AGS Commercial notes

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Proportionate liability

The Law, Crime and Community Safety Council is seeking to develop uniform proportionate liability legislation across Australia.[1] At this stage each jurisdiction has legislation that, while similar in many respects, is slightly different. This article considers some of the similarities and differences in legislation between the different jurisdictions. Key provisions of the proposed model legislation are discussed at the end of the article.

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Proportionate liability legislation exists in all Australian States and Territories.[2] The legislation has replaced the doctrine of joint and several liability for claims for property damage or purely economic loss arising from a failure to take reasonable care. The legislation also extends to claims for damages under the misleading or deceptive conduct provisions of fair trading legislation in various jurisdictions.[3]

Proportionate liability legislation also exists at the federal level to deal with claims for damages under the misleading or deceptive conduct provisions of the *Competition and Consumer Act 2010* (Cth), the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).[4]

In this issue

Why proportionate liability?

Before the introduction of proportionate liability regimes throughout Australia, the common law rule of 'solidarity' or joint and several liability applied to negligence claims for economic loss or property damage. This approach allowed the injured party to recover

1 In December 2013, the Law, Crime and Community Safety Council (LCCSC) replaced 2 previously separate councils: the Standing Council on Law and Justice (SCLJ) (formerly the Standing Committee of Attorneys-General (SCAG)) and the Standing Council on Police and Emergency Management (SCPEM).

2 *Civil Liability Act 2002* (NSW), Pt 4; *Civil Liability Act 2003* (Qld), Pt 2; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), Pt 3; *Civil Liability Act 2002* (Tas), Pt 9A; *Wrongs Act 1958* (Vic), Pt IVAA; *Civil Liability Act 2002* (WA), Pt 1F; *Civil Law (Wrongs) Act 2002* (ACT), Ch 7A; *Proportionate Liability Act 2005* (NT).

3 Note that the situation is slightly different under the South Australian legislation. Unlike the other jurisdictions the South Australian legislation does not overtly extend to claims under South Australia's fair trading legislation. Instead, it applies to claims where the wrongdoer is negligent or innocent: see *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 3(2) and in particular the example given.

4 *Competition and Consumer Act 2010* (Cth) (CCA) Pt VIA; *Corporations Act 2001* (Cth) (CA), Pt 7.10 Div 2A; *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), Pt 2 Subdiv GA.

its entire loss from any 1 concurrent wrongdoer. While the wrongdoer held liable was able to seek contribution or indemnity from other parties who were at fault, they would bear the entire burden of meeting the judgment if other liable parties were insolvent or untraceable.

Proportionate liability was introduced as a measure in response to the 2001–2002 'insurance crisis' in order to reduce rising liability insurance costs. Proportionate liability enabled liability to be apportioned between wrongdoers according to their assessed proportion of responsibility for the damage suffered. Instead of being liable for the whole amount of a judgment, a defendant would only be liable to the extent of his or her responsibility for the loss. It was intended that this approach would overcome unfairness to defendants arising from joint and several liability, particularly in cases of economic loss or property damage. Personal injury claims were expressly *excluded* from the operation of the proportionate liability scheme.

An example of proportionate legislation – Victorian scheme

The Victorian proportionate liability legislation is a typical example of a proportionate liability scheme.

What does the Victorian legislation cover?

The Victorian scheme was introduced in 2003.[5] It operates to 'apportion' liability for an 'apportionable claim' between 'concurrent wrongdoers' – each wrongdoer can only be held responsible for the 'portion' of the damage that it caused, thereby avoiding a situation where the plaintiff can recover its entire loss from a single defendant.

What is an 'apportionable claim'?

The legislation only applies to 'apportionable claims'. These are defined in *Wrongs Act 1958* (Vic), s 24AF(1) to be:

- claims for economic loss or damage to property in an action for damages (in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care, or
- a claim for damages for a contravention of the misleading or deceptive conduct provisions in s 18 of the *Australian Consumer Law* (Victoria).

'Damages' is defined broadly to cover 'any form of monetary compensation': s 24AE.

Importantly, claims relating to:

- transport accidents
- workers compensation
- volunteer firefighters and State Emergency Service
- police assistance compensation
- victims of crime
- equal opportunity complaints
- claims for compensation under the *Juries Act 1967* and the *Education and Training Reform Act 2006*

are all excluded from the application of the legislation: s 24AG(1) and (2). There is also scope for further exclusions by regulations: s 24AG(3).

