

SCAG - Consultation Draft Proportionate Liability Model Provisions and SCAG Proportionate Liability Regulation Impact Statement September 2011

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**SCAG – Consultation Draft Proportionate Liability Model
Provisions
and
SCAG Proportionate Liability Regulation Impact Statement
September 2011**

The Law Society of Western Australia responds to the request for comment from Mr Laurie Glanfield, Secretary, Standing Committee of Attorneys-General, by letter dated 16 September 2011.

Submissions are requested by 7 October 2011. The Society confirms that it has been granted an extension until 14 October 2011.

The Society's submission responds to the specific questions relating to proportionate liability and the model provisions in the SCAG Proportionate Liability Regulation Impact Statement, September 2011.

1. BACKGROUND

1.2. Definition of apportionable claim

Question

1. What has the financial impact of the proportionate liability provisions been? Have they increased the affordability of insurance?

Comment

It is the Society's view that the data presented in the Regulation Impact Statement (RIS) makes it impossible to determine the impact of the proportionate liability provisions.

The data is too superficial.

The first of the two tables lists figures for public and product liability insurance. These should be disaggregated. One would expect to see data for the same period and from the same insurance sources, domestic or international, outside the liability covered by the legislation.

2. STATEMENT OF THE PROBLEM

Inconsistent proportionate liability legislation in the States, Territories and Commonwealth

Questions

2. Are practical problems being created by inconsistencies in proportionate liability provisions between jurisdictions? If so, what?

3. Is there evidence of 'forum-shopping' and is this causing problems?

4. Is contracting out of proportionate liability provisions occurring and is this causing problems?

5. Is the inability to contract out of proportionate liability provisions causing problems?

Comment

With respect to 'forum-shopping' there is insufficient Western Australian experience.

The inability to contract out is not the position in Western Australia.

Contracting out is occurring in Western Australia. It is common in large infrastructure projects and does not appear to be causing major practical problems.

4. OPTIONS

4.1.1.2 Definition of apportionable claim

Questions

6. Which is the preferred definition of apportionable claim – the definition in the consultation draft proportionate liability model provisions, or the definition of apportionable claim proposed in the consultation drafting instructions? Why?

7. Do you have any concerns about either of these definitions?

Comment

The consultation drafting instructions proposed that the model provisions contain a definition of 'apportionable claim' along the following lines:

- (a) a breach of tortious duty of care, or from a breach of a contractual obligation which is concurrent and coextensive with such a tortious duty, or
- (b) a breach of a statutory prohibition on misleading or deceptive conduct.

In the consultation draft proportionate liability model provisions, a claim is an **apportionable claim** if it is for economic loss or damage to property in –

- 2(2) (a) an action for damages arising (in contract, tort, under statute or otherwise) from a failure to take reasonable care; or

Examples

- 1 breach of duty of care
- 2 breach of express contractual term to take reasonable care
- 3 breach of implied contractual term to take reasonable care
- 4 breach of director's civil obligation to act with reasonable care and diligence
- 5 breach of statutory warranty to render services with due care and skill.

- (b) an action for damages for breach of a statutory prohibition or duty in relation to misleading or deceptive conduct.

- (3) However, none of the following is an apportionable claim:

- (a) a claim arising out of an injury;
- (b) a consumer claim;
- (c) a claim to the extent that an Act provides that liability for an amount payable in relation to the claim is joint and several;
- (d) a claim under the Discrimination Act [of the jurisdiction];
- (e) a claim to which the Road Transport (Third-Party Insurance) Act [of the jurisdiction];
- (f) a claim under the workers' compensation legislation [of the jurisdiction].

- (4) there is a single apportionable claim in a proceeding in relation to the same loss or damage even if the claim for the loss or damage is based on more than 1 cause of action (whether of the same or a different kind).

The Society could not reach a consensus view in relation to the definition in the draft proportionate liability model provisions.

The competing views are these:

View A

Clause 2(2)(a)

The words "*arising*" and "*from a failure to take reasonable care*" ("**relevant words**") may well be unnecessary in light of the series of clearly defined "carve outs" in proposed clause 2(3).

Further, retaining the relevant words may also perpetuate uncertainty, inconsistency and unfairness. That is particularly so in circumstances where the relevant words are not to be restricted to an essential element of a cause of action. The following hypothetical scenario illustrates the point:

Party A claims equitable compensation from Parties B, C, D and E for an alleged breach of a fiduciary duty owed to Party A by each of the other parties.

The Court finds, on the facts, that:

- *each Defendant breached the fiduciary duty owed to Party A;*
- *the breaches by Parties B and C involved a failure to take reasonable care; and*
- *the breaches by Parties D and E involved no failure to take reasonable care.*

Under the proportionate liability model provisions, Parties B and C would be concurrent wrongdoers but parties D and E would not.

