Drafting instructions for Uniform Proportionate Liability Provisions

Drafting instructions for Consultation
October 2008

Note: These drafting instructions do not necessarily represent the views of the Standing Committee of Attorneys-General nor of any individual Attorney-General.

Proportionate Liability Drafting Instructions

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1. Introduction

In 2003 the Standing Committee of Attorneys General (SCAG) agreed to introduce a nationally consistent system of proportionate liability for damages for economic loss or property damage and endorsed key features of a model of proportionate liability. However, SCAG Ministers did not formally consider the issue of 'contracting out' of proportionate liability and the approach to this issue differs between jurisdictions. There are also other, smaller differences between proportionate liability legislation in the States, Territories and the Commonwealth. Stakeholders have raised various concerns with the operation of the proportionate liability provisions, in particular the potential for forum shopping and lengthy and costly litigation and concerns over the clarity and effectiveness of certain provisions.

SCAG Ministers approved the formation of a SCAG officers' working group to:

(a) review the current national legislative framework on proportionate liability and to make recommendations for achieving greater national consistency in proportionate liability legislation; and

(b) consider options for contracting out of proportionate liability provisions.

Two reports were prepared to assist SCAG with the review and are attached.

- Mr Tony Horan's report 'Proportionate Liability: Towards National Consistency' ('Horan report'); and
- Professor Jim Davis's report 'Proportionate Liability: Proposals to Achieve National Uniformity' ('Davis report').

These drafting instructions draw on the two reports but do not adopt the recommendations from either of the reports in full. Stakeholder comment is invited on the drafting options presented in this paper to assist SCAG in preparing the model provisions.

2. Purpose of proportionate liability legislation - guiding principles[1]

Issues:

One report identifies the purpose of proportionate liability legislation as ensuring that professional indemnity insurance remained available and affordable for professional service providers. This report recommends limiting proportionate liability to claims against a professional or the provision of (or failure to provide) professional services.

[1] Horan report pp. 20-34; Davis report pp. 4-7

The other report identifies the purpose of the legislation replacing joint and several liability by providing for distribution of liability between concurrent wrongdoers according to their proportionate share of fault in damages claims involving property damage or purely economic loss.

The second reading speeches and explanatory memoranda for the various bills that introduced proportionate liability legislation suggest that for a number of Australian jurisdictions the purpose of the proportionate liability legislation included addressing problems with the affordability and availability of liability insurance in general rather than professional indemnity insurance specifically.

Proposed approach:

It is proposed that the model provisions should make clear that the legislation is not limited to claims against a professional.

3. Definition of apportionable claim[2]

Current position:

Currently all proportionate liability legislation applies to an 'apportionable claim'. All States and Territories, with the exception of Queensland and South Australia define an 'apportionable claim', with minor variations, as:

> a 'claim for economic loss or damage to property….arising from failure to take reasonable care', not including a claim for personal injury.

The definition also usually includes a claim for damages for a breach of the prohibition of misleading conduct under the relevant fair trading act of each State and Territory and in the *Trade Practices Act 1974* (Cth), *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).

For example:

Section 34(1) of the *Civil Liability Act 2002* (NSW) provides:

> This Part applies to the following claims (apportionable claims):
>
> (a) 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, but not including any claim arising out of personal injury,
>
> (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act.

Section 4(2) of the *Proportionate Liability Act 2005* (NT) provides:

> An apportionable claim is –

[2] Horan report pp. 56-59; Davis report pp. 7-9

(a) a claim for damages (whether in tort, in contract, under a statute or otherwise) arising from a failure to take reasonable care; or

(b) a claim under the *Consumer Affairs and Fair Trading Act* in respect of loss or damage arising from a contravention of section 42 of that Act.

The Queensland and South Australian definitions use the words 'duty of care' rather than 'reasonable care'. See section 28(1) of the *Civil Liability Act 2003* (Qld) and section 4(1) of the *Law Reform (Contributory Negligence and apportionment of Liability) Act 2001* (SA).