5 See *Wrongs Act 1958* (Vic), Pt IVAA.

If a proceeding involves more than 1 'apportionable claim' arising out of different causes of action, liability is to be determined as if the claims were a single claim: s 24AF(2). If a proceeding involves claims that are apportionable, as well as claims that are not apportionable, the non-apportionable claims continue to be treated in accordance with the rules that otherwise apply: s 24AI(2).

Who is a 'concurrent wrongdoer'?

A 'concurrent wrongdoer', in relation to a claim, is a person who is 1 of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim: s 24AH(1).

What is proportionate liability?

The liability of a defendant who is a concurrent wrongdoer in relation to a claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just, having regard to the extent of the defendant's responsibility for the loss or damage: s 24AI(1)(a).

In apportioning responsibility between different concurrent wrongdoers in the proceeding, the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party because the person is dead or, if the person is a corporation, the corporation has been wound up: s 24AI(3).

A defendant against whom judgment is given under the proportionate liability provisions as a concurrent wrongdoer in relation to an apportionable claim:

- cannot be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer in the same proceeding for the apportionable claim
- cannot be required to indemnify any such wrongdoer: s 24AJ.

Exclusions

An exception to these provisions relates to fraud. A defendant in a proceeding in relation to an apportionable claim and against whom a finding of fraud is made is jointly and severally liable for the damages awarded against any other defendant in the proceeding: s 24AM.

The legislation specifically notes that it does not override principles relating to vicarious liability, agency liability, partnership liability or exemplary or punitive damages being awarded against a particular defendant. It also does not affect the operation of any other legislation to the extent that it imposes several liability on any person for an otherwise apportionable claim: s 24AP.

High Court decision on operation of proportionate liability

In the recent case of *Hunt and Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (*Hunt*)[6] the High Court considered the provisions of the New South Wales Civil Liability Act relating to proportionate liability. In relation to the definition of a 'concurrent wrongdoer', the New South Wales and Victorian Acts are substantially the same.[7]

6 (2013) 247 CLR 613.

7 *Civil Liability Act 2002* (NSW), s 34(2); and *Wrongs Act 1958* (Vic), s 24AH(1).

A majority of the High Court held that, in determining whether a person is a concurrent wrongdoer, 2 questions must be answered:

- What is the damage or loss that is the subject of the claim?
- Is there a person, other than the defendant, whose act or omission also caused that damage or loss?

In determining the damage or loss, the majority stated that 'damage, properly understood, is the injury and other foreseeable consequences suffered by a plaintiff' and that '[i]n the context of economic loss, loss or damage may be understood as the harm suffered to a plaintiff's economic interests' (at [24]).

This interpretation of the provision by the High Court indicates a broader construction of 'concurrent wrongdoers' than previously adopted by the intermediate appellate courts in Australia.

The majority judgment also considered the question of causation of the damage or loss. The majority noted the law's recognition that concurrent and successive acts may each be a cause of a plaintiff's loss and that it is enough for liability that a wrongdoer's conduct be one cause, in the sense that it materially contributed to the loss.

Some differences between legislation in different jurisdictions

There are a number of differences between the proportionate liability legislation adopted by each jurisdiction. What follows is a brief discussion of some of the more significant differences.

Is the 'liability' of persons who are not party to the litigation relevant?

In New South Wales, Queensland and the Territories, and under the federal Acts, a court *may* have regard to the liability of persons who have not been joined in the action.[8] In South Australia, Tasmania and Western Australia the court *must* have regard to the liability of those persons.[9]

In all jurisdictions except Victoria, a defendant is required to identify to the plaintiff any other concurrent wrongdoers who are not parties to the litigation – presumably to give the plaintiff the opportunity to join these other entities.[10]

As noted above, in Victoria the court *must* not have regard to persons who are not parties to the litigation unless they are dead or (being a corporation) have been wound up.[11] Therefore, in Victoria, defendants will seek to ensure that all relevant persons have been joined as parties to the proceedings. In the other jurisdictions (particularly South Australia, Tasmania and Western Australia) it will be the plaintiff who will look to ensure that they have identified and joined all relevant parties (to ensure that they are able to fully recover).

Does the legislation apply to persons who jointly caused loss?

