31 March 2014

Director Justice Policy
Department of Attorney General & Justice
Email: justice_policy@agd.nsw.gov.au

Dear Sir/Madam

Re: **Proportionate liability model provisions**

Thank you for the invitation to comment upon the model provisions on proportionate liability proposed by the Standing Council on Law and Justice.

The model provisions would introduce a number of changes to the proportionate liability regime presently in place in New South Wales under Part 4 of the *Civil Liability Act* 2002 (CLA). I will only comment on what seem to me to be the significant changes.

Definition of "apportionable claim"

The first change of significance is the definition of "apportionable claim". Under the present law it is defined as a "claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care": s 34(1)(a) CLA. The definition proposed in the model provisions is "an action for damages (in contract, in tort, under statute or otherwise) where a failure to take reasonable care is an element of the claimant's action": cl 2. Various examples of apportionable and non-apportionable claims are also provided.

Under the present law breach of a term of a contract that does not require the promisor to take reasonable care, but nonetheless is breached as a result of a failure to take reasonable care would arguably be apportionable.[1] It appears that this is the perceived problem that the model provisions seek to cure.

[1] *Reinhold v New South Wales Lotteries Corporation (No 2)* [2008] NSWSC 187, [25]; Barbara McDonald and JW Carter, 'The Lottery of Contractual Risk Allocation and Proportionate Liability' (2009) 26 *JCL* 1.

The Honourable T F Bathurst
Telephone: + 61 2 9230 8218
Facsimile: + 61 2 9230 8810

GPO Box 3, Sydney NSW 2001, Australia
DX 829 Sydney
Email: victoria_bradshaw@courts.nsw.gov.au
Website: www.lawlink.nsw.gov.au/sc

There is ambiguity in the expression "element" in the definition of apportionable claim in the model provisions. Conventionally the "elements" of the cause of action for breach of contract are a valid contract, breach, and damage resulting from that breach. The assumption underlying the draft provisions may be that if it is essential for the claimant to prove want of reasonable care in order to establish breach, then a failure to take reasonable care is thereby an "element". However it remains uncertain whether "an element of the claimant's action" means the elements of the particular cause of action, or whether it is an evidentiary or factual aspect of the claim.

I suggest the draft provisions will only achieve their apparent objective if the expression "element" is understood as an "essential part" of the claimant's cause of action as opposed to the evidentiary background to the cause of action.

One of the examples of an apportionable claim is "breach of director's civil obligation to act with reasonable care and diligence": example 4. It is uncertain whether the expression "director's civil obligation" is intended to mean a director's obligation under the general law, both common law and equity, or whether it is intended to mean the director's statutory duty, for instance, under s 180 of the *Corporations Act 2001* (Cth) or both. If it refers to the director's statutory obligation further thought may be required as to how claims under civil penalty provisions, of which s 180 is one, are able to be apportioned. In any event it may be appropriate to amend the description of the example to remove any uncertainty.

The two examples of claims that are not apportionable ("breach of strict contractual duty"; and "breach of absolute contractual duty") may also create difficulties. These difficulties are exemplified by the observation that "the further the performance of a contract has proceeded the more absolute a strict liability becomes" [2] and possibly compounded where such claims are combined with a claim for breach of a term that does not fall within either description.

<u>Definition of "concurrent wrongdoer"</u>
The present law defines a "concurrent wrongdoer" as "a person who was one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim": s 34(3) CLA. The definition proposed in the model provisions is in the same terms but with the addition of the words, "or substantially or materially similar loss or damage": cl 4(1)(a). There is also the express requirement that each of the concurrent wrongdoers must be "legally liable" to the claimant for the loss or damage caused": cl 4(1)(b).

It is not clear why it is thought to be necessary to expand the scope of the loss. This language has also been the subject of judicial criticism in that it may lead to

---

2 JW Carter, *Contract Law in Australia* (6th, LexisNexis Butterworths), [29–16].

uncertainty in the application of the law.[3] For instance, "substantially or materially similar loss" will accommodate loss that is, in part, different from the loss or damage the subject of the claim, so long as it is not substantially or materially different. When part of the loss caused is different from that caused by another concurrent wrongdoer, it is not clear how the court is to allocate responsibility for that loss.

Excluded concurrent wrongdoer

The present law defines an "excluded concurrent wrongdoer" as one who: "intended to cause the economic loss or damage to property that is the subject of the claim"; or "fraudulently caused" that loss or damage; or whose civil liability was otherwise of a kind excluded from the operation of the Part of the Act dealing with proportionate liability: s 34A CLA.

Although the model provisions expand the scope of loss to "substantially or materially similar loss or damage" in respect of concurrent wrongdoers, this expansion is not reflected in the provisions relating to the excluded concurrent wrongdoer. It is limited to "the loss or damage the subject of the claim": cl 5 (1).
It is not clear if it is intended that a fraudulent concurrent wrongdoer or a concurrent wrongdoer who intended to cause the loss, would have available a defence that only substantially or materially similar loss was caused, rather than "the loss or damage the subject of the claim".

Joinder of parties

The present law provides that the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings: s 35(3)(b) CLA. The present law also provides that a court may give leave for persons to be joined as defendants in proceedings involving an apportionable claim. However the court is prevented from granting leave to the joinder of any person who was a party to any previously concluded proceedings in respect of an apportionable claim: s 38 CLA.

The model provisions propose a regime for notification to an alleged concurrent wrongdoer with the requirement that the defendant must give a copy of the pleadings to that person "if possible": cl 8(3).

Proceedings involving the apportionment of liability may be heard and concluded in the absence of an alleged concurrent wrongdoer both under the present law and under the model provisions. It appears that the rationale for this approach is the avoidance of delay and expense. However the prospect of adverse findings being made in respect of a concurrent wrongdoer who is not a party (albeit unenforceable) is not consistent with the overriding purpose of the CLA and the *Uniform Civil*

---

[3] *Royal Brompton NHS Trust v Hammond* [2002] 1 WLR 1397, 1410 (Lord Steyn).

Procedure Rules 2005, the pivotal part of which is the "just" determination of proceedings. There is also the prospect of inconsistent findings by different judges in respect of the same conduct litigated in different proceedings if the concurrent wrongdoer is not a party to the first set of proceedings but joined as a party to later proceedings.

It is preferable that the apportionment of liability should not occur in the absence of the concurrent wrongdoer, unless that person is a party and has chosen not to take part in the proceedings.

This could be achieved by amendment to the present law, requiring joinder of any alleged concurrent wrongdoer. This will ensure a "just" determination and will avoid the prospect of inconsistent findings in respect of the same conduct by different judges but in different proceedings.

Subsequent proceedings

The model provisions adopt a new approach to subsequent proceedings in respect of the same loss. Presently s 37(2) of the CLA prevents a plaintiff in subsequent proceedings from recovering more than the "damage or loss actually sustained" having regard to what the plaintiff has previously recovered.

The model provisions include the concept of "nominal damages" and a regime pursuant to which the "judgment first given" (or as varied on appeal) determines the maximum amount of the claimant's notional damages, the minimum proportionate liability of concurrent wrongdoers who were parties to the first proceedings, and minimum contributory negligence of the claimant: cl 10 (2).

It is not clear how these provisions would operate in subsequent proceedings against a concurrent wrongdoer who was not a party to the first proceedings nor an alleged concurrent wrongdoer and whose conduct was not taken into account in those proceedings. By contrast, the current provision is simple and achieves the basic purpose of preventing double recovery.

I trust these comment may be of assistance.

Yours sincerely

T F Bathurst