



Regulatory Impact Statement: Shift to Proportionate Liability for Building and Construction

Decision sought	Final decisions are sought from Cabinet to adopt a proportionate liability approach in the building and construction sector, and to direct officials to undertake policy work on support mechanisms to enable its effective implementation.
Agency responsible	Ministry of Business, Innovation and Employment
Proposing Ministers	Building and Construction
Date finalised	16 July 2025

Amend the *Building Act 2004* to change liability settings for the building and construction sector from the current joint and several liability to proportionate liability, and seek Cabinet direction for officials to develop options for supporting mechanisms that will ensure building owners have access to tools they need to protect themselves.

Summary: Problem definition and options

What is the policy problem?

New Zealand's current joint and several liability rule for determining who pays for damages during building defect claims is misaligned with the sector's evolving needs and risks. It allows plaintiffs to recover full damages from any one liable party, regardless of their actual contribution to the harm. This has led to solvent parties – commonly building consent authorities (BCAs) and large developers with 'deep pockets' – being disproportionately burdened with liability when other responsible parties are insolvent, absent, or have engaged in phoenixing.

Joint and several liability is undermining sector-wide accountability. It enables some practitioners to avoid responsibility, weakens incentives for building projects to be done right the first time, and contributes to prolonged litigation. The result is a system that discourages responsible behaviour and imposes costs not only on BCAs and ratepayers, but also on homeowners, insurers, and the wider building sector.

Various stakeholders, including insurers, homeowner groups, industry bodies, and BCAs have expressed concern that the current liability rule is no longer fit for purpose. There is strong support for reform that better aligns liability with actual fault and promotes a culture of fairness and responsibility.

Underlying indicators of market failure present under the status quo include:

- Unfair distribution of liability across defendants following liquidation of other parties.
- Poor accountability for completed building projects.

- Perverse incentives favouring litigation to capture ‘deep pocket’ parties.
- Disproportionate and long-running costs for BCAs and their ratepayer communities.

An amendment of the *Building Act 2004* is required because joint and several liability has been embedded in common law and cannot be changed through voluntary or market-led mechanisms.

What is the policy objective?

The following objectives are sought to address the liability issues arising from the current joint and several settings for building defect claims:

1. Accountability: encourage better risk management and quality assurance
2. Fairness: Align liability with actual fault or contribution
3. Efficiency: Reduce litigation and ratepayer burden.

Criteria for options analysis are:

1. Effectiveness – the extent to which the option will achieve the policy objectives.
2. Equity – fairness in the distribution of the option’s costs, benefits and risks across impacted parties.
3. Efficiency – overall cost of the option to those in the building system, including litigation, insurance and administration, and whether the expected outcomes are proportionate to the costs.

Further analysis on support mechanisms is planned:

Cabinet is being asked to direct MBIE officials to undertake further work on support mechanisms that would be introduced alongside the preferred option. These support mechanisms are excluded from the scope of this RIS, but these will be considered in a second regulatory impact analysis later in 2025.

What policy options have been considered, including any alternatives to regulation?

Three options were assessed:

1. **Status Quo (Joint and Several Liability)**
 - Maintains current settings.
 - Ensures full compensation for plaintiffs but perpetuates unfair cost allocation and weak accountability.
2. **Proportionate Liability (Preferred Option)**
 - Each party pays only their share of the damage.
 - Improves sector responsibility and fairness for defendants but would require support mechanisms to protect homeowners from gaps in redress.
3. **Capped Liability for BCAs**
 - Retains joint and several liability but limits BCA exposure.
 - Offers partial relief but does not address broader sector behaviour or systemic accountability.

Non-regulatory options were ruled out due to their inability to address the legal structure of liability allocation. Analysis of hybrid options was discounted given these are broadly versions of proportionate or capped liability rules, with some imposed limitations.

What consultation has been undertaken?

Targeted consultation has taken place, including:

- Engagement with Australian state and federal officials and sector experts, to understand their transition to proportionate liability.
- Meetings with BCAs, insurers, homeowner groups, warranty providers and industry bodies.
- A national Liability Roundtable attended by key sector stakeholders, major BCAs, legal experts and insurers.

Stakeholders expressed a broad appetite for changes to liability settings, and near unanimous support should a change in liability include supporting mechanisms, such as requirements for home warranty cover. There is agreement amongst stakeholders that proportionate liability should be introduced in tandem with supporting mechanisms, not in isolation or stages.

Is the preferred option in the Cabinet paper the same as preferred option in the RIS?

Yes. Both the Cabinet paper and the RIS recommend Option 2: Proportionate Liability as the preferred approach.

Summary: Minister's preferred option in the Cabinet paper

Costs (Core information)

While no monetised data is available, several non-monetised costs associated with transitioning to a proportionate liability have been identified:

- Regulated parties (eg BCAs, practitioners, developers):
 - One-off adjustment costs as parties adapt to new liability settings.
 - Legal and compliance costs may arise during the transition period, particularly as parties test the boundaries of fault-based allocation.
 - Regarding the insurance market, some parties may face increased premiums or reduced coverage until the market stabilises under the new regime.
- Homeowners/claimants:
 - Risk of partial compensation if one or more liable parties are insolvent, absent or have phoenixed.
 - Confidential advice to Government [REDACTED]
 - While aggregate impacts over the longer term are currently unclear, MBIE will continue to develop this knowledge during the implementation period.
- MBIE:
 - Legislative and policy development costs.
 - Minor implementation costs associated with information and education, including a public awareness campaign utilising existing engagement channels.
 - Potential future costs associated with support mechanisms.

There are potential impacts on competition from the shift to proportionate liability. This preferred option will incentivise building owners – including residential homeowners – to take greater responsibility in undertaking due diligence when selecting firms and practitioners to undertake building projects. This will reward firms that perform well by

being accountable for their building work.

