Proportionate Liability: Fair Responsibility, Stronger Protection, Better Building

Speech on the Building Amendment Bill 2026 and the proposed liability reforms

Introduction

Tēnā koutou katoa.

Today I want to address a law reform that goes to something very familiar: when a building fails, who should pay? The Government's Building Amendment Bill proposes to move the building sector from joint and several liability to proportionate liability. The First Reading of the Bill was passed with wide-spread support in Parliament this year. It had the full support of the coalition government parties, support from Labour, Te Pati Māori, and Independent MPs, but not from the Greens. As such, it is safe to say that the Bill, which has now been sent to Parliament's Transport and Infrastructure Committee has a good chance of passing into law in 2027 or 2028.

The proposed changes have been presented as a fairer allocation of responsibility for defective work. They are intended to deliver greater accountability, efficiency and fairness, while preserving confidence for homeowners through a new package of protections. The First Reading debate suggests that Parliament's central test will be whether those two objectives can be achieved together: ending unfair residual exposure for councils and other solvent defendants without leaving homeowners with an uncollectable share of their loss. The details may still change through the select committee and later parliamentary stages, so my comments today address the Bill and policy package as presently proposed.

What changes—and why

The Law Commission has previously considered the issue of joint and several liability. First in 1998 and latterly in 2014. It's a difficult area of law.

As you will be aware, under the present joint and several liability rule, a claimant may recover the whole loss from any one liable defendant. The law then leaves solvent defendants to seek contributions among themselves. In practice, if a developer has disappeared, a building company has been liquidated, or another liable party is uninsured, the party still standing may inherit much more than its own share of the fault.

That party has often been a local authority. Councils have statutory functions, identifiable assets and a continuing ratepayer base. They cannot simply close the doors and disappear. Under joint and several liability, once some measure of council fault can be established, a claimant has a powerful commercial incentive to pursue the party with the deepest and most dependable pocket. The result is that claims concerning work carried out under building consents have frequently concentrated on councils, even where the principal failure lay with architects, product suppliers, developers, builders or subcontractors who had disappeared or could not pay. The Ministry of Business, Innovation and Employment's (MBIE's) Building Performance material describes councils and ratepayers as the "ambulance at the bottom of the cliff", in some cases left to cover the full cost even where the council played only a small part.

Proportionate liability changes the allocation: each party involved in defective building work will be responsible only for the costs of its own contribution to the fault. If another contributing party is

absent or insolvent, the remaining defendants will not automatically absorb that shortfall; insurance and warranties therefore become central to homeowner protection.

That is the central bargain. Liability follows fault more closely, but the homeowner can no longer assume that one solvent defendant will be required to fund every dollar of an indivisible loss. The strongest concern raised in the parliamentary debate is therefore not abstract: a legally sound allocation of fault may still leave an innocent owner carrying the share attributable to an insolvent, uninsured or absent wrongdoer. The reform cannot be judged by the liability rule alone. It must be judged together with the warranty, insurance, solvency and enforcement settings that support it—and by whether those settings provide a practical route to full and timely recovery.

A principled case for the change

There is a simple principle at stake: a party should ordinarily pay for the harm it caused—not for the harm caused by everyone else. A council that negligently misses an obvious defect should remain accountable for that failure. But a council that played a minor consenting or inspection role should not become the universal insurer of a project because the developer, builder or designer is insolvent or has disappeared. The Building Performance guidance expressly recognises that, under the present system, local councils as building consent authorities—and ultimately ratepayers—can end up paying for others who cannot meet their obligations. In that sense councils have become insurers of last resort, without having chosen the risk, underwritten the project, collected a premium or controlled all of the people who created the defect.

The proposed law change is positive for councils, but more importantly it is positive for ratepayers. Rates are collected to fund local roads, water, parks, libraries, waste services and the many daily functions communities depend on. They should not be treated as an open-ended insurance premium for private construction risks. Both in principle and logically, the public balance sheet should not be the default last resort whenever a commercial participant has structured itself too thinly, failed to insure adequately, or left the market.

