THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref:Injury:RElw827572

1 May 2014

Mr Andrew Cappie-Wood
Secretary
Department of Police and Justice
GPO Box 6
SYDNEY NSW 2001

By email: justice_policy@agd.nsw.gov.au

Dear Mr Cappie-Wood,

Consultation on the Proportionate Liability Model Provisions

The Law Society of New South Wales welcomes the opportunity to provide a submission to the Department of Police and Justice in relation to the possible implementation of the Proportionate Liability Model Provisions ("Model Provisions"). I write to you on behalf of the Litigation Law and Practice Committee and Injury Compensation Committee ("the Committees") who have considered the options proposed by the Standing Council on Law and Justice ("SCLJ") in the Proportionate Liability Model Provisions Decision Regulation Impact Statement ("RIS") dated October 2013.

1. Preferred Model

It is the position of the Committees that Option 3, that is uniform legislation which broadly defines an apportionable claim and prohibits contracting out, is the preferred option. However, the Committees make the following provisos:

- If a majority of the larger States or Territories agree to implement Option 4 or Option 5, then New South Wales ("NSW") ought to implement the same options, for the purposes of consistency and uniformity;

- In determining the criteria for the majority of States and Territories, consideration ought to be given to:

  - the geographical location of the State or Territory in proximity to NSW; and

  - the economic strength of the State or Territory.

By way of example, if Victoria, Queensland and Western Australia were willing to adopt Option 4, then NSW ought to adopt Option 4 notwithstanding that Option 3 is the preferred option.

It is the Committees' position that the above criteria best address the overall objectives[1] and problems[2] identified in the RIS.

Conversely, Option 2, the repeal of the apportionment legislation is the least preferred option. It is the Committees' position that if there is no realistic prospect of uniform legislation being implemented, then the status quo ought to remain in order to provide certainty and consistency within the NSW jurisdiction and to retain the level of fairness that the current system provides.

2. Issues for Consideration

2.1 General

The Committees consider that the implementation of model provisions, which are consistent across all jurisdictions, is likely to benefit all stakeholders. It is probable that many of the stakeholders involved, such as law firms, accountants, valuers, auditors, the construction industry, insurers, and State governments[3] operate across a number of jurisdictions. The implementation of consistent provisions will allow businesses and individuals to operate in multiple jurisdictions without having to vary their operations, re-assess risks or increase costs to take into account the vagaries that may apply in each individual jurisdiction.

Further, stakeholders may wish to expand their operations into different jurisdictions. The introduction of uniform legislation ought to provide some form of certainty and less hindrance in their operations without interfering with the primary purpose of the apportionment legislation, which is to spread loss in accordance with the culpability of the wrongdoer.

2.2 Contracting Out

The preferred option, Option 3, prohibits contracting out of the proportionate liability provisions. It is the Committees' position that this is in line with the principles underlying the introduction of proportionate liability, that is, the apportionment of damages in accordance with the level of culpability. To allow parties to contract out of the legislative scheme directly contradicts the principle.

While it is agreed that this would substantially change the law as it currently stands in NSW, it is noted that the arguments in favour of contracting out were largely supported by government bodies and large industry bodies. These are likely to be the entities which have a stronger bargaining power and would be able to take advantage of the contracting out provisions to the detriment of smaller, less powerful entities for whom the proportional liability scheme is most likely to prove beneficial. It is the Committees' position that, on balance, it is more important for the legislation to provide a measure of protection and benefit to those who are in a weaker position, than those who are in a stronger bargaining position and may use that to their advantage.

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[1] Refer to RIS at page 9 where the objectives are identified as (1) Helping to ensure the availability and affordability of professional indemnity and public liability insurance, which in turn has flow on benefits for consumers (2) Minimising procedural complexity (3) Greater clarity and certainty, reducing the likelihood of increased, multiple or further litigation (4) Workable legislation in terms of commercial policy and practical outcomes, and as part of ensuring efficient court processes, and (5) fairness to the plaintiff in recovering damages, and fairness to the defendant in ensuring that their legal liability is proportionate to their level of culpability.

[2] Refer to RIS at page 7 where the two main problems identified with the current regime are inconsistencies between jurisdictions and lack of clarity and/or certainty in the operation of particular provisions.

[3] The examples are extracted from page 11 of the RIS.

Conversely, it is also noted that as a general rule, parties ought to be free to bargain between themselves and allocate risk amongst themselves on their own terms. As this is a fundamental basis of contract law, it is accepted that if the majority of jurisdictions elect to allow contracting out of the proportionate liability scheme, the benefits of consistency for stakeholders across jurisdictions would outweigh the detriment.

2.3. Arbitration

It is noted that the issue of including arbitration and other External Dispute Resolution ("EDR") schemes has a number of practical issues.[4] However, these issues do not appear to support the conclusion that the proportionate liability provisions should not apply to arbitrations and EDR in making a determination.

