

CE14/0115

Mr Andrew Cappie-Wood
Director General
Department of Attorney General and Justice
GPO BOX 6
SYDNEY NSW 2001

Dear Mr Cappie-Wood *Andrew*

PROPORTIONATE LIABILITY MODEL PROVISIONS

Thank you for your letter of 24 January 2014 providing Roads and Maritime Services (RMS) with the opportunity to make a written submission on the proportionate liability model provisions.

RMS supports option 4, namely the introduction of harmonised proportionate liability legislation which enables the parties to contract out of the regime.

Please find attached a copy of RMS' submission.

If you or your staff would like to discuss RMS' submission, please do not hesitate to contact Christine Lithgow, General Counsel on 8588 5370.

Yours sincerely

P. Duncan 12.3.2014.

Peter Duncan
Chief Executive

Submissions on Proportionate Liability Model Provisions



Transport
Roads & Maritime
Services

Roads and Maritime Services (RMS) supports the introduction of uniform proportionate liability model provisions in accordance with option 4 set out in the Decision Regulation Impact Statement.

RMS has the following concerns with sections 7, 8 and 12 of the draft Proportionate Liability Model Provisions.

Sections 7 & 8 – Notification of concurrent wrongdoers

Section 7 requires the defendant to notify the claimant of the identity and location of the concurrent wrongdoer as well as the circumstances that make that person a concurrent wrongdoer and provides penalties for non-compliance.

Section 8 requires the defendant to plead the circumstances upon which a person is a concurrent wrongdoer and establish the prima facie case that a person is a concurrent wrongdoer.

RMS agrees that ensuring all concurrent wrongdoers come before the Court in the one set of proceedings would reduce the burden on the Courts resources. However, requiring the defendant to take reasonable steps to notify the plaintiff, including obtaining orders for substituted service and establishing the prima facie case that a person is a concurrent wrongdoer will significantly increase a defendants litigation costs. Those costs are more fairly borne by the Plaintiff as the entity that has elected to initiate the litigation.

The penalties for non-compliance with sections 7 should also be reconsidered. Section 10 allows a plaintiff to bring subsequent proceedings and while RMS agrees there are likely to be cost implications, the penalty imposed in section 7(6)(a) does not appear to be a just and equitable consequence of non-compliance.

Section 12 – Contracting Out

The proportionate liability provisions in NSW allow parties to contract-out and therefore agree to allocate risk between them. RMS is of the view that parties should continue to be able to contract out of proportionate liability. This will allow parties to agree during negotiations on a single point of responsibility, particularly in situations where a head contractor has more control over suppliers and subcontractors than RMS does.

If it is decided to remove the current contracting-out rights then in our view those rights should still be preserved for scenarios where the Defendant is a contractor of the Plaintiff and the Concurrent Wrongdoer is the Defendant's subcontractor. RMS selects its contractors having regard to many factors including its finances and insurances as that impacts on the ability of the contractor to meet any liability to RMS. If contracting-out is no longer permitted in this scenario then the contractor's poor choice of a subcontractor (whether known to RMS or not) will impact on RMS. The risk of selecting a subcontractor lies with the contractor not the principal and therefore the liability should rest with the contractor not the principal by continuing to allow the parties to contract out of proportionate liability.

RMS Legal Branch
7 March 2014