Issues:

The reports identify two issues with the definition. Firstly, plaintiffs may draft claims specifically to avoid application of the legislation. Secondly, the phrase 'arising from failure to take reasonable care' is ambiguous and could be interpreted as including strict contractual obligations in the scope of the definition.

Proposed approach:

It is proposed that the model provisions contain a definition of 'apportionable claim' along the following lines:

(a) a breach of tortious duty of care, or from a breach of a contractual obligation which is concurrent and coextensive with such a tortious duty, or

(b) a breach of a statutory prohibition on misleading or deceptive conduct.

The proposed approach will ensure that the legislation will only apply to the intended type of claims. The revised formula is similar to the provisions under section 4(1) of the *Law Reform (Contributory Negligence and apportionment of Liability) Act 2001* (SA) and under section 28(1) of the *Civil Liability Act 2003* (Qld).

4. Definition of concurrent wrongdoer[3]

Current position:

All States and Territories, with the exception of Queensland and South Australia, define 'concurrent wrongdoers' as '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'. See, for example, section 34(2) of the *Civil Liability Act 2002* (NSW).

The Queensland and South Australian definitions only include persons who have acted independently of each other and exclude persons who have acted jointly, for example section 3(2b) of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001*(SA) and see also sections 30(1) and (2) of the *Civil Liability Act 2001* (Qld).

[3] Horan report pp. 67-68; Davis report pp. 9-11

Issues:

The current definition is ambiguous as to whether, in order to satisfy the definition, a defendant must simply prove that another party caused the loss or whether it must also be proved that the party is also legally liable to the plaintiff. The current definitions are also unclear as to whether the definition would include a person who at one time came within the definition of 'concurrent wrongdoer' but who ceases to be liable to the plaintiff.

Proposed approach:

To address these ambiguities it is proposed that the model provisions provide that 'concurrent wrongdoer' be defined along the following lines - as one of two or more persons who:

> (a) not only caused, but is also legally liable for, the loss or damage which is the subject of the apportionable claim, even if an act or omission of the plaintiff has extinguished that liability; and
>
> (b) caused that loss independently of each other or jointly.

The provisions should be clear that a concurrent wrongdoer includes a person who has ceased to exist (e.g. an individual who has died or a company that has been wound up).

This approach adopts the majority approach used by all States' and Territories' provisions (except for South Australia and Queensland) by including both wrongdoers who act independently and jointly rather than excluding persons who act jointly. It also clarifies the position of a person who ceases to be liable to the plaintiff.

5. Obligation to notify other concurrent wrongdoers[4]

Current position:

The general approach taken by all jurisdictions except Victoria is that the defendant should notify the plaintiff of all possible non-parties that the defendant has reasonable grounds to believe are concurrent wrongdoers. Although the obligation to notify is not compulsory, most jurisdictions impose a penalty on a defendant who fails to notify within a reasonable time. No jurisdictions require a plaintiff to notify other concurrent wrongdoers of their status as a concurrent wrongdoer.

For example

Section 35A(1) of the *Civil Liability Act 2002* (NSW) states:

> If:

[4] Horan report pp. 75-76; Davis report pp. 15-19

> (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the other person) may be a concurrent wrongdoer in relation to the claim, and
>
> (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:
>
> (i) the identity of the other person, and
>
> (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim, and
>
> (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim,
>
> the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.

However, the Queensland and South Australian legislative provisions expressly impose an obligation on the defendant to notify the plaintiff of concurrent wrongdoers.

For example

Section 10(1) and (2) of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) requires a defendant to provide the plaintiff with information about the identity and location of other possible concurrent wrongdoers.