In all jurisdictions except Queensland and South Australia, the legislation applies to persons who independently of each other or *jointly* caused the loss or damage claimed.[12]

8 NSW, s 35(3)(b); Qld, s 31(3); ACT, s 107F(2)(b); NT, s 10; CCA, s 87CD(3)(b); CA, s 1041N(3)(b); ASIC Act, s 12GR3(b).

9 SA, s 8(2)(b); Tas, s 43B(3)(b); WA, s 5AK(3)(b).

10 NSW, s 35A(1); QLD, s 32(2); SA, s 10(1); Tas, s 43D(1); WA, s 5AKA(1); ACT, s 107G; NT, s 12; CCA, s 87CE(1); CA, s 1041O(1); ASIC Act, s 12GS(1).

11 Vic, s 24AI(3).

12 NSW, s 34(2); Tas, s 43(A)(2); Vic, s 24AH; WA, s 5AI; ACT, s 107D; NT, s 6(1); CCA, s 87CB(3), CA, s 1041L(3), ASIC Act, s 12GP(3).

As discussed above, the High Court decision in *Hunt*[13] demonstrates that, under the legislative provisions in New South Wales (and jurisdictions where it also provides for joint loss or damage cause independently of each other or jointly), it is not necessary that the wrongdoers cause the 'same damage' but only that each wrongdoer materially contributed to the loss or damage suffered.

In Queensland and South Australia the legislation only applies to persons who independently of each other caused the relevant loss or damage.[14]

Are 'consumer claims' caught?

In Queensland and the ACT, consumer claims are expressly excluded by the legislation.[15] In the Northern Territory, the proportionate liability regime applies to some consumer claims.[16] In Tasmania, claims for damages for economic loss or damage to property in an action for damages under the Australian Consumer Law are expressly permitted.[17] In all other jurisdictions, consumer claims are not expressly excluded so are presumably caught by the legislation.

Other exclusions

As noted above, in Victoria a 'fraudulent' wrongdoer is not able to take advantage of the proportionate liability regime to reduce their liability. In all other jurisdictions, an 'intentional' wrongdoer is also precluded from taking advantage of these provisions.[18]

Can you 'contract out' of the legislative regime?

New South Wales, Tasmania and Western Australia permit parties to 'contract out' of the proportionate liability regime.[19] In these jurisdictions contracting parties can include a clause in a contract providing that the relevant proportionate liability regime will not apply to any claims between the parties arising under the contract. While a clause that expressly states that the relevant legislation is excluded would be preferable, a clause providing for how liability will be apportioned in relation to an apportionable claim (for example, an indemnity that makes a head contractor responsible for losses associated with the acts or omissions of its subcontractors) or that otherwise allocates liability in respect of the rights, obligations and responsibilities of the parties would be sufficient – there is no need for the contract to expressly exclude the relevant proportionate liability legislation.[20]

Queensland prohibits contracting out.[21] The other jurisdictions are silent about whether contracting out is permitted or prohibited. This raises the question of whether contracting out is allowed in these jurisdictions. In Victoria, it has been argued that contracting out is not allowed because the *Wrongs Act 1958* (Vic) (which contains the proportionate liability provisions) expressly allows contracting out in relation to a number of its other provisions. As there is no reference to contracting out of the proportionate liability provisions, this may suggest that it is not allowed.

13 (2013) 247 CLR 613.

14 QLD, s 30(1); SA, s 3(2).

15 QLD, s 28(3)(b); ACT, s 107B(3)(b); NT, s 4(b).

16 See *Proportionate Liability Act 2005* (NT), s 4(2) and 4(3).

17 Tas s 43A(1)(b).

18 NSW, s 34A(1); QLD, ss 32D and 32E; SA, s 3(2); Tas, s 43A(5); WA, s 5AJA(1); ACT, s 107E(1); NT, s 7(1); CCA, s 87CC(1); CA, s 1041IM(1); ASIC Act, s 12GQ(1).

19 NSW, s 3A(2); Tas, s 3A(3); WA, s 4A.

20 *Aquagenics Pty Ltd v Break O'Day Council* (2010) 20 Tas R 239.

21 QLD, s 7(3).

Importantly, if contracting out is prohibited in a jurisdiction, clauses providing how liability will be apportioned in relation to an apportionable claim, such as the indemnity example above, may be ineffective in that jurisdiction on the basis that such clauses could be regarded as an attempt to contract out.

