994b) "Multidefendant Settlements Under Joint and Several Liability: The Problem of Insolvency" Journal of Legal Studies 23, pp517-542.

[79] Kornhauser L and Richard Revesz (2008) "Joint and Several Liability". Revised entry on Joint and Several Liability in The New Palgrave Dictionary of Economics and the Law (1998). Macmillan reference Ltd/Stockton Press.

[80] Given our focus on residential building and construction, the discussion relating to settlement (versus litigation) are less relevant, although they may pertain to commercial situations.

APPENDIX 8: INTERVIEW PARTICIPANTS AND QUESTIONS

List of participants

Name and role	Organisation/sector
John Duthie, General Manager City Development	Auckland City Council (previously)
Ken Smith, Regulatory Manager*	Kapiti Coast District Council
David Rolfe, General Manager, Environment and Regulatory Services*	Porirua City Council
Derek Baxter, Chief Executive	Certified Builders Association of New Zealand
Warwick Quinn, Chief Executive	Registered Master Builders Federation
Allan Fraser, Director and Andrew Fraser, Director	Newcrest Property Investment and Development
Craig Stewart, Chief Executive	Stratum Management Limited (property developers)
Grant Porteous, National Managing Director	G J Gardner Homes
Don Houchen, General Manager Professional Risks	Aon Insurance
Stewart O'Brien, Professional Liability Manager Corporate and Special Risks	QBE (International) Limited
Clive Davidson, Liability Manager	Lumley General Insurance (N.Z.) Limited
John Gray, President and Roger Levie, Executive Member	Home Owners and Buyers Association of New Zealand
Darren Powell, General Manager Body Corporate	Crockers Body Corporate Management Limited
John Green, Director	Building Disputes Tribunal
Paul Grimshaw, Grant Shand, and Gareth Lewis, Partners	Grimshaw and Co. Litigation and Dispute Management
Pieter Burghout, Chairman and Chief Executive and John Duncan	BRANZ limited
Peter Degerholm	Calderglen Associates Limited (Dispute Resolution)
Dr Arthur Park, Chair	Consulting Engineers Advancement Society

Name and role	Organisation/sector
Tim Melville, Nominated representative*	New Zealand Institute of Architects
Peter Marshall, Chief Executive	Warren and Mahoney Limited
Phil Sim, Managing Director	ABS Home Owners Warranty Pty Ltd.
Professor Barbara McDonald	University of Sydney
Steve Griffen, Assistant Commissioner Home Building Services	New South Wales Office of Fair Trading
Michael Mills, Director	MartinJenkins and Associates Ltd
Paul Carpenter	RiskPool

*Interview not yet completed.

Interview questions

Scene setting

1. What is your involvement and/or interest in the building and construction sector?

    (a) Nature;

    (b) Scale;

    (c) Length.

2. Could you please give your general view of the liability rules that apply to the building and construction sector, particularly in relation to:

    (a) The degree to which you have given thought to the topic (time, specific areas of concern, how important is this to you, etc)?

    (b) Your understanding of the operation of the liability rules (experiences, perspectives viewed from, etc);

    (c) Your views on how well key decision-makers understand the impacts of liability rules (i.e. is there any fundamental misalignment)?

3. Are your answers to the above predicated on the proposed amendments to the Building Act as a result of the review?

    (a) Do your answers reflect the amendments? How would they have differed absent the amendments?

    (b) Was enough done?

    (c) If change is likely, how rapidly will this take place?

Issues and tensions

4. What, in your opinion, are the major issues around joint and several liability in the building and construction sector (now and into the future)?

5. How would you prioritise the issues (i.e. what do you consider to be the top 3 issues and why)?

    (a) How important is the liability regime to your activities (e.g. resources devoted? general interest? constraints imposed)?

6. What are the practical effects of these issues?

    (a) Specific impacts in as much detail as possible.

    (b) How do they manifest (i.e. what is the transmission mechanism as it relates to joint and several liability (as opposed to other aspects of the regime)?