A similar hypothetical scenario might be constructed involving the breach of a strict contractual obligation (eg. a guarantee or warranty).

Interpretational difficulties might be significantly reduced if the relevant words were simply omitted, with clause 2(3) listing each type of claim (for economic loss or damage to property) that is not to be apportionable.

Clause 2(2)(b)

If the relevant words are deleted, there would be no need for clause 2(2)(b). If they are not, the words "*in relation to*" may give rise to interpretational difficulties (particularly when read in light of the proposed definition of "consumer claim").

Should the relevant words be retained, alternative options might be for clause 2(2)(b) either :

- to read "*an action for damages for breach of a statutory provision prohibiting misleading or deceptive conduct*"; or
- to refer, specifically, to the relevant legislative provisions.

In summary, View A proposes that the definition of "apportionable claim" should be simplified, and that this may be achieved by: (a) removing the relevant words; and (b) clearly identifying, in clause 2(3), the types of claims to which the proportionate liability provisions are not to apply.

View B

In this View the definition in the model proportionate liability model provisions might be taken to extend to areas not initially intended by the proportionate liability legislation to the extent it includes cases where a failure to exercise reasonable care was not an essential element of the cause of action. The model might be re-drafted to make this point clearer.

4. OPTIONS

4.1.1.3 Definition of concurrent wrongdoer

Question

8. Do you have any concerns or comments about the approach taken?

In the draft proportionate liability model provisions:

- 3 (1) A person is a **concurrent wrongdoer** for a claim if -
- (a) the person is one of 2 or more people whose acts or omissions (or act or omission) caused, independently or each other or jointly, the loss or damage the subject of the claim or substantially or materially similar loss or damage: and
 - (b) Each of them is legally liable for the loss or damage caused.

The Society's comments are:

1. The Society has a concern with the use of the present tense in clause 3(1)(b):
Each of them is legally liable for the loss or damage caused.

It is recommended that clause 3(1)(b) be amended to read:

Each of them is, was or would have been legally liable for the loss or damage caused.

2. The Society recommends that the word "the" be deleted immediately before the word "loss" in line two of clause 3(1)(a).
3. It is also recommended that fees be included in the loss or damage.

4. OPTIONS

4.1.1.4 Obligation to notify other concurrent wrongdoers

Question

9. Do you have any concerns or comments about the approach taken?

Clauses 6(3), 6(4) and 7(3)

The Society is not satisfied that a case has been made for concurrent wrongdoers to notify other concurrent wrongdoers.

Ultimately it is a matter for the plaintiff to decide whether to initiate proceedings against any particular party, what claims to advance and against whom. One of the main features of proportionate liability is to shift various risks to the plaintiff. Absent a third party claim, the Society sees no compelling reason why a defendant should be burdened with the cost, inconvenience or risk (if any) of serving papers on a person other than a plaintiff.

Clause 7(4)

Clause 7(4) of the draft proportionate liability model provisions provides:

7(4) *The defendant has the burden of establishing a prima facie case that the person is a concurrent wrongdoer for the claim.*

It is the Society's view that clause 7(4) should be deleted. Proportionate liability is a defence. The onus of establishing the facts to support the defence, and not merely a prima facie case, is borne by the defendant.

4. OPTIONS

4.1.1.5 Apportioning liability to non parties

Question

10. Do you have any concerns or comments about the approach taken?

As stated in the RIS, the legislation in South Australia, Tasmania and Western Australia effectively requires the court to take account of the responsibility of concurrent wrongdoers, whether they are a party to proceedings or not.

The Society has no difficulty with this position.

4. OPTIONS

4.1.1.6 Apportioning liability

Question

11. Do you have any concerns or comments about the approach taken?

The Society has no concerns or comment to make about the approach taken.

4. OPTIONS

4.1.1.7 Claims to be excluded from PL and on what basis

Question

12. Do you have any concerns or comments about the approach taken?

Clause 2(3) of the draft proportionate liability model provisions excludes:

- (a) *a claim arising out of an injury;*
- (b) *a consumer claim;*
- (c) *a claim to the extent that an Act provides that liability for an amount payable in relation to the claim is joint and several;*

- (d) a claim under the *Discrimination Act* [of the jurisdiction];
- (e) a claim to which the *Road Transport (Third-Party Insurance) Act* [of the jurisdiction];
- (f) a claim under the workers' compensation legislation [of the jurisdiction].

In clause 2(5) of the draft proportionate liability model provisions **consumer claim** means a claim by an individual relating to goods or services acquired by the individual as a consumer. In the RIS reference is made to the Australian Consumer Law (ACT) with the note that jurisdictions will need to vary the reference appropriately.

