



25 March 2014

Director Justice Policy  
Department of Attorney General & Justice  
GPO Box 6  
SYDNEY NSW 2000

By email to [justice\\_policy@agd.nsw.gov.au](mailto:justice_policy@agd.nsw.gov.au)

Dear Director

I refer to the letter from your Secretary to the Secretary for Transport dated 24 January 2014, seeking submissions in relation to the proportionate liability model provisions.

The Transport portfolio agencies support the introduction of uniform proportionate liability model provisions in accordance with option 4 set out in the Decision Regulation Impact Statement.

However, Transport wishes to raise the following issues concerning 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 plaintiff of the identity and location of the concurrent wrongdoer as well as the circumstances that make that person a concurrent wrongdoer; it also 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.

While Transport supports the position that all concurrent wrongdoers coming before the Court in the one set of proceedings would reduce the burden on the Court's resources, 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, would significantly increase a defendant's litigation costs. Those costs are more fairly borne by the plaintiff as the initiator of the litigation.

The penalties for non-compliance with section 7 should also be reconsidered. Section 10 allows a plaintiff to bring subsequent proceedings and while we agree 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 current proportionate liability provisions in NSW allow parties to contract-out and therefore agree to allocate risk between them. The Transport agencies are of the view that parties to a

contract 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 it is the head contractor that has control over suppliers and subcontractors.

If it is decided to remove the current contracting-out rights, then they should still be preserved for scenarios where the defendant is a contractor of the plaintiff and the concurrent wrongdoer is the defendant's subcontractor.

Transport agencies enter into arrangements as the principal with private sector entities having regard to many factors including the contractor's financial capacity and insurances, to minimise as far as possible potential liability of our agencies. If contracting-out is no longer permitted, then a contractor's poor choice of a subcontractor will impact adversely on our agencies. The risk of selecting a subcontractor lies with the contractor not the principal and therefore the liability should rest with the contractor and not the principal. Allowing the principal to contract out of proportionate liability assists our agencies to manage this risk, and minimizes potential burdens on taxpayers.

Yours sincerely



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