Benefits (Core information)

MBIE has identified the following benefits of adopting proportionate liability:

- Fairer allocation of liability: Each party pays only their share of fault, reducing cross-subsidisation by 'deep pocket' parties.
- Improved sector accountability: Practitioners are incentivised to deliver quality work and maintain solvency.
- Reduced litigation and legal costs: Less incentive for plaintiffs to pursue 'deep pocket' defendants.
- Insurance market stability: Greater predictability may support broader coverage and lower premiums over time.
- Ratepayer relief: Lower likelihood of councils absorbing large payouts, reducing pressure on local rates.

Balance of benefits and costs (Core information)

While MBIE has been unable to quantify costs and benefits of the proposal, the RIS indicates that the benefits of the Minister's preferred option (proportionate liability) are likely to outweigh the costs.

Improved fairness, accountability, efficiency and insurance stability are expected to deliver longer term benefits for the building and construction sector and building owners, through a more efficient building regulatory system.

This is balanced against the key risk associated with the proposal, which is that there will be coverage gaps for building owners in the event of responsible party insolvency. While the change will also incentivise building practitioners to take accountability for their work and homeowners to take greater responsibility for due diligence, MBIE's assessment is that this risk can be mitigated to some extent through existing consumer protections (such as commercial building warranties) but would be further mitigated through a broader range of support mechanisms. These support mechanisms, including any associated costs and benefits, are intended to be assessed in a separate RIS prior to consideration by Cabinet later in 2025.

Implementation

There is an opportunity for liability reform to occur alongside wider ongoing reforms of the building regulatory system, given the proposed shift to proportionate liability will require legislative amendment to the *Building Act 2004*. MBIE will lead the implementation process, which will involve work to introduce a legislative vehicle shared Confidential advice to Government

Should Cabinet agree, Confidential advice to Government officials will also undertake detailed design of supporting mechanisms, such as Confidential advice to Government home warranty requirements. This work will be returned to Cabinet in 2025.

To ensure adequate time and education of the rule change, MBIE expects a two-year implementation timeframe, which will include development and rollout of supporting mechanisms, subject to approval by Cabinet. MBIE will continue to engage with stakeholders during the process of detailed development of support mechanisms.

Limitations and Constraints on Analysis

MBIE has been unable to source quantitative data to support monetised impact estimates for the proposed shift to proportionate liability. Economic analysis did not yield usable data, and there is limited information available on the volume of defect claims or the scope of insurance coverage across the sector because of the prevalence of out of court settlements and confidentiality requirements. Existing home build schemes are predominantly warranties where defects are often repaired rather than financially settled, making claims

volumes difficult to quantify. Private entities are also under no obligation to share their own financial information with MBIE.

The scope of this RIS has been constrained by the limited timeframes set for developing this policy. As a result, the analysis relies primarily on legal principles and comparative experience from international jurisdictions rather than empirical modelling or domestic data.

To mitigate these limitations, MBIE undertook extensive targeted stakeholder consultation, which revealed near unanimous support for proportionate liability as the preferred option. This qualitative evidence has been supplemented by comparative analysis of Australian states, where similar reforms have been successfully implemented.

Subject to Cabinet approval, MBIE will prepare a subsequent RIS focused on the design and implementation of supporting mechanisms such as ^{Confidential advice to} home warranty cover and ^{Confidential advice to Government} This will ensure that remaining ce gaps are addressed later in

I have read the Regulatory Impact Statement and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the preferred option.

**Responsible Manager(s)
signature:**



**Fiona Hill
Manager - System and
Markets Policy (Acting)
16 July 2025**

Quality Assurance Statement

Reviewing Agency: MBIE and the
Ministry for Regulation

QA rating: Partially meets

Panel Comment:

A Quality Assurance Panel from MBIE and the Ministry for Regulation has reviewed the Regulatory Impact Statement (RIS) prepared by the Ministry of Business, Innovation and Employment titled *Shift to Proportionate Liability for Building and Construction* on 30 July 2025.

The Panel consider that the information and impact analysis summarised in the RIS **partially meets** the Quality Assurance criteria.

This rating reflects the limited information that is available to guide decision makers, such as the evidence to support the expected consumer behaviour change. For context, the Panel notes that successful outcomes are also dependent on other changes that are the subject of future Cabinet decisions.

Careful monitoring and evaluation is recommended to assess the impact of this change alongside broader building system changes.

--

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

1. Common law is the body of law developed by judges through court decisions rather than legislation. It forms the foundation of New Zealand's legal system and includes tort law, which deals with civil wrongs that cause harm or loss.
2. The accountability of tortfeasors (wrongdoers) in New Zealand is underpinned by the "joint and several" liability rule, which is used to determine the liability of multiple parties and how costs are allocated among them. In the context of building defects, tort law—particularly negligence—has been used to hold parties like builders, developers, and councils liable when construction work fails to meet the Building Code and causes loss to property owners.

The joint and several liability rule is inefficient and promotes perverse incentives.

3. If a building is found to be defective, and the council, the builder and the developer are all found liable for the entirety of the cost to repair the house, this rule allows the owner of the defective building to seek the full amount of compensation from any one of the defendant responsible parties, or from all of them together, even when their role might have been minor.
4. If a responsible party, such a designer or product manufacturer, is unable to pay due to being absent or insolvent then the remaining parties must cover the unpaid amount, even if it exceeds their share of responsibility for the defective building work.
5. The joint and several rule has raised concerns among the building sector about accountability, fairness, and efficiency. This has led to calls for reform, including requests for Government to consider shifting to a proportionate liability regime (where each party pays only their share of fault), capping council liability, or enhancing other forms of support available in the event of building failure.

The Law Commission reviewed liability rules in 1998

6. The New Zealand Law Commission (the Commission) reviewed the joint and several liability rule on two occasions, in 1998 and in 2014. The Commission also considered potential alternatives, such as proportionate liability and capped liability.
7. In its 1998 review the Commission considered whether joint and several should be replaced with a proportionate liability regime, under which each party would only be responsible for their share of the damage. It concluded that joint and several liability should be retained.
8. The Commission considered that joint and several liability was especially beneficial because it ensured full compensation for plaintiffs (commonly homeowners in construction cases). In contrast, the Commission viewed

alternatives such as proportionate liability as unjust, given the risk of redress going unrecovered in the event of insolvency or absence due to remaining defendants only paying for their own share of responsibility.

