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Australian Institute of Architects

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Consultation on the proportionate liability provisions

Dear Sir/Madam

Thank you for the opportunity to put the Institute's views on whether NSW should implement the model proportionate liability provisions developed by the Standing Council on Law and Justice (SCLJ) in October 2013.

No contracting out

The Institute is pleased to see that the fundamental proposed reform is to disallow contracting out of proportionate liability. Contracting out was not allowed when in NSW proportionate liability was only, as far as we know, a feature of Part 4C of the Environmental Planning and Assessment Act as amended in 1997. Similarly, it was not allowed for the building industry under the Building Act 1994 in Victoria, or legislation providing similar effect in South Australia and the Northern Territory.

We have from the outset of the current legislation and beforehand, maintained that proportionate liability provides both the necessary and the fair method of dealing with complex claims which involve concurrent wrongdoers who are each subject to a duty to take reasonable care.

Necessary, because without it being applied consistently, the benefits of lower premiums are not likely to be realized in harder insurance markets and, without its positive effect on loss ratios, capacity (the amount of insurer reserve funds being allocated to professional indemnity insurance in case of claims) will not be as reliably provided during hard insurance market cycles.

Fair, because it is simply inequitable that "deep pockets" such as architects, engineers, and other professionals who have personal liability at law outside corporate structures, should pay for the liability of those who have contributed to the claimant's loss, but avoided responsibility by insolvency, voluntary or otherwise, or a corporate veil.

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In the construction industry focused legislation mentioned above, contracting out was recognized as an anathema to effective proportionate liability. It was correctly recognized that contracting out would permit the characteristic imbalance of bargaining power in professional consultancy engagement to defeat proportionate liability's intent. For such individuals and their businesses, being given no alternative but to agree to contract out of the statutory liability reduction afforded by proportionate liability is a double blow, because in almost all cases the insurance cover essential to practice is reduced or compromised by the contracting out. .

We emphasize this point about contracting out negating the effect of proportionate liability, because although the model provisions propose to disallow contracting out, the proposed definitive statement that proportionate liability does not apply to arbitration introduces another mechanism to defeat the effect of proportionate liability which is as much of a concern to any professional service provider as the ability to contract out.

Essentially, our concern arises for the same reasons as for contracting out, namely, the characteristic lack of bargaining power of professional service providers in their engagement, and the very likely outcome that arbitration will be pushed by their clients into their engagement as a substitute means to avoid proportionate liability.

The stated concerns in the SCLJ which lead to the model act's treatment of arbitration, are the difficulties discussed by *Justice Beech in Curtin University of Technology –v- Woods Bagot Pty Ltd* [2012] WASC 449. Arbitration does not permit the joining of parties without consent, and there is uncertainty about what applying the law means.

However, for the reasons we have given, there is significant 'evil' in excluding arbitration from proportionate liability.

Mr Tony Horan, one of the experts engaged in the long process of review of the proportionate liability legislation, pointed the problem out succinctly in his 2007 paper, at paragraph 446, where he said:

> "*…..if arbitrations are not subject to PL* [proportionate liability], *then parties will use arbitration agreements under the relevant state and territory law effectively to contract out of PL.*"

Mr Horan had observed in his prior paragraph, that the inability of an arbitrator to join non-voluntary parties was not, per se, a reason that arbitration would fail if the arbitrator apportioned liability by taking account of non-party concurrent wrongdoers in making the award, as the claimant remains able to pursue non-party wrongdoers in court to recover the part of its loss not recovered from the arbitrating party.

Mr Horan further observed that although this raises concerns over multiple proceedings and inconsistent findings among them, these situations have not been an unknown outcome of arbitration between contracting parties which leaves out other potential parties.

Consequently, we put for consideration that not only should the model legislation's direction that proportionate liability does not apply, be removed, but that the better solution to remove doubt is a positive statement that the arbitrator must apply proportionate liability to the liability of the participating parties, and in addition, amendment of the Arbitration Act, to confirm that "the law" the arbitrator must apply is common law *and* statute.

Definition of an apportionable claim

We are generally supportive of the notion that proportionate liability was not intended to operate against strict contractual obligations where those are the only obligations between the parties, but in our view the proposal in the model legislation puts at great risk fair application of proportionate liability in real litigation.

This is because the model legislation is insufficiently clear about whether the Court (or arbitrator) is required to take account *only* of the plaintiff's express claim, or to determine according to the circumstances whether there is an associated duty to take reasonable care that would trigger proportionate liability, despite the plaintiff not pleading a failure to take reasonable care.

The SCLJ's discussion paper itself notes that the proposed redefinition of an apportionable claim (that triggers proportionate liability) is not tested in the Courts, and raises the possibility of plaintiffs manipulating or creatively pleading their claim to avoid proportionate liability. Despite this, the model legislation does not seek to expressly prevent the plaintiff determining unilaterally whether proportionate liability applies.

In full support of the position taken by the Liability Reform Steering Group, our colleagues representing professional service providers generally, we strongly recommend that the definition of apportionable claim is best left alone, so that the court must, as now, determine whether a claim is apportionable because there is a duty of the defendant to take reasonable care, according to the facts and circumstances of the individual case.

Alternatively, the redefinition must in addition to confining proportionate liability to duty of care claims, specifically prevent the plaintiff artificially avoiding proportionate liability by mandating that the court must consider the facts and circumstances surrounding the claim (provided by the defence to the claim presumably) and from that consideration determine whether an apportionable claim is present, which then triggers the mechanisms for joining named concurrent wrongdoers and so on.

Consumer 'carve outs'

For those architect practitioners who perform small scale projects for consumers, and for whom the cost and availability of professional indemnity insurance is a significant if not critical factor in viability of their business, consumer 'carve out' provisions loom as significant problems. For similar reasons to those given against contracting out, making the reduction of exposure unavailable to insurers, has inevitable effects on premium levels and capacity in the Australian insurance market for professional indemnity insurance.

Consumer carve outs do not apply in NSW at present, and we are not aware of any significant public dissatisfaction with current arrangements that justify a change.

While our position is that no carve out ought to be adopted, of the two alternatives, the preferable exclusion from proportionate liability is consumer claims under the Australian Consumer Law, not a monetary threshold on the fee for the services provided. The latter has no boundary on liability because the law does not account in any way for the amount of the fee received for a service that is found to be negligently provided (in breach of the duty to take reasonable care).

If there is no boundary on liability, there is no positive outcome for insurers with the desired effect on premium levels and capacity.

Conclusion

Finally, we reiterate our concern that to permit arbitration to exclude proportionate liability is a major barrier to proportionate liability being actually effective, because it will become an alternative form of contracting out, despite the SCLJ's recommendation that contracting out be removed.

Allowing the possibility that plaintiffs could exclude proportionate liability by their pleadings is a significant concern for it would enable another form of contracting out, albeit post-contract.

Consumer carve outs are not necessary, but if adopted need to be chosen so that they minimize the risk that of themselves they will negate the insurance benefit of proportionate liability.

The writer would be pleased to meet with you, or to answer questions arising from this response.

Yours sincerely

Richard Barton RAIA

General Counsel & Company Secretary