

Proportionate Liability - Dividing the Construction Industry

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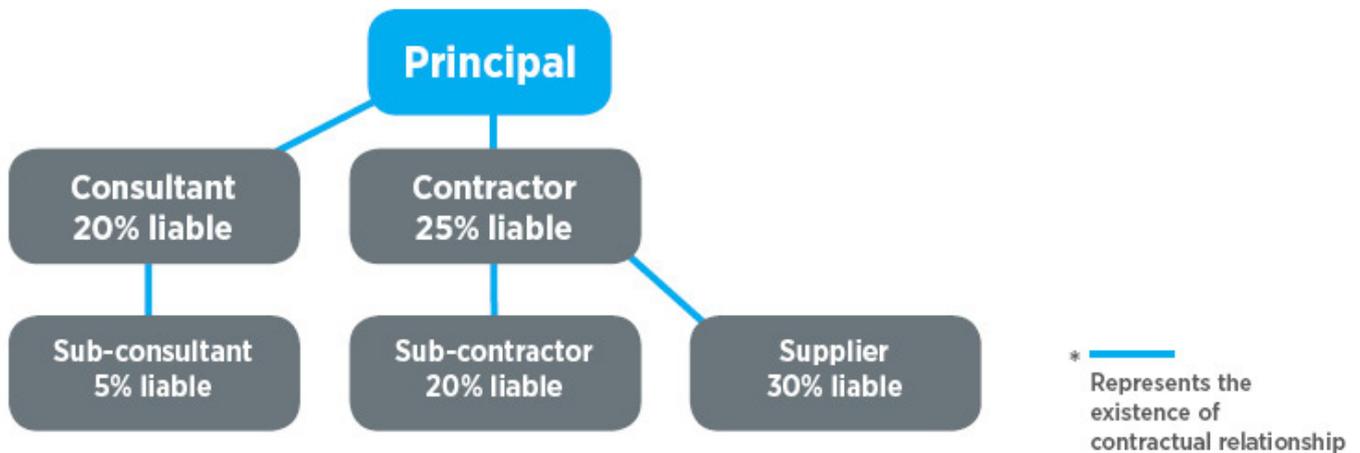
Key Points

1. The regime of proportionate liability under the Civil Liability Act 2002 (NSW) ("the CLA") and corresponding statutes in other jurisdictions, provides that the liability for loss be apportioned between concurrent wrongdoers.
2. At times, this regime can complicate and prolong the pursuit, through proceedings, for damages.
3. Contractors, consultants and suppliers must be aware of whether proportionate liability applies to their contractual arrangements and of the resulting implications. This article provides a guide to both.

What is proportionate liability?

The regime of proportionate liability under the CLA applies to an extensive number of commercial contracts and has narrowed the application of joint and several liability. Whilst all jurisdictions within Australia have legislated to introduce proportionate liability, the regimes are not uniform. In NSW the regime originates from Part 4 of the CLA.

Where two or more wrongdoers are concurrently responsible for causing loss, Part 4 of the CLA requires the Court to determine the resultant allocation of liability between the concurrent wrongdoers. The liability so allocated may vary depending on the Court's interpretation of how the loss was caused. However, each wrongdoer's allocated liability is always limited by the extent to which they have contributed to the loss suffered, as determined by the court - 20% for example. As a defendant, you will focus on ensuring that your potential liability is reflected accurately in your assessed contribution to the alleged loss.



The example above illustrates how the total liability (100%) for a litigated loss may be apportioned among all wrongdoers (regardless of their role in the project or whether a direct contractual relationship exists with the party claiming damage - in this example, the principal).