Sections 7 and 8 of the *Fair Trading Act 2010 (WA)* define "consumer" and "services":

7. **Meaning of consumer**

- (1) *In this Act (other than Part 3 and the Australian Consumer Law (WA)) —*
consumer means —
- (a) a person who purchases or takes on hire or lease, or is a potential purchaser or hirer or lessee of, or borrows money for the purpose of purchasing, goods otherwise than for resale or letting on hire or leasing; or
 - (b) a person who uses or is a potential user of, or borrows money for the purpose of using, any service rendered for fee or reward; or
 - (c) a person who purchases or is the potential purchaser of, or borrows money for the purpose of purchasing, an estate or interest in any land or building otherwise than for resale, letting or leasing; or
 - (d) a person who becomes a tenant or lessee of, or is a potential tenant or lessee of, any land or building or part of a building otherwise than for assignment or underletting.
- (2) However, a person who carries on a trade or business is not a consumer for the purposes of subsection (1)....

8. **Meaning of services**

- (1) *In this Act (other than Part 3 and the Australian Consumer Law (WA)) —*
services includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce.
- (2) Without limiting the generality of subsection (1), the definition of **services** includes the rights, benefits, privileges and facilities that are, or are to be, provided, granted or conferred under —
- (a) a contract for or in relation to —
 - (i) the performance of work (including work of a professional nature), whether with or without the supply of goods; or
 - (ii) the provision of gas or electricity or the provision of any other form of energy; or
 - (iii) the provision for reward of lodging or accommodation; or
 - (iv) the provision, or making available for use, of facilities for amusement, entertainment, recreation or instruction; or
 - (v) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or
 - (b) a contract of insurance; or
 - (c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
 - (d) a contract for or in relation to the lending of money.
- (3) The definition of **services** does not include rights or benefits being the supply of goods or the performance of work under a contract of service.
- (4) Legal services as defined in the *Legal Profession Act 2008* section 3 are not services for the purposes of this section.

The consumer guarantee provisions of the Australian Consumer Law replace existing statutory warranties and implied conditions on goods and services. Consumer guarantees apply to:

- any type of goods or services costing up to \$40,000;
- a vehicle or trailer used mainly to transport goods regardless of the cost;
- goods or services costing more than \$40,000 which are normally used for personal, domestic or household purposes; and
- leased, hired and second-hand goods.

It is the Society's view that the language regarding consumer claims needs to be tightened in at least three respects.

First, if consumer claims are to include goods and services it is important to ensure that the definition of "consumer claims" is restricted to persons acquiring goods or services for non-business purposes.

Second, if it is contemplated that there is to be a value limit on what would otherwise be a consumer claim, it is the Society's view that the value limit should be the value of the claim and not the value of the contract.

Third, if services (as well as goods) are to be included in consumer claims it needs to be clarified precisely what services are covered by the definition of "services".

It goes without saying that the initial object of the proportionate liability legislation might well be frustrated unless professional services are excluded from the definition of **consumer claim**, or unless the value limit of a **consumer claim** is defined by reference to (a modestly determined) value of the claim (rather than of the goods or services themselves).

It is also suggested that the meaning of "injury" should include injury causing death.

Further:

There is a difficulty in the differing language in cl 12, in cl 12(1)(a) ('vicariously liable for a proportion of an apportionable claim for which someone else is liable'); in (b) ('jointly and severally liable for the damages awarded against someone else as agent of the person'); and in (c) ('jointly and severally liable as a partner for the proportion of an apportionable claim for which the other partner is liable'). It is hard to see that a difference in treatment is meant. Further, it seems that what is meant is that the liability referred to in each case is a common liability with the 'someone else' or the 'other partner', as the case may be. Furthermore, this common liability that by cl 12 is not prevented from arising is not a liability as a 'concurrent wrongdoer', as the latter liability is in the terms of cl 3(1)(a) as a person whose 'acts or omissions (or ... act or omission) ... caused the loss or damage'.

The problem cl 12 is presumably meant to address is where the person vicariously liable, the principal or the co-partner, as the case may be, is also a 'concurrent wrongdoer' (as where the employer, principal or co-partner negligently permitted the 'someone else' or 'other partner' to act in the respect that caused the loss or damage). If that is right, the important point is to distinguish the two forms of liability that arise, as concurrent wrongdoer (that person's own proportion) and the common liability as person vicariously liable, principal or co-partner (being liability for the other person's proportion). It would follow then that cl 8 is meant to have no application to the common liability (the second case).

