
Proportionate Liability – Northern Territory

1. Proportionate liability – national approach

On 27 February 2004, the national Ministerial forum on Insurance Issues comprising representatives from the Commonwealth, the States, the Northern Territory and the Australian Capital Territory affirmed commitment to legislation dealing with proportionate liability.

2. What is "proportionate liability"?

Sometimes a person ("claimant") suffers damages because of the possible negligence of two or more people ("respondents"). For example, in one famous case, ships were damaged as a result of the following events:

- (a) a ship's crew negligently discharging some heavy oil into a harbour;
- (b) that oil floating down the harbour;+-
- (c) some workers on a wharf (negligently) welding;
- (d) spark from welding causes oil to catch fire; and
- (e) oil (on fire) floats across the harbour and the fire damages some moored ships.

Under the current (common law) the claimant could take action in respect of the whole of the damage against any of the potential respondents in the chain of causation. That person could be found to be liable to compensate the claimant for all of the claimant's loss. The respondent could then take action against other potential respondents to recover monies according to their share of the damage.

Thus the common law leaves the respondent (or insurer) with the most money and assets as the one most likely to pay the damages to the claimant. Insurers are often seen as fulfilling that role.

"Proportionate liability" seeks to change this outcome so that the Court makes a finding about the extent (percentage) to which a respondent has caused the damage. The respondent is then responsible for paying that percentage of the total loss.

Accordingly, "Proportionate liability" is a concept that provides that, if two or more persons may have caused some damages to a person, they compensate the damaged person proportionately to the degree to which they have caused the damage.

Proportionate Liability – Northern Territory

3. Why is there a need for reform?

Professional groups have reported that there is a market failure in the provision of professional indemnity insurance. There are fewer insurers offering the product and those that do are severely restricting the scope of services they are prepared to cover. Professionals across Australia have experienced difficulties with the availability and affordability of professional indemnity insurance.

The current problems with professional indemnity insurance may lead to a withdrawal of services provided by occupational groups and there is evidence that this has occurred. For example:

- the Institute of Chartered Accountants reports that a January 2003 survey of members indicates over half are considering or have ceased offering services because of rising insurance costs; of these the service most likely not to be offered is audit at 78%; and
- the Association of Consulting Engineers Australia reports that a January 2003 survey of members indicates firms are withdrawing from offering services in areas where insurance is unavailable or unaffordable such as environmental services (eg pollution control, asbestos removal, air-conditioning treatment to combat legionnaires, radiation control) and geotechnical engineering (which deals with the properties and mechanics of soils and is fundamental to the existence of most structures).

Professional groups report that the greatest impact is being felt by small to medium sized businesses and businesses in regional areas. Less impact is being felt by large firms which have the necessary capital to self-insure up to certain levels and reinsure on the international market. This will cause an impact on competition where only the bigger players can continue to provide professional services.

Professional groups claim that the current liability system is a contributing factor to the professional indemnity insurance market difficulties.

To ameliorate the position reforms have been sought in two areas – namely:

- (a) professional standards (capping of liability)¹; and
- (b) proportionate liability.

This paper deals with the second issue (proportionate liability).

¹ The Northern Territory Parliament is expected to debate the Professional Standard Bill 2004 during the sittings of Parliament occurring 30 November- 2 December 2004. The Northern Territory Treasurer is responsible for that Bill.

Proportionate Liability – Northern Territory

4. What are the contents of proportionate liability legislation?

Typically, proportionate liability legislation provides for the following:

Coverage

A statement saying what claims are subject to the legislation².

Generally, the legislation covers all claims for economic losses arising from failures to take reasonable care under contract, under tort law or under statute excepting for personal injury claims. Often the coverage includes claims arising from breaches of legislation such as section 42 of the *Consumer Affairs and Fair Trading Act*³.

A statement saying what types of persons are covered. This is generally something along the lines that the legislation applies to "concurrent wrongdoers" with such a person being a person, in relation to a claim, who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

The principles of proportionality

A statement setting out the principles of proportionality⁴. In essence these are that in proceedings relating to "claims" (as defined, see above, coverage):

- the liability of a respondent who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just having regard to the extent of the respondent's responsibility for the damage or loss; and
- the Court may give judgment against the respondent for not more than that amount.