Subsections 32(2) and (3) of the *Civil Liability Act 2001* (Qld) require a defendant to provide the plaintiff with information about the identity and location of other possible concurrent wrongdoers as well as the circumstances that make the defendant believe the other person is a possible concurrent wrongdoer. Subsections 32(1) and 32(4) of the *Civil Liability Act 2001* (Qld) require a claimant to make the claim against all persons they have reasonable grounds to believe may be liable and provide the sanction for failure to do so – the court can make such orders as it considers just and equitable on the apportionment of damages and on costs thrown away as a result of the failure to comply.

The related Victorian provisions stand apart from the legislation of the other jurisdictions as they neither expressly require a defendant to provide information about a possible concurrent wrongdoer nor provide a penalty for failing to notify. However, the Victorian provisions prohibit the court from having regard to concurrent wrongdoers except in specific circumstances.

Section 24AI(3) of the *Wrongs Act 1958* (Vic) states:

> In apportioning responsibility between defendants 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 to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up.

Issues:

The general position adopted by jurisdictions is that once the defendant has informed the plaintiff of the existence of concurrent wrongdoers then the onus shifts to the plaintiff to notify those people of their status as concurrent wrongdoer.

There is a possibility that defendants will assert the existence of other concurrent wrongdoers toward the end of a limitation period

There are a variety of approaches across jurisdictions regarding the obligation to notify the plaintiff of other concurrent wrong doers. A nationally consistent approach will ensure that access to justice is equal across jurisdictions.

Ensuring that all possible concurrent wrongdoers come before the court in the original proceeding would reduce the need for subsequent proceedings.

Proposed approach:

The proposed approach would require a defendant to provide information to a plaintiff in a reasonable time about the identity and location of other possible concurrent wrongdoers, as well as the circumstances for believing the person is a possible concurrent wrongdoer.

It is proposed that a model provision be drafted along the lines of the Queensland approach to notifying other concurrent wrongdoers. This approach would also prevent defendants delaying asserting the existence of other concurrent wrongdoer until the latter part of the limitation period.

Sections 32(2), 32(3) and 32(5) of the *Civil Liability Act 2003* (Qld) provide:

> (2) A concurrent wrongdoer, in relation to a claim involving an apportionable claim, must give the claimant any information that the concurrent wrongdoer has—
>
> (a) that is likely to help the claimant to identify and locate any other person (not being a concurrent wrongdoer known to the claimant) who the concurrent wrongdoer has reasonable grounds to believe is also a concurrent wrongdoer in relation to the claim; and
>
> (b) about the circumstances that make the concurrent wrongdoer believe the other person is or may be a concurrent wrongdoer in relation to the claim.
>
> (3) The concurrent wrongdoer must give the information to the claimant, in writing, as soon as practicable after becoming aware of the claim being made or of the information, whichever is the later.
>
> …
>
> (5) If a concurrent wrongdoer fails to comply with the concurrent wrongdoer's obligations under this section, a court may on application, if it considers it just and equitable to do so, make either or both of the following orders—

(a) an order that the concurrent wrongdoer is severally liable for any award of damages made;

(b) an order that the concurrent wrongdoer pay costs thrown away as a result of the failure to comply.

However, the equivalent of subsection 32(2)(a) in the draft provisions should refer to 'someone not being a concurrent wrongdoer who is already a party in the proceedings' rather than '(not being a concurrent wrongdoer known to the claimant)'.

It is also proposed that the equivalent of subsection 32(5)(a) in the draft provisions should refer to 'is jointly and severally liable' rather than 'is severally liable'.

6. Apportioning liability to non parties[5]

Current position:

Legislation in all jurisdictions with the exception of Victoria provides for the court, when apportioning liability, to have regard to concurrent wrongdoers who are not parties to the proceedings.

The legislation in South Australia, Tasmania and Western Australia effectively *requires* the court to take account of the responsibility of concurrent wrongdoers, whether they are a party to proceedings or not.

The legislation in the other jurisdictions allows the court a discretion whether to take account of the conduct of non-parties.