Some consequences of the legislation

Applicable law and contracting out

Since the legislation is not uniform, the question of which State or Territory statute applies to the action may make a considerable difference to the outcome of a case. Private international law rules governing such things as applicable law will be relevant. 'Application of laws' clauses in contracts may assist in those claims that arise under a contract, but this will not help in relation to 'non-contractual' claims.

In this context, if parties wish to contract out of the proportionate liability regime, an option might be to select as the applicable law of a contract the law of a State that explicitly allows this to be done (that is, New South Wales, Tasmania or Western Australia).

In deciding whether to do this, consideration of all of the other potentially applicable legislation in the relevant jurisdiction is required (for example, unfair contracts legislation etc). There is a risk that a court would refuse to give effect to the parties' choice of law if it determined that that choice was for the specific purpose of avoiding the proportionate liability legislation (ie where there is no obvious connection between the chosen law and the location of the parties or the subject matter or performance of the contract).[22] This risk is arguably reduced if the relevant claim is brought in courts of the same jurisdiction. That is, it would be reasonable to expect that a court, say, in New South Wales would be less likely to raise objection to the parties to a contract choosing the law of New South Wales to govern the contract.[23]

Does proportionate liability apply to arbitration?

Since the introduction of proportionate liability regimes across Australia there has been a question regarding whether these regimes would apply to disputes that were the subject of arbitration.

The Western Australian Supreme Court had the opportunity to consider this question in *Curtin University of Technology v Woods Bagot Pty Ltd*.[24] In this case it was held that the proportionate liability regime did not apply to disputes that were the subject of arbitration under the *Commercial Arbitration Act 1985* (WA). A key factor in reaching this conclusion was the view that the term 'court' in the Western Australian *Civil Liability Act 2002* did not encompass an arbitral tribunal. It was held that a requirement in the Commercial Arbitration Act that the questions being arbitrated be determined 'according to law' was not of itself sufficient to render the proportionate liability provisions applicable.

This raises the issue of whether proportionate liability regimes could be avoided in jurisdictions where the legislation does not allow for contracting out by the parties requiring all disputes to be referred to arbitration.

22 *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378.

23 Note that agencies who contract as 'the Commonwealth' will not be able to take the further step of contractually granting exclusive jurisdiction to the courts of the relevant State. This is because the Commonwealth cannot 'contract out' of the jurisdiction conferred or vested in the High Court or a State or federal court by or pursuant to ss 75 to 77 of the Constitution.

24 [2012] WASC 449.

The definition of 'court' in the relevant legislation of New South Wales, Victoria, the Northern Territory and Tasmania includes a 'tribunal'.[25] It is by no means certain that a court would interpret this reference to 'tribunal' as including an arbitral tribunal.[26]

Claims in both tort and contract

A further complexity under the proportionate liability regime arises where a matter with multiple wrongdoers involves claims in both tort and contract. For example, consider a situation where a principal suffers loss as a result of the failure to exercise reasonable care by both a head contractor and 1 of its subcontractors. The principal intends to bring claims in both tort and contract to recover the loss. The contract is expressed as being subject to the law of New South Wales and provides for the contracting out of the New South Wales proportionate liability legislation, with the head contractor being liable for any losses caused by its own breach of contract or lack of care but also all losses caused by the failure to exercise reasonable care on the part of any subcontractor.

In light of the contractual provision for the head contractor to be liable for all losses, whether caused by itself or its subcontractors, the principal should be able to obtain full recovery against the head contractor by suing in contract provided the parties' choice of New South Wales law is adopted by the court (notwithstanding the 'contribution' of the subcontractor). In this situation, the fact that the principal could get only partial recovery against the head contractor in relation to a tort claim (in accordance with Victoria's proportionate liability legislation) ought not to concern the principal, as it has already recovered all the losses it has suffered. However, a problem would arise if the court decided not to give effect to the parties' choice of law – see the discussion above. In particular, the principal would need to be aware that it may not recover anything from the subcontractor for reasons that are explained next.

Does the legislation 'create' liability?

Since the passage of proportionate liability legislation in jurisdictions around Australia, the question has arisen whether it operates to 'create' liability that otherwise would not have existed or, conversely, creates a situation where a plaintiff can only recover part of its loss on the basis that the plaintiff does not have a valid claim against all 'concurrent wrongdoers'.