9. Despite prioritising plaintiff redress, the 1998 review did acknowledge concerns about fairness to defendants. The Commission recognised that joint and several liability was particularly problematic for parties with 'deep pockets', such as professional firms and BCAs.
10. While the Commission was opposed to liability reform and favoured retaining the existing system in 1998, it did consider that alternative options may become viable in future.

A second Law Commission review was undertaken in 2014, as the sector faced the consequences of the leaky building crisis

11. Weathertightness issues arising from building defects were prominent in the late 1990s and 2000s, affecting 42,000 buildings and costing the New Zealand economy \$11.3 billion.¹ This 'leaky building' crisis once again saw concerns around fairness for defendants under joint and several liability, particularly for 'deep pocket' parties.
12. The Government asked the Commission to revisit the joint and several liability rule in 2014, prompted by the need to review how the rule had performed through the weathertightness issues.
13. The 2014 review once again recommended retaining joint and several liability, primarily due to the Law Commission's strong view that plaintiffs should not be left uncompensated through no fault of their own. This prioritisation of compensation for owners of defective buildings was particularly relevant at that time due to recent experiences of the leaky building crisis, where homeowners often faced difficulties securing redress due to the insolvency or absence of other responsible parties.
14. However, the Commission's view had softened since 1998, and the review took a more nuanced approach. They recognised the role councils were playing was essentially a last resort insurer for homeowners when other parties could not pay and that this was not fair or efficient, especially for ratepayers.
15. The Commission's 2014 report recommended capping the liability of BCAs and that the Government should investigate development of a comprehensive residential building guarantee scheme.

How the case for liability change has evolved over time

16. Since the 1998 and 2014 Law Commission reviews were published, more reasons to support a change in the way liability is apportioned have emerged. These include that:
 - a. liability risk has increased as the reach of duty of care for BCAs has expanded and the proportion of higher complexity building work has increased (eg townhouses, multi-unit developments, high-rise apartments)

¹ *Weathertightness - Estimating the Cost*, 2009 PricewaterhouseCoopers report
<https://www.interest.co.nz/sites/default/files/PWC-leaky%20homes%20report.pdf>

- b. while the Law Commission prioritised the objective of fulfilling compensation for homeowners, there is growing recognition in the sector that this has created perverse incentives where poor behaviour is indirectly subsidised by deep pocket parties
 - c. a wide range of sector participants have expressed growing support for a shift towards alternative liability settings, due to perceived benefits in insurance and accountability.
17. There are also clear signs that most leaking building claims have worked their way through the system,² providing an opportunity to reconsider liability rules that will meet current and future challenges facing the sector.

Joint and several liability has continued to negatively affect the building sector

18. While there is growing evidence of the need for change, the ongoing disproportionate burden of joint and several liability has particularly been evident. This is commonly found in building defect cases where multiple parties are found liable, but only one or two remain solvent.
19. MBIE is aware that some parties may undertake strategic company structuring in order to ringfence liability from past work. While some instances of company closure may be illegal as phoenix activity, it is possible to close companies voluntarily at the end of specific projects. This benefits the company shareholders by limiting ongoing exposure to potential building defect claims amongst other benefits.
20. An example of strategic liquidation occurred during litigation over the Gore Street Apartments in Auckland³, where entities linked to several of the 15 named defendants continued operating even though the parties responsible had already entered liquidation.
21. BCAs, which are required by law to continue performing statutory consenting functions under the *Building Act 2004*, are most likely to be the last solvent party remaining when liability is allocated. This has led to BCAs being treated as ‘insurers of last resort’, a role the Law Commission has noted was unlikely to be fair or efficient.
22. In practice, this means that when designers, builders, or other practitioners are insolvent or otherwise unable or unwilling to meet their share of liability, BCAs are left to cover the full cost of the damage. This imposes a long-running and disproportionate financial burden on local government and ratepayers, with plaintiffs incentivised to seek all of the sum from BCAs given that they are in effect a ‘guaranteed payer’.

Limited data indicates councils and ratepayers are bearing disproportionate costs

² Indicated by the number of litigation cases involving building consent authorities declining since 2012 and 2022, when MBIE published the *Risk, Liability and Insurance in the Building Sector* policy position statement, and around 30 remaining weathertightness claims with MBIE (down from 446 in 2020).

³ Body Corporate 366567 v Auckland Council [2024]

23. There is limited data available on the scale of the liability damages which are transferred to BCAs and other deep pocketed entities under joint and several liability. This is commonly due to confidentiality clauses in settlements and a lack of centralised reporting.
24. A 2018 report undertaken by Sapere⁴ provides the best available estimate at a national level, with an estimate that absent parties may be resulting in additional costs of 170% for BCAs. The report further quantified this disproportionate cost transferred to BCAs as approximately \$332 million for the 2008 – 2018 period.
25. For example, 2015 litigation⁵ regarding defects with the 12-storey Nautilus apartment building saw Auckland Council and another defendant as the last remaining solvent responsible parties out of six defendants captured by the claim. While the court allocated 20 per cent of responsibility for the defects to Auckland Council, the Council ultimately paid approximately 95% of the \$24 million redress⁶ due to the limited financial capability of the remaining defendant.
26. There are strong indications that this problem has continued in recent years, including regions with lower ratepayer bases. Media reports emerged in 2022 that Queenstown Lakes District Council were facing \$162.9 million in a single property with substantial fire safety, structural and weathertightness defects, which would result in a 9.6% rates increase (\$305 per property annually for 30 years).⁷
27. This disproportionate financial risk to BCAs is currently being mitigated by council insurance policies, where such policies are available, and risk aversion in assessment of building consent applications and inspection of building work to ensure it meets the Building Code.
28. Current liability settings also discourage collaboration and resource sharing among BCAs, as liability must be clearly assigned – often to a single authority. Without clear legal protections or frameworks, BCAs are cautious about entering shared arrangements, knowing they could be held solely responsible for issues arising from joint work, even if their role was minor.
29. This creates a high-risk environment and limits incentives for consolidation. As a result, each BCA operates independently to manage its own risk, contributing to a fragmented system of 68 BCAs, each administering the consenting process under varying risk profiles.
30. If left unaddressed, the status quo is expected to result in continued unfairness for defendants and financial exposure for responsible parties with ‘deep pockets’, and prolonged litigation. Without intervention, the liability settings will continue to undermine the fairness, efficiency and responsibility of the building and construction sector.

