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Proportionate liability: A major shift for construction risk

When a construction project encounters problems, determining who is responsible can quickly become complex.

Developers, builders, architects, engineers, project managers and subcontractors all play important roles in delivering a project. When defects or failures occur, liability is often shared across multiple parties.

That question sits at the heart of proposed reforms to New Zealand's building liability framework. If introduced, proportionate liability could represent one of the most significant changes to construction risk allocation in decades.

More importantly, it could change how businesses think about contractual risk transfer, accountability, project governance and insurance.

Why this matters

Under New Zealand's current joint and several liability regime, one party can potentially be held responsible for the full amount of a claim, even if they were only partly responsible for the problem.

The proposed move to proportionate liability is intended to change that by aligning liability more closely with each party's contribution to a loss.

In simple terms, responsibility would be more closely linked to fault.

While the details continue to progress through Parliament, the broader message for businesses is already clear: accountability, documentation and risk allocation are likely to become even more important.

A new risk for project owners and Principals

One of the less discussed implications of proportionate liability is the potential impact on project owners and Principals.

Under the current regime, a Principal may be able to recover the full value of a loss from a single responsible party, even if multiple parties contributed to the problem.

Under a proportionate liability framework, recovery may become more dependent on the financial strength, longevity and insurance arrangements of each individual project participant.

For Principals, this creates a different risk consideration:

What happens if one of the parties responsible for a defect or loss can no longer meet its share of the liability?

This may place greater emphasis on contractor selection, due diligence and insurance oversight throughout the life of a project.

Accountability may become more visible

The biggest implication may not be the legal reform itself, but the potential shift in expectations around accountability.

If liability becomes more closely linked to responsibility, businesses will need to be able to clearly demonstrate where that responsibility sits.

For developers, contractors, consultants and property owners, this may place greater emphasis on:

- Clearly defined project roles
- Decision-making processes
- Quality assurance procedures
- Record keeping and documentation
- Project governance frameworks
- Oversight of contractors and consultants

In future disputes, being able to demonstrate who was responsible for what, and when, could become increasingly important.

Contractual risk transfer will matter even more

Construction projects already rely heavily on contracts to allocate risk and define responsibilities.

If proportionate liability proceeds, contractual arrangements may come under even greater scrutiny.

Businesses should consider:

- Are responsibilities clearly defined?
- Do contracts reflect how risk is actually managed on the project?
- Are responsibilities appropriately allocated between parties?
- Do subcontractor arrangements adequately address risk transfer?
- Are project participants clear about their obligations and accountabilities?
- How financially stable are key project participants?
- How long have contractors and consultants been operating under their current trading entity?
- Are insurance requirements being independently verified?
- Does the Principal have sufficient visibility of project-wide insurance arrangements?

Strong contractual risk transfer cannot eliminate risk, but it can provide much greater clarity around who is responsible for managing it.

For larger organisations operating across multiple projects and contractor relationships, that clarity becomes increasingly valuable.

Why insurance programmes may need closer attention

Proportionate liability is primarily a legal reform, but it also has significant insurance implications.

As liability becomes more closely aligned with individual responsibility, organisations may wish to review whether their insurance arrangements continue to align with their contractual obligations and project role.

Areas that may warrant attention include:

- Professional indemnity insurance
- Liability insurance programmes
- Contract works arrangements
- Project-specific insurance structures
- Consultant and subcontractor insurance requirements

The objective is not simply to purchase insurance. It is to ensure risk, responsibility and insurance remain aligned.

Governance may become a competitive advantage

As projects become larger and more interconnected, businesses are increasingly expected to demonstrate strong oversight, accountability and risk management practices.

The organisations best positioned to navigate a changing liability environment are likely to be those that can demonstrate:

- Strong project governance
- Clear records and documentation
- Well-defined decision-making authority
- Effective risk management processes
- Robust contractor and consultant oversight

In many cases, these capabilities support better project outcomes regardless of whether liability reforms proceed.

What businesses should be doing now

The Building Amendment Bill is still progressing through Parliament and the final form of any reforms may change. However, businesses do not need to wait for legislation to begin reviewing their approach.

Now is a good opportunity to:

- Review contractual arrangements and risk allocation
- Strengthen project governance and documentation
- Ensure responsibilities are clearly defined
- Assess professional indemnity and liability programmes
- Review consultant and subcontractor obligations

Looking ahead

The proposed shift to proportionate liability reflects a broader trend across many sectors: increasing expectations around accountability, governance and risk management.

For businesses involved in development, property and construction, the conversation is no longer simply about compliance. It is about understanding how responsibility is allocated, how risk is transferred and how insurance programmes align with both.

Because if liability becomes more closely linked to responsibility, businesses will need to be able to clearly demonstrate where that responsibility sits.

How Rothbury can help

Changes to liability frameworks can have important implications for contracts, project governance and insurance programmes.

Rothbury's Senior Financial Lines Broker, Blair Dyer, brings specialist expertise across professional indemnity, general liability, policy structure and liability claims. He can work alongside your Rothbury broker to review how contractual responsibilities, project roles and insurance arrangements interact under a proportionate liability framework.

For Principals, developers and project participants, this may include reviewing risk allocation, professional indemnity and liability programmes, project-specific insurance structures, and the insurance arrangements of key contractors and consultants.

If your business operates in the construction or property sector, talk to your Rothbury broker about what these changes could mean for you.

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