The Victorian legislation requires that concurrent wrongdoers must be parties to proceedings before the court can apportion liability, unless the concurrent wrongdoers are dead or have been wound up.

Issues:

The disadvantages of requiring that concurrent wrongdoers be parties to proceedings before the court can apportion liability to them are:

- A defendant may join a further party purely for the purpose of lessening their own liability, even though the plaintiff may make no claim against that further party because there may little chance of recovering damages from them or because the costs and risks of pursuing that claim outweigh the possible benefits.

- If one defendant wishes to settle with the plaintiff, it may be necessary to remain a party in proceedings so the liability of other parties is not inadvertently increased.

[5] Horan report pp. 80-81; Davis report pp. 11-15

- This diminishes the protection proportionate liability affords to defendants against having to bear an unfair burden of liability.

The advantages of requiring that concurrent wrongdoers be parties to proceedings before the court can apportion liability to them are:

- This reduces the risk of subsequent litigation.

- This ensures that all concurrent wrongdoers have the opportunity to appear and argue their level of responsibility and the court is not forced to apportion liability based on conjecture.

On balance, the preferred approach is not to require that concurrent wrongdoers be parties to proceedings.

Proposed approach:

It is proposed that a model provision be drafted along the lines of the approach taken in South Australia, Tasmania and Western Australia and require the court to take into account the responsibility of all concurrent wrongdoers for the loss or damage claimed, whether or not those concurrent wrongdoers are parties to the proceedings.

7. Apportioning liability[6]

Current position:

The language used in apportioning responsibility among defendants varies. The form of words used in all jurisdictions other than Queensland and South Australia is that in any proceedings involving an apportionable claim, the liability of any one defendant 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 defendant's responsibility for the damage or loss.

In Queensland, the amount to which a defendant's liability is limited is described as being that which the court considers 'just and equitable', while in South Australia the limitation is described as that which the court considers 'fair and equitable'

Issues:

Legislation dealing with the right of those jointly and severally liable to claim contribution from other tortfeasors refers to such amount 'as may be found by the court to be *just and equitable* having regard to the extent of [the other party's] responsibility for the damage.'

Proposed approach:

[6] Davis report pp. 19-20

It is proposed that a model provision be drafted with the effect that in apportioning responsibility among defendants, the liability of any one defendant should be what the 'court considers just and equitable…'

This will forestall possible arguments that some different measure of responsibility from previous legislation was intended, will provide courts with a source of existing judicial discussion of this phrase and will create greater certainty.

8. Claims to be excluded from PL and on what basis[7]

Current position:

Certain categories of claims are excluded from the proportionate liability regime, but the exclusions are not uniform across jurisdictions.

- Vicarious liability and the liability of a partner
  Proportionate liability legislation in all jurisdictions excludes vicarious liability and the liability between partners from proportionate liability.

- Intentional or fraudulent conduct
  All jurisdictions, with the exception of Victoria, provide that proportionate liability does not apply to a concurrent wrongdoer who either intentionally or fraudulently caused the loss.
  The *Wrongs Act 1958* (Vic) goes further than this imposing joint and several liability on the defendant, whether or not the fraud had any connection to the apportionable claim, and whether or not the defendant would otherwise have been jointly and severally liable. Section 24AM provides:

  > despite sections 24AI and 24AJ, a defendant in a proceeding in relation to an apportionable claim who is found liable for damages 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.

- Liability excluded by other legislation
  All jurisdictions, with the exception of South Australia, expressly prevent a concurrent wrongdoer from relying on the proportionate liability legislation if this is excluded by other legislation. South Australian drafters may have felt it unnecessary to repeat what was in other legislation.

- Personal Injury
  All States and Territories expressly exclude a claim arising out of personal injury.

- Agency
  Legislation in the ACT, Queensland and Victoria expressly provides that it does not prevent

  > a person from being held jointly and severally liable for the damages awarded against another person as agent of the person.