What is the policy problem or opportunity?

⁴ *Liability outcomes in the building sector - glimpses from available data*

<https://www.mbie.govt.nz/dmsdocument/4960-liability-outcomes-in-building-sector>

⁵ *Body Corporate 326421 v Auckland Council [2015]*

⁶ <https://www.stuff.co.nz/business/industries/68953499/auckland-council-to-pay-nearly-24m-in-nautilus-leaky-building-case>

⁷ <https://www.odt.co.nz/regions/queenstown/ratepayers-taking-hit-over-leaky-resort-fix>

Problem definition

31. The current liability rule, joint and several liability, allows plaintiffs to recover full damages from any liable party, regardless of their actual contribution to the loss.
32. In building defect cases, this can result in BCAs being held financially responsible for a disproportionate share of remediation costs when other parties (eg developers, designers, contractors) are insolvent, absent, or have phoenixed.
33. A range of issues that are expected to persist or worsen under the status quo have been identified on the following table.

Table one: Stakeholders and impacted populations under joint and several liability (status quo)

Group	Impact under joint and several liability
BCAs and ratepayers	<p>Face disproportionate liability exposure due to their continued solvency and statutory role.</p> <p>Are incentivised to adopt risk-averse practices to avoid future liability claims, which can delay consenting, increase costs and stifle innovation.</p> <p>Face costs from litigation, payment of settlements, rates increases and liability insurance (if available).</p>
Owners of defective buildings	<p>Benefit from increased likelihood of full compensation, even if some defendants are insolvent.</p> <p>Are incentivised to undertake litigation proceedings with the aim of capturing ‘deep pocket’ responsible parties.</p>
Practitioners⁸ and product manufacturers	<p>May avoid full liability through insolvency or phoenixing. Lack of accountability can undermine building quality and sector integrity.</p>

What objectives are sought in relation to the policy problem?

34. The following objectives are sought to address the liability issues arising from the current joint and several settings for building defect claims:
- i. Accountability: encourage better risk management and quality assurance
 - ii. Fairness: Align liability with actual fault or contribution
 - iii. Efficiency: Reduce litigation and ratepayer burden

Trade-offs and considerations

35. Some of these objectives may involve trade-offs. For example, improving fairness by reducing the financial risk for BCAs may limit the ability of plaintiffs to recover the full cost of remediation when other liable parties are absent or unable. Given the current balance of fairness resting firmly with plaintiffs under the design of joint and several liability, potential alternative options (proportionate or capped liability) would shift some risk back onto claimants, particularly in cases where no alternative redress mechanism is in place.
36. Where there is conflict between objectives, such as the additional risk to plaintiffs outlined above, this may be resolved with consideration of

⁸ Practitioners impacted by current liability rules include builders, contractors, designers, engineers, etc.

supporting mechanisms. While this analysis is currently restricted to options surrounding potential changes to the liability rule, there is clear evidence from consultation that any change in approach would be expected to stand alongside specific mechanisms to protect homeowners such as home warranties *Confidential advice to Government* These are acknowledged following the options analysis in this paper and will be considered further if Cabinet agrees to direct officials to undertake work to investigate and design these supporting mechanisms.

37. Trade-offs will be explored in the options analysis, with a focus on identifying a balanced approach that delivers net benefits for the criteria used to assess each option.

What consultation has been undertaken?

Consultation with Australian building and construction participants

38. In September 2024, MBIE officials met with Australian experts and regulators to gather insights on Australia's building regulatory systems, including their liability rule changes in the early 1990s and early 2000s.
39. Professor Kim Lovegrove, adjunct Professor at the University of Western Sydney and at the University of Canberra, was closely involved in Australia's move to proportionate liability. He is the Inaugural Board Chair of the International Building Quality Centre (IBQC) and Senior Construction Lawyer at Lovegrove & Cotton Lawyers. He has over 30 years' experience in international construction law and building regulation.
40. Professor Lovegrove facilitated meetings between MBIE officials and a wide range of participants in the Australian building and construction system, including:
- Commonwealth officials involved in federal building policy.
 - State building officials, responsible for administering and developing building regulatory regimes in the Australian Capital Territory, Victoria and New South Wales.
 - State building insurance providers.
 - Building surveyors/private building certifiers.
 - Building industry membership organisations.

Key themes from Australian states and territories regarding liability and insurance

41. The Australian Capital Territory, New South Wales and Victoria support proportionate liability and see it working within a system that has a range of other accountability features. This includes:
- Mandatory home warranty insurance, covering defects, loss of deposit and non-completion.
 - Mandatory professional indemnity insurance requirements for builders and building surveyors.
 - Comprehensive occupational registration and licensing and continuing professional development.
 - Strong disputes resolution and mediation processes.

42. Most states and territories run last-resort insurance schemes, with the insurer only paying out if the builder is insolvent, dead or has disappeared. The remediation process can take a long time (eg two plus years) for homeowners to get defects fixed under a last resort scheme.
43. In contrast, Queensland has a first-resort scheme where the Queensland Building and Construction Commission (QBCC) pays out up front and then chases the liable parties for compensation. In June 2025, Victoria passed legislation that reforms their building regulatory landscape, including changes to their home warranty insurance regime that aligns with Queensland's approach.
44. In February 2025, MBIE officials held targeted conversations with the QBCC, who operate Queensland's home warranty scheme and Victoria's Department of Treasury and Finance, who drove the recent changes to Victoria's home warranty scheme to better understand how home warranty insurance operates as a supporting mechanism for proportionate liability.