The effect of this provision is to oust the common law on this issue.

Most jurisdictions have also enacted provisions along the following lines:

- for the resolution of issues where the proceedings involve both an apportionable claim and a claim that is not an apportionable claim (with the legislation providing that liability for the apportionable claim is to be determined in accordance with the provisions of this Part and that liability for the other claim is to be determined in accordance with the legal rules, if any, that might apply apart from the proportionate liability legislation;
- exclude that proportion of the damage or loss in relation to which the claimant is contributory negligent under any relevant law in apportioning responsibility between respondents in the proceedings; and

² For an example of such legislation, see section 34 of the *Civil Liability Act 2002 (NSW)* as amended by *Civil Liability Amendment Act 2003*

³ Section 42(1) provides:

"(1) A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

⁴ For an example of such legislation, see section 35 of the *Civil Liability Act 2002 (NSW)*

Proportionate Liability – Northern Territory

4

- the Court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings in apportioning responsibility between respondents in the proceedings (in other words, in apportioning liability the Court is not limited to parties to the litigation).

A provision denying the benefits of proportionality to some wrongdoers

Most jurisdictions have enacted provisions stating that the following wrongdoers do not have the benefit of the legislation:

- wrongdoers who intentionally caused the loss;
- wrongdoers who fraudulently caused the loss⁵.

Some jurisdictions have taken this principle a step further by denying the benefits of proportionality to some kinds of businesses.

By way of explanation to this divergent approach it is noted that the net effect of the reforms will be that of making it more difficult for claimants to mount a case in the situation where there are two or more respondents. This is because they will need to bring forth evidence as to the degree of guilt of each of the respondents. They run the costly risk that one of the respondents may, successfully, argue that all blame be shifted to a respondent who has no assets. Such a respondent will not, in all probability, bother to defend liability. Thus the claimant will, in effect, argue the case of that respondent. These issues don't currently exist in the Northern Territory except regarding claims under the *Building Act*. As far as the Department of Justice is aware there has been no litigation in the Northern Territory in respect of the provisions of the *Building Act*.

The main alternate approach, as in ACT legislation is that "consumers", would retain the benefit of joint and several liability, rather than being subject to the proportionate liability regime. This exclusionary definition would cover, for example, any person whose claim is based upon rights relating to goods, services or both in circumstances where the particular goods or services are being acquired for personal, domestic or household use or consumption, or in relation to personal financial advice, with no monetary threshold.

The disadvantage of the consumer carve out in proportionate liability legislation, is that it is said that it could lead to immense complexity and claimants seeking to forum-shop to their best advantage.

A provision setting out that a respondent has a duty to inform the claimant of other concurrent wrong doers

The legislation is structured so that a respondent who is a party to proceedings can, in effect, bring forth evidence that puts the blame of a person who is not a party.

⁵ For an example of such legislation, see section 34A of the *Civil Liability Act 2002 (NSW)* as amended by *Civil Liability Amendment Act 2003*

Proportionate Liability – Northern Territory

5

Often this other person is someone with no money and thus has no interest in defending any allegations. This leaves open the possibility of some abuse of the scheme by respondents who may attempt to shift as much responsibility as possible to such persons knowing that such persons may not be in a position to, or have no possible interest in, defending their position. To counter this possibility most jurisdictions have introduced provisions that oblige respondents to notify claimants of any such persons. There are various costs penalties for failures to do this.⁶ Whilst this outcome does not entirely solve the problem it does, at the least, give claimants some warning about the contest in respect of allocating responsibility.

