



SUBMISSION BY THE
Housing Industry Association

to the
NSW Department of Attorney General and Justice
on the
Consultation Draft Proportionate Liability Model
Provisions

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HIA :

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HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85% of all new home building work in Australia is performed by HIA members.

1 Executive summary

On 24th January 2014, the Housing Industry Association (HIA) received correspondence from the NSW Department of Attorney General and Justice seeking to consult on the appropriateness of the inclusion of model proportionate liability provisions (**Model Provisions**) in the *NSW Civil and Liability Act (CLA)*.

The HIA welcomes the opportunity to provide feedback on this proposal.

It is of note that in October 2011 (**2011 Submission**) HIA made submissions in response to a request by the Standing Committee of Attorney Generals for feedback on these model provisions.

HIA sees this as an important topic covering a number of areas most notably contracting and dispute resolution in the residential building industry.

HIA wishes to raise a number of particular issues of importance when considering if the Model Provisions are appropriate for inclusion in the NSW CLA including:

- National consistency of proportionate liability laws.
- Whether or not proportionate liability provisions should apply to home building statutory warranty and insurance schemes, specifically the interaction between the *NSW Home Building Act 1989 (HBA)* and the CLA.
- The availability of “contracting out”.

2 National consistency?

HIA acknowledges that each State and Territory having its own approach to proportionate liability is problematic. Where it is possible and practical to do, HIA supports efforts in achieving national consistency in proportionate liability legislation. However, HIA does not agree with creating “harmonised” laws for harmonisation’s sake, particularly if it is achieved at the expense of genuine, positive regulatory reform for the housing industry.

The introduction of private building certification was a key driver in the change from joint and several liability to proportionate liability in the building industry. Proportionate liability is considered to be an essential element of this regime, enabling surveyors/private certifiers to purchase affordable professional indemnity insurance. The industry consensus is that private certification has led to a more efficient and cost effective building control model.

In this regard whilst there are similarities across the jurisdictions, each state and territory regulates building work differently, with different licensing regimes, building approval processes, certifier accreditation and consumer protection laws.

Summary of HIA’s position

HIA supports efforts in achieving national consistency in proportionate liability legislation provided it is practical to do so and does not compromise private certification.

3 Domestic building and proportionate liability

Whilst proportionate liability laws have applied in the commercial building sector for a number of years, it has generally been understood within the residential building industry that that contractual responsibility (including the responsibility for statutory warranties implied into the building contract) rests with the licensed builder and this builder is responsible for the actions of its subcontractors¹. Whilst there are at times practical and commercial difficulties in getting subcontractors to return to fix up defects, this is accepted as being the builder's responsibility.

HIA notes that the 2010 decisions of the NSW Supreme Court in *Owners SP 72357 v Dasco Constructions Pty Ltd & Ors* and *The Owners of Strata Plan v Brookfield Multiplex Limited* have caused some controversy. HIA does not concur with the view of some that the Court was wrong.

As a result of these decisions in October 2011 the NSW Government amended the HBA to prevent the apportioning of liability in relation to a claim for a breach of statutory warranty. It is of note that the Model Provision does not contain this exclusion.

As a matter of general principle HIA would submit that the extension of proportionate liability defences to statutory warranty claims brought by homeowners is problematic:

1. Firstly, the existing regulatory framework for residential building work includes a number of elements focused on consumer protection including builder licensing, implied statutory warranties, regulated contract terms, mandatory warranty insurance and fast, easy and accessible dispute resolution.

The balance in this regulatory environment is clearly weighted in favour of the consumer and at times can arbitrarily and unfairly operate against the licensed builder.

For instance, as between the builder and owner, a builder is usually held strictly liable for the structural failure of a residential building even though four major parties determine structural building quality – the engineer, the designer/architect, the builder and the certifying authority (whether that is the Council or private certifier). The onus is on the builder to separately join the concurrent wrong doers. Such joinder is not always guaranteed as it is a discretion exercised by the Courts under court rules, and Courts may determine that the consumer action not be confused or complicated with multi-party actions.

On the other hand, an extension of proportionate liability would considerably shift the risk in dispute resolution circumstances to the owner.

The conduct of proportionate liability proceedings are long, drawn out, expensive and complicated involving:

- An identification of which (if any) claims are apportionable breach of duty claims and which are purely contractual claims and not apportionable.
- Applications for joinder for further parties.
- Directions hearings dealing with Tribunals as to the appropriate pleadings of the apportionment claims.
- Difficulties created when one or more parties try and settle with the plaintiff.
- Difficulties in identifying and serving all possible parties.
- Difficulties when a potential or actual defendant who is not required to hold Home Warranty insurance becomes insolvent, dies or disappears.

