



THE LAW SOCIETY
OF SOUTH AUSTRALIA

South Australian Bar Association

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Mr Laurie Glanfield
Secretary
Standing Committee of Attorneys-General
Legislation, Policy and Criminal Review Division
Department of Attorney-General & Justice
GPO Box 6
SYDNEY NSW 2001

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

Dear Laurie

Re: SCAG CONSULTATION DRAFT PROPORTIONATE LIABILITY MODEL PROVISIONS

We refer to your letter of 16 September 2011.

Thank you for providing the consultation draft for comment. The joint comments of the South Australian Bar Association and the Law Society of South Australia on each question posed by the consultation draft are set out below.

By way of overview, the proportionate liability provisions are still not well understood. There have been comparatively few decisions. Whilst there are some examples of contracts addressing these provisions (whether by way of contracting out or seeking indemnity) they are comparatively rare. These comments are therefore provided in a context where there are comparatively few decided cases illustrating the potential problems.

One of the major issues, however, concerns whether the onus of joining wrongdoers' lies with a plaintiff or a defendant. This is an example of an issue on which uniformity is essential. The same is true of provisions regarding contracting out.

This submission is made with the support of the Law Society of South Australia.

Question 1: What has the financial impact of the proportionate liability provisions been?

No information regarding the financial impact of the proportionate liability provisions is available to our associations.

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

Consultation in our associations has not revealed examples of practical problems created by inconsistencies in the existing provisions. Nonetheless, it remains highly desirable that there be uniformity, if not greater consistency, amongst the existing proportionate liability provisions in the various Australian jurisdictions.

Question 3: Is there evidence of “forum-shopping” and is this causing problems?

Consultation in our associations has not revealed examples of “forum shopping” occurring nor causing problems. Again, it remains highly desirable that there be uniformity, if not greater consistency, across the various jurisdictions.

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

There are examples of contracting out of proportionate liability provisions from time to time. There are, in addition, examples of contractual indemnity provisions. There is no evidence that these are causing problems.

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

The South Australian provisions permit contracting out.

Question 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?

The South Australian provision is widely regarded as working well.

The Regulation Impact Statement is broadly accurate in its reference to the South Australian provisions in respect of “*apportionable claim*”. However we note that the references to s4(1) of the South Australian legislation, at page 10, footnote 9, and at p17 should be clarified. That subsection does not use the words “duty of care” as suggested in the consultation draft. The implication that the South Australian provisions are different in a substantial way to the provisions in the States that use the expression “reasonable care” is not accurate.

The relevant parts of the scheme in this State are:

s3(2) Defines *apportionable liability* as arising if a number of conditions are met, including relevantly that “the liability is the liability of a wrongdoer whose wrongdoing was negligent or innocent”.

s3(1) Defines the terms “negligent” and “innocent” as follows:

innocent—wrongdoing is innocent if the wrongdoer whose act or omission actually caused the harm neither intended to cause harm nor was negligent in causing harm;

negligent wrongdoing means—

- (a) a breach of a duty of care that arises under the law of torts; or
- (b) a breach of a contractual duty of care; or
- (c) a breach of a statutory duty of care that is actionable in damages or innocent wrongdoing that gives rise to a statutory right to damages;

The subsection defines the term “duty of care” as follows:

duty of care means a duty to take reasonable care or to exercise reasonable skill (or both)

s4(1) Provides that the Act applies to liabilities of the following kinds:

- (a) a liability in damages that arises under the law of torts;
- (b) a liability in damages for breach of a contractual duty of care;
- (c) a liability in damages that arises under statute.

The effect of these provisions is that the South Australian provisions apply:

- to failures to exercise reasonable care, whether the obligation arises under the law of tort, by contract or under a statute; and
- to a liability under statute for an innocent wrongdoing.

In effect, the South Australian provisions are at least as wide as s2(2) of the draft liability model.

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

The South Australian provisions are at least as wide as s2(2) of the draft proportionate liability model.

The South Australian provisions capture liability under statute that is neither founded upon a duty of care nor arises out of misleading or deceptive conduct.

Question 8: Definition of “concurrent wrongdoer” - Do you have any concerns or comments about the approach taken?