When applying proportionate liability legislation the Courts in NSW, and jurisdictions other than Victoria, often determine apportionable claims when all parties are not before the Court. The Court is able to make its determination based on the evidence placed before it. Any arbitration or EDR can and should be able to make determinations as to the application of proportionate liability legislation in the same manner.

It is undesirable to create a regime before the Courts that applies proportionate liability provisions so as to achieve the objectives of government[5] while permitting arbitration and EDR to operate in a manner that may undermine those same objectives.

The Model Provisions note that an entity other than a court is "not required" to apply the provisions in making a binding determination. It is unclear as to whether the Model Provisions do not apply or whether there is some discretion as to their application that is to fall to the entity making the binding determination to choose if they apply. Further, if the Model Provisions do not apply then arbitration and EDR may facilitate contracting out of the application of proportionate liability legislation in another form.

Notwithstanding the decision in *Curtin University of Technology v Woods Bagot Pty Ltd [2012]* WASC 449, the application of current proportionate liability legislation to arbitrations and EDR is uncertain. Choosing not to include provision 3 or to include it in its current form will allow that uncertainty to continue.

It is submitted that to give certainty and further the objectives of government section 3 should be stated in the affirmative and the word "not" deleted and section 12(3) may be omitted.

It is recommended that all jurisdictions should be requested to adopt the same approach in the interests of uniformity.

2.4 Apportionable Claim

Failure to Take Reasonable Care as an Element

It is considered that the preferred option for the definition of an apportionable claim is Option 3, that is, a broad definition of an apportionable claim. It is noted that this is consistent with the law in most jurisdictions.

An amendment to the definition of apportionable claim in section 2(a) of the Model Provisions to the following effect should be considered:

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[4] Pages 43-44 of RIS.

[5] Page 9 of RIS.

an action for damages (in contract, in tort, under statute or otherwise) whether the damages arise from a failure to take reasonable care

The above amendment would align the definition with current legislation that is well understood and avoid introducing a new legislative term that has not been the subject of judicial interpretation and may be seen as restricting the operation of proportionate liability by reference to a claimant's pleadings.

It is noted that one of the benefits of a broader definition is that the Courts would look at the factual merits of a claim, rather than how a claim is pleaded. A further advantage flowing from a broader definition that focuses on substance, rather than the pleaded case, is that it would arguably provide a cost saving to clients in potentially avoiding interlocutory arguments between parties about the elements of various pleaded causes of action.

Definition of Concurrent Wrongdoer

It is considered that in line with the requirement for consistency in all jurisdictions, the definition of concurrent wrongdoers to require the acts or omissions to have caused the loss "independently or jointly" ought to be implemented (and retained in NSW). While this is not significant for NSW, some jurisdictions such as Queensland have a differing definition which only requires the acts or omissions to cause the loss or damage "independently".[6]

2.5 Consumer Claims

The preferred option is the inclusion of Option 1, that is, the inclusion of Model Provision section 2(3)(b) only. This is the preferred option for the following reasons:

- The Australian Consumer Law ("ACL") has been implemented across all States and Territories with a view to ensuring a consistent level of consumer protection for consumers. It would be contradictory to then enact legislation which may negate or vary this protection.

- The ACL provides an "apportionable claim" remedy at federal level for misleading and deceptive conduct claims only.[7] Section 2(3)(b) of the Model Provisions is consistent with this protection.

- The current ACL apportionable claim remedies were enacted while the existing apportionable claim regime, as set out in Part 4 of the *Civil Liability Act 2002* was in place. It is noted that Part 4 is substantially similar to Option 1.

The inclusion of Option 2, that is, section 2(3)(c) of the Model Provisions would arguably increase the level of apportionable claims for statutory breaches of applicable claims beyond the scope envisaged in the ACL (as currently operating in conjunction with Part 4 of the *Civil Liability Act 2002*). A variation of the ACL appears to be outside the objectives of introducing the Model Provisions[8].

If further ACL claims are to be apportioned, it is submitted that this should be implemented and harmonised in the ACL legislation. However, as submitted earlier, if the majority of States and Territories prefer the inclusion of both Options 1 and 2, then the Committees believe that NSW ought to include both options.

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[6] See s 30(1) of the *Civil Liability Act 2003* (Qld). The decision in *Hobbs Haulage P/L v Zupps Southside P/L & Anor* [2013] QSC 319 provides an example of the types of arguments which may be engaged in when the basis for an apportionable claim only requires an "independent" action.

[7] See Part VIA of the *Competition and Consumer Act (2010)* Cth.

[8] Page 9 of RIS.

2.6 Notification Provisions

It is noted that the changes to the notification provisions are more extensive than the current NSW provisions. However, it is submitted that these are largely procedural changes which, overall, do not affect the substantive operation of the apportionment regime, subject to the following, which it is submitted, makes the regime more effective.

Section 8(5) of the Model Provisions addresses the issue of burden of proof in concurrent wrongdoer proceedings. The current scheme has been questioned or criticised for not dealing with this issue.[9] At its core, the apportionment legislation is remedial as it provides the defendant a defence which may reduce the damages that the defendant would otherwise be liable to pay. It needs to be remembered that if it were not for the provisions, the defendant would be liable for the entire judgment amount.