[7] Horan report pp. 90-93; Davis report 24-28

The South Australian legislation appears to have the same effect as it excludes proportionate liability between members of the same group and a group is defined as including someone vicariously liable for the acts of another. The drafters in other jurisdictions may have considered that an express exclusion was unnecessary.

- Exemplary/Punitive Damages
  Legislation in Queensland, South Australia and Victoria expressly excludes exemplary damages. Once again, drafters in other jurisdictions may have considered that an express exclusion was unnecessary.

- Consumer claims
  The ACT and Queensland legislation exclude claims by a consumer and the definitions of consumer are similar but not identical. A consumer means an individual whose claim relates to goods and services acquired or supplied for the claimant's personal, domestic or household use or consumption, or personal advice. In the ACT the personal advice must be 'financial' while in Queensland it must be given by a professional.

- Miscellaneous exemptions:
  - Section 4(3)(b) of the *Proportionate Liability Act 2005* (NT) excludes claims under Part 4 of the *Consumer Affairs and Fair Trading Act* (NT) in relation to product safety and production information. .
  - Section 32F of the *Civil Liability Act 2003* (Qld) prevents a wrongdoer from seeking protection under the proportionate liability legislation if they engaged in misleading or deceptive conduct in breach of section 38 of the *Fair Trading Act 1989* (Qld).
  - The *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) excludes:
    - proportionate liability between persons of the same 'group'. 'Group' is defined as:

      > vicarious liability, including a partner's liability for the act or omission of another partner;
      >
      > the liability of a person for breaching non-delegable duty of care for the act of another;
      >
      > the direct liability of an 'insurer or indemnifier' to a claimant in respect of the insured or indemnified person;
      >
      > the liability of a nominal defendant under third party motor vehicle insurance

    - criminal proceedings
    - an 'agreement for an indemnity that would not have been enforceable apart from' the South Australian Act
    - a liability which is subject to proportionate liability under section 72 of the *Development Act 1993* (SA).

Issues:

Inconsistencies between jurisdictions present difficulties for contracting parties, disputing parties, their lawyers and the Courts, especially in claims and proceedings that involve more than one jurisdiction. Uniformity in exclusions across jurisdictions is desirable.

The ACT and Queensland legislation exclude claims by a consumer. This appears to be an attempt to balance the objective of protecting potential defendants against the possibility of being liable for 100% of a plaintiff's damages, despite having been responsible for only a minor portion of that loss, against the cost to claimants who must seek out all persons who may have contributed to the loss. Excluding consumer claims may be desirable because an individual who has acquired goods or services for his or her own personal use may not have the resources to locate, and commence litigation against, a number of defendants or to negotiate separately with each defendant in relation to compromising a claim. Further, such an exclusion in unlikely to apply often because proportionate liability only applies when two or more people have caused an indivisible loss to the plaintiff.

The other differences in exclusions between jurisdictions appear to arise from differing views as to whether express exclusion provisions are necessary for the avoidance of doubt.

Proposed approach:

It is proposed that a model provision be drafted to expressly exclude (and only exclude) the following:

- vicarious liability and the liability between partners
- concurrent wrongdoers who either intentionally or fraudulently caused the loss from proportionate liability. This exclusion should be in the narrower terms used by jurisdictions other than Victoria
- liability excluded by other legislation. This exclusion should be in similar terms to subsection 28(4) of the *Civil Liability Act 2003* (Qld), namely:

  > this part does not apply to a claim to the extent that an Act provides that liability for an amount payable in relation to the claim is joint and several.

- personal injury
- agency. This exclusion should be in similar terms to the provisions in ACT, Queensland and Victoria
- exemplary/punitive damages
- consumer claims.

9. Successive/subsequent proceedings[8]

Current position:

All States and Territories, with the exception of South Australia, provide, with minor variations, similar rules for subsequent proceedings. These rules allow subsequent proceedings, with the proviso that a plaintiff cannot recover in the second proceedings an amount of damages which would result in the plaintiff receiving combined compensation which is more than the loss or damage actually sustained.