Targeted engagement with key New Zealand building and construction participants

45. MBIE has undertaken targeted consultation on reform of liability settings and related support mechanisms. Officials met with a range of participants in New Zealand including:
- The Insurance Council's Liability and Regulatory Committees – these include representatives from the major international insurers.
 - HOBANZ (Home Owners and Buyers Association of NZ).
 - Home warranty providers – including Registered Master Builders Association (RMBA), Certified Builders (Halo), Stamford and BuiltIn (who currently offer loss of deposit and non-completion cover rather than defects cover, as well as email consultation with Signature Homes and Classic Builders.
 - Insurance companies – QBE Insurance and Berkshire Hathaway Specialty Insurance.
 - Peak industry bodies – including Architectural Designers NZ and Engineering NZ.
 - MBIE's Building Advisory Panel (BAP).
 - BCAs and local authorities, including Auckland City Council, Christchurch City Council, Dunedin City Council, Hamilton City Council, Queenstown Lakes District Council, Tauranga City Council and Wellington City Council.

Liability Roundtable

46. In April 2025, MBIE hosted a Liability Roundtable attended by key stakeholders from the building and construction, insurance and legal sectors as well as experts from Australia. The Roundtable was facilitated by Professor Lovegrove, leveraging his extensive experience, expertise and network reach.
47. Professor Lovegrove provided an overview of options for liability reform:

- maintaining the status quo,
 - introducing caps on liability; and
 - moving to proportionate liability.
48. Professor Lovegrove also outlined complementary support mechanisms, such as home warranty schemes aimed at protecting building owners and improving sector-wide risk management.
49. The Roundtable included speeches on the Victorian experience by a senior construction lawyer about how proportionate liability works in practice and by a Judge of the County Court of Victoria on a Judge's view of proportionate liability legislation.
50. There was broad appetite for changes to liability settings, and near unanimous support should a change in liability include supporting mechanisms, such as requirements for home warranty cover. There was consensus amongst the participants that proportionate liability should be introduced in tandem with supporting mechanisms – not in isolation or stages.

Public consultation

51. In addition to the targeted consultation undertaken, public consultation for the liability rule change will occur during the select committee process.
52. Previous public consultation on risk and liability in the context of building system reforms took place in 2019, receiving mixed feedback. Several key stakeholders asserted that wider reforms would be limited in effectiveness unless liability settings for building and construction were changed.

Section 2: Assessing options to address the policy problem

What criteria will be used to compare options to the status quo?

53. These criteria reflect the key objectives identified in response to the policy problem and are designed to ensure a balanced and transparent comparison:

Table Two: Criteria for options analysis

Criterion	Description
Effectiveness	Assesses the extent to which the option will achieve the policy objectives, particularly the extent to which the option will drive better accountability and quality assurance.
Equity	Assesses fairness in the distribution of the option's costs, benefits and risks across impacted parties.
Efficiency	Considers the overall cost to the building system, including litigation, insurance and administration, and whether the expected outcomes are proportionate to the costs.

What scope will options be considered within?

54. Initial high-level options for support mechanisms, such as an ^{Confidential advice to C} requirement for home warranty products and ^{Confidential advice to Government} are alluded to within this paper. MBIE intends to seek ^{Confidential advice to Government} Cabinet agreement to direct officials to undertake detailed design on these concepts.
55. For this reason, options and cost-benefit analysis below does not assume that support mechanisms are included. The analysis reflects the rule change only. There would be an opportunity to undertake regulatory impact analysis of these potential support mechanisms when resulting recommendations are returned to Cabinet in the fourth quarter of 2025.
56. There will also be an opportunity to consider whether larger interventions, ^{Confidential advice to Government} are necessary prior to any proposed changes taking effect in approximately two years.

Discounted options

57. As these proposals relate to a rule change rather than a policy intervention or programme, there is a limited range of options to consider outside of the joint and several and proportionate liability rules, which serve as opposite ends of the liability spectrum. Within those opposite ends there are hybrids and variants.
58. In North America, liability rules vary among Canadian provinces and American states – each with their own economy-wide rules and a general focus on personal injury (e.g. motor vehicle accidents) and how much a plaintiff can recover based on their percentage of fault (contributory or comparative negligence)⁹.
59. While Canadian and American jurisdictions have roots in English common law, they have both developed independently and share less in common with New Zealand legal frameworks than Australia. For example, Canada's legal system is based on a combination of English common law and French civil law systems. The Australian liability regime shares a closer jurisprudential lineage with British-based legal systems and offers more instructive and relevant insights for New Zealand policymakers seeking to pursue balanced and effective reform.
60. The New Zealand Law Commission have also previously considered hybrid approaches; however, these often reflect broadly the same options as proportionate or capped liability rules, with some imposed limitations. These hybrids tend to operate within the same conceptual boundaries, offering nuanced variations rather than substantive alternatives, so are assessed here as distinct options rather than hybrid.

⁹ Under contributory negligence, a plaintiff's own negligence may prevent them from recovering any damages. This approach is contrasted by comparative negligence, in which a plaintiff can recover damages even if they are partially at fault and has its own variants of 'modified' comparative (bars the plaintiff from recovering if their fault exceeds a specified threshold, such as 51%) and 'pure' comparative (allows the plaintiff to recover even if their fault exceeds the threshold).

61. For these reasons, the clarity of Australia's proportionate liability settings and the New Zealand Law Commission's capped liability approach are more suitable for the New Zealand context.

What options are being considered?

62. Three options have been considered to address the liability challenges facing the building and construction sector.

Option One - Status Quo / Joint and Several Liability

63. This is the current common law framework. Where multiple parties are found liable, any one party can be required to pay the full amount of damages. If one or more parties are insolvent or unavailable, the remaining parties must cover the full loss.
64. This approach prioritises full compensation for claimants but can result in disproportionate financial risk for remaining solvent parties, usually BCAs and major developers.