    (c) What is the evidence base (i.e. actual experience versus assumed effects, scale and incidence of impacts)?

7. How are the impacts (actual and potential) dealt with in practice?

    (a) Avoidance versus mitigation?

    (b) Costs of such behaviours?

8. To what extent will the raft of amendments to the Act affect the issues as they are implemented and play out in practice?

Options for change

9. What do you consider to be the appropriate “test” (or hurdle) that should be cleared in order to contemplate changes to the joint and several liability rule?

10. What options stand out to you as having merit?

    (a) Regime tweaks (e.g. keep joint and several liability rule, but make changes in areas such as insurance requirements, lifting the "corporate veil", etc)

    (b) Blanket regime changes (e.g. a move to proportionate liability)?

    (c) Targeted regime changes (e.g. proportionate liability for specific parties only (e.g. BCAs), changes to duties of care, liability caps, etc).

11. How would these options alter the behaviour and responses discussed previously, relative to the status quo and each other?

    (a) Specific changes to relationships between players, transmission mechanisms (costs and benefits)?

    (b) Pre-event (indirect) and post-event (direct) differences?

    (c) What players would be affected more (less) from changes?

(d) How would any change play out in the context of the amendments to the Building Act (e.g. consistency, alignment, timing)?

Omissions

12. Is there anything else of importance that we have missed?

13. In addition to these general questions, more specific responses were sought in relation to:

(a) Statutory warranties - uptake and impacts on behaviour;

(b) Use of company structures and incidence of insolvency;

(c) The approach taken by Councils;

(d) Availability (i.e. coverage and price) of insurance;

(e) Consumer behaviour;

(f) Impacts of the Building Act review amendments; and.

(g) Commercial disputes.

APPENDIX 9: OTHER OPTIONS NOT CONSIDERED IN DETAIL

1. As well as the four options described in the main body of the report, the consultants considered other options, but decided not to analyse them further after discussion with the Department. These options are listed below, along with a brief explanation of the reasons for the consultants deciding not give them further consideration.

Proportionate liability with some reallocation of the uncollectable share

2. This option involves a modified version of proportionate liability, which would provide for proportionate liability to apply, but for some reallocation of any uncollectable share. This reallocation could take many forms, for example it could provide that if there is an uncollectable share, the remaining defendant wrongdoers would be required to pay an uncollectable share up to an amount not exceeding 50 per cent of their original liability.

3. While this option may go some way in reallocating the uncollectable share to alleviate any hardship to a plaintiff from proportionate liability, some of the burden of the uncollectable share would still fall on the plaintiff. As the uncollectable share would fall on remaining defendants, the concerns of those defendants who feel they should not be liable for more than they feel responsible for would not be addressed. The consultants decided not to consider this option further because it seems to be a half-way-house between joint and several liability and proportionate liability that will not meet the needs or concerns of any of the parties involved in building and construction markets.

Proportionate liability if plaintiff contributorily liable

4. This option has been considered by various law reform bodies that have reviewed joint and several liability. It would mean that joint and several liability would remain, except for those cases in which the plaintiff has been contributorily negligent, in which case proportionate liability would apply. While this option would make a difference in some cases, the consultants cannot see any practical or principled reason for imposing proportionate liability only where the plaintiff is contributorily negligent. In any case, given the relatively few cases in which plaintiffs are held to be contributorily negligent in building failures, there would seem to be little difference between this option and the status quo.

Different liability rules for sophisticated and unsophisticated parties

5. This option is similar to option 3 discussed above in that it provides for different liability rules depending on the particular case. This option differs in that it distinguishes between sophisticated and unsophisticated parties. The rationale for the distinction lies in the notion that unsophisticated building owners need more protection, whereas sophisticated building owners are in a better position to make economic judgments and cost their risks appropriately. This option was dismissed as it may not be a significant shift from the status quo where commercial building owners are effectively able to contract in and out of various liability arrangements. Moreover, the distinction between the two groups would be a hazy one, and would do little for certainty or accountability in the sector.