Nor is unlimited residual exposure costless. When a council knows that even a modest error may make it answerable for losses caused predominantly by others, institutional risk aversion is entirely predictable. The safest organisational response is to ask for another report, commission another peer review, carry out another inspection, impose another condition and defer sign-off until every conceivable concern is closed. Those extra cost and conditions are currently ultimately paid for by the home or building owner, whether or not they are either needed or wanted by those owners. The effect is that they may marginally protect the council's litigation position, but it can also duplicate work already undertaken by competent designers and builders. It consumes scarce inspector time, lengthens queues, raises professional and holding costs, delays occupation and encourages a compliance culture focused on protecting the defendant rather than enabling a safe building to be completed efficiently. For the developer and ultimately the home or building owner, the resultant cost is enormous. Currently, developers and building owners are being required to pay for risk averse Councils to such an extent that building or renovation work becomes cost prohibitive. This disproportionate council exposure creates

hesitation around consents and inspections, slows consenting and externalises defective-building costs onto ratepayers and onto the very home or building owners who pay once for the council's risk averse behaviour and later for the cost of enforcing against the council.

Proportionate liability should encourage a change in behaviour. It should allow a building consent authority to exercise sound professional judgement without acting as though every consent were an unlimited indemnity. The incentive becomes: inspect well, record decisions clearly and correct genuine non-compliance—not inspect repeatedly merely to defend against the insolvency of someone else, at some stage in the future. Faster and more targeted processes should follow, particularly when combined with greater consistency between authorities. The wider reform programme is expressly intended to speed development, reduce unnecessary costs and give homeowners, builders and councils greater certainty, while also making it easier for councils to share or combine building consent authority services.

What it means for builders and developers

For reputable builders, proportionate liability should mean two things. First, they should not be required to pay for defects outside their responsibility merely because another defendant cannot pay, has skipped the jurisdiction, or been liquidated. That is fairer and should make exposure more predictable. Secondly, their own workmanship, records and contractual allocation of responsibility will receive sharper attention, because each participant's contribution must be identified and valued.

Builders should therefore expect better documentation to become commercially essential: clear scopes, approved variations, product records, inspection photographs, subcontractor agreements, completion evidence and prompt notice of emerging defects. The question in litigation will increasingly be: precisely what did this party do, what should it have done, and what share of the damage followed?

The reform should also improve incentives around business structure and selection. Developers and head contractors will need to pay closer attention to the financial resilience and competence of those they engage. A bargain-priced contractor with no durable balance sheet may create a very expensive gap later. Tendering should consider not only price, but insurance, warranty eligibility, licensing, quality systems and the ability to stand behind the work.

The announced professional indemnity requirement will apply to designers such as architects and engineers, while mandatory home warranties will apply to qualifying residential work. That makes warranty eligibility and compliance a practical market discipline. Builders who cannot meet provider standards may find it harder to win projects, while firms with strong systems may gain a competitive advantage.

What it means for councils

Councils will remain liable for their own negligent acts or omissions. Proportionate liability is not immunity, and it must not become an excuse for weak inspection or poor decision-making. A building consent authority that materially contributes to a loss should pay its fair share.

But councils and therefore ratepayers should no longer be targeted simply because they are solvent. Their exposure should reflect the significance of their actual failure, not the happenstance that other parties have vanished. That creates a healthier relationship between public regulation and private responsibility. Inspection is a safeguard; it is not a promise that every aspect of private work is defect-free, and it should not displace the primary obligations of those who design and build.

It also removes the incentive for Councils to over regulate, to add unnecessary costs onto home and building owners. The current excuse for that sort of excessive behaviour will end.

For ratepayers, that is a material correction. It limits exposure to risks genuinely created by the council and reduces pressure for defensive consenting. It also makes council performance easier to assess: quality, timeliness and consistency can be improved without pretending the council is guaranteeing the commercial solvency and workmanship of an entire supply chain.

Councils will be more accountable for their own behaviour and will lose the excuse of wanting to protect the building or home-owner to the enormous expense of said victims.

What it means for designers, engineers and other professionals

Architects, engineers and other design consultants will face more explicit financial-responsibility requirements: the Bill proposes mandatory professional indemnity insurance for designers, strengthening accountability and helping ensure valid claims can be met. The detailed categories, minimum cover, duration and other requirements are to be prescribed, so the regulations will matter greatly.

This should strengthen assurance that design professionals can meet valid claims. It will also put pressure on firms to define scopes, exclusions and interfaces carefully. On complex projects, causation does not respect professional boundaries: design, specification, substitution, installation, inspection and maintenance may all interact. Well-integrated project governance will become more important, not less.