¹ HIA notes that it is arguable that in it also appears to be the case that builders are entitled to limit their liability for breach of statutory warranties (at least as they related to failure to take reasonable care) under the Domestic Building Contracts Act . See: *Lawley v Terrace Designs Pty Ltd*

It is difficult to see how in these circumstances, proportionate liability fits (or is capable of effectively operating) with the overall policy objectives of the consumer protection framework.

2. Additionally "last resort" home warranty insurance provides protection for home owners against non-completion claims and defective work claims where the builder dies, disappears becomes insolvent or NSW, fails to comply with a money order of the Court.

Warranty insurance is paid for by the builder and the policy is based on and assessed against an individual builder's eligibility.

In HIA's view, warranty insurance provides an effective safety net for consumers.

However in a proportionate liability regime in the event of a defective works claim, if a builder is responsible for only a portion of the loss, then the warranty insurance will only cover this amount (in the further event access to the policy is triggered).

This again, is inconsistent with the intent of the warranty scheme as it is likely that warranty insurance should apply up to the full amount of the policy.

HIA consider it is important that consumer confidence in the home building industry, including the availability of effective last resort insurance, be preserved.

3. Whilst HIA opposes proportionate liability applying as a general rule in statutory warranty claims, there are several situations where it would be unreasonable and unfair for a builder not to have access to appropriate proportionate liability defences.

For example, in NSW the *Home Building Act 1989* allows a builder to apportion liability where the building works failure relates solely to a design or specification prepared by or on behalf of the owner. That is, where the client has engaged an architect who has supplied the plans to the builder that are not compliant with the Building Code of Australia, the builder has and should remain to have the right to apportion liability with the architect.

HIA notes that in *Ownit Homes Pty Ltd v. Batchelor* [1983] 2 Qd.R. 124, the Court held that in circumstances where a plan was defective:

"The builder is entitled to build the structure strictly in accordance with the defective plan and be paid the full contract price."

Consistent with common law decisions like *Ownit Homes*, the builder should have the benefit of a proportionate liability defence in the event the builder has relied on plans and/or documents provided by the owner's expert.

Additionally HIA supports the extension of proportionate liability defenses to statutory warranty claims for multi-story residential work where the defendant is not a licensed builder, or in the case of tortious claims regarding building work that that is not covered by home owners warranty insurance.

In this regard, HIA does not agree with the notion that a developer of multi-story residential work, where Parliament has seen fit that warranty insurance is not required, should nevertheless be held strictly liable for the actions of the licensed builder. A developer, like any other client, is entitled to rely on the builder fulfilling its contractual duties. It is inappropriate and unfair to deprive a developer of the opportunity to raise a defence of proportionate liability in such circumstances.

Summary of HIA's position

- (1) *HIA only supports proportionate liability laws applying:*
 - (a) *where the builder has relied upon and used plans or designs provided by the owner or the owner's consultants or otherwise where the owner or the owner's consultants or contractors have contributed to the loss;*
 - (b) *to those statutory warranty claims for multi-story residential work where the defendant is not a licensed builder, or in the case of tortious claims regarding building work that that is not covered by home owners warranty insurance.*
- (2) *Otherwise HIA opposes proportionate liability laws applying to statutory warranty claims. Therefore in the event that the NSW Government sees fit to adopt the Model Provisions HIA submits that they maintain the current exclusion within the CLA.*

4 Contracting out

HIA believes that, in a commercial construction context, parties should be free to contractually allocate risk as they see fit, especially at the upper end of the market.

HIA notes that in October 2013 the Standing Council on Law and Justice released a Regulation Impact Statement (**RIS**) in relation to the Model Provision. The RIS outlined a number of options, including an option to allow for parties to 'contract out' of the Model Provision.

Generally speaking it would be in the interests of the client to contract out, but it is a risk that can be priced and is likely to affect the price whether or not risk allocation is able to be negotiated. This is particularly likely to be the case in a large commercial contract with a fully informed and properly advised business client. If the law does not allow contracting out, the risk will be with the client and in a perfect market a business client will be able to deduct the price of that risk from the contract price. In theory, then, there is no argument for preventing large commercial clients in major contracts from contracting out if both parties agree.

It is unclear as to whether the ability to 'contract out' is being considered in the NSW context.

Summary of HIA's position

HIA supports the option of contracting out of proportionate liability provisions for commercial projects.