5. What has happened elsewhere in Australia?

Jurisdiction	Reform	Comment
Commonwealth of Australia	<p><i>Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Act 103 of 2004).</i></p> <p>This Act amends the <i>Australian Securities and Investment Commission Act 2001</i>, <i>Corporations Act 2001</i> and the <i>Trade Practices Act 1974</i> so that the principle of proportionate liability apply to economic losses arising from misleading or deceptive conduct. The legislation commenced operation on 26 July 2004.</p>	<p>The Commonwealth Act provides for proportionate liability. In respect of the contested policy issues, the Bill:</p> <ul style="list-style-type: none">(a) does not provide for a consumer carve out; and(b) does permit findings concerning in respect of persons who are not formal parties to the litigation.

⁶ For an example of such legislation, see section 35A of the *Civil Liability Act 2002 (NSW)* as amended by *Civil Liability Amendment Act 2003*

Proportionate Liability – Northern Territory

Jurisdiction	Reform	Comment
New South Wales	<p><i>Civil Liability Act 2002</i> as amended by the <i>Civil Liability Amendment (Personal Responsibility) Act 2002</i> and <i>Civil Liability Amendment Act 2003</i>.</p> <p>Not commenced as at 29 September 2004</p>	<p>Not yet operational. In respect of the contested policy issues, the Act:</p> <ul style="list-style-type: none"> (a) does not provide for a consumer carve out; and (b) does permit findings concerning in respect of persons who are not formal parties to the litigation.
Victoria	<p><i>Wrongs Act 1958</i> as amended by the <i>Wrongs and Limitations of Actions Acts (Insurance Reform) Act 2003</i> and the <i>Wrongs and other Acts (Law of Negligence) Act 2003</i>.</p> <p>Commenced operation on 1 April 2004.</p>	<p>In respect of the contested policy issues, the Act:</p> <ul style="list-style-type: none"> (a) does not provide for a consumer carve out; and (b) does not permit findings concerning in respect of persons who are not formal parties to the litigation.
Queensland	<p><i>Civil Liability Act 2003</i>, sections 28-30 as amended by the <i>Professional Standards Act 2004</i>.</p> <p>The legislation is not yet in force (September 2004)</p>	<p>Queensland enacted legislation in 2002 (which has not been commenced). On 2 September 2004, it passed new legislation (<i>Professional Standards Act 2004</i>) along the lines of that enacted in Victoria and New South Wales excepting for the inclusion of a "consumer carve out". In essence this carve out provides that the new Act does not apply to goods and services provided for non business purposes.</p>

Proportionate Liability – Northern Territory

7

Jurisdiction	Reform	Comment
Western Australia	<p><i>Civil Liability Act 2002, Civil Liability Amendment Act 2003</i> and Civil Liability Amendment Bill 2004, part 1F.</p> <p>The Bill containing the amendments was amended by the WA Upper House on 18.8.2004. These amendments do not appear to affect the proportionate liability parts of the Bill.</p>	<p>Not yet operational (noting that not all of the legislation has been passed). When passed the legislation will be commenced⁷. In respect of the contested policy issues, the Bill:</p> <p>(a) does not provide for a consumer carve out; and</p> <p>(b) does permit findings concerning in respect of persons who are not formal parties to the litigation.</p>
South Australia	<p>No legislation appears to have been introduced.</p>	<p>Intention to legislate – see reported in <i>Reform of liability Insurance law in Australia</i>, page 64. South Australia advises that legislation is to be introduced 'shortly.'⁸ As at September 2004, the legislation has not been introduced.</p>

⁷ advice provided 11 May 2004

⁸ advice provided 11 May 2004

Proportionate Liability – Northern Territory

8

Jurisdiction	Reform	Comment
Tasmania	The Civil Liability Amendment (Proportionate Liability) Bill 2004 was introduced into Parliament on 19 October 2004 and is expected to be passed by the end of 2004 ⁹ .	Intention to legislate – see reported in <i>Reform of liability Insurance law in Australia</i> , page 65. Legislation is expected to be introduced in the Spring session of Parliament. No consumer carve out is expected ¹⁰ A draft discussion Bill has been released and is expected to be finalised in November 2004
Australian Capital Territory	<i>Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004.</i> The legislation has not commenced (November 2004)	Includes the consumer carve out provision.