Option Two - Proportionate Liability

65. Each liable party is allocated a share of the total loss. Liable parties are responsible only for the portion of the loss corresponding to their share of fault.
66. If a liable party is unable to pay (eg due to insolvency), the unpaid portion is not recoverable from other parties. This approach aligns liability with actual responsibility but may reduce the likelihood of full compensation for building owners.

Option Three - Capped Liability

67. Retains joint and several liability while introducing a statutory cap on the total liability of BCAs to limit their financial exposure in building defect claims. The cap would act as a backstop to prevent excessive penalties where BCAs are the only remaining solvent party.
68. While this may reduce fiscal risk for councils and ratepayers, it may not address broader accountability concerns or significantly alter behaviour among other sector participants given these will continue to be determined in accordance with joint and several liability.
69. As a result of wider sector behaviour remaining unaddressed, this option is unlikely to alter insurance trends or promote greater responsibility for participants as significantly as Option 1.

How do the options compare to the status quo/counterfactual?

70. The three potential options have been assessed against the five selected criteria reflecting the policy objectives, shown in the multi criteria analysis table below. The qualitative scoring is summarised below.

Key

Symbol	++	+	0	-	--
Meanin	Much better	Better than	The same	Worse than	Much worse

g	than the status quo	the status quo	as the status quo	the status quo	than the status quo
---	---------------------	----------------	-------------------	----------------	---------------------

Table Three: Options Analysis

	Option One - Joint and Several Liability (Status Quo)	Option Two - Proportional Liability	Option Three - Capped Liability for BCAs
Effectiveness	0	+ +	+
Equity	0	+ +	+
Efficiency	0	+	+
Overall assessment	Neutral	+5	+3

Evaluation

Option One – Status Quo (Joint and Several Liability)

71. Joint and several liability is resulting in unfair outcomes, particularly for BCAs, who may be held liable for disproportionate costs of defects despite limited fault. This is directly passing unavoidable costs to ratepayers. Other options, such as proportional or capped liability, would deliver more equitable outcomes.
72. Joint and several liability is currently ensuring that homeowners are likely to receive full compensation, even if some parties are insolvent. This is a key strength of the status quo, as the capped and proportional liability options create a gap in coverage should a liable party lose solvency.
73. Both alternative options under consideration would ensure greater accountability than the current joint and several liability rule.
74. The current liability rule is resulting in high litigation and insurance costs for all parties, especially BCAs. Risk aversion by BCAs is also contributing to potentially costly consent processing delays due to excessive scrutiny.
75. The status quo is well understood and embedded in current legal practice; however key objectives for current building system reforms would remain unaddressed. Retaining the joint and several rule will not deliver on objectives such as encouraging better risk management and quality assurance by sector participants (accountability), aligning responsibility for damages with actual fault (fairness), or contributing to efficient resolution of litigation action.

Option Two – Proportionate Liability

76. Proportionate liability significantly improves fairness by ensuring each party is only liable for the portion of harm they caused. It removes the disproportionate and involuntary burden currently placed on 'deep pocket' solvent parties, particularly BCAs.
77. Despite this improvement in fairness at a system level, there would be a gap in coverage created under a proportionate liability system when liable parties are absent, exposing claimants to the risk of not receiving full compensation. Supporting mechanisms – such as home warranties and Confidential advice to Government would be needed to mitigate this risk to building owners (outlined by section 3 of RIS).
78. As building owners become better educated on risk and the market responds through improved due diligence and insurance coverage, this risk would be further mitigated.
79. Proportionate liability also strengthens incentives for building practitioners and product manufacturers to behave responsibly, as homeowners, better informed by due diligence, will adapt by avoiding parties that have poor records as 'cowboys'. Companies must stand by their products, and ensure that construction projects have good outcomes, or lose out on future contracts to competitors.
80. While there may be some initial costs as market participants adapt to the proportionate liability settings, the long-term benefits include reduced risk of costly litigation and more certain allocation of liability. Greater certainty may support the offerings of the insurance market, particularly for BCAs.
81. Given liability is determined by the courts, there should be no change to the accessibility of justice compared to the status quo. Liable parties will be assigned responsibility in the same manner as the status quo, with the exception of there being no transfer of liability from absent parties. Assuming awareness and a greater uptake of measures to manage their risk exposure, such as home building guarantees or insurance products, homeowners may be better placed to navigate building disputes than under the status quo.
82. Implementation would require legislative change and education through a communications campaign. While excluded from the scope of this RIS, policy work to enable development of any future supporting mechanisms (eg Confidential advice to Government warranty schemes) may occur subject to Cabinet agreement.

Option Three – Capped Liability for BCAs

What is a liability cap?

83. This option consists of a modified joint and several liability rule with a statutory liability cap introduced for certain participants. A liability cap is not a third option that stands alone from the existing liability regime. Rather, a cap is introduced on top of the joint and several or proportionate liability regime and would only apply to specific situations.
84. There are two sub options when considering capped liability including:
 - a. Cap for BCAs.
 - b. Cap as part of a professional or industry group standards scheme.

Capping BCAs

85. Capping the liability of BCAs at 20 per cent was the model previously considered by MBIE in 2017 following the 2014 Law Commission review. This model was designed by the Law Commission and further developed by MBIE with a focus on addressing the impact of liability on BCAs/councils as the 'deep pocket' defendant.
86. The proposal set the cap at 20 per cent for BCAs due to it being broadly consistent with decisions made by New Zealand's courts following claims resulting from the 'leaky homes' crisis. Given time has passed since this proposal was first considered, further assessment would be required to determine an updated percentage for a liability cap.
87. The reasons for treating councils differently from other types of defendants included the fact that councils do not voluntarily participate in profit-driven markets, cannot opt out of delivering essential services and face limited options for insuring against potential liabilities.

