

Preface

Readers of this book may well ask a question why two specialist real property lawyers have embarked on an exercise such as this which analyses and critiques in considerable detail the contractual, tortious and statutory liability of professionals engaged in property transactions. To answer the question directly, it appeared to us, particularly over the last decade, that litigation against professionals arising out of property transactions had grown significantly.

Several reasons for this increase are evident. First, the law's recognition that a professional may be sued not only in contract for breach of duty but also in tort expanded the basis of professional liability. The decision of the House of Lords in *Hedley Byrne v Heller* [1964] AC 465 opened the way for claims in negligence for economic loss exponentially expanding the liability of professional persons. The removal of the necessity of a contractual nexus between the parties opens the doors for professionals such as solicitors, valuers, real estate agents and lenders to be liable to persons with whom they had not dealt.

Leading on from the recognition of a duty of care owed by professionals has been the expansion of the categories of person to whom a professional may owe a duty of care. Cases such as *Hill v Van Erp* (1997) 188 CLR 159 and *Perre v Apand* (1999) 198 CLR 180 exemplify the judicial trend of finding a duty of care to be owed by a professional to a third party who is not in a contractual relationship with the client. The rejection of the notion of proximity to an approach which emphasises factors such as vulnerability of the person, assumption of responsibility by the professional and reasonable foreseeability of reliance on the advice given, has contributed to a widening of the scope of professional liability.

The third, and to a certain extent most significant, factor is the increasing use of the *Trade Practices Act 1974* (Cth) and State Fair Trading Acts in litigation against professionals. The move of professionals to more commercial activities and practices

has also heralded a greater application of s 52 of the *Trade Practices Act 1974* (Cth) to their conduct. Once described as the 'exocet' in the commercial lawyers arsenal, s 52 is consistently raised in litigation and has expanded the liability of professionals and the array of remedies available to potential litigants. The expanse of litigation related to property transactions suggests that these three factors have impacted significantly on the professionals involved in these types of transactions.

The growing complexity of litigation for professional liability and the interaction of remedies in contract, tort, equity and under statute prompted, for us, the need for a critical and comprehensive analysis of the spectrum of liability of property professionals. In most recent times, this complexity has been exacerbated by the introduction of the new civil liability legislation in each State introduced in consequence of the Ipp Report. These reforms of the law have the most significant impact on property professionals (liable usually for economic loss only) in the area of liability between joint and several tortfeasors, with the introduction of proportionate liability.

The first two chapters of the book, quite deliberately, deal respectively with the concept of professionalism in the twenty-first century and the historical sources of professional liability. These initial chapters set the scene for the more concentrated analysis of remedies generally and specific remedies against individually nominated professionals and associated professional organisations engaged in property transactions. It is abundantly clear that as the prevalence of professional indemnity insurance has grown and as more professionals have been more willing to give evidence against their colleagues, proceedings against professionals by an aggrieved client can be a more attractive option than suing the other party to a failed property transaction who, quite naturally, would not have the benefit of any such an indemnity.

Some of the professionals mentioned are commonly involved in most property transactions, principally being sales, leasing and the contracting of mortgages. It is clear from the plethora of case law on the subject that solicitors, real estate agents and valuers in that priority are probably the most frequently sued of the professionals engaged in property transactions. More recently, there is a growing body of case law evidencing claims against accountants and construction professionals, including both building inspectors and surveyors.

It seemed inappropriate in a book of this kind not to deal with claims against other actors involved in property transactional process and against whom clients have often sought redress, these being lenders to buyers and local authorities from whom buyers, tenants and mortgagees seek information concerning property being dealt with. It is for this reason that the final Part of the book deals with liability against those whom we have described as professionals associated with property transactions.

The work is divided into five Parts. Part One contains Chapter 1 on the subject of "Professionalism". This Chapter has been written by Ms Tamara Walsh, BSW (Hons)(NSW), LL.B. (NSW), one of our Faculty colleagues who is qualified in social work as well as in law. The purpose of this Chapter is to set the scene in the sense of identifying what might be called modern professional attributes against the background of social, political and economic factors which impact on professional practice in this era. This is introductory to Part Two entitled, "General Liability", Chapter Two of which traces the legal sources of professional liability from an historical perspective until contemporary times providing a detailed understanding of how the courts have dealt with the phenomena of contract and status concurrently with the development of the general law of negligence, all of which has impacted upon professional liability over the past 200 or so years. Chapter 3 considers the short, but important, subject of disclaimer of this form of liability.

Part Three, "Remedial Aspects of Professional Liability" encompasses Chapters 4 and 5, the former of which deals with general matters relating to compensation including vicarious liability, contributory negligence, and apportionment in contribution between those jointly liable professionals. The latter, Chapter 5 examines the procedural issues of relevance in this special context including the application of the statutes of limitation, the nature of expert evidence and more recent phenomenon of representative actions against professionals in property transactions. Part Three examines the liability of more specific individual professionals being solicitors, real estate agents, valuers, accountants and construction professionals and Part 4 examines the similar liability of the associated professionals, being lenders and local authorities.

The individual professionals chosen were selected as the subjects of the most frequently made claims against them by their clients and third parties for loss or damage suffered

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arising from property transactions. All chapters relating to the liability of specific professionals or associated professionals have been formatted in a similar way so that comparisons between common aspects of their liability may be easily drawn. Particular emphasis in all cases has been given to remedies many available concurrently, in tort, contract, equity and under legislation such as the *Trade Practices Act 1974* and the various state Fair Trading Acts as appropriate.

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