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Dear Sir/Madam,

CIARB SUBMISSION IN RESPONSE TO SCAG PROPORTIONATE LIABILITY REGULATIONS IMPACT STATEMENT (SEPTEMBER 2011)

The Chartered Institute of Arbitrators Australia Limited wishes to make the following submissions in respect of the Impact Statement.

Paragraph 4.1.1.9 of the Impact Statement deals with proceedings other than judicial proceedings – arbitration and external dispute resolution schemes. This submission addresses the question whether proportionate liability legislation should apply to arbitration proceedings.[1]

The Impact Statement correctly states that the issue of whether proportionate liability legislation applies to arbitrations is not specifically dealt with under current legislation enacted across the country. The Impact Statement notes that there are arguments for and against the proposition that proportionate liability does apply to arbitrations.

In our view, the current position is that proportionate liability does not apply to arbitrations. The issue has only been considered by one court – namely, the Full Court of the Supreme Court of Tasmania in *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3, in the context of the *Civil Liability Act 2002* (Tas). Under the Tasmanian Act, "court" is defined to include "tribunal", and there is no need to join a putative wrongdoer before seeking proportionate liability relief (s 43B(4)). The Full Court expressed the view (in obiter) that the proportionate liability provisions of the Tasmanian Act did not apply to

[1] We make no submission as to whether proportionate liability legislation should apply to "external dispute resolution schemes".

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arbitrations.[2] The view that proportionate liability relief does not apply to arbitrations is stronger in jurisdictions, like Victoria, where proportionate liability relief cannot be availed of unless the putative wrongdoer is joined as a party to the proceeding.

In particular, the better view is that where proportionate liability legislation defines a "court" to mean a "tribunal", that is meant to refer to a statutory tribunal (such as the Victorian Civil and Administrative Tribunal), and not a private arbitrator or tribunal.[3]

Thus, the consultation Model Proportionate Liability provisions make proportionate liability apply to arbitrations when it does not presently do so. This is proposed to be achieved by defining "court" to expressly include an "arbitrator". The Impact Statement asserts that there are strong policy arguments that proportionate liability legislation should apply to arbitrations, yet it does not articulate any. Indeed, there are strong policy arguments to the contrary.

Proportionate liability legislation provides an incentive to a plaintiff in court proceedings, who is faced with a proportionate liability defence, to join putative concurrent wrongdoers who are responsible for the same damage, thereby avoiding a multiplicity of proceedings. This is not, however, possible in arbitration. The arbitrator's jurisdiction is founded on the consent of the parties. The arbitrator has no jurisdiction to join third parties and to make an award against them (absent the consent of the respondent[4] and the third party). Indeed, the Impact Statement recognises that "arbitrators generally[5] cannot make a binding award against a concurrent wrongdoer who is not a party to the arbitration agreement."

During 2009-2010 SCAG undertook substantial steps to re-invigorate domestic arbitration in Australia. This commenced on 17 April 2009 with the publication of a Communique by which it committed to re-invigorate the reform of the then uniform domestic arbitrations Acts.[6] Then on 7 May 2010 SCAG resolved that the various States and Territories should adopt a new Model Bill to overhaul the existing domestic uniform arbitration Acts. New domestic arbitration Acts (based on the Model Bill) have been adopted in New South Wales,[7] Tasmania,[8] and the Northern Territory[9] (collectively, "the revised CAAs").

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[2] At [26]-[33].
[3] See David Levin QC, "The Choice of Dispute Resolution and its Implications for Proportionate Liability Claims", *The Australian ADR Reporter*, Issue 15 – May 2011, pp 53-55.
[4] "Claimant" and "respondent" are here used to identify respectively the party initiating the arbitration and the party responding to the claim brought by arbitration.
[5] That is, absent consent of the parties to the arbitration and also the third party.
[6] The SCAG Communique referred to the adoption of the UNCITRAL Model Law "supplemented by any additional provisions which are necessary or appropriate for the domestic scheme."
[7] *Commercial Arbitration Act 2010* (NSW).
[8] *Commercial Arbitration Act 2011* (Tas).
[9] *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT).

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Moreover, South Australia, Victoria and Western Australia have introduced similar Bills into their Parliaments, which are likely to come into force by the end of the 2011 calendar year.

