

LIABILITY REFORM STEERING GROUP

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2 May 2014

Director Justice Policy
Department of Attorney General and Justice
GPO Box 6
Sydney NSW 2001
By email: justice_policy@agd.nsw.gov.au

Dear Sir/Madam,

Re: Consultation on the proportionate liability model provisions

Introduction and background

In October 2013, the Standing Council on Law and Justice considered model proportionate liability provisions (the Model Provisions) developed to address concerns about differences in proportionate liability legislation across the various Australian jurisdictions. Attorneys General agreed to consider introducing the Model Provisions in their respective jurisdictions.

The Department of Attorney General and Justice in NSW (the Department) is consequently now consulting on the Model Provisions to inform assessment of whether they should be wholly or partially implemented in NSW.

The Liability Reform Steering Group (LRSG) welcomes the opportunity to contribute to the consultation process.

The LRSG represents professional associations and professional firms on professional liability issues. The LRSG was first convened in 2002 to share information on the deteriorating state of the professional indemnity (PI) insurance market and the detrimental consequences of this for professionals and consumers, and to advocate for legislative reform measures to alleviate market failure in PI insurance. Australian governments subsequently unanimously agreed to the passage of a package of reforms including proportionate liability and professional standards legislation to address this problem. The LRSG has since 2002 continued to meet regularly to monitor these issues and the progress of reform. The LRSG currently includes representatives of the Australian Institute of Architects, Consult Australia, CPA Australia, Engineers Australia, the Institute of Chartered Accountants Australia, the Law Institute of Victoria, the Law Council of Australia, Professions Australia and representatives from large professional services firms.

The LRSG confirms that it is responding to the Model Provisions and accompanying material as set out on the SCLJ website at www.sclj.gov.au.

On 20 December 2013 the LRSG sent letters to all Australian Attorneys General providing our views on the Model Provisions in advance of the current consultation by the Department. Our letter to the then NSW Attorney General and Minister for Justice, the Hon Greg Smith MP, is appended.

The substance of our 20 December 2013 to Mr Smith continues to reflect our position on the Model Provisions and we would like the views put forward in that letter as well as in this communication to be taken into account by the Department in its current consultation process on the Model Provisions.

In summary, our views including additional reflection on the Model Provisions are as follows:

1. The Model Provisions are a significant improvement over the previous 2011 version. In particular we note and support the prohibition on contracting out of proportionate liability. The LRSG has in its submissions to the SCLJ/SCAG over many years stated our view that permitting contracting out would fundamentally undermine the public policy objectives underpinning the introduction of proportionate liability, namely assisting to make PI insurance more available and affordable, for the ultimate goal of better protecting all consumers of professional services. We have also provided independent, researched findings to demonstrate that (i) permitting contracting out of proportionate liability creates uncertainty for PI insurers, undermining the delivery of expected benefits in the availability and affordability of PI Insurance; and (ii) potentially creates significant "deadweight" economic costs in the order of tens of millions of dollars for contracting parties.
2. The Model Provisions do require at least one essential change, which we regard as fundamental to the success of proportionate liability. This is to amend Clause 3 of the Model Provisions re: "Non-application to arbitration etc" to make it clear that an entity (other than a court) that is able to make a binding determination about liability in relation to an apportionable claim is required to apply the proportionate liability principles in making a determination. A necessary related amendment is to delete proposed Clause 12 (3). (Hereunder Clause 3 and Clause 12 (3) are referred to as "the Arbitration Clauses".)

The LRSG opposes the Arbitration Clauses as they loom as "contracting out" clauses under another name. The Arbitration Clauses should be amended to require application of proportionate liability principles in arbitration, otherwise the same problems posed by "contracting out" (which the Model Provisions rightly proposes be prohibited) will again be encountered.

3. One of the key points acknowledged in the Regulation Impact Statement accompanying the Model Provisions is that permitting contracting out of proportionate liability exacerbates imbalances in negotiating power between contracting parties. That is, larger and more economically powerful contracting clients (including government agencies) could impose contracting out clauses on smaller, professional clients, with many of the latter not being in a position to "walk-away" from work and the cash-flows that they depend upon. In our view, the Arbitration Clauses as currently drafted will continue to offer clients with stronger market/bargaining power a ready means to by-pass the operation of proportionate liability. As a result the operation of the proportionate liability regime will remain inconsistent and uncertain, which will have a negative effect on the PI insurance market and reduce the likelihood that the proportionate liability regime will deliver the benefits over time in respect of improved PI insurance cost and availability that the reform was intended to deliver.
4. We are aware of concerns that Clause 3 (c) of the Model Provisions potentially varies the application of the Australian Consumer Law. We note that the Drafting Note accompanying this section of the Model Provisions states that jurisdictions may adopt either or both of paragraphs (b) and (c) depending on the extent of consumer carve out sought. We submit that (b) alone is appropriate. The object of the proportionate liability Model Provisions should be to align the consumer carve-out, if required at all, with existing consumer

definitions and protections as determined by applicable consumer protection law, not to alter the definition and application of consumer carve-outs.

5. We are of the view that defining an apportionable claim (Clause 2 (a)) by reference to whether or not a failure to take reasonable care is an element of the claimant's action is a departure from existing law in this area, and that this risks introducing a new and untried concept into the law. We would recommend leaving failure to take reasonable care as a matter to be determined by the court according to the facts of the case.

With amendment of the matters detailed above, the LRSG supports the adoption of the Model Provisions. We believe that if NSW takes a leadership role with regard to adopting the Model Provisions, this will send a strong message to other jurisdictions about the importance of achieving nationally consistent proportionate liability legislation for the benefit of professionals and consumers alike. It would also be consistent with NSW's objective to facilitate the development of a strong and vibrant professional services sector.

Accordingly, we encourage NSW to introduce legislation to enact the Model Provisions, as amended in accordance with the recommendations above and in the attached letter of 20 December 2013, as early as possible.

On behalf of the LRSG, I appreciate the opportunity to comment on the Model Provisions. If you require any further information, please do not hesitate to contact me on (02) 9335 7108 or by email to chrishall@kpmg.com.au.

Yours sincerely,



Chris Hall
Chairman, Liability Reform Steering Group