Take again the example of a principal who suffers loss as a result of a failure to exercise reasonable care by both a head contractor and 1 of its subcontractors. Previously, the principal could have sued the head contractor in tort for the entire loss notwithstanding that the subcontractor's actions also contributed to the loss. Alternatively, provided a standard indemnity had been included in the contract which made the head contractor responsible for losses associated with the acts or omissions of subcontractors, a claim could have been made under that indemnity. The head contractor, in turn, would have been able to sue the subcontractor for contribution based on the extent to which the subcontractor had been responsible for the loss.

25 NSW, s 3; Vic, s 24AE; NT, s 3; Tas, s 3.

26 See also Hayford, O, 'Proportionate Liability – its impact on contractual risk allocation' (2010) 26 *Building and Construction Law Journal* 11–29, in which the author suggests that the requirement in the Victorian legislation that the 'court' only have regard to the liability of concurrent wrongdoers who are 'parties' to the proceedings indicates that the term 'tribunal' is not intended to cover an arbitral tribunal. Note that the draft model proportionate liability legislation proposes to resolve any outstanding uncertainty on this matter by amending the definition of 'court' to expressly include arbiters, making clear the intention that proportionate liability provisions should apply to arbitration.

Under the proportionate liability legislation, the head contractor, when sued by the principal, would be able to 'point' to the subcontractor as someone who had, at least partially, caused the relevant loss or damage. The head contractor would therefore only be held liable for its 'proportion' of the claim. In our example, the principal will not have a contract with the subcontractor on which it could sue. But it is also possible that the principal does not have an action in negligence against the subcontractor, as there may not be a 'duty of care' owed by the subcontractor to the principal.[27] In this situation, the plaintiff would be left without full recovery – which some commentators have suggested is 'unduly harsh and is unlikely to have been the intention of the legislation'.[28]

This issue has been considered briefly by the courts. It has been suggested that, for a proportionate liability regime to apply, 'the concurrent wrongdoers must each have committed the relevant legal wrong against the applicant'.[29] This suggests that the plaintiff must have a cause of action against a person for that person to be a 'concurrent' wrongdoer – a mere causal link between the person's acts or omissions and the plaintiff's loss may not be enough.[30] On this basis, in the scenario of the principal who suffers loss as a result of the actions of both the head contractor and 1 of the subcontractors, the subcontractor will not be a 'concurrent wrongdoer' unless the principal has a claim against it. If no claim exists, the proportionate liability regime will not apply and the principal can seek to recover its entire loss from the head contractor.

However, this is not expressly stated in the legislation, so it remains a live issue.

Another possible approach would be to argue that, despite earlier authority to the contrary, the subcontractor does owe a duty of care to the principal and therefore the principal does have a claim in negligence against the subcontractor.

A further possible 'solution' may flow from the acknowledgment in the legislation that it does not prevent vicarious liability claims being made.[31] In a situation involving an apportionable claim where liability is apportioned between a head contractor and a subcontractor, an argument might be run that the head contractor should be 'vicariously liable' for the proportion of the claim that is apportioned to the subcontractor. However, given 2 High Court decisions, there would appear to be significant difficulties with such an argument.[32]

The risk of an 'impecunious co-defendant'

The impact of the legislation is that the plaintiff (rather than an otherwise jointly liable defendant) now bears the 'risk' of 1 of the defendants being unable to satisfy a judgment against it. In effect, the 'deep-pocketed' defendant (whether it be an insurance company or the Commonwealth) is 'protected' against the financial vulnerabilities of its co-defendants, as it will only be held liable for its 'proportion' of any claim.

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27 See, eg, Balkin and Davis, *Law of Torts*, 3rd ed, 2004, para [13.70], and the cases cited at fn 212.

28 Wright, J and Casey, B, 'Proportionate liability: what is it all about?' (2005) 14(4) *Australian Corporate Lawyer* 10.

29 *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450, [40]. See also *Shrimp v Landmark Operations Ltd* (2007) 163 FCR 510, [59].

30 Although this causal link is all that is established explicitly by the legislation: NSW, s 34(2); QLD, s 30(1); SA, s 3; Tas, s 43A(2); Vic, s 24AH(1); WA, s 5AI; ACT, s 107D(1); NT, s 6(1); CCA, s 87CB(3); CA, s 1041L(3); ASIC Act, s 12GP(3).