For example, section 37 of the *Civil Liability Act 2002* (NSW) provides:

> (1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.
>
> (2) However, in any proceedings in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

South Australia has taken a more detailed approach (see sections 11 and 12 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001)* (SA) as set out below).

Issues:

The current approaches regarding subsequent proceedings give rise to a number of problems. A court conducting the subsequent proceeding is not bound by the first court's ruling as to the amount of the defendant's loss, the liability of a particular defendant to the plaintiff, or the proportions of the liability of any of the defendants. In addition, the amount that a plaintiff might recover in the second proceedings must take into account only the amount that is actually recovered and not the amount of the judgement that was awarded in the first proceedings.

In considering proposals to limit subsequent proceedings, it should be noted that there may be legitimate reasons for a plaintiff bringing a subsequent action against a particular defendant - for example, a plaintiff only becoming aware that a person is a concurrent wrongdoer after the culmination of the original proceeding.

Proposed approach:

It is proposed that a model provision be drafted along the lines of the approach taken by South Australia in sections 11 and 12 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA).* These provisions provide:

[8] Horan report pp. 94-98; Davis report pp. 22-24

Section 11

If a plaintiff brings separate actions for the same harm against wrongdoers who are entitled to a limitation of liability under this Part, the judgment first given (or that judgment as varied on appeal) determines for the purpose of all other actions—

(a) the amount of the plaintiff's notional damages; and

(b) the proportionate liability of each wrongdoer who was a party to the action in

which the judgment was given; and

(c) whether the plaintiff was guilty of contributory negligence and, if so, the extent of that negligence.

Section 12

(1) A judgment for damages against one person does not bar an action against another person who is also liable for the same harm.

(2) The general rule is that if separate actions are brought for damages for the same harm—

(a) the aggregate amount of damages recoverable in the actions cannot exceed the relevant amount; and

(b) the claimant is not entitled to costs in any action except the first.

(3) However, if a court is satisfied that there were in the circumstances of a particular case, reasonable grounds for bringing the actions separately, the court may depart from the general rule to the extent that it is fair and equitable to do so in the circumstances of that case.

(4) The relevant amount is—

(a) in a case that does not involve apportionable liability—the amount of damages awarded in the judgment first given (or, if that amount is varied on appeal, the amount as varied);

(b) in a case involving apportionable liability—the amount fixed in the judgment first given as the plaintiff's notional damages1 (or, if that amount is varied on appeal, the amount as varied).

The South Australia approach eliminates the problems that arise from related provisions in other legislation and provides a clearer, more detailed approach to the issue.

10. Transitional provisions[9]

Deleted: *1*

Current position:

Transitional provisions differ between jurisdictions. For instance:

- Proportionate liability under the *Wrongs Act 1958* (Vic) applies to proceedings commenced on or after 1 January 2004.
- Proportionate liability under the *Civil Liability Act 2002* (NSW) applies to proceedings commenced on or 1 December 2004, provided that the causes of action accrued on or after 26 July 2004.
- Proportionate liability in other jurisdictions applies to causes of action which accrued after the proclamation date.

Issues:

With the passage of time differences in transitional provisions will diminish.

Proposed approach:

It is not proposed to amend the current transitional provisions. The draft model provisions should include transitional provisions as necessary..

11. Preserving contractually assumed risk allocations and contracting out[10]

Current position:

Section 7(3) of the Civil Liability Act 2003 (Qld) expressly prohibits contracting out of proportionate liability:

> This Act, other than chapter 2, part 2 and chapter 3, does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract (the ***express provision***) in relation to any matter to which this Act applies and does not limit or otherwise affect the operation of the express provision.

The ACT, Northern Territory, South Australia, Victoria and the Commonwealth do not expressly allow or prohibit contracting out. It seems likely that parties would therefore not be permitted to contract out, although this is uncertain.

