LIABILITY REFORM STEERING GROUP

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The Hon Greg Smith MP
Attorney General and Minister for Justice
Level 31 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
By email: office@smith.minister.nsw.gov.au

Dear Attorney General,

Re: New Model Provisions on Proportionate Liability (agreed for release by Attorneys at the meeting of the Standing Council on Law and Justice, October 2013)

The Liability Reform Steering Group (LRSG)[1], notes the communiqué from the meeting of the Standing Council on Law and Justice (SCLJ) meeting on 10-11 October 2013, in particular that "Ministers agreed to consider introducing the model proportionate liability legislation in their jurisdictions and to publicly release the model legislation and regulation impact statement".

The LRSG welcomes the significant forward step that this represents on the long-standing reference to the SCLJ (and its predecessor, the Standing Committee of Attorneys General or SCAG) on national harmonisation of proportionate liability (PL) legislation. We wish to commend the SCLJ and its working group for the work that it has done on this topic since the Draft Proportionate Liability Model Provisions and accompanying Regulation Impact Statement were released for public consultation in September 2011. We regard the October 2013 model proportionate liability legislation (the new model provisions or NMP) as a significant improvement over the previous 2011 version, and in particular note and support the position in the NMP with respect to contracting out of proportionate liability; that is, that contracting out is prohibited for all contracts except an agreement by a concurrent wrongdoer to contribute to indemnify another concurrent wrongdoer. The LRSG has in its submissions to the SCLJ/SCAG over many years reiterated our view that permitting contracting out would fundamentally undermine the public policy objectives underpinning the introduction of PL, namely assisting to make professional indemnity insurance more available and affordable, for the ultimate goal of better protecting all consumers of professional services. We are pleased to see this acknowledged in the NMP.

Recognising that the issue of harmonisation of national PL laws has been before the SCLJ/SCAG for many years, in the spirit of compromise and progress the LRSG is encouraging Attorneys General in

[1] 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 of the large national accounting firms and actuarial firms.

all jurisdictions to move forward to enact the NMP in their respective jurisdictions, though with one essential change.

The change we urge, and which we regard as fundamental to the success of PL, is to amend Clause 3 of the NMP 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 PL principles in making a determination. A necessary related amendment is to delete existing 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 PL principles in arbitration, otherwise the same problems posed by "contracting out" (which the NMP rightly proposes be prohibited) will again be encountered.

If not amended to require application of PL principles, the Arbitration Clauses will offer clients with stronger market/bargaining power a ready means to by-pass the operation of PL and will rapidly become a de-facto across-the-board approach for business and government when contracting with a broad range of professional service providers, negating the effect of PL. Lack of effective PL will of course have a negative effect on the PI insurance market, and impact on the delivery of expected benefits over time in respect of PI insurance cost and availability that PL has been expected to deliver.

Indeed, if the NMP are enacted nationally with the Arbitration Clauses intact, it is reasonable to expect that the effect on PI insurance will be greater than the effect to date of inconsistent treatment within PL laws of contracting out, as in the case of the latter this has been permissible only in three jurisdictions. Professional bodies that are members of the LRSG also warn that this risk (of PL being avoided by use of the Arbitration Clauses) is a less obvious risk than contracting out per se and hence one that will be difficult to educate members on, especially those in smaller practices.

Moreover, we are also concerned that the Arbitration Clauses might have even more negative consequences. If the NMP with the Arbitration Clauses intact are enacted, it is foreseeable that future PI insurance contracts might be drafted to contain clauses that specifically exclude additional liability incurred as a result of contractual agreements to be bound by the determinations of arbitrators.

In addition, we question any public policy need for the Arbitration Clauses in the NMP to exclude PL. Given the new, narrower definition of an apportionable claim, which requires that a failure to take reasonable care is an element of the claimant's action, PL will not be an applicable issue in the majority of typical arbitration cases where only strict contractual obligations are at issue. Where a failure to take reasonable care is an element of the claimant's action and this does come before an arbitrator, we can see no reason that an arbitrator cannot take account of the principles of PL in reaching a decision.

Whilst professional service providers do utilise alternative dispute resolution mechanisms, the use of arbitration is not common. Ultimately, as professional services disputes can involve complex matters of law and judgement, as a point of principle we believe that parties should have access to the courts as the ultimate adjudicator of disputes, not be driven to arbitration simply because the NMP facilitates and encourages it by providing a mechanism to defeat PL.

Finally, we do not think that the threat posed by the Arbitration Clauses is ameliorated in any way by the Drafting note to Clause 3 that states "Jurisdictions may choose whether or not to include this provision". On the contrary, we find this totally inconsistent with the objective of achieving nationally consistent PL legislation and inconsistent with the logic and reasoning of the Decision Regulation

Impact Statement. Should Clause 3 be adopted by any jurisdictions, the outcome is likely to be "forum shopping" that will result in pressure on professional service providers to agree to contract in the law of those jurisdictions that adopt the Arbitration Clauses; that is those that effectively by-pass the operation of PL, with all the negative consequences this will entail.

As we concluded in our submission on the Draft Model Provisions released in 2011, it is imperative that we remember that proportionate liability was introduced only a relatively short time ago for solid public policy reasons as a response to market failure in PI insurance that put consumers at risk and threatened the continued provision of vital professional services. We were then strongly of the view that allowing contracting out undermines the intended policy objectives of proportionate liability - namely, to ensure that PI insurance is both affordable and available in the commercial market to better protect consumers that suffer loss and ensure that vital professional services remain insurable and available to consumers. Whilst we welcome the fact that the NMP contain a prohibition on contracting out, the LRSG regards the Arbitration Clauses of the NMP as a similarly fatal flaw that will defeat the purpose and objectives of PL.

One further observation on the NMP that we also believe should be corrected relates to Clause 12 (2). This sub-clause "grandfathers" contracting out agreements entered into before the commencement of Clause 12. However, as such agreements are only permissible in NSW, WA, and Tasmania, sub-clause 12 (2) is only necessary in relation to amending legislation in these three states.

With amendment of the Arbitration Clauses to permit application of PL principles and addressing the drafting anomaly detailed above, the LRSG supports the adoption of the NMP and will be happy to assist Attorneys General to pass this legislation in a nationally consistent way.

On behalf of the LRSG, I appreciate the opportunity to comment on the NMP. 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