In general terms the following conclusions can be stated:

1. out of the jurisdictions that have enacted legislation there is, or will be, uniformity on all issues except for what is known as the "consumer carve out" and the requirements concerning whether all possible respondents need to be joined as parties to the proceedings;
2. of the remaining jurisdictions it is understood that most are likely to end up with legislation similar to New South Wales;
3. Queensland and Australian Capital Territory are likely to include the consumer carve out.

⁹ available at www.thelaw.tas.gov.au (Bills)

¹⁰ advice provided 11 May 2004

Proportionate Liability – Northern Territory

6. Proportionate liability - Advantages

The introduction of proportionate liability for economic loss will address a number of significant problems for professionals and other respondents under the current law of joint and several liability.

- Under proportionate liability, a respondent is liable to compensate an injured party only to the extent to which that respondent is found to be responsible for the claimant's loss. Under joint and several liability, a respondent may become liable for 100 per cent of the damages awarded to an injured claimant even though there are one or more other respondents or potential respondents who were also responsible for causing the loss. This can (and does) occur where one respondent or potential respondent is unable to pay (due to insolvency) or cannot be found. The fairness or justice of a legal rule can be questioned when its effect is to place full liability on a solvent respondent who may have been only marginally at fault, and when the principal cause for the claimant's loss lay in the activities and default of others, over whom the solvent respondent had no real control.
- Joint and several liability encourages "deep pocket syndrome". That is, it encourages claimants to direct their claims against respondents who have the greatest capacity to satisfy a judgment, rather than against respondents who are thought to have been primarily responsible for the loss. This is of particular concern to potential respondents such as professionals, local councils and governments. The insurance industry and professional organisations claim joint and several liability (as a result of the "deep pocket syndrome") places upward pressure on insurance costs, as it is usually an insured respondent who has the best capacity to satisfy a judgment. Professional indemnity insurance premiums for many professional groups have risen rapidly in recent years, and in some cases, insurers have refused to continue to offer insurance cover.
- Joint and several liability places on the respondents the onus of ensuring all wrongdoers are joined as parties to the action. This burden is generally transferred to the claimant under proportionate liability. Where a wrongdoer is the sole tortfeasor, the claimant bears the burden of finding and suing that person. It therefore follows, logically, that the claimant ought to bear the burden of finding and suing all the wrongdoers - there is no reason in logic why that burden should be transferred to the first, or richest, wrongdoer identified by the claimant.

Under the current joint and several liability rules, insurers are faced with uncertainty in assessing a professional's risk because the professional can be held liable for loss caused by third parties. Proportionate liability would enable insurers to assess the risk profile of a professional on his or her claims history and that of the professional's firm. Insurers would then be able to set a premium without having to factor in the element of uncertainty arising from the potential liability of the professional for the negligence of other parties whose risk profile is unknown.

Professional groups believe proportionate liability will have the advantage of encouraging directors and the management of companies to be more diligent in their corporate governance and risk evaluation processes because other potential respondents, such as a professional service provider, could no longer be sued for more than its share of the responsibility for a loss.

Professional groups also expect that over time this should encourage insurance companies back into professional indemnity insurance market as the professions will no longer carry the liability that rightfully rests with others who have caused economic damage. However insurers have advised them that the benefit of reduced premiums flowing from proportionate liability will take five to seven years to occur due to the long term nature of such claims.

7. Proportionate liability - Disadvantages

The arguments against proportionate liability (that is, in favour of retaining joint and several liability) can be summarised as:

- it is a principle of our legal system that quantum is determined not by the degree of the respondent's fault, but by the extent of injury to the claimant. Trifling negligence, a momentary inattention for example, can cause horrific damage. Gross negligence can result in minor or no damage. As between the claimant and respondent it is not the fault but the loss that is measured;
- fairness to the wronged party. A claimant may recover less than 100% of the damages awarded simply because one or more of the parties who contributed to their loss or damage is unable to satisfy their portion of the judgment. The argument is that it is better that a wrongdoer bear this risk than a wronged party. This argument is particularly strong in cases where there is no contributory negligence on the part of the claimant, i.e., the claimant was faultless; and
- proportionate liability requires a claimant to join all respondents to an action and prove the relative responsibility of each. Under the rules of contribution applying to joint and several liability, this burden falls on the respondents who are often in the best position (particularly financially) to bear it. This is of particular significance where the claimant has a contractual relationship with only one of the respondents. The officers are unaware of any significant criticisms of the contribution provisions contained in the relevant State and Territory Acts.