Western Australia, New South Wales and Tasmania expressly permit contracting out.

For example:

Section 3A of the *Civil Liability Act 2002* (NSW) provides:

[9] Horan report pp. 99-100
[10] Horan report pp. 102-113; Davis report pp. 28-31

(1) …

(2) This Act (except Part 2) does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with respect to any matter to which this Act applies and does not limit or otherwise affect the operation of any such express provision.

(3) Subsection (2) extends to any provision of this Act even if the provision applies to liability in contract.

Most jurisdictions expressly prohibit claims for contribution or indemnity between concurrent wrongdoers.

For example:

Section 36 of the *Civil Liability Act 2002* (NSW) provides:

> A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:
>
> (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not damages or contribution are recovered in the same proceedings in which judgment is given against the defendant), and
>
> (b) cannot be required to indemnify any such wrongdoer.

The ACT, Queensland, Victoria, the *Australian Securities and Investments Act 2001* (Cth), the *Corporations Act 2001* and the *Trade Practices Act 1974* have the same provision.

However, some jurisdictions explicitly allow contracting out between concurrent wrongdoers.

For example:

The Northern Territory, Tasmania and Western Australia have similar provisions to Section 36 of the *Civil Liability Act 2002* (NSW) but also include an additional sub-section:

> (2) Subsection (1) does not affect an agreement by a defendant to contribute to the damages recoverable from, or to indemnify, another concurrent wrongdoer in relation to an apportionable claim.

Section 9 of the *Law Reform (Contributory Negligence and apportionment of Liability) Act 2001* (SA) takes a different approach providing that where proportionate liability has been applied:

> 377.1 no order for contribution between wrongdoers may be made (unless they are members of the same ‘group’);

377.2 no contribution claim may be made by a wrongdoer whose liability is limited against a wrongdoer whose liability is not limited, and

377.3 a wrongdoer whose liability is not limited can only seek contribution from a wrongdoer whose liability is limited (up to that limit) and only after it has fully satisfied its judgment debt.

Issues:

Differences between jurisdictions on whether contracting out of proportionate liability is permitted can lead to forum shopping and uncertainty and create difficulties in claims and proceedings that involve more than one jurisdiction.

Legislation that does not expressly state whether contracting out is permitted creates uncertainty.

The reports identify arguments in favour of permitting contracting out and these include:

- Arms length contractual arrangements should be preserved and risk should be distributed in accordance with the terms of the contract between the parties.
    - There is a generally recognised position that the law of contract is a 'higher' law than of torts and that parties ought to be able to vary or exclude rights or liabilities unless otherwise prohibited by law or on public policy grounds.
    - Permitting contracting out allows parties who wish to contractually allocate risk between themselves to do so with certainty – parties to a contract should retain the freedom to determine whether proportionate liability applies.
- Parties, who have given 'no fault' guarantees or indemnities might otherwise seek to limit their liability and avoid those obligations.

The reports also identify arguments against permitting contracting out and these include:

- Contracting out subverts the purposes of the legislation:
    - Contracting out is acceptable between parties of equal bargaining power but unfair when one of the parties is in a dominant position.
    - Joint and several liability can work an injustice on some parties as they may be responsible for only a minor portion of the total loss but because they are covered by insurance and the only ones able to satisfy the judgment end up providing all of the compensation (they are treated as 'deep pockets'). Proportionate liability was introduced to address this and permitting contracting out would subvert this as those likely to be plaintiffs would seek to contract out and there will be cases where the parties do not have equal bargaining power.

- Allowing contracting out may result in higher insurance costs and decreased availability of insurance.

- Allowing contracting out may be counterproductive or ineffective:
  - Insurance policies typically don't provide cover for any liability accepted over and above that which is provided for by the proportionate liability legislation.
  - In many cases professional standards legislation limits liability in any event so plaintiffs may obtain judgment but be unable to recover the full loss.

