

Our ref: R90/0231-06

28 March 2014

Director Policy Justice
Department of Attorney General and Justice
GPO Box 6
SYDNEY NSW 2001

Consultation on the Proportionate Liability Model Provisions

Local Government NSW (LGNSW) is the peak body for NSW Local Government, representing all the 152 NSW general-purpose councils, the special-purpose county councils and the NSW Aboriginal Land Council.

LGNSW is a credible, professional organisation representing NSW councils and facilitating the development of an effective community-based system of Local Government in NSW.

LGNSW represents the views of councils to NSW and Australian Governments, provides industrial relations and specialist services to councils and promotes NSW councils to the community.

LGNSW welcomes the opportunity to respond to the Model Proportionate Liability Provisions and in particular the Decision Regulation Impact Statement.

The primary aim of proportionate liability legislation can be summarised as:

- To help ensure that insurance, particularly professional indemnity insurance and public liability insurance, remained available and affordable, and
- To help ensure that defendants were only liable to the extent that they contributed to the plaintiff's economic loss, addressing the deep pocket syndrome.

These issues were of particular concern for local government in the early 2000s as councils found it difficult to find affordable and appropriate insurance. Councils were threatening to close public parks and in particular children's playgrounds and were often the last defendant standing and quite often required to pay for the losses that were in reality the liability of others (the deep pocket syndrome).

Local Government NSW understands that with the introduction of the *Civil Liabilities Act 2002* these matters have been largely dealt with.

The Standing Council on Law and Justice Proportionate Liability Model Provisions Decision Regulation Impact Statement provides 5 options in regards to overcoming some of the real or perceived difficulties currently faced as a result of differing legislation relating to Proportionate Liability between individual jurisdictions.

These options are:

1. Retain the status quo whereby jurisdictions continue to have separate legislative arrangements (or enact specific aspects of the draft model provisions).
2. Repeal the proportionate liability legislation in each jurisdiction.
3. Uniform legislation that defines what constitutes an apportionable claim broadly and prohibit contracting out.
4. Uniform legislation that defines what constitutes apportionable blame broadly but enables parties to contract out of the regime.
5. Uniform legislation that more narrowly defines apportionable claim as one where a failure to take reasonable care is an element of the action and prohibits contracting out (the draft model provisions).

Each option will be discussed in turn as they relate to local government.

Option 1: Local Government NSW has not been provided with evidence that councils have particular difficulties with the current situation. The status quo would provide certainty for councils in so far as they would be able to carry on business without the need for change.

Option 2: This is not an option that would provide any benefits for local government and would in all likelihood create an unacceptable cost burden on councils and should be vigorously challenged.

Option 3: This would achieve consistency of legislation between jurisdictions and reduce judicial uncertainty. It is possible that this option would have a negative impact on parties to complex commercial contracts to effectively structure their arrangements so as to allocate risk in ways that the parties agree are fair and reflect the contract price or where an alternative structure is needed to manage liability.

This option may affect councils entering into joint venture arrangements comprising of two or more contractors on the basis that each is jointly and severally liable for all the obligations of the joint venture under the contract.

It is unclear what effect this would have on local government and therefore is not a preferred option.

Option 4: While this option provides consistency, certainty and is workable although it may operate unfairly where there is an inequality of bargaining power between the contracting parties.

As this is the current option used in NSW and local government has gained a number of benefits from this system it is not seen as an imperative to change the system.

Option 5: This is the draft Model Provisions option.

Under this option proportionate liability would apply to claims for economic loss or damage to property where a failure to take reasonable care is an element of the claimant's action.

This would narrow the application of proportionate liability as to how it is currently used.

Any claims that a breach of an express or implied contractual duty to render services with due care and skill, a breach of a tortious duty of care or the breach of an implied or express contractual duty of care would be apportionable.

Claims based on a breach of a strict contractual duty, such as a warranty that will be fit for purpose, would not be apportionable.

This reflects the basic principle that people should honour their contracts.

Overall this option is expected to provide greater certainty in risk allocation for commercial contracts and if arbitration and consumer claims are excluded from the legislation, it represents a narrower but more certain application of proportionate liability.

It is not clear that this option would be of benefit to local government and is therefore not the preferred option.

Local Government NSW would be pleased to receive further advice as to any perceived benefits for local government if this option was to be introduced.

What does this mean for local government?

Local Government has benefited from the introduction of proportionate liability legislation through lower insurance premiums and relief from the issue of deep pocket syndrome.

Of the 5 options that have been put forward by the draft Model Provisions, Option 1, that is to keep the status quo would have no appreciable impact on councils as the current provisions have provided councils with substantial benefits.

While it is unclear whether councils in NSW would benefit from changes to the contracting in/out provisions, or whether the introduction of the Model Proportionate Liability Provisions would create greater certainty for local government in which to do business, Local Government NSW would prefer at this stage that the status quo remain.

LGNSW will only support any provision that does not convey a cost burden to local government or fetter the rights of councils to enter into a commercial agreement that is of greatest benefit to the council.

To that end Local Government NSW would propose to maintain the status quo as set out in Option 1 as it is not clear that any of the other options will provide a better outcome for councils.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bill Gillooly', with a stylized flourish at the end.

Bill Gillooly AM
CHIEF EXECUTIVE