The arguments over which system is better in terms of substantive fairness (who bears the loss should recovery against one of the concurrent wrongdoers not be possible) and procedural fairness (who bears the onus of ensuring all wrongdoers are joined to the action) go both ways. Overall, there is unlikely to be any less costs and delay in a proportionate liability system than in a joint and several system, as the

factual issues and evidence will be equally difficult and both systems allow for multiple parties or multiple proceedings. The difference is that the claimant generally bears the risk of insolvency of a wrongdoer and a greater procedural and cost burden under proportionate liability than under joint and several liability systems.

8. Impact on Insurance Premiums

The insurance industry and professional organisations claim joint and several liability (as a result of the "deep pocket syndrome") places upward pressure on insurance costs, as it is usually an insured respondent who has the best capacity to satisfy a judgment. Professional indemnity insurance premiums for many professional groups have risen rapidly in recent years, and in some cases, insurers have refused to continue to offer insurance cover.

The extent to which this is specifically related to joint and several liability is unclear. However, the Insurance Council of Australia ("ICA") has advised that:

- the application of joint and several liability is a major cost driver in certain classes of professional indemnity insurance;
- reforms in this area, however, may not be reflected in lower premiums in the short term, as the major change will be the distribution of the liability between the parties rather than a reduction in the liability as a whole; and
- although this will be up to each insurer to decide, there still may be a need for further premium increases in the professional indemnity insurance market, so that premium reductions may not necessarily be possible.

Availability of data is problematic because overseas insurers write over 60 per cent of professional indemnity insurance. Furthermore, any assessment of the data must include an element of subjective judgment rather than be based on any actuarial evidence (ie it is impossible to demonstrate statistically that a change in the law would result in a particular outcome).

A report by Trowbridge Deloitte from November 2002 on behalf of Professions Australia also suggests that the impact on premiums will be modest in the short run, until some experience develops which may result in more favourable market conditions in the medium term.

Insurers have advised their professional clients that the benefit of reduced premiums flowing from proportionate liability will take five to seven years to occur due to the long term nature of such claims.

A particular effect of the Victorian *Building Act 1993* has been to make it possible for independent building surveyors to gain insurance. Previously, surveying work was done by local councils who would be targeted as "deep pockets".

It has been estimated the effect on premiums of both proportionate liability and professional standards legislation. They concluded that, although there was uncertainty amongst insurers, that premium savings might be in the range of 10 to 20 per cent for small firms and more for larger firms. The report did not, however, quantify the various contributions related to proportionate liability and professional standards legislation.

The report notes that the impact on premiums will be modest in the short run, until some experience develops which may result in more favourable market conditions in the medium term.

9. Summary of the discussion draft of the Bill

This paper accompanies a discussion draft of the Proportionate Liability Bill 2004.

The following is a summary of the provisions in the draft Bill, noting that some of the provisions (eg those dealing with the *Building Act*) are only included so as to indicate what might happen if particular policy decisions are taken.

PROPORTIONATE LIABILITY BILL 2004

PART 1 –PRELIMINARY

Part 1, containing clauses 1-4, deals with machinery, definition and application provisions.

Clause 1. Short Title

Clause 1 sets out the name by which the legislation will be known. In other jurisdictions the equivalent provisions are found in general legislation.

Clause 2. Commencement

Clause 2 provides that the legislation is to commence on a day to be fixed by the Administrator. At this time the likely day is on or about mid March 2005.

Clause 3. Definitions

Clause 3 contains definitions of the following terms:

“apportionable claim”

See used in clause 3 (definition of “proceeding” and clauses 4-13.