The recent reforms to domestic arbitration were designed to make domestic arbitration a credible alternative to litigation before the courts. Arbitration is meant to be different to litigation.[10] Just because proportionate liability relief applies to court proceedings does not mean that it should apply to arbitrations.

The application of proportionate liability legislation to arbitrations, as contemplated in the Impact Statement and the Model Proportionate Liability provisions, will, in our view, undo a lot of SCAG's good work.

The suggestion in the Impact Statement (at p 33) that:

> if a respondent is not able to claim proportionate liability in an arbitration but would have a clearly arguable case in court, there is a basis for the respondent to claim the arbitration should be stayed and the claimant left to bring court proceedings – the alternative is a multiplicity of proceedings,

is, with respect, plainly wrong. An important aspect of the revised CAAs is that they change the law as to the stay of court proceedings in favour of arbitration. Under the old uniform arbitration Acts,[11] courts had a general discretion whether or not to stay a court proceeding brought in the face of an arbitration agreement. In contrast, under the revised CAAs,[12] courts are mandated to stay court proceedings upon the request of a party, where the parties have agreed to refer the relevant dispute to arbitration (subject to very limited exceptions). The fact that there may be an overlap of issues with claims between one or other of the parties to the arbitration agreement and third parties, with the consequent risk of inconsistent findings arising out of a multiplicity of proceedings, is no longer a relevant factor to be considered by a court in refusing a stay of court proceedings in favour of arbitration. Conversely, there is no basis for a respondent in an arbitration regulated by the revised *CAA* to apply to the court for a stay of the arbitration on the grounds that there are putative concurrent wrongdoers who are not amenable to the jurisdiction of the arbitrator and that therefore there is likely to be a multiplicity of proceedings.

The reform of the domestic arbitration regime in Australia was intended to promote uniformity between the domestic and the international arbitral regimes in Australia. Separately, the *International Arbitration*

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[10] Indeed, arbitrators have in the past been criticised for mimicking court procedures.
[11] In particular, s 53.
[12] In particular, s 8 which is based on Article 8 of the UNCITRAL Model Law.

Act 1974 (Cth) ("IAA") was amended on 6 July 2010. One of the major objectives of the reform of the *IAA* was to position Australia as a hub for dispute resolution in the Asia-Pacific region.[13]

The proposed application of proportionate liability legislation to arbitrations may also have an adverse impact on the concerted efforts to attract international arbitrations to Australia. In other words, the proposed amendments do not affect only **domestic** arbitration. They also apply (or at least, in the absence clarifying provisions, there is uncertainty whether they apply) to **international** arbitrations seated in Australia.[14]

For all these reasons, CIArb strongly opposes legislation which seeks to make proportionate liability legislation expressly referrable to arbitrations seated in Australia.[15]

The Impact Statement notes that there are varying approaches across the country as to whether or not parties may "contract-out" of the proportionate liability regime. The model provisions (in clause 11) prohibit "contracting-out". We note that there may be an argument that agreeing to arbitrate amounts to an implied contracting-out under the proposed legislation. If notwithstanding our submission arbitration remains within the operation of the legislation contracting-out should be permitted.

Conclusion

We strongly recommend that "court' be defined to specifically exclude an "arbitrator" or "arbitral tribunal". In the alternative, the legislation should provide an exception to the effect that the contracting-out prohibition does not apply to an agreement by which parties refer their disputes to arbitration.

If, notwithstanding the above submissions, SCAG is intent on making proportionate liability legislation applicable to arbitrations, we submit that the legislation should provide that it does not apply to an "international arbitration" as defined in the *IAA* That is, it should only apply to domestic arbitrations.

If, notwithstanding our submissions, proportionate liability is made applicable to arbitrations "judgment" will need to be defined to include "award" so that 9(2) applies. We note that 9(4) (subject to 9(5)) may operate harshly if the first proceeding was an arbitration given that the claimant is not able to join a third party to the proceeding.

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[13] International arbitration is the preferred method if dispute resolution for transnational disputes. It is growing exponentially in the Asia-Pacific region. Singapore and Hong Kong have emerged as the leading arbitration seats in the region.

[14] Proportionate liability provisions may apply to an international arbitration by virtue of the fact that they may be considered to be a mandatory law of the seat. They alternatively may apply as part of the governing law of the arbitration if the governing law selected by the parties is Australian law.

[15] Which would include international as well as domestic arbitrations.

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You are invited to contact the writer should you wish to discuss the matter.

Yours sincerely

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President