



31 March 2014

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

Dear Sir/Madam,

Consultation on the proportionate liability model provisions

Thank you for giving me the opportunity to comment on the model proportionate liability provisions (model provisions).

The Office of the NSW Small Business Commissioner (OSBC) was established in mid-2011 to support small businesses throughout NSW. The role of the OSBC is to:

- provide dispute resolution services;
- speak up for small business within government; and
- deliver quality business advice through Small Biz Connect.

The OSBC is focused on improving the operating environment for small businesses within NSW. The OSBC therefore supports strategies aimed at improving the availability and affordability of professional indemnity and public liability insurance, and minimising any existing inconsistencies and/or complexities in proportionate liability legislation which may have a negative impact on small businesses.

The OSBC has reviewed the decision regulation impact statement and offers the following comments on matters directly relevant to small businesses.

The OSBC supports the introduction of the model provisions in NSW

Greater consistency and uniformity in proportionate liability provisions across all jurisdictions has the potential to allow liability disputes to be resolved or settled in a quicker and cheaper manner. This is in the interests of small businesses, which have limited time and financial resources to commence and/or maintain lengthy litigation.

The inconsistency between jurisdictions on the ability of parties to "contract out" of proportionate liability, and the resultant ability of parties to "forum shop", can have a disproportionate effect on small businesses. Small businesses are often in a much weaker bargaining position relative to big businesses or government, which often dictate the terms of contracts, including applicable or governing law clauses.

The OSBC recognises that "forum shopping" is likely to be less prevalent in NSW, given that existing NSW proportionate liability provisions allow for "contracting out" of proportionate liability provisions. However, this is not to say that small businesses operating in NSW are not impacted by this practice, since NSW businesses may enter into contracts with big businesses and government agencies located in other jurisdictions which may currently prohibit "contracting out".

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If NSW was to introduce a prohibition on “contracting out” as part of the model provisions, but other jurisdictions did not do so, then the practice of “forum shopping” may become more prevalent and potentially disadvantage NSW small businesses. NSW should therefore at the very least ascertain the intentions of Victoria and Queensland regarding “contracting out” and work towards achieving a consistent approach on that aspect across NSW, Victoria and Queensland.

More generally, small businesses will be assisted when there is greater consistency and uniformity in proportionate liability provisions across jurisdictions. This has the potential to maintain or improve the availability and affordability of professional indemnity and public liability insurance. However, it is difficult to predict and/or quantify the effect of the adoption of the model provisions on insurance premiums, since premiums are driven by a number of different factors.

The OSBC supports the introduction of a prohibition on “contracting out” of proportional liability in NSW

The ability of a party to “contract out” of proportional liability can result in unfairness to a party that is in a relatively weak bargaining position, since it may be forced to accept full liability when it has little control over the potential loss or damage.

As mentioned above, small businesses are often in a weak bargaining position, but may also be unaware of the implications of agreeing to “contract out”, one of which may be taking on uninsured liabilities.

Introducing a prohibition on “contracting out” in NSW will therefore limit the opportunities to take advantage of small businesses which can have relatively weaker bargaining power and may have limited sophistication.

This may also assist with reducing relevant insurance premiums to the benefit of small businesses, as there will no longer be uncertainty about whether an insured party will or will not contract out of potential liability reduction through the application of proportionate liability provisions.

The OSBC supports the narrowing of the consumer claims exemption, and recommends that “Option 2” be implemented in NSW

Small businesses are regularly suppliers of consumer goods and services, and the OSBC supports the proposed narrowing of the consumer claims exemption to the application of the proposed proportionate liability provisions.

The OSBC supports the adoption only of “Option 2” described at page 39 of the decision regulation impact statement, on the basis that this would limit the potential liability of small businesses. In relation to larger liability claims made by consumers (i.e. those over \$40,000), a small business should only be liable for the proportion of damage it is responsible for, and as such no exception to the application of the proportionate liability provisions should apply.

Should you wish to further discuss any of the issues raised in this submission please contact Georgos Papanastasiou, Assistant Advisor, Advocacy on (02) 8222 4833 or georgos.papanastasiou@smallbusiness.nsw.gov.au.

Yours sincerely



Robyn Hobbs OAM
Small Business Commissioner