“concurrent wrong doer”

See used in clauses 5-6, 9-12 and 14-15.

“court”

See used in clauses 10-12.

“damages”

See used in clauses 4-5, 14-15 and 18.

“defendant”

See used in clauses 10-12 and 14.

“economic loss”

See used in clause 3 (definition of “loss or damage”) and in clause 18.

“loss or damage”

See used in clause clauses 4-8, 12 and 15.

“proceeding”

See used in clause 3 (definition of “defendant” and clauses 7-15.

Clause 4.

Apportionable claims to which Act applies

Clause 4(1) sets the principle that the Act is only to apply to claims that occur wholly or partly after the commencement of the legislation.

Clause 4(2) contains a definition of the meaning of “apportionable claim”. Subject to clause 4(1), 4(3) and 4(4), the intent of this clause is to cover all claims whether arising under common law or statute).

Clause 4(3) sets out some claims that are not “apportionable claims”.

Clause 4(4) provides that the Regulation may provide for other claims that are not apportionable claims.

PART 2 –PROPORTIONATE LIABILITY

Part 2, containing Divisions 1-4, clauses 5-15, deals with the application of the principles of proportionate liability in respect of apportionable claims.

Proportionate Liability – Northern Territory

Division 1 - Preliminary

Clause 5. Concurrent wrongdoers

Clause 5 defines the meaning of “concurrent wrongdoer”.

Clause 6. No apportionment for loss caused intentionally or fraudulently

Clause 6(1) provides a definition of “excluded concurrent wrongdoer” for the purposes of clause 6(2)-(3). Such a wrongdoer is a person who intended to or fraudulently caused damage. Accordingly, the principles of proportionate liability will only apply to “accidents” rather than to incidents where there is a quasi criminal element.

Clause 6(2) and (3) provides that Part 2 of the Act does not limit the liability of “excluded concurrent wrongdoers” and that the liabilities of such persons is to be determined in accordance with the legal rules that, but for this Act, would apply.

Clause 6(4) provides that the liability of a person who is concurrent wrongdoer with an excluded concurrent wrongdoer is to be determined in accordance with Part 2 of the Act.

Division 2 – General provisions for proceedings

Clause 7. Determination as single claim if more than one cause of action

Clause 7 states that where there are two or more apportionable claims, the Court is to determine liability as if the claims were a single claim.

Clause 8. Determination of apportionable claim and other claim

Clause 8 states that where there is an apportionable claims and a claim that is not apportionable, then the apportioned claim shall be dealt with in accordance with part 2 and the other claims shall be dealt with in accordance with the legal rules that, but for this Act, would apply.

Clause 9. No need for all concurrent wrongdoers to be parties

Clause 9 provides that Part 2 applies to proceedings even if all of the alleged concurrent wrongdoers are not parties to the proceedings.

Clause 10. Joining concurrent wrongdoers as respondents

Clause 10 sets out that the court may permit other concurrent wrong doers to be joined as parties to the proceedings. However, this power cannot be exercised in respect of a person who was a respondent in previously concluded proceedings in respect of the same matter.

Clause 11. Respondent to inform claimant of other concurrent wrongdoers

Clause 11 imposes on respondents a duty to inform the claimant of the identity of another persons how may also have contributed to the damage. If the respondent fails to do this, the respondents may be liable for any unnecessary costs incurred by the claimant arising from the lack of awareness of the other respondent.

Division 3 – Determination of liability in apportionable claims

Clause 12. Determination of liability of concurrent wrongdoers

Clause 12 sets out the principle that the liability, for damages, of concurrent wrongdoers is proportionate to their share of responsibility for the acts and omissions that led to the damage.

Clause 13. Other liability not affected

Clause 13 sets out that the Act does not affect liability for various other kinds of liabilities governed by other principles namely:

- (a) liabilities governed by principles relating to vicarious liability;
- (b) liabilities governed by partnership law; and
- (c) liability governed by other legislation.

