

## IT BYTES

## ANSWERING YOUR COMMON IT CONTRACT LAW QUESTIONS

## WHAT IS PROPORTIONATE LIABILITY?



## WHEN DOES THIS QUESTION TEND TO ARISE?

**Questions about proportionate liability arise where loss or damage is caused by more than one wrongdoer. Proportionate liability deals with the ways in which liability can be allocated between different defendants who have all contributed to a plaintiff's loss. For example, this may arise in a multi-vendor environment where there are a number of contractors working on the same IT project and the overall outcome of the project is adversely impacted by different failures by different contractors. In this case, laws on proportionate liability will determine what loss and damage the principal is able to recover from each contractor.**

## WHAT DOES THE LAW SAY?

Traditionally the common law rules of 'solidary' or 'joint and several' liability meant that a party could recover its entire loss from any one concurrent wrongdoer. That wrongdoer could then seek contribution or indemnity from other concurrent wrongdoers who had also contributed to the loss. However, if that was not possible (e.g. because the other wrongdoer is insolvent), then the first wrongdoer would bear the full burden of meeting the overall liability, even if they were only partly responsible. This meant that often plaintiffs would simply pursue the wrongdoer with the 'deepest pockets' who would then bear the recovery risk on all other wrongdoers. This in turn put significant pressure on insurance premiums, particularly for professional services firms that were targeted with negligence claims even in situations where their overall share of responsibility was relatively small, simply because they were well-insured and likely to be able to pay out.

Proportionate liability legislation has been implemented in all Australian jurisdictions to replace the common law doctrines of joint and several liability in relation to claims for economic loss or damage to property, with the aim of more fairly apportioning liability between concurrent wrongdoers. Under this legislation, the liability of each concurrent wrongdoer in relation to an apportionable claim (whether in tort, in contract or otherwise) is limited to the proportion of the relevant loss or damage that the Court considers just, having regard to the extent of their respective responsibility for the loss or damage. In most cases, there are also anti-avoidance provisions to prevent wrongdoers from undermining the proportionate liability regime by requiring other

wrongdoers to indemnify them against their share of any claimed loss or damage. Where it applies, the effect of the legislation is that plaintiffs will need to pursue all relevant concurrent wrongdoers in order to fully recover for any loss or damage they have suffered.

In NSW, Tasmania and Western Australia it is possible to 'contract out' of the proportionate liability regime. In Queensland, contracting out is prohibited. In other jurisdictions, the legislation is silent as to whether or not contracting out is permitted – in these cases, while the position is not clear, there is a significant risk that contracting out is not possible as it is arguably inconsistent with the public policy that underlies the proportionate liability regime. In any event, if the parties do contract out of the proportionate liability regime in a jurisdiction where that is permitted, then the effect is to revert to the traditional common law position where one concurrent wrongdoer can be held responsible for the full extent of any loss or damage suffered. Customers will often prefer this position, as it will enable them to hold their head contractor fully responsible for any loss or damage they have suffered, without also having to pursue any subcontractors that may have contributed to that loss or damage – it will then be up to the head contractor to seek appropriate contribution from any subcontractors who were at fault.

It is important to bear in mind that the proportionate liability legislation in each jurisdiction is similar, but different and so you cannot assume that the position is the same in all cases. If you have any particular concerns about how the regime in your jurisdiction works, it is always wise to seek advice.



## WHAT ARE THE PRACTICAL IMPLICATIONS FOR YOUR CONTRACT?

If you are entering a contract as a customer with a service provider to work on a project that may involve contributions by others (e.g. separate service providers or subcontractors), then you may wish to expressly contract out of the applicable proportionate liability regime to the extent it is possible to do so. If something goes wrong under the contract, this will maximise your chances of being able to fully recover for any loss or damage that you may suffer as a result (subject of course to any liability caps or exclusions that apply under the contract). Conversely, if you are the service provider you would not want to contract out of any applicable proportionate liability regime, and it would likely be more favourable to simply remain silent on the topic in the contract.

If it is your intention to contract out of the proportionate liability regime, then it is usually preferable to include an express provision to that effect. However, it may be possible to do so in a less direct way, such as by including an indemnity that makes the head contractor liable for loss or damage arising from the acts or omissions of its subcontractors, or by expressly stating that the contract counterparty will be jointly and severally liable for certain conduct that may involve other parties. Noting that the position differs between jurisdictions, you may need to seek advice on whether or not it is possible to contract out of the proportionate liability regime that applies under the relevant governing law of your contract.

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