Due to the practical nature of concurrent wrongdoer proceedings, a plaintiff, upon provision of adequate particulars of an apportionable claim:

- is required to join any concurrent wrongdoer to proceedings or risk having to litigate the matter twice (if an apportionable claim is found); or conversely

- may elect not to join the concurrent wrongdoer, leave the defendant to solely discharge the onus, and risk an incomplete recovery if the defendant is successful.

The practical effect for a defendant is that, although possibly being in a better position to prove the wrongdoing of the concurrent wrongdoer, the defendant can place the primary evidentiary burden on the plaintiff. It is only if the plaintiff's evidence is not satisfactory that a defendant is forced to incur costs in providing a defence which is ultimately to its benefit. It would be unlikely that a plaintiff, who having joined a concurrent wrongdoer to proceedings, would risk leaving it solely to the defendant to lead evidence on the issue.

It is understood that in practice, a defendant relying on a concurrent wrongdoer defence simply relies on the plaintiff's evidence and only incurs the additional costs to prove the defence if required.

As one of the primary reasons for introducing apportionment legislation is to stop plaintiffs instituting actions against "deep pocket" defendants, it is inequitable to allow such defendants to require plaintiffs (who may be financially limited) to bear the primary burden of substantiating a "deep pocket" defendant's defence in order to obtain a complete recovery in circumstances where the "deep pocket" defendant is otherwise liable.

In the circumstances, it is submitted that the notification provisions are a preferable model as they place more onus and obligations on the party seeking to rely on the remedial nature of the provisions.

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[9] See for example *Proportionate Liability in Australia: The Devil in the Detail* (2005) 26 Aust Bar Rev 29 at 39-40; *Proportionate Liability In Construction Litigation*: http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/mcdougall_2006.07.10.pdf

2.7 Personal Injury Claims

It is noted that "a claim arising out of an injury or death" is not an apportionable claim. However, this phrase has the potential to apply not only to a claim for damages for personal injury but also to a claim for damages against a legal practitioner for negligence in acting for a plaintiff with a personal injury claim. It is suggested that the Model Provisions should be revised to make clear whether the latter scenario is also excluded from the proportionate liability provisions.

2.8 *Home Building Act 1989* (NSW)

An impact that appears not to have been considered in the Model Provisions which is particularly relevant to NSW is the impact of the Model Provisions upon the statutory warranties in Part 2C of the *Home Building Act 1989* (NSW). The *Home Building Amendment Act 2011* ("Amendment Act") amended section 34 of the *Civil Liability Act 2002* and removed an action for a claim of breach of the statutory warranties from the operation of Part 4 of this Act.

In the second reading speech for the Amendment Act,[10] it was expressly stated that the amendment was due to a 2010 decision which found that the defence of proportionate liability was available to those seeking to defend statutory warranty claims under the *Home Building Act 1989*. As most building work is carried out by subcontractors rather than the builders/developers, allowing a proportionate liability defence to builders/developers was seen as undermining the statutory warranty scheme (as encapsulated in the *Home Building Act 1989*) as the builders/developers could pass most, or all, liability onto the subcontractor. If the subcontractor was dead or insolvent, the owner would not be able to recover the apportioned losses from the subcontractor direct, or via the home warranty insurance scheme as that scheme only covers the builder.

In the circumstances, as:

- the operation of the home warranty insurance scheme and the implied warranties are considered to be part of NSW's consumer protection framework for residential buildings; and

- the likelihood that builders or developers will (and do) seek to shift blame to subcontractors

the application of any proportionate liability scheme to Part 2C of the *Home Building Act 1989* ought to be expressly excluded from any model provisions implemented (as they currently are in section 34(3A) of the *Civil Liability Act 2002*). It is considered that this consumer protection in NSW outweighs any benefits that the implementation of consistent model provisions across different jurisdictions would provide.

3. Summary

In summary, it is considered that Option 3, as set out in the RIS, is the preferred option, namely uniform legislation that defines an apportionable claim broadly and prohibits contracting out. However, before Option 3 is implemented unilaterally by NSW, consideration ought to be given to which variation/s are to be implemented by other jurisdictions with a view to keeping NSW as consistent as possible with the other

[10] Refer to:
https://www.parliament.nsw.gov.au/Prod/parlment/nswbills.nsf/0/7c98936a81a709d4ca257927001476ee/$FILE/Home%20Building%20Amdt%20-%20LC%202nd%20Reading.pdf

jurisdictions. It is also the Committees' view that proportionate liability should have mandatory application to arbitrations and other binding EDR schemes.

The Committees thank you for the opportunity to provide this submission. Should your policy officers have any queries with regard to this submission they are welcome to contact the Committees' policy lawyer, Leonora Wilson at leonora.wilson@lawsociety.com.au or by telephone on (02) 9926 0323.

Yours sincerely,

Ros Everett

Ros Everett
President