



Proportionate liability reforms
Professional indemnity insurance

Proportionate liability reforms

What are the reforms and what has changed?

Proportionate liability legislation has been introduced in Australia to replace the common law principle of joint and several liability. Under the previous system, in actions where you and one or more other parties were responsible for the same damages, a plaintiff could choose to sue you for 100% of the loss, despite the fact that, for instance, you may only have been 10% responsible.

Reforms have now been introduced at federal, state and territory government levels to establish proportionate liability. In each law, the intention is to restrict the loss or damage among each concurrent wrongdoer according to their share of responsibility.

The proportionate liability regimes apply more broadly than under previous legislation and apply to economic loss or damage to property (but not personal injury) in any contractual, tortious or statute-based claim arising from a failure to exercise reasonable skill and care.

Why have the reforms been introduced?

For two main reasons:

- To increase availability and reduce the cost of PI insurance. Although the reforms were not a direct result of the Ipp Report (Review of Law of Negligence) 2002, subsequent ministerial meetings (following extensive lobbying by bodies such as ACEA, RAIA and AIQS) led to the reforms' introduction.
- To help overcome "deep pocket syndrome", that is where claims tend to focus on professionals who maintain high levels of PI insurance.

New regimes

The Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (also known as CLERP 9) was introduced to provide proportionate liability principles under federal law.

With the benefit of the backing of federal legislation (amendments were also made to the (since repealed) Trade Practices Act 1974, the Corporations Act 2001 and the Australian Securities and Investment Commission Act 2001), legislation has now been introduced in almost all states and territories.

Previously, in Victoria and NSW, protection was available under the Building Act 1993 (Vic) and the Environmental Planning and Assessment Act 1979 (NSW). However, with no previous federal law, until now, forum shopping (choosing another jurisdiction to avoid more onerous legislation) often restricted the effectiveness of that part of the Acts.

At the federal level, part VIA of the Trade Practices Act 1974 was enacted in July 2004 and allowed claims for misleading and deceptive conduct under section 52 to be apportioned (except for personal injury claims). That section of the Act had been a major source of claims against professionals.

Proportionate liability reforms

Issues and considerations

Legal concern has been expressed at the piecemeal approach by the federal, state and territory governments when introducing legislation. It has been suggested plaintiffs who are appropriately advised may be able to find weak spots in the legislation to avoid the reforms.

In NSW, Western Australia and Tasmania parties can contract out of the reforms if the intention is expressly stated in a contract. That is common and we advise clients to avoid it wherever possible.

The future

The reforms have had a significant impact on the way claims are brought, often as parties are dragged into matters early and perhaps irrelevantly. However, JMD Ross has seen matters where the legislation has assisted our clients as it was intended to, although examples are less common than we would like. Time will tell how successful the legislation will be.

If the reforms fulfil their purpose in coming years, they will improve professionals' position for potential liability. Benefits will be gained through greater security and peace of mind for professionals, while concurrently offering insurers a greater degree of certainty for risk assessment and therefore scope for easing the cost of PI insurance.



JMD Ross Insurance Brokers Pty Ltd

(ABN 59 001 706 289)

Level 6, 1 Chandos St

St Leonards NSW 2065

Tel 02 9906 1199 **Fax** 02 9906 1007

Email jmdross@jmdross.com.au

Web www.jmdross.com.au

JMD Ross Insurance Brokers Pty Ltd operates as a strategic partner in Australia to Griffiths & Armour Professional Risks Ltd.

© 2018 by JMD Ross Insurance Brokers Pty Ltd

All right reserved. No part of this publication may be reproduced, stored in retrievable system or transmitted in any form or by any means, electronic, photocopying, recording or otherwise, without the express permission of JMD Ross Insurance Brokers Pty Ltd.

This document does not present a complete or comprehensive statement of fact or the law, nor does it constitute legal advice. It is intended only to highlight issues that might be of interest to JMD Ross Insurance Brokers Pty Ltd clients. Specialist legal advice may be required where appropriate.

The contents of this publication are based primarily on the legal position under Australian law and may be subject to change or variation according to the applicable federal, state or territory law. Further, more detailed advice may be appropriate in relation to other jurisdictions in which you work.

Where links to third-party websites are provided, we accept no responsibility for their content.