Capping for professional or industry groups

88. In Australia, capped liability was introduced alongside proportionate liability for professionally regulated groups including surveyors, engineers and building consultants. It was introduced in response to challenges in access to, and affordability of, professional indemnity insurance for these industry groups following the collapse of the HIH Insurance Group.
89. During our consultation with industry and insurance groups, we heard that some professionals have taken steps to limit their exposure to liability through contract clauses and professional indemnity insurance limits. For this reason, consideration of introducing a liability cap is limited to BCAs only.

Would capped liability improve equity, efficiency, and cost-effectiveness for sector participants?

90. Capped liability reduces the financial liability risk for BCAs and addresses one component of the 'deep pocket' problem while still providing some protection for the consumer. However, the introduction of caps does not address the broader imbalance in how liability is distributed to other 'deep pocket' parties such as major developers.
91. A gap in coverage is also created where compensation owed to claimants exceeds the chosen liability cap, leaving building owners short of their entitled redress. In a High Court Case brought by Health New Zealand – Te Whatu Ora against Masterton District Council, the Council was found 100 per cent negligent for damages claimed to be upwards of \$90 million¹⁰. Under a proposed capped liability regime, the claimant would be unable be compensated for 80 per cent of those costs.
92. Supporting mechanisms similar to those considered necessary to implement option two (proportionate liability), such as home warranties **Confidential advice to Government** would similarly be needed under capped liability. This creates complexity and administrative burden for an option that only partially addresses the policy problem.

¹⁰ <https://www.1news.co.nz/2025/02/10/hospital-settlement-where-has-our-money-gone/>

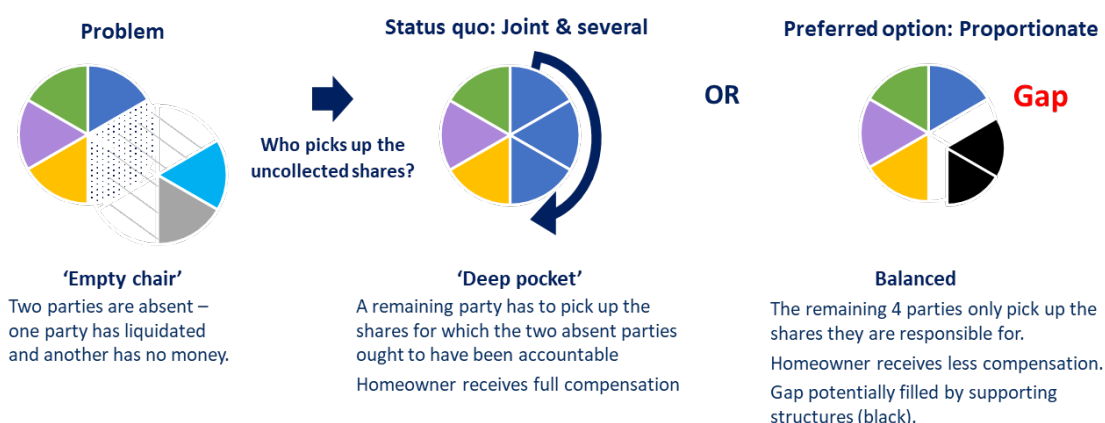
93. This option delivers a limited opportunity to incentivise responsible behaviour, as claimants are less likely to engage in lengthy attempts to capture BCAs in litigation to secure full costs. The imposed liability cap will effectively ringfence BCA financial risk, leading to increased likelihood of earlier settlements and a more rational approach to consenting processing.
94. The market will likely adapt to capped liability settings quickly due to the key impacts being limited to the role of BCAs, however there will be only limited long-term benefits as wider objectives go unachieved.
95. Implementation would require legislative change and policy work to enable supporting mechanisms (eg Confidential advice to Government home warranty).

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

96. Proportionate Liability (option two) is the preferred option to achieve the desired objectives of liability reform. Option two contributes directly to the policy objectives by:
- incentivising homeowners to undertake due diligence and building practitioners to stand by their work (improves accountability)
 - aligning liability with own degree of fault, reducing disproportionate financial risk for BCAs and ratepayers (improves fairness)
 - providing greater certainty in liability settings, which is expected to support the development of a more stable insurance market, and supports a more efficient consent system (improves efficiency).

Comparison of Proportionate Liability vs Joint & Several Liability

EXAMPLE: Joint & Several Liability vs Proportionate Liability when a home fails and six parties are found liable



97. The example above demonstrates how options one (Status Quo) and two (Proportionate Liability) perform using a hypothetical case in which proceedings are filed against six parties, of which one party has no money and another is liquidated.
98. While proportionate liability introduces a coverage gap in cases of insolvency, this risk can be mitigated through supporting mechanisms such as home warranty schemes Confidential advice to Government

These mechanisms are also likely to be beneficial under option three (Capped Liability), indicating that the implementation burden is not unique to option two.

99. In contrast, option one maintains the current high likelihood of full compensation for homeowners but fails to address the underlying issues of fairness, accountability and cost inefficiency. Option three offers partial mitigation for BCAs but does not resolve broader sector-wide imbalances or deliver the same level of behavioural change.

Is the Minister's preferred option in the Cabinet paper the same as the agency's preferred option in the RIS?

100. Yes, the Minister's preferred option in the Cabinet paper is the same as MBIE's preferred option in the RIS. This is to shift from joint and several liability to proportionate liability, and to direct officials to undertake design of supporting mechanisms.
101. The marginal costs and benefits of the preferred option are presented on the following page.

What are the marginal costs and benefits of the preferred option in the Cabinet paper?