31 NSW, s 39(a); QLD, s 32I(a); SA, s 3(2)(a); Tas, s 43G(1)(a); Vic, s 24AP(a); WA, s 5AO(a); ACT, s 107K(a); NT, s 14(a); CCA, s 87CI(a); CA, s 1041L(3); ASIC Act, s 12GP(3).

32 In *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, the plaintiff claimed damages from a head contractor for an injury caused by the negligence of one if its independent contractors. The majority of the High Court held that the defendant could not be held vicariously liable for the conduct of an independent contractor. Also, in *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 the High Court unanimously held that the Council was not liable to the respondent pedestrian, who had been injured by the negligence of one of the Council's independent contractors.

As noted above, where parties to a contract have decided not to or cannot 'contract out' of the proportionate liability scheme, a principal may only be able to recover part of a claim from the head contractor but may be unable to seek recovery of the remainder from the subcontractor in an action in tort, despite the latter's acts or omissions being part of the cause of the loss. Given this potential situation, a principal will need to consider entering into a separate deed with a subcontractor in order to ensure that the principal has a clearly established cause of action against the subcontractor, particularly where a subcontractor's role in a project is significant and/or high risk. Such a deed need provide only that the subcontractor promises *to the principal* that it will exercise due care in carrying out its obligations owed to the head contractor under the subcontract.[33] This could be done, if the contract with the head contractor provides for it, when approving the relevant subcontractor before the head contractor engages them.

The principal would also need to assess the financial viability of and/or insurance cover held by the subcontractor, as there is little point in having an enforceable claim against a subcontractor if the subcontractor does not have the means to meet it. This could be done as part of the assessment of the head contractor's original proposal, by requiring head contractors to provide such information for any subcontractors, or when assessing a request from a head contractor to 'approve' a new subcontractor.

The model legislation project

The Law, Crime and Community Safety Council (LCCSC) is in the process of developing uniform model proportionate liability provisions to improve consistency and address some areas of policy concern. Draft legislation was put out for public consultation by the Standing Council of Law and Justice in 2011–12. In October 2013 revised draft model legislation was released for consideration. At this stage, no jurisdiction has introduced the model legislation

The proposed model laws, if adopted, will significantly alter the existing law in most States and Territories. The following are a few of the most significant provisions proposed by the model laws:

- Contractual terms that exclude, limit or modify the operation of the legislative provisions will be void.
- In apportioning liability the court *must* take into account the responsibility of a notified concurrent wrongdoer and *may* take into account the responsibility of persons who are not parties or notified concurrent wrongdoers.
- Jurisdictions may choose whether or not to include a provision which provides that proportionate liability will not apply to arbitration and external dispute resolution schemes.
- A court will be required to consider the comparative responsibility of each concurrent wrongdoer who is a party to the proceeding or about whom the claimant has been given information, including any who have settled with the claimant, when apportioning responsibility.
- A revised definition of a 'concurrent wrongdoer' will provide that a concurrent wrongdoer is 1 of 2 or more defendants whose conduct independently or jointly causes the same or 'substantially or materially similar' loss or damage.
- Any indemnity that appears in the contract will operate between the parties, notwithstanding that otherwise the proportionate liability legislation would operate to limit or apportion their liability.

33 Cf. *McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, in which the House of Lords considered the effect of a 'duty of care deed' entered into between a construction company and the owner of the land on which the building was constructed, the purpose of that deed being to establish liability by the builder, who (according to the law of negligence in England) does not owe a duty of care to the owner of the property.

Summary

Proportionate liability regimes currently exist in all Australian jurisdictions, covering claims for economic loss or damage to property but not personal injury.

Model proportionate liability provisions are being developed.

Proportionate liability has particular relevance to contracts where subcontracting is contemplated.

Agencies should consider whether or not they wish to 'contract out' of the applicable proportionate liability regime and whether this is possible under the law of the jurisdiction that governs their contract.

Agencies should consider the potential implications of including provision for arbitration within the contract.

Proportionate liability regimes could restrict the ability of an agency to recover its entire loss from a head contractor.

Particularly for higher-risk subcontracts, agencies should consider entering into a separate 'duty of care deed' with the subcontractor in order to ensure that they have an actionable claim directly against the subcontractor in relevant circumstances. This, in turn, will require agencies to pay attention to the insurance and financial viability of the subcontractor.

For a detailed discussion of indemnities in Commonwealth contracting, see AGS *Legal briefing* No 105, 12 May 2015.

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