If all of this is correct, the Committee would agree with the position, which is to leave liability within cl 12(1)(a), (b) and (c), including rights of contribution, to be determined by other law. However, to achieve this position the language of cl 12 should be clarified.

The Committee notes in respect of the rights of contribution arising under other law that the final Report on the Review of the Law of Negligence (Ipp Report) said this:

12.2 The law of contribution in Australia is extremely complex, and it varies in significant respects from one jurisdiction to another. In the time available to us, we have not been able to give the law of contribution the consideration it needs and deserves. Our view is that if our Recommendation is accepted that the existing regime of solidary liability be retained in relation to personal injury and death claims, there should be a review of the law of contribution with the aim of introducing a uniform national regime of rules to govern contribution.

4. OPTIONS

4.1.1.8 Successive/subsequent proceedings

Question

13. Do you have any concerns or comments about the approach taken?

Clause 9(3) of the draft proportionate liability model provisions:

9(3) Leave of the court is required to bring a subsequent proceeding against a person if the claimant had been given information about the person under section 6 and reasonably had the opportunity to include the persons as a defendant in a previous proceeding.

It is the Society's view that the granting of leave should not be dealt with as a matter of entitlement.

The Society recommends that clause 9(3) should be amended to provide that leave will only be granted if it is just and equitable to grant leave.

4. OPTIONS

4.1.1.9 Proceedings other than judicial proceedings – arbitration and external dispute resolution schemes

Question

14. Do you have any concerns or comments about the approach taken?

The Society has no comment to make about the approach taken.

4. OPTIONS

4.1.1.10 Post Loss Settlements

Question

15. Do you have any concerns or comments about the approach taken?

The Society has no comment to make about the approach taken.

4. OPTIONS

4.1.1.11 Binding the Crown

Question

16. Do you have any concerns or comments about the approach taken?

The Society has no comment to make about the approach taken.

4. OPTIONS

4.1.2 Option 2 (General) - Status Quo

Question

17. Do you have any concerns or comments about maintaining the status quo?

Option 2 is *"to refrain from action and maintain the status quo. Under this option, each jurisdiction would be left to administer its own system of proportionate liability, inconsistencies between jurisdictions would remain, and the courts in each jurisdiction could deal with the issue of uncertainty in specific provisions as they arise."*

The Society disagrees with maintaining the status quo.

Option 3 (General) – Repeal proportionate liability provisions

Question

18. Do you have any concerns or comments about taking this option?

Option 3 *"is to repeal the proportionate liability provision in each jurisdiction."*

The Society could not reach a consensus view.

The minority view is that the legislation should be repealed (other than, possibly, in relation to auditors). The majority view does not favour repeal of the legislation, and considers that there should be uniform proportionate liability legislation along the lines of, if not identical with, the model provisions.

4.2.3 Option 3 (Contracting Out) – Permitting contracting out for contracts above a certain value

Questions

19. Comments are invited on:

- the approach adopted to contracting out in the consultation clause 11 and whether this would create any problems
- the practicality of consultation clause 11
- ways in which consultation clause 11 could be improved
- the appropriateness of the proposed amount on clause 11 – is it most appropriate to allow contracting out of proportionate liability where a contract has a total consideration of at least \$5m or \$10m or some other amount?

The Society supports the position in Western Australia of unrestricted contracting out.

Option 1 – Clarify that the proportionate liability provisions do not apply to statutory warranty and insurance schemes such as those in the Home Building Act 1989 (NSW)

Questions

20. Should the legislation clarify that the proportionate liability provisions do not apply to the statutory warranty and insurance schemes as the Home Building Act 1989 (NSW)?

21. Are there other similar schemes to which the proportionate liability provisions should not apply?

The Society's view is that the answer to question 20 should be 'yes' but dependant upon the statutory warranty and insurance scheme in the relevant Act and not the provisions of the proportionate liability legislation.

Questions

22. Comments are invited on the likely costs and benefits associated with:

1. General

- (a) introducing uniform model proportionate liability provisions across the jurisdictions
- (b) maintaining the status quo
- (c) repealing proportionate liability provisions

2. Contracting Out

- (a) expressly permitting contracting out
- (b) expressly prohibiting contracting out
- (c) permitting contracting out for contracts above a certain value
- (d) each jurisdiction to determine its own position on contracting out

3. Statutory Warranty Insurance Schemes

- (a) clarifying proportionate liability provisions do not apply to statutory warranty and insurance schemes
- (b) clarifying proportionate liability provisions do apply to statutory warranty and insurance schemes
- (c) leave this issue to be resolved by the courts.

The Society makes no further comments.

A handwritten signature in black ink, appearing to read 'Hylton Quail', written in a cursive style.

Hylton Quail
President