Table Four: costs and benefits of option two (shift to proportionate liability)

Affected groups	Comment <i>nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks.</i>	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	Evidence Certainty <i>High, medium, or low, and explain reasoning in comment column.</i>
Additional costs of the preferred option compared to taking no action			
Regulated groups (eg BCAs, Practitioners, other liable parties/plaintiffs)	One-off costs as sector adjusts to adapt to new liability settings.	Low cost	Medium – Based on stakeholder feedback and international experience.
Homeowners/claimants	One-off costs for homeowners voluntarily mitigating risk through existing market warranty products and insurance. Ongoing costs when shortfalls occur due to liable party insolvency.	Medium cost	Medium – Based on qualitative analysis and stakeholder input.
Regulators (eg MBIE)	One-off legislative and policy development costs.	Low cost	Medium – Based on similar reforms in Australia and stakeholder input.
Total monetised costs	<i>No monetised data available.</i>		
Non-monetised costs	Low implementation costs, medium ongoing costs for claimants that do not hold private warranty coverage.	Medium	Medium – dependencies noted above.
Additional benefits of the preferred option compared to taking no action			

Regulated groups (eg BCAs, Practitioners, other liable parties/plaintiffs)	Ongoing benefit for BCAs no longer absorbing liability of insolvent parties.	Medium benefit	Medium – Based on stakeholder feedback and international experience.
Homeowners/claimants	No longer subject to potential rates increases as a result of disproportionate liability claims. Efficiency benefits during consenting of builds.	Low benefit	Low certainty – some BCAs likely to retain risk aversion tendencies.
Regulators (eg MBIE)	Greater accountability in the construction sector and building regulatory system.	Medium benefit	Medium – Based on stakeholder feedback and international experience.
Total monetised benefits	<i>No monetised data available.</i>		
Non-monetised benefits	Medium		

Section 3: Delivering an option

How will the proposal be implemented?

Legislation will be amended to enact proportionate liability for building and construction

102. MBIE has considered and discounted a piloted implementation of proportionate liability. This would have likely presented challenges for the courts and contributed to public uncertainty given existing legal precedent and legislative standing of the existing liability rule.
103. Changes to liability rules will require an amendment of the *Building Act 2004*. Legislation would be amended to change building and construction law to a proportionate liability approach, which changes how a plaintiff can recover entitled damages at the end of a court decision.
104. It is intended that the liability rule change will not take immediate or imminent effect following legislation receiving Royal Assent.

Confidential advice to Government

105. It is MBIE's understanding that proportion of responsibility is allocated by the court to each responsible party under the status quo. This will not change under proportionate liability, however there will be no subsequent transfer of liability held against insolvent or absent parties as would usually take place under joint and several.

Significant implementation work is not anticipated, excluding support mechanisms

106. This proposal is for a rule change rather than a policy intervention or programme – MBIE would not face significant implementation to enact the preferred option.
107. MBIE will use the Confidential advice to Government lead-in period to undertake a public awareness campaign to inform and educate building and construction sector participants and homeowners on the new liability rule. This would utilise existing engagement channels.
108. Should Cabinet agree, work to take place on supporting mechanisms may have potentially large implementation impacts. These will be considered in a subsequent RIS.

Opportunity for reform to connect with wider building and construction reforms

109. The need for wider reform work to be phased to complement liability reform has been a priority for the building and construction portfolio. In September 2024, Cabinet [ECO-24-MIN-0192] agreed that MBIE would need to consider questions of liability as a related area of possible reform around options being investigated for BCA structural reform.
110. The Government is proposing legislative and regulatory changes to remove barriers that currently hinder BCAs from voluntarily consolidating. These amendments, supported by a package of operational changes, will enhance councils' ability to collaborate, share resources and achieve economies of scale.
111. This BCA structural reform will introduce legislative, regulatory and operational improvements that will make it easier for BCAs to consolidate or share consenting services, improving the consistency, responsiveness and efficiency of the consent system.
112. While BCA structural reforms and any change to liability settings are distinct policy areas, they are closely related given their impact on roles and responsibilities in the building regulatory system. It is intended that the preferred option of this paper will be progressed through the same
- Confidential advice to Government

Mechanisms to support implementation of proportionate liability settings

113. Subject to Cabinet agreement, a package of supporting mechanisms, such as Confidential advice to Government requiring cover for building defects warranty, will be developed to support the proposed move to proportionate

liability. Stakeholders have consistently and strongly called for the development and introduction of these mechanisms. As discussed in the consultation section above, there is broad appetite among stakeholders for changes to liability settings, but consensus that proportionate liability should be introduced in tandem with supporting mechanisms – not in isolation or stages.

114. The rationale for these supporting mechanisms is addressing the gap in coverage for homeowners that is created by moving from joint and several to proportionate liability when things go wrong and a liable party is absent and there is no longer a ‘deep pocket’ to take on the liabilities left behind.
115. If left unaddressed, this risk becomes an ‘empty chair’ left by BCAs and other major developers that would instead be borne by the building owner. This would potentially leave homeowners out of pocket, and unable to adequately remedy their defective homes.
116. As a result, subject to Cabinet confirmation, MBIE intends to undertake policy work on the supporting mechanisms outlined below. Detailed analysis of these options is currently out of scope, as this would take place in a second RIS later in 2025.

Confidential advice to Government

Mandatory home warranty products Confidential advice to Government

118. Home warranty products provide a level of protection for homeowners while work is underway, and for an extended period following construction completion. MBIE understands that approximately Confidential advice to Government of current residential buildings in New Zealand are covered by home warranty products on the private market. Confidential advice to Government could be an effective way of covering the gap created by the ‘empty chair’ problem.

How will the proposal be monitored, evaluated, and reviewed?

119. The proposal to change the liability rule to proportionate liability will be Confidential advice to Government stakeholder engagement, primarily through the Confidential advice to Government Confidential advice to Government. Since this proposal is a rule change rather than an intervention or programme, there are not specific measurables and evaluations.
120. As earlier explored, there is limited data available, and nothing that specifically isolates the differentials between what costs deep pocket parties have been paying that they are not responsible for.
121. MBIE will explore developing new baselines for future comparison and evaluation. This could include the frequency and cost of litigation, court decisions, availability of insurance offerings, insurance premium trends, number of building consent requests for information (RFIs).