What it means for insurers and warranty providers

Insurers will become even more central to the building system. There will be new demand for professional indemnity cover and warranty capacity. The reform transfers some risk away from councils and solvent co-defendants, but the risk does not disappear. It must be priced, managed, retained or insured.

Underwriting is likely to become more discriminating. Insurers and warranty providers will look closely at builder history, design quality, product selection, quality assurance, subcontractor management and claims records. That scrutiny may impose costs, but it can also create a strong private-sector incentive for better practice. Firms that demonstrate competence and sound risk management should be easier to insure and more attractive to clients.

Government will need to watch capacity, exclusions, premiums and claims performance. Mandatory insurance is useful only if suitable cover is genuinely and competitively available and responds when expected. Long-tail building claims also raise questions about run-off cover, aggregation, retroactive dates and the survival of protection after a firm closes. These are not peripheral details; they determine whether the proposed safety net works.

What it means for homeowners

For homeowners, the reform brings both discipline and risk. A claimant may need to identify and pursue every materially responsible participant. If one is insolvent and no insurance or warranty responds, there may be an unrecovered share. Claims could involve more detailed evidence about responsibility and may require proceedings against several parties.

That is why the supporting protections are critical. The proposal requires home warranties for new houses, multi-unit residential buildings up to 10 metres, and renovations of $100,000 or more involving restricted building work and a consent. The minimum protection is expected to include a one-year defects period and a 10-year structural warranty.

The Government indicates that a warranty generally costs around half of one per cent of the build cost; for a $500,000 build, approximately $1,200 to $2,750 as a one-off payment. Warranty providers will need to register with MBIE, meet minimum standards, report regularly and publish clear product information.

This moves consumer protection towards a priced and regulated product rather than an implicit reliance on whoever has the deepest pocket. That is more transparent. Yet coverage must be understandable, claims handling must be effective, and exclusions must not hollow out the promise. Homeowners will need good disclosure before they sign, and advisers will need to explain what is covered, by whom, for how long and subject to what conditions.

What good implementation should look like

A sensible transition to 2028 should focus on five tasks. First, finalise regulations early enough for insurance and warranty markets to build capacity. Secondly, ensure cover is continuous and meaningful, including when firms retire or fail. Thirdly, make responsibility visible through clear contracts and auditable project records. Fourthly, strengthen information for homeowners so the new balance of risks is understood. Fifthly, monitor premiums, exclusions, claim outcomes, consent times and litigation costs after commencement.

How incentives and behaviour may change

The most important effect should be behavioural. Joint and several liability can blur responsibility. Currently, a developer may use a thinly capitalised project company; a contractor may assume the council's inspections provide a backstop; an owner may regard a code compliance certificate as a guarantee; and a claimant may rationally focus on the council rather than every actor who caused the loss. Proportionate liability changes those incentives because missing, uninsured or insolvent participants can leave a real gap.

For contractors, the change should sharpen the connection between workmanship and financial consequence. A contractor will be less able to regard the council inspection as the ultimate safety net, because the council will answer only for its own contribution and not automatically for the contractor's defective work. That should encourage better supervision of subcontractors, earlier correction of defects, disciplined use of approved products, clearer sign-off at critical stages and stronger records showing who performed each task. Contractors who can

demonstrate robust quality assurance, durable insurance arrangements and a good claims history should become more attractive to clients, lenders, warranty providers and insurers.

It may also alter subcontracting behaviour. Head contractors will have a stronger incentive to examine whether subcontractors are competent, licensed, insured and financially capable of meeting claims, rather than selecting solely on the lowest tender. Contract documents should define scopes and interfaces more precisely, require evidence of cover, preserve project records and provide mechanisms for prompt remedial work. That emphasis is consistent with MBIE's wider reform programme, which seeks to reset risk, responsibility and regulation while strengthening professional accountability.

That prospect should encourage developers to maintain stronger balance sheets, select competent contractors and demand credible insurance. It should encourage builders to improve supervision, records and defect prevention. It should encourage designers to define interfaces and carry suitable professional indemnity cover. It should encourage owners and lenders to check warranties before work starts. And it should encourage insurers and warranty providers to become active quality gatekeepers, rewarding firms with reliable systems and pricing poor practice accordingly. The Government's proposed supporting measures—mandatory home warranties, regulated warranty providers and compulsory professional indemnity insurance for relevant designers—are intended to protect homeowners while reinforcing accountability.