- Contracting out is prohibited in other legislation designed to protect people (e.g. the *Insurance Contracts Act 1984* (Cth); section 68 of the *Trade Practices Act 1974* (Cth); and the *Contracts Review Act 1980* (NSW)).

On the question of contribution or indemnity between concurrent wrongdoers both reports recommend provisions similar to section 36 of the *Civil Liability Act 2002* (NSW) (contribution not recoverable from defendant) with an additional sub-section clarifying this doesn't affect an agreement by a defendant to contribute to damages recoverable from, or to indemnify, another concurrent wrongdoer.

Proposed approach:

The reports recommend prohibiting contracting out but it is acknowledged that there are strong arguments both for and against this. Comments are invited on the two alternative drafting instructions on contracting out set out below.

OPTION 1

It is proposed that a model provision be drafted to expressly permit contracting out of proportionate liability in similar terms to Section 3A of the *Civil Liability Act 2002* (NSW)

(1) This Act does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with respect to any matter to which this Act applies and does not limit or otherwise affect the operation of any such express provision.

(2) Subsection (1) extends to any provision of this Act even if the provision applies to liability in contract.

OPTION 2

It is proposed that a model provision be drafted to expressly prohibit contracting out of proportionate liability with the effect of section 7(3) of the *Civil Liability Act 2003* (Qld):

This Act, [other than chapter 2, part 2 and chapter 3], does not prevent the

parties to a contract from making express provision for their rights, obligations and liabilities under the contract (the ***express provision***) in relation to any matter to which this Act applies and does not limit or otherwise affect the operation of the express provision.

It is also proposed that a model provision be drafted to permit contracting out between concurrent wrongdoers in the following terms:

> (1) A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim:
>
> (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not damages or contribution are recovered in the same proceedings in which judgment is given against the defendant), and
>
> (b) cannot be required to indemnify any such wrongdoer.
>
> (2) Subsection (1) does not affect an agreement by a defendant to contribute to the damages recoverable from, or to indemnify, another concurrent wrongdoer in relation to an apportionable claim.

This is similar to the provisions in the Northern Territory, Tasmania and Western Australia and reflects the effect of the current provisions in New South Wales and Victoria.

12. Proceedings other than judicial proceedings - arbitration and external dispute resolution schemes[11]

Current position:

The issue of whether proportionate liability legislation applies to arbitrations and external dispute resolution schemes is not specifically dealt with in the current legislation and views on this differ.

Arguments in support of the proposition that proportionate liability does apply to arbitrations and external dispute resolution schemes include:

- In relation to Commonwealth legislation - the High Court in *Government Insurance Office (NSW) v Atkinson Leighton Joint Venture (1981) 146 CLR 206* determined that a term is to be implied into an arbitration clause that the arbitrator is to have the authority to grant the same relief as a court of law.

- Proportionate liability legislation in NSW, Victoria, Northern Territory and Tasmania defines 'Court' as including 'tribunal' and there is a reasonable argument that 'tribunal' includes arbitrations.

- The definition of 'apportionable claim' refers to 'an action for damages'.

[11] Horan report pp. 120-122; Davis report pp. 31-32

- Arbitrators are required under section 22 of the *Uniform Commercial Arbitration Act* 1984 to 'make determinations 'according to law' which may mean arbitrators must comply with proportionate liability legislation.

Issues:

There are strong policy arguments that proportionate liability legislation should apply to arbitrations and external dispute resolution schemes.

Proposed approach:

It is proposed that a model provision be drafted to clarify that proportionate liability applies to arbitration and external dispute resolution schemes.

Consideration should be given to doing this by defining 'Court' to include 'tribunal' and that while this may not be possible for Commonwealth legislation (for constitutional reasons) it may not be necessary because of the High Court decision *Government Insurance Office (NSW) v Atkinson Leighton Joint Venture* referred to above.