Division 4 – After judgment given in proceedings

Clause 14 Concurrent wrongdoers not required to contribute or indemnify

Clause 14 sets out that a concurrent wrongdoer against whom judgment is given cannot be required by any other concurrent wrongdoer to contribute to that other wrongdoer.

Clause 15. Subsequent actions

Clause 15(1) states that a claimant who has taken action against a concurrent wrongdoers may take separate action against other concurrent wrongdoers.

Clause 15(2) provides that a claimant who takes action as referred to in clause 15(2) cannot obtain damages greater than the actual damage suffered.

PART 3 – REGULATIONS

Clause 16. Regulations

Clause 16 provides for the making of regulations. Regulations may be required for the purposes of clauses 4(3)(d) and 4(4).

PART 4 – REPEAL AND TRANSITIONAL MATTERS FOR *PROPORTIONATE LIABILITY ACT 2004*

Clause 17. Repeal of apportionate liability provisions of *Building Act*

Clause 17 provides for the repeal of sections 154-158 of the *Building Act*.

Clause 18. Transitional matters

Clause 18 provides for transitional matters arising from any repeal of sections 154-158 of the *Building Act*. These provisions retain the current law (rather than the new law) for matters arising from acts or omissions instituted before the commencement date of the *Proportionate Liability Act 2004* or in respect of damages suffered wholly before the commencement of the *Proportionate Liability Act 2004*.

10. Issues on which comment is sought

The Northern Territory Government is committed to introducing legislation that reforms the law of proportionate liability in respect of non personal injuries matters.

This law will conform with the generality of the reforms in place by the Commonwealth, Western Australian, Australian Capital Territory, Victorian and New South Wales Governments and those proposed by the South Australian and Tasmanian Governments. In terms of the variations in place elsewhere, the Northern Territory Government intends that the Northern Territory law will not draw any distinction between consumers and business in respect of the application of the new law.

However, this is highly technical law. In the course of the development of the various interstate laws issues have arisen and been resolved in an ad hoc fashion. There may be some outstanding issues. Additionally, there may be local Northern Territory issues that have not yet been identified.

The following is a list of issues on which comment is sought. Comment is also sought on other issues that not been resolved by the proposed legislation.

Issue 1:

Is there any problem arising from the fact that it is proposed that the Northern Territory legislation will only apply to specified provisions of the *Consumer Affairs and Fair Trading Act*. That is, clause 4(2)(a) provides that only claims made in respect of breaches of section 42¹¹ of that Act will be subject to the principles of proportionality.

Arguably, other claims (eg those arising from breaches of sections 43-54) could be covered even if a policy position is adopted that claims dealing with unsafe products should be excluded from the operation of the legislation. Currently, the draft Bill adopts the position taken by most of the other proportionate liability Acts.

Issue 2

Should the legislation apply to defamation? Is it clear enough that the legislation is presently worded so that it does apply to defamation proceedings?

Issue 3

Should clause 14 be revised so that it permits construction and other commercial contracts to contain certain indemnity clauses that might otherwise be prohibited by this clause.

Issue 4

Should the principles in this legislation governing proportionate liability also apply to the proportionality provisions contained in the *Building Act 1993*. In essence the difference between the two schemes is that the new scheme contains various procedural and policy provisions designed to:

- (a) remove various ambiguities about how proportionality is to work; and
- (b) so as to receive a just result in particular kinds of situations.

Thus:

- (a) the new scheme clarifies the issue of whether all respondents need to be part of the proceedings in order for the proportionality principle to apply to them;
- (b) the new scheme denies to certain parties the benefits of proportionality

¹¹ See quoted in an earlier footnote

(eg where they have deliberately or fraudulently caused the wrong);

(c) the new scheme clarifies what is the position where apportionable claims and mixed up with non apportionable claims.

11. Comments

It is intended that legislation be introduced during the November/December 2004 sittings of the Legislative Assembly and that the Bill be debated during the first sittings of 2005.

Comments are sought by 27 November 2004.

Comments should be directed to:

Mr Robert Bradshaw, Department of Justice, 45 Mitchell Street Darwin, telephone 89997014, email Robert.Bradshaw@nt.gov.au