There is also a litigation effect. Claimants and their advisers will need to investigate the full chain of responsibility, rather than

treating the council as the obvious recovery target. Contracts, product evidence, site records and the continuing solvency of each participant will matter earlier. That should make risk more visible at the start of a project, when it can still be managed, rather than only after defects appear.

The transition also requires cultural change. Builders cannot assume the council's inspection replaces their own quality control. Designers cannot assume a contractor will correct an ambiguous detail. Developers cannot treat thinly capitalised project vehicles as costless. Owners cannot treat the consent as a comprehensive guarantee. Councils cannot retreat from competent regulation. Every participant must understand both its duty and its capacity to meet that duty.

There will be difficult questions. How will courts apportion overlapping causes? How will limitation periods and contribution claims operate in practice? Will smaller firms obtain affordable cover? Will warranty providers remain solvent through a downturn or a major cluster of claims? Will apartment and mixed-use owners receive adequate protection? These questions support careful scrutiny; they do not defeat the reform's core principle.

Experience in other jurisdictions

The contribution of Adjunct Professor Kim Lovegrove

It is appropriate to acknowledge the work of Adjunct Professor Kim Lovegrove, an experienced construction-law reformer who was retained by MBIE to advise on pathways from joint and several liability to proportionate liability and on the supporting insurance framework. His perspective combines direct involvement in the development of Australia's building-law

reforms—including the Victorian Building Act 1993—with decades of practice in construction disputes and insurance.

Professor Lovegrove has articulated the reform in admirably direct terms: proportionate liability is responsibility-based liability. If a party is assessed as 20 per cent responsible, it pays 20 per cent of the damages. He has been particularly clear that territorial authorities have too often been cast as insurers of last resort, carrying the liabilities of more culpable but insolvent participants, with the burden ultimately falling on ratepayers.

His work is valuable not simply because it supports the direction of reform, but because it brings practical warning from Australia. He has emphasised that the statutory text, the identification of concurrent wrongdoers, limitation settings and the relationship with insurance all determine whether proportionate liability works as intended. He has also cautioned that differences between Australian jurisdictions have produced unintended consequences and that New Zealand should use Australia's extensive case law to calibrate its model carefully.

That is an important contribution. The object is not merely to relieve councils. It is to create a coherent system in which responsibility, insurance, warranties and professional standards reinforce one another. Professor Lovegrove's analysis helps explain both the fairness of ending involuntary cross-subsidisation by councils and ratepayers, and the care required to ensure homeowners retain dependable pathways to recovery.

The Building Performance guidance says the new approach aligns New Zealand with practice followed in Australia. Australian jurisdictions use statutory proportionate-liability regimes for defined claims, although their legislation is not uniform and

questions of scope, contracting out, limitation periods and insurance differ. Victoria is a particularly relevant building-sector comparison: its Building Act provides a 10-year period for building actions running from the occupancy permit or certificate of final inspection.

The Australian experience offers two lessons. First, allocation rules work best when they are supported by credible insurance, durable records and clear limitation settings. Secondly, consistency matters: differing statutory exceptions and contractual rules can create satellite disputes about whether proportionate liability applies before the court even reaches the merits. New Zealand should take the principle from Australia without importing avoidable complexity.

Conclusion

The move to proportionate liability is a major redistribution of legal and financial risk. Builders, designers and developers will be more clearly responsible for the consequences of their own work. Insurers and warranty providers will play a larger role in converting that liability into reliable financial protection. Homeowners will need safeguards that are strong, simple and enforceable. Councils will remain accountable for their own failures, but they should no longer be required to pay for everyone else's. The should also no longer be able to excuse delays and mandated over-engineering on the excuse that they are the 'insurer of last resort'.

That last point deserves emphasis. It is neither fair nor efficient to make ratepayers the involuntary insurer of private building projects. Protecting homeowners is essential, but that protection should be designed openly through warranties, insurance, sound

contracts, competent practice and effective regulation—not achieved indirectly by searching for the last solvent defendant.

If the reform is implemented well, it can deliver a better balance: consumers protected by deliberate safeguards; professionals accountable for their own work; councils focused on timely and competent regulation; insurers rewarding sound risk management; and ratepayers protected from liabilities they did not create.

That is not a retreat from accountability. It is accountability made clearer, fairer and more sustainable. And as New Zealand prepares for the expected 2028 commencement, that should be the standard by which the final legislation and regulations are judged.