Persons who are jointly liable to a plaintiff should not fall within the definition of *concurrent wrongdoers*. Where two or more persons are jointly liable, the position should be that they do not have the benefit of apportionment of liability. No convincing reason is given for departing from the position currently taken in South Australia and Queensland (apart of course from uniformity).

The proportionate liability provisions should apply even if a concurrent wrongdoer’s liability has come to an end for any reason, such as that it has settled with the plaintiff or the claim against it has become statute barred.

Question 9: Obligation to notify other concurrent wrongdoers - Do you have any concerns or comments about the approach taken?

The approach set out in the consultation draft is broadly supported.

The proposed s6(4)(b) contemplates the taking of reasonable steps to bring information to the attention of a liquidator if the person is being wound up or has ceased to exist.

A distinction should be drawn between a company which is in the process of winding up and a company which has ceased to exist by reason of deregistration. In the case of winding up, it is appropriate that information be brought to the attention of the liquidator. In the case of deregistration, there will not be any liquidator or other office holder. Except where the direct liability of an insurer may be invoked, an application for the reregistration of the company would generally be necessary before any steps could be taken against the company. There should be an exemption from the obligation to give information to the "other person" where that "other person" is a deregistered company and the direct liability of an insurer is not invoked.

Question 10: Apportioning liability to non parties - Do you have any concerns or comments about the approach taken?

We agree with the approach taken in the consultation draft.

Question 11: Apportioning liability - Do you have any concerns or comments about the approach taken?

We agree with the approach taken in the consultation draft.

Question 12: Excluding claims - Do you have any concerns or comments about the approach taken?

We agree with the approach taken in the consultation draft.

Question 13: Successive, subsequent proceedings - Do you have any concerns or comments about the approach taken?

The approach set out in the consultation draft is broadly supported.

In our view the South Australian approach which enables the Court in subsequent proceedings to depart from the general rule as to the aggregate amount of damages if it is fair and equitable to do so is preferable to the determination in the first proceedings being a cap in subsequent proceedings.

Question 14: Arbitration and external dispute resolution - Do you have any concerns or comments about the approach taken?

This is an area which requires more consideration.

We support the approach of defining "court" to include an "arbitrator and another entity able to make a binding determination about liability". This definition appears to cover an expert appointed under a contractual provision for expert determination of disputes.

Clause 5 of the model provisions does not require that concurrent wrongdoers be parties to proceedings.

Where the claimant and one concurrent wrongdoer are bound by an arbitration agreement or expert determination provision, and another concurrent wrongdoer is not, that concurrent wrongdoer cannot be made a party to the arbitration or expert determination provision.

The result is that multiple proceedings are unavoidable.

Consideration should be given to providing for this case by a provision that where in arbitration or expert determination proceedings an issue of a proportionate liability is raised by a claimant or a concurrent wrongdoer, then the Court have power to require the proceedings to proceed as Court proceedings. Such a provision would mirror the Court's existing inherent jurisdiction to stay an arbitration in appropriate circumstances.

Question 15: Post loss settlements - Do you have any concerns or comments about the approach taken?

No comment is made.

Question 16: Binding the Crown - Do you have any concerns or comments about the approach taken?

We agree with the approach taken in the consultation draft.

Question 17: Option 2 - Do you have any concerns or comments about maintaining the status quo?

After consultation, we do not support this option.

The present opportunity to improve the proportionate liability regime, and make it uniform, should be preferred over maintaining the status quo.

Question 18: Option 3 - Do you have any concerns or comments about taking this option?

After consultation, we do not support this option.

Question 19: Prohibiting or permitting contracting out - Comments are invited on a number of matters.

We broadly support an approach which permits contracting out in circumstances where the parties to a contract have negotiated on an equal footing.

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

We suggest that the legislation should be expressed not to apply to statutory warranty and insurance schemes such as the Home Building Act 1989 (NSW).

Question 21: Are there any similar schemes to which the proportionate liability provisions should not apply?

No comment is made.

Question 22: Comments are invited on the likely costs and benefits associated with a number of matters.

No comment is made.

Yours faithfully



Mark Livesey QC
President
SOUTH AUSTRALIAN BAR ASSOCIATION



Ralph Bonig
President
LAW SOCIETY OF SOUTH AUSTRALIA