Contracting out of proportionate liability

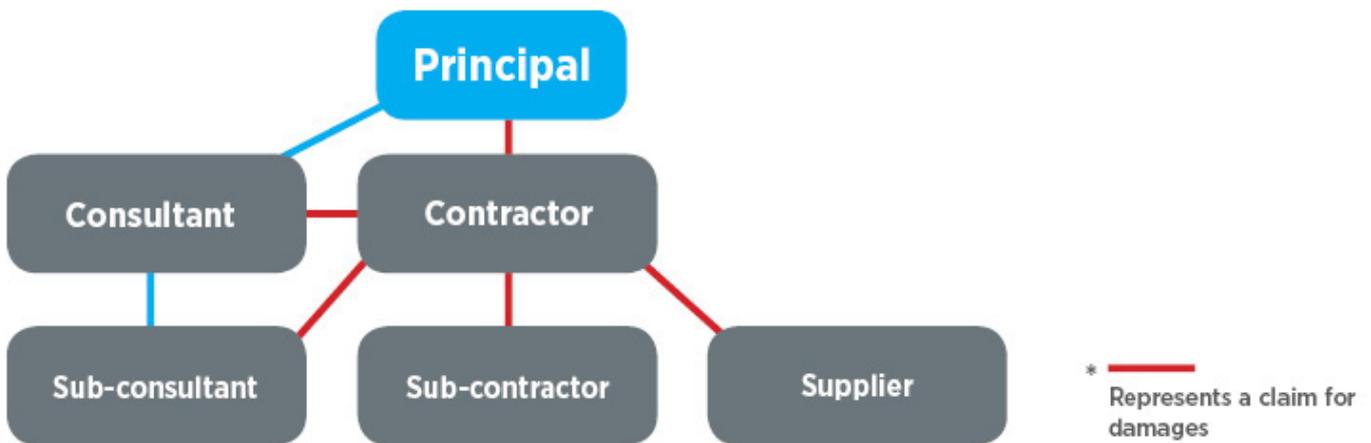
Contracting parties in NSW, WA and Tasmania can contract out of the CLA and avoid proportionate liability legislation. The effect of contracting out is that the party claiming loss is not subjected to the process of identifying all concurrent wrongdoers. Instead, the claimant can simply pursue one of those parties being typically the one which has been

engaged directly by the claimant and has significant involvement in the project.

It is somewhat unclear whether you can contract out of proportionate liability in Victoria, SA or the Northern Territory as these jurisdictions are silent on the matter. There is an express statutory right to exclude some provisions of the relevant legislation but not proportionate liability. This absence leaves uncertain whether a party can contract out of the proportionate liability regimes in these jurisdictions.

The absence may have been intended to reflect the position in Queensland, where an express prohibition against contracting out has been legislated. In Qld, the concurrent wrongdoers and their respective contribution to the loss must be identified. Consider the difficulty faced by a claimant pursuing those identified as wrongdoers, whilst potentially being so far removed from the ground level, day-to-day operations of the project.

Principals will typically seek to exclude, where possible, the obligation to enforce proportionate liability from head contracts, whilst contractors will attempt to do the same in their subcontracts. In doing so, claimants are able to simply pursue one wrongdoer for the liability for a loss. Consequently, as shown below, the onus is then placed on that wrongdoer to seek contribution damages from the other wrongdoers, to the extent of their respective contributions.



This situation is beneficial for a claimant (the principal above), who is able to avoid firstly, the lengthy and complicated process of identifying all the concurrent wrongdoers and secondly, the need to await the Court's determination of each respective contribution. Only after these two requirements are met, will a claimant be in a position to potentially recover the entirety of the loss sustained. Instead, by excluding the operation of proportionate liability, the claimant can seek 100% of its damages through one claim against one contributing party.

Cautions for contractors, consultants and suppliers

Contractual "downstream parties" (incl. subcontractors, consultants and suppliers) will seek to affirm the proportionate liability regime and resist any attempt to contract out of it. In NSW particularly, these parties should be aware that a contract can exclude the operation of the CLA, without expressly stating this intention.

The decision in *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No.2)* [2013] NSWCA 58 reveals that it is not a requirement for a contract to expressly reject proportionate liability provisions when attempting to circumvent them. The court found in this instance, that simply the inclusion of an indemnity which was inconsistent with the CLA's proportionate liability legislation was enough to oust its application.

The proportionate liability regime adds further complexity to contractual arrangements. Contracting parties would be well advised to familiarise themselves with the CLA and discuss this with their legal advisors